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.	)	
JICARILLA APACHE NATION,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Adv. Pro. No. 09-01087**
	)	
PLATINUM OIL PROPERTIES, LLC,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF
NATION'S MOTION FOR SUMMARY JUDGMENT

The Jicarilla Apache Nation (the "Nation"), a federally recognized sovereign Indian Nation, by its counsel Holland & Knight LLP, respectfully moves pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure and Rule 56 of the Federal Rules of Civil Procedure for entry of an order granting summary judgment to the Nation in the above-captioned adversary proceeding. In support thereof, the Nation states as follows:

Preliminary Statement

Platinum's chapter 11 case is entirely premised on its claim to be "the assignee of operating rights for specific tracts of land under the [Jicarilla] Leases" ("Operating Rights"),[1] which Platinum claims to have acquired from Golden Oil pursuant to the Golden Oil Plan in June, 2005. Platinum's claim flies in the face of prevailing Federal law and applicable Nation

[1] Capitalized terms not defined herein have the meanings ascribed to them in the accompanying Statement of Uncontested Facts.

law governing assignments of Indian mineral leasing rights. Questions regarding the enforceability and scope of what rights, if any, Platinum allegedly acquired in the Jicarilla Leases, whether it contracted those rights away before the Petition Date, and whether it can use the Bankruptcy Code to secure and enforce those alleged rights as against the Nation and the Secretary of the Interior ("Secretary"), lie at the core of every motion, objection and pleading currently before this Court.

Recognizing the centrality of Platinum's claim to hold valid and enforceable Operating Rights in the Jicarilla Leases, the Nation filed this Adversary Proceeding seeking a declaratory judgment that the Jicarilla Leases are not property of Platinum's estate. Even if the Court finds that Platinum held some interest in the Jicarilla Leases, that interest cannot be validly exercised and enforced against the Secretary and the Nation because Platinum has never complied with the IMLA and its implementing regulations (defined below), and with the Nation's law governing assignment of oil and gas leasing interests on the Jicarilla Apache Nation, and because neither the Secretary nor the Nation was a party to the contractual agreements which conveyed such asserted Operating Rights.

The facts here are clear and undisputed, and so is the applicable law.

First, by contract, Golden Oil transferred its Operating Rights to the Jicarilla Leases to the McKay-Lotspeich Group (also known a "MLG"), not Platinum, and MLG, by contract, sold and transferred those rights directly to Star Acquisition in June 2005. Platinum itself was assigned only some limited interests in a few wells that were abandoned by former Golden Oil shareholders and took those interests directly from the former shareholders, not from the entity Golden Oil. As such, Platinum took none of such Operating Rights from Golden Oil and therefore, never owned the Operating Rights it now claims are assets of its estate in this case.

Second, Platinum and MLG, by contract, sold and transferred whatever collective Operating Rights they held in June 2005 for valuable consideration, and controlling law precludes Platinum from using this Bankruptcy Case to unilaterally nullify that transaction. MLG and Platinum received the benefits of the agreement and full consideration for what they contracted for, and such agreement was not subject to an express condition precedent requiring Secretarial and/or Nation approval of the transfer of such rights. Therefore, the agreement is binding as to the parties who entered into it, but the agreement cannot be enforced against the Secretary and/or the Nation because neither was party to it.

Third, because Platinum holds neither Operating Rights nor Record Title to the Jicarilla Leases, Platinum is not in privity with either the Secretary or the Nation. Since there is no contract between Platinum and the Secretary and/or Nation, there is nothing for Platinum to assume even if section 365 applied to the Jicarilla Leases.

Finally, the Nation's exercise of its inherent sovereign authority to regulate oil and gas leasing activities which requires, for instance, the Nation to expressly approve all assignments and transfers of oil and gas leasing interests, including operating rights and record title rights, precludes Platinum from enforcing its asserted Operating Rights because the transfer of these purported rights have never been approved by the Nation.

Under the circumstances, summary judgment should be entered here.

STATEMENT OF UNCONTESTED FACTS
[SEE ATTACHED]

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is governed by Bankruptcy Rule 7056, which adopts Federal Rule of Civil Procedure 56. Section (c) provides:

> Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Diamond Bar Cattle Company v. United States*, 168 F3d. 1209, 1211 (10th Cir. 1999) (citing *Sundance Assocs., Inc. v. Reno*, 139 F.3d 804, 807 (10th Cir. 1998)). All material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted. *Elephant Butte Irr. Dist. of New Mexico v. Dept. of Interior*, 538 F.3d 1299, 1305-06 (10th Cir. 2008); Fed. R. Civ. P. 56(e)(2).

II. PLATINUM HAS FAILED TO ASSERT VALID CLAIMS TO OPERATING RIGHTS IN THE JICARILLA LEASES

A. *Operating Rights in Jicarilla Lease Nos. 71 and 363 Are Not Property of Platinum's Estate*

In this case, Platinum claims to be "the assignee of operating rights for specific tracts of land under the [Jicarilla] Leases" ("Operating Rights"), which Platinum claims to have acquired from Golden Oil pursuant to the Golden Oil Plan in June, 2005. Platinum has filed a motion under section 365 of the Bankruptcy Code to assume its Operating Rights in the Jicarilla Leases, and its recently filed proposed plan is premised upon the notion that it will be able to do so. Of course, no order authorizing Platinum to assume Operating Rights in the Jicarilla Leases can be entered unless Platinum can demonstrate that it actually held such rights on the Petition

Date. In other words, Platinum must show that its asserted Operating Rights to the Jicarilla Leases were property of its bankruptcy estate on the Petition Date. It cannot do so. [2]

B. Platinum Took Nothing from Golden Oil

Property of the 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). Here, Platinum claims that it obtained the Operating Rights at issue here from Golden Oil, pursuant to the confirmed Golden Oil Plan, and that it held those rights as of the Petition Date. *See, e.g.,* Platinum Disclosure Statement at 4, attached as **Exhibit A**. This assertion is wrong.

Upon entry of an order confirming a plan of reorganization, the plan and the order fix the rights of the parties thereto and become binding. *See* 11 U.S.C. § 1141(a). Once a plan is confirmed, neither a debtor nor a creditor can assert rights that are inconsistent with its provisions. *In re Varat Enter., Inc.,* 81 F.3d 1310, 1317 (4th Cir. 1996) ("Under the Bankruptcy Code, a confirmed plan of reorganization acts like a contract that is binding on all of the parties, debtor and creditors alike."). *See In re K.D. Company, Inc.*, 254 B.R. 480, 490 (10th Cir. B.A.P.

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[2] Debtor's characterization of its putative interest in the Jicarilla Leases has vacillated. Debtor's initial Motion for an Order Authorizing Assumption of the Leases, makes no mention of operating rights whatsoever but refers to "its interests as lessee." *See* Dkt. 10 at ¶5 and ¶6 and *passim*. Since then, Debtor has taken to characterizing these amorphous interests as "operating rights." *See* Response to Objection of the Jicarilla Apache Nation to Debtor's Motion to Assume Oil and Gas Mining Leases Nos. 71 and 363. (Dkt. 29.) The assignment of operating rights under a Federal oil and gas lease has long been distinguished from the assignment of record title to the lease. *Cross Creek Corp.*, 131 IBLA 32, 36 (1994), *citing Harry L. Bigbee*, 2 IBLA 23, 25, 27 (1971). As explained in *Pitch Energy Corporation*, 169 IBLA 267, 274 (2006):

> "Departmental regulations differentiate between [operating rights and record title], stating that "[a] transfer of operating rights is * * * a subsidiary arrangement between the lessee (sublessor) and the sublessee * * * [and does not] affect the relationship imposed by a lease between the lessee(s) and the United States." 43 CFR 3100.0-5(e). The assignee of full title to a Federal oil and gas lease, upon approval of the assignment to him, becomes the Government's lessee and is responsible for compliance with the lease terms and any regulations affecting the lease. *Marlin Oil Corporation*, 158 IBLA 362, 367 (2003); *Ralph G. Abbott*, 115 IBLA 343, 346 (1990). While the designated operator and operating rights owner have primary responsibility for plugging wells, the ultimate responsibility remains with the record title owner of the lease. 43 CFR 3100.0-5(a), (d), (j); 43 CFR 3106.7-6(b); *Marlin Oil Corporation*, 158 IBLA at 367; *Ralph G. Abbot*, 115 IBLA at 346; *see also Stanco Petroleum, Inc.*, 143 IBLA 86, 88 (1998).

2000) ("As the bankruptcy court correctly concluded, [the creditor] is bound by the terms of the Confirmed Plan even if it had a different understanding of their meaning or did not realize their effect"). As such, we must look to the terms of the Golden Oil Plan and Confirmation Order to determine the recipient of any transfers from Golden Oil.

Contrary to Platinum's claim here, neither the Golden Oil Plan nor the Golden Oil Confirmation Order say anything about a transfer of anything to ***Platinum***. Rather, the Golden Oil Plan, Golden Oil Confirmation Order, and even the 2004 Settlement Agreement that is incorporated into the Plan, each state in unequivocal language that the rights held by Golden Oil with respect to the Jicarilla Leases 71 and 363 would be transferred to the McKay-Lotspeich Group (also known as "MLG").[3] Platinum was not even a party to any of the operative agreements. For example,

- The Settlement Agreement, dated March 17, 2004,[4] submitted to the Golden Oil Bankruptcy Court for approval as document 311-2, is between Golden Oil Company and MLG. Platinum was not a party to the Settlement Agreement.

- Golden Oil's Motion to Approve Compromise, submitted to the Golden Oil Bankruptcy Court designated the MLG as the party with whom the Debtor sought to compromise litigation that began in 1991.[5] Platinum was not a party to the Motion to Compromise.

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[3] Platinum cannot claim that it is actually MLG because Platinum was not yet formed on February 6, 2004, when MLG provided Golden Oil with a definitive list of individuals and entities comprising MLG. Such an interpretation would be contrary to the clear language of the Plan which, in section 1.30 of the Golden Oil Plan, defined MLG to mean and include "all persons including individuals, corporations, partners and other interest owners represented by the law firm of Dolan & Domenici, PC, as detailed in their letter of representation sent to [Golden Oil Company] dated *February 6, 2004*, attached, both individual and in any and all other capacities, including as former or current officers, directors, joint venturers, shareholders or control persons (within the meaning of the Federal Securities Acts), of Chace Oil Company, Ltd., Golden Oil Company, Cobb Resources Corporation or Hydro Resources Corporation (inclusive of all entities referenced above)." (*Emphasis added*). See list of MLG Group attached hereto as **Exhibit B**. Platinum Oil Properties, LLC is a New Mexico limited liability company that was formed on *March 30, 2004*.

[4] A copy of the March 17, 2004 Settlement Agreement is attached hereto as **Exhibit C**.

[5] A copy of Golden Oil's Motion to Approve Compromise is attached hereto as **Exhibit D**.

- Golden Oil's Disclosure Statement filed on April 22, 2004[6] as document 223, describes the Debtor's compromise with MLG in section 10.5.2 (page 23). Platinum is not named or referred to in the Disclosure Statement.

- Golden Oil's Third Amended and Restated Joint Plan of Reorganization, filed on October 6, 2004 ("Golden Oil Plan") as document 399-2,[7] provides in section 5.5.1 that, "MLG shall receive the benefit of the Settlement Agreement, the respective interests in the 71 and 363 leases described therein, and the liabilities associated therewith." The Golden Oil Plan does not define, describe or refer to Platinum in any capacity.

- The Order Confirming the Golden Oil Plan, signed by the Court on October 6, 2004 (the "Confirmation Order),[8] refers to the settlement between Golden Oil and MLG referred to in section 7 of the Plan. The Confirmation Order does not provide any rights or transfers to Platinum.

- Ordering paragraph 30, at 8, of the Confirmation Order specifically provides: "On the later of the Effective Date or June 30, 2004, all rights, title and interest in the Section 71 and 363 leases (except for five wells on the 71 lease being worked-over, which will be transferred after collecting allowable charges for work over), shall be transferred to MLG. If the transfer cannot legally take place on the later of the Effective Date or June 30, 2004, then MLG shall be entitled to a transfer of all equitable interests in and to the Section 71 and 363 Leases (except for five wells on the 71 lease being worked-over, which will be transferred after collecting allowable charges for work over)." The Confirmation Order does not provide any rights or transfers to Platinum.

- Ordering paragraph 33 of the Confirmation Order provides: "The Debtor is authorized to execute all documents under the confirmed Plan as may be necessary, required, or appropriate to carry out the provisions of the confirmed Plan, including the documents necessary to effectuate the transfer of legal title of assets under the 1991 asset purchase agreement between Chace and the Debtor, specifically including forms required by the Jicarilla Apache Nation, and the documents necessary to transfer assets to the MLG group in accordance with Article 7 of the Plan." The Confirmation Order does not provide any rights or transfers to Platinum.

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[6] A copy of Golden Oil's Disclosure Statement is attached hereto as **Exhibit E**.

[7] A copy of the Golden Oil Plan is attached hereto as **Exhibit F**.

[8] A copy of the Confirmation Order is attached hereto as **Exhibit G**.

- On October 22, 2004, counsel for Golden Oil filed a "Notice of Effective Date and Substantial Consummation"[9] as document 404, which notified the Bankruptcy Court that "on October 18, 2004, the Debtor paid more than $250,000 in administrative fees and expenses, substantially consummating the plan" (the "Effective Date Notice"). From and after that date, no further modification of the plan was permitted under Bankruptcy Code § 1127.

The foregoing documents show that Golden Oil, by contract, transferred whatever Operating Rights it had in the Jicarilla Leases to MLG, not Platinum. Indeed, when disputes arose post-effective date, it was MLG, not Platinum, who sought to enforce the Golden Oil Plan. *See* MLG's February 3, 2005, Motion to Enforce Compromise approved under the Golden Oil Plan.

That MLG, not Platinum, was the recipient of the Operating Rights transferred under the Golden Oil Plan is confirmed by the Corrective Assignment and Bill of Sale dated July 7, 2005, filed with the office of the County Clerk, Rio Arriba County, New Mexico (the "Assignment"). *See* **Exhibit I**. In the Assignment, the "Assignor" is defined as Platinum and MLG, and the Assignee is Star Acquisition VII LLC ("Star"). Clearly, if Platinum held all the rights to be transferred, there would be no reason for MLG to have been a party to the Assignment.

As noted above, a dispute arose between Golden Oil and MLG *after* the confirmed Golden Oil Plan was substantially consummated in October 2004, and MLG filed a Motion to Enforce in February 2005. MLG's Motion to Enforce was resolved by entry of a Stipulated Order entered by the Bankruptcy Court on June 20, 2005 (the "Stipulated Order").[10]

The Stipulated Order indicates that Platinum was to be the recipient of varying small "abandoned" percentages of working interests in 15 wells located within Jicarilla Lease 71 and two wells located within Jicarilla Lease 363. *See* Stipulated Order at Finding ¶ 6A. Said

[9] A copy of the Effective Date Notice is attached hereto as **Exhibit H**.

[10] A copy of the Stipulated Order is attached hereto as **Exhibit J**.

abandoned interests were held by former Golden Oil shareholders, and Platinum ostensibly took those interests directly from the former Golden Oil shareholders, not from the Golden Oil entity. (Collectively, those rights and the rights that Golden Oil transferred to MLG are the purported "Operating Rights" at issue here). Nothing in the Stipulated Order operates as a transfer from Golden Oil to Platinum. Rather, the Stipulated Order recites the parties' agreement as to how to divide up the abandoned interests, and states that "All other limited partners' abandoned or unclaimed interests in the Jicarilla 71 and 363 Leases not retained by Debtor, have been or are to be transferred directly from the limited partners to Platinum. . ." Stipulated Order at ¶ 6.

III. CONTRACTS BETWEEN PRIVATE ENTITIES SELLING & CONVEYING IMLA INTERESTS (EITHER RECORD TITLE OR OPERATING RIGHTS) ARE BINDING AS TO THE PARTIES BUT DO NOT BIND AND CANNOT BE ENFORCED AGAINST THE SECRETARY AND/OR THE NATION

A. Platinum Sold and Conveyed by Contract to Private Parties Any Interests It May Have Had in the Jicarilla Leases

The Stipulated Order confirms that Platinum took nothing, directly or indirectly, from Golden Oil or under the Golden Oil Plan. At best, Platinum, by contract, was conveyed a small percentage of the working interests in a few of the wells located on Jicarilla Leases 71 and 363. *See* Stipulated Order at Finding ¶ 6A. Platinum did not hold those interests for very long, however.

On or about June 23, 2005, MLG and Platinum, as "assignor," executed the first of their collective interests in the Jicarilla Leases to Star.[11] The Assignment reserved to the "Assignor" certain "net profits" from certain of the wells on the Jicarilla Leases, but this net profit interest

[11] A copy of the "Corrective Assignment and Bill of Sale" filed with the State of New Mexico is attached hereto as **Exhibit I**. This document corrected an earlier "Assignment and Bill of Sale," dated June 23, 2005, between Platinum and MLG as Assignors and Star Acquisition VII LLC, as Assignee.

was later assigned to Star in 2006.[12] As such, neither MLG nor Platinum held any interests in the Jicarilla Leases as of the March 2, 2009 Petition Date (the "Petition Date"). Therefore, Platinum has no rights to assume here.

B. Platinum Lacks the Ability to Declare the Assignments it Conveyed As Void

Of course, Platinum is aware of the Assignment to Star and of the subsequent assignment from Star to Sagebrush. However, to avoid the conclusion that Platinum therefore contracted away any rights it may have had in the Jicarilla Leases, Platinum now unilaterally asserts that the Assignment and any subsequent assignments are *void ab initio* because those assignments were not approved by the Secretary of the Interior ("Secretary"). Stated another way, Platinum appears to be claiming that, since the Secretary never approved the transfers, this Court should treat the underlying sale agreements as if they never existed.

It is well settled law that the failure to obtain the necessary governmental approval renders the transfer ineffective and unenforceable *vis a vis* the Secretary and/or the Indian mineral owner (*i.e.*, without the requisite governmental approval, the transferee cannot legally operate the wells) but, in the absence of an express condition precedent making governmental approval a condition of contract formation, the parties remain bound to the terms of the agreement, and the seller cannot treat as void the underlying sale agreement. *See, e.g., Wood v. Cunningham*, 140 N.M. 699, 147 P.3d 1132 (NM Ct. of App. 2006).

In *Wood*, plaintiff seller entered into a contract to transfer to buyer all of seller's rights, title and interests in certain IMLA oil and gas leases located on the New Mexico portion of the Navajo Nation. The parties' contract provided that the seller was required to deliver executed assignment documents in a form acceptable to the BIA and the Navajo Nation, made the buyer

[12] Star subsequently transferred its interests in the Jicarilla Leases to Sagebrush Holding/O&G, LLC. See Assignment of Interests" dated June 10, 2008, attached hereto as **Exhibit K**.

responsible for obtaining governmental approval, but did not condition the effectiveness of the contract as between the buyer and seller upon receipt of the respective Federal and Navajo governmental approval of the transfer. The seller delivered the assignments and the closing occurred, but the buyer delayed submitting them for approval nearly five years after buyer took possession of the leases and the wells. As of the pendency of the litigation, said assignments had not yet been either approved or denied.

Seller filed an action to rescind the agreement asserting that secretarial approval was a condition precedent to the effectiveness of the agreement. The New Mexico Court of Appeals rejected the seller's claim finding that "no performance by Buyer or Seller was expressly made contingent upon approval of the assignments by the BIA." 147 P.3d at 1135. Instead, the Court found that "Seller agreed to transfer the oil and gas leases to Buyer, and Buyer agreed ***at its sole risk and expense*** to plug and abandon any and all of the wells and reclaim lands on which the wells were situated in accordance with applicable laws, rules, and regulations. An offer was made to assign the oil and gas leases and the offer was accepted. The contract was thereby formed and became binding." *Id.* (*emphasis added*).

The New Mexico Court of Appeals also rejected "substantial failure of consideration" as a basis for rescission because: (1) the assignments had not been approved or denied but remained pending before the BIA, (2) the parties were in a binding contract with no express condition precedent requiring governmental approval, and (3) buyer received all of the consideration it was entitled to under the Agreement. *Id.* The court reasoned that "[w]hether BIA ultimately approves the assignments of the oil and gas leases will not result in any greater or lesser consideration passing from Seller to Buyer." Stated another way, the pendency of BIA approval to the assignments has not resulted in any injury to Seller. *See, Armijo v. Nuchols,* 57

N.M. 30, 35, 253 P.2d 317, 320 (1953) ("The principle is well established that voidable contracts may be rescinded at the election of an injured party[.]"); *Gross, Kelly & Co. v. Bibo,* 19 N.M. 495, 504, 145 P. 480, 483 (1914). ("[A] contract which *may* be set aside at the option of the injured party, is to be considered as being in effective operation until that party takes measures to enforce his right to rescind." (internal quotation marks and citation omitted))." *Id.*

Regarding the principle that "the grounds generally available to the purchaser for rescission are not likewise available to the seller for that purpose," the court noted that, in this case, the seller, not the buyer, sought rescission for failure to obtain governmental approval. *Id.* at 1136. However, the court explained that "the purpose of the requirement that the BIA approve oil and gas leases such as those in this case is to effectuate the fiduciary duty the United States Government as trustee owes the beneficiary Indian tribes," *Id.* Thus, seller's attempt to rely on the lack of governmental approval as a basis for rescission of the underlying agreement was inapposite because secretarial approval is for the benefit and the protection of the Indian mineral owner and not the seller of leasing rights.

Finally, the New Mexico Court of Appeals recognized that private parties can enter into binding agreements to sell and convey interests in IMLA leases. However, securing the requisite governmental approval of such transfers is a separate and distinct process. With respect to the agreement at issue in *Wood*, the court upheld the district court's conclusion that the Agreement constituted a valid and binding contract between the seller and buyer, reasoning that an assignee has a right to the assignment ***as per the agreement*** between the private parties, but that ultimately, "its validity is solely a matter between the assignee [not the seller] and the government." *Id.* at 1137 (*citing, Ganas v. Tselos,* 157 Okla. 107, 11 P.2d at 751, 753 (Okla. 1932))("The [assignee] had a right to the assignment as per agreement, and it would then be a

matter between the [assignee] and the Secretary of the Interior as to [the assignment's] approval.").

Wood is on point here. In this case, Platinum and MLG received valuable consideration from Star for the Assignment, and Star operated wells on the Jicarilla Leases for almost two years pursuant to the Assignment and pursuant to a Temporary Vendor Operating Permit from the Nation. The Permit expired in September 2007, and the wells were shut-in in October, 2007. Securing governmental approval was not an express condition precedent to either formation or performance in the agreement between those parties' agreement. *See* Exhibits L & M. Platinum received the consideration it bargained for under the agreement and, thus, like the seller in *Wood*, Platinum, having received the full benefit of its bargain, has incurred no injury as a result of the fact that neither the Secretary nor the Nation has approved the Assignment. Moreover, because governmental approval of the transfer and assignment of IMLA leasing interests was established for the benefit of the Indian mineral owner, Platinum cannot rely on the failure to secure such approval of its contractual assignments as a basis to nullify them. *See, e.g.*, *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036-1037 (8th Cir. 2002) (rejecting the claim that non-Indian lessors have enforceable rights based on requirements created to protect Indian interests). Under these circumstances, Platinum has no grounds, as seller, for unilaterally seeking a decree declaring the Assignment (or any subsequent assignment) void *ab initio*.

C. ***Platinum Cannot Enforce Any Asserted Interests in the Jicarilla Leases against the Secretary and/or the Nation***

The instruction from *Wood* is that private parties who entered into contractual agreements conveying IMLA leasing interests do so at their own risk and expense because these types of

agreements do not bind the Secretary and/or the Indian mineral owner.[13] Accordingly, such agreements cannot be enforced against the Secretary and/or the Indian mineral owner to require their approval of such transfers. In this case, Platinum clearly failed to familiarize itself with the applicable IMLA and Nation regulatory requirements before it precipitously agreed to transfer its interest. Platinum now seeks not only to reform its agreement to mandate governmental approval, but also to make the Nation and its trustee answer for Platinum's failures and omissions.

Platinum's only hope of overcoming this legal barrier is its misplaced claim that it acquired the asserted Operating Rights through the Golden Plan which had the implicit effect of granting Secretarial approval. By contrast, Platinum utterly denies that the Nation has any say in approving such rights. As demonstrated above, however, Platinum took nothing from either the Golden Plan or the Golden Confirmation Order, and any interests it may have acquired occurred outside this context, it contracted away in a binding agreement it cannot now declare to be void. Moreover, neither the Secretary nor the Nation were parties to any agreement between MLG and Platinum, and nothing in the Golden Plan or the Golden Confirmation Order required either the Secretary or the Nation to affirmatively grant approval of the assignments alleged here. Certainly, nothing in the Golden Plan or the Golden Confirmation Order sought to abrogate the Nation's laws requiring Nation approval of such assignments.

Indeed, the Golden Plan contemplated that the non-governmental parties would cooperate with each other and file the necessary forms required for submission and approval by the Nation. Moreover, there is no evidence to support Platinum's suggestion that either the Secretary and/or

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[13] *Billco Energy v. Acting Albuquerque Area Director, Bureau of Indian Affairs*, 35 IBIA 1, 7 (2000) ("As a person doing business on Indian land, Appellant was responsible for familiarizing itself with duly promulgated regulations governing its activities. Under well-established law, Appellant is deemed to have knowledge of regulations published in the Code of Federal Regulations."); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Narconon Chilocco New Life Center v. Acting Anadarko Area Director*, 25 IBIA 273, 277 (1994).

the Nation made the extraordinary concession that they had an obligation to approve the assignment of Operating Rights, either as part of the Plan, or in any post-confirmation agreement that neither the Nation nor the United States either negotiated or signed. To substantiate its position, Platinum would be required to point to a specific act of Congress that clearly and unequivocally abrogated the Nation's sovereignty and expressly waived the sovereignty immunity of Federal Government from suit in order to allow Platinum to enforce a private agreement against the Secretary and/or the Nation.[14] No such act of Congress exists and, as a matter of law, Platinum cannot enforce private contractual rights against the Secretary and/or the Nation to require either or both to approve of the assignments of the asserted operating rights, which is required to effectuate the transfer under prevailing Federal and Nation law.

III. PLATINUM CANNOT USE SECTION 365 TO MAKE ITS OPERATING RIGHTS ENFORCEABLE

As noted above, Platinum has asked this court to enter an order allowing it to assume its Operating Rights in the Jicarilla Leases pursuant to section 365 of the Bankruptcy Code, arguing that its Operating Rights "constitute an unexpired lease between the [Nation] and the Debtor as lessee with respect to the tracts covered by those operating rights.[15] Federal law affords the Debtor all the rights, and imposes on the Debtor all the obligations, of the lessee with respect to the tracts covered by the Debtor's operating rights." Platinum's Response in Support of Assumption at 6, ¶ 9.

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[14] *See, e.g., Sangre de Christo Development Company v. United States*, 932 F. 2d 891, 895-898 (10th Cir. 1991) (rejecting damages claim against the United States for its actions as Indian trustee even though Congress enacted a special statute that vested jurisdiction in the United States District Court for New Mexico and eliminated procedural requirements such as the statute of limitations, but did not expressly enlarge or expand the government's immunity).

[15] As to the argument that oil and gas leases are "unexpired leases," this Court, citing *Vanzandt v. Heilman*, 54 N.M. 97, 108, 214 P.2d 864 (1950), stated, "It is clear that under New Mexico law an oil and gas lease is not a 'lease' and does not create a landlord/tenant relationship." *In re Antweil*, 97 B.R. 65, 68, (Bankr.D.N.M. 1989). Platinum is not a lessee and has no contractual relationship with the Nation. However, even if it did, Platinum could not "assume" the Jicarilla Leases under Bankruptcy Code § 365.

By this argument, Platinum relies on inapposite definitions that grant no substantive rights to transform a contractual relationship between the record title holder of a lease and the third party to whom it assigns out a portion of its rights to operate such lease into a direct relationship between the third party and the Indian lessor. In other words, Platinum has asked this court to let it use section 365 to exercise the rights of a Record Title holder without being the actual Record Title holder, and in so doing cure the enforceability problem resulting from its failure to obtain Nation approval for its Operating Rights.[16] While creative, this argument fails because only the holder of record title has the type of contractual relationship with the Secretary and the Indian Mineral Owner that might qualify for treatment under the assumption and cure provisions of section 365. *Cross Creek Corp.*, 131 IBLA 32, 37 (1994).

In *Cross Creek*, the Record Title holder, Cross Creek Corporation, appealed from a decision of the Bureau of Land Management ("BLM") requiring Cross Creek to plug and abandon five wells located on Indian oil and gas leases. Cross Creek was Record Title holder by virtue of a 1987 assignment of record title from BHP Petroleum (Americas), Inc., which was approved by the BIA effective January 25, 1990. In February, 1989, Cross Creek in turn assigned record title in the leases at issue to Dry Mesa Corporation ("Dry Mesa"). However, BIA never approved the Dry Mesa assignment. *Cross Creek*, 131 IBLA at 33.

Cross Creek argued that, as a result of certain actions by BLM and BIA, Dry Mesa became the "defacto lessee" and was therefore liable under the lease to pay for the cost of plugging and abandoning the wells. *Cross Creek*, 131 IBLA at 35-36. Rejecting Cross Creek's argument, Judge Hughes confirmed that only the holder of Record Title has a contractual relationship with the Secretary and the Indian Nation:

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[16] As discussed *infra*, the undisputed Record Title holder for Lease 71 is BP and for Lease 363 is EnerVest.

> The assignment of record title requires BIA approval. See 25 U.S.C. §§ 1a, 2, 396a (1988); 25 C.F.R. § 211.26(a). Since the assignment of record title, unlike the assignment of operating rights, gives rise to a contractual relationship between the lessor and the lessee's assignee, in order to effect a change in the holder of record title, the agency must affirmatively approve an assignment of record title, in order to bring the assignee under the prevailing terms of the contract with the lessor.

Cross Creek, 131 IBLA at 35.[17]

It is axiomatic that a debtor can only assume contracts to which it is a party. 11 U.S.C. § 365. In the case of the Jicarilla Leases at issue here, BP and EnerVest are the approved Record Title holders of Leases 71 and 363, respectively, not Platinum.[18] As such, even if section 365 applies to IMLA oil and gas leases, Platinum cannot rely on that section to assume the Jicarilla Leases or to cure the enforceability issues related thereto as stated in its motion. *See* Motion at 1, 4 ("By this Motion, Debtor seeks to (i) assume the Leases and (ii) have this Court determine that no default exists under the Leases or . . . permit Debtor to cure such defaults. . .").

IV. AS A MATTER OF LAW, PLATINUM'S CLAIMS CANNOT OVERRIDE THE INHERENT SOVEREIGNTY OF THE JICARILLA APACHE NATION

In the landmark case of *Merrion v. Jicarilla Apache Tribe ("Merrion")*, the Supreme Court recognized and upheld the Nation's inherent sovereignty to regulate the conduct of nonmembers engaged in oil and gas leasing activities within the Nation's territory. 455 US. 130 (1982). *Merrion* is a seminal precedent addressing, recognizing and re-affirming the fundamental Indian law principle that Indian sovereignty is an inherent and fundamental attribute

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[17] 25 C.F.R. § 211.26(a) cited by Judge Hughes in *Cross Creek* is now codified as 25 C.F.R. § 211.53(a). See *Gavilan Petroleum, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 32 IBIA 191, 203 n.9 ("Part 211 concerns leasing of tribal lands for mineral development and Part 212 deals with leasing of allotted lands for mineral development. These parts were amended on July 8, 1996. 61 Fed. Reg. 35,653. The sections which now correspond to former sections 211.26 and 212.22 are sections 211.53 and 212.53. Present subsection 211.53(b) differs from former subsection 211.26(b), upon which the Area Director relied, only in non-essential wording.")

[18] The Nation's records show that Chace Oil is the last approved holder of the Operating Rights at issue here. Sandoval Declaration at ¶ 17.

of tribal self government and territorial management that has not been divested by any treaty or Act of Congress. *Merrion* affirms that inherent sovereignty of federally recognized Indian tribes does not derive from any power delegated from the Federal Government, but exists as an essential attribute of an Indian tribe's general authority, as sovereign, to control and regulate activities within its territorial jurisdiction.

Clearly, it is beyond question that *Merrion* fully applies here. The Nation has the inherent authority to regulate the conduct of all oil and gas leasing activities within the Nation's territorial jurisdiction, that is, within the boundaries of the Nation's Reservation. As discussed below, the Nation has done so by enacting provisions that are a part of the Nation's Code which require Nation approval of ALL assignments and transfers of operating rights and record title rights to oil and gas leases on the Nation. Nothing in the IMLA or its implementing regulations specifically divests the Nation of its inherent sovereignty to require such Nation approval. Indeed, the IMLA Regulations recognize the Nation's sovereign authority to regulate oil and gas activities concurrently with the IMLA's procedures. *See* 25 C.F.R. § 211(d). Therefore, Platinum's claim that the IMLA preempts the Nation's law to require Nation approval of Platinum's asserted Operating Rights in the Jicarilla Leases is plainly wrong as a matter of law. Platinum has no legal basis for evading compliance with the Nation's laws.

A. Transfers of Operating Rights Must Be Approved By The Nation to Be Effective As against The Nation

The alleged "property interests" at issue here are Operating Rights to certain wells on the Jicarilla Leases.[19] Interests in oil and gas wells located on the Nation's land are created and

[19] See Platinum's "Response To Objection of the Jicarilla Apache Nation to Debtor's Motion to Assume Oil and Gas Mining Leases Nos. 71 and 363" filed on April 10, 2009 as docket entry no. 29 ("Platinum Response in Support of Assumption"), attached as **Exhibit L**. Platinum claims only Operating Rights, and does not assert that it is the Record Title holder to either of the Jicarilla Leases.

governed by the IMLA and its implementing regulations and are regulated concurrently by the Nation's Code. *Merrion*, 455 U.S. at 144-45. Leaving aside the question of whether Platinum actually owned any interest in the Operating Rights on the Petition Date (it did not), this Court must look to the IMLA, its implementing regulations and to the Nation's Code to determine whether Platinum can exercise those Operating Rights. *See* 28 U.S.C. § 959(b) (during pendency of a chapter 11 case, a debtor-in-possession "shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof"). This is true because a property interest that has passed to the estate is subject to the same limitations imposed upon the debtor by applicable non-bankruptcy law. *In re American Freight Sys., Inc.*, 179 B.R. 952, 960 (Bankr. D. Kan. 1995); *In re Sanders*, 969 F.2d 591, 593 (7th Cir.1992) ("[A] bankruptcy trustee succeeds only to the title and rights in property that the debtor had at the time she filed the bankruptcy petition."); *In re FCX, Inc.*, 853 F.2d 1149, 1153 (4th Cir.1988) *cert. denied, Universal Cooperatives, Inc. v. FCX, Inc.*, 489 U.S. 1011, 109 S. Ct. 1118 ("The estate under § 541(a) succeeds only to those interests that the debtor had in property prior to commencement of the bankruptcy case."). *McKown v. United States Department of Agriculture*, 276 F. Supp. 2d 1201, 1209 (D.N.M. 2003).

Platinum does not dispute that the IMLA and its implementing regulations apply to the Jicarilla Leases,[20] However, Platinum denies that the Nation's approval is required to obtain a

[20] Curiously, Platinum has argued that Secretary approval is required to obtain a valid and enforceable assignment of Operating Rights, but claims that it satisfied this requirement when the BIA withdrew its objection to the Golden Oil Plan and the Bankruptcy Court confirmed that Plan. The BIA's withdrawal of its objection to the Golden Oil Plan pursuant to a *settlement* between private parties is not the same as an affirmative *approval* of a transfer of Operating Rights to *Platinum*, particularly given that Golden Oil Plan transfers Operating Rights to MLG. In any case, Platinum cannot demonstrate compliance with the IMLA because it has failed to register with the BIA a duly approved transfer of Operating Rights. *Cross Creek Corp.*, 131 IBLA at 36 n. 10. Transfers of Operating Rights are required to be approved by the Nation. Approval by the Secretary is not required for assignments of Operating Rights. *Cross Creek Corp.*, 131 IBLA at 36 n. 10 ("In particular, it appears that the assignment of operating rights

valid and enforceable assignment of Operating Rights in the Jicarilla Leases because the underlying Leases do not contain such a requirement and because the Nation's Code is preempted by the IMLA Regulations.[21] *See* Platinum's Response in Support of Assumption at 6. As discussed herein, no authority exists to support Platinum's outlandish claim that it is absolved from complying with the Nation's law. Instead, *Merrion* fully applies and Platinum is wrong, as a matter of law.

The Jicarilla Leases at issue in this case were first executed in 1951 and 1963. While the language in the leases do not require Nation approval of transfers or assignments of leasing interests, the Nation subsequently enacted laws providing that no assignment of record title or operating rights under an oil and gas lease will be effective until such assignment is approved by the Nation's Legislative Council. *See* Nation's Code Title 18, Chapter 11, ff.[22] In fact, under the Nation's law, no lessee and/or operator is *permitted* on any lease before the assignment of record title, operating rights, sublease or designation of operator is approved by the Council. *Id.* at § 3 (*emphasis added*). To that end, any individual or entity seeking to conduct business on the Nation's Land also must apply for and be granted a Vendor Operating Permit (Nation's Code

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does not require BIA approval. Appellant has provided a copy of a Sept. 30, 1988, letter from BIA, which states that, as of August 1987, it will no longer process assignments of operating rights. The assignment of record title does require BIA approval. See 25 U.S.C. §§ 1a, 2, 396a (1988); 25 CFR 211.26(a)"). Because approval of the Nation is required for assignments of Operating Rights, the Golden Oil Plan and Confirmation Order required Golden Oil and MLG to work together to obtain the requisite approval of the Nation for such assignment.

[21] Platinum admits that it must obtain a Vendor Operating Permit pursuant to Title 18, Chapter 1 of the Nation's Code and further admits that Platinum has not yet obtained such permit.

[22] Title 18, Chapter 11 of the Nation's Code at §§ 1, 2 and 3 provides, in relevant part:

§1 Under the BIA Regulations . . ., no lease assignment (record title or operating rights) of any oil and gas lease within the Jicarilla Apache Nation shall be effective until approval of the Legislative Council of the Jicarilla Apache Nation is obtained. . .

§ 2 No sublease or designation of operator of any oil and gas lease within the Jicarilla Apache Nation shall be effective until approval of the Council is obtained. All lessees and/or operators will submit subleases and designations of operators to the BIA. . .

§ 3 No lessee and/or operator will be permitted on any lease before his assignment (record title or operating rights), sublease or designation of operator is approved by the Council.

Title 18, Chapter 1).[23] Individuals or entities that conduct business on the Nation's Reservation are responsible for complying with the Nation's Code. Consistent with *Merrion*, the Nation enacted these laws as an aspect of its inherent sovereignty to regulate the conduct of oil and gas leasing activities on the Nation.

In *Merrion*, certain nonmember IMLA lessees challenged the Nation's authority to impose a severance tax on nonmembers who extract minerals from the Nation's land for a variety of reasons, for example, because the right to impose such a tax was not included in the original lease agreement. The lessees also argued that, since the power to tax derives from the power to exclude, their leaseholds entitled them to enter the Nation and exempted them from further exercises of the Nation's sovereign authority, such as the power to tax.

The Supreme Court fully rejected these arguments recognizing that the Nation's sovereign power to regulate activities by nonmembers within the Nation's territorial jurisdiction does not derive solely from its inherent sovereign authority to exclude, but is an essential attribute of Indian sovereignty because it is a necessary instrument of tribal self-government and territorial management. *Id.* at 138. The Supreme Court recognized that the inherent sovereign powers of the Nation, along with those that stem from the Indian Reorganization Act of 1934, are vested in the Nation's Tribal Council through the Nation's Constitution which vests the Tribal Council with the authority to govern and regulate development of Nation resources:

> The Tribe is organized under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*, which authorizes any tribe residing on a reservation to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior (Secretary). The Tribe's first Constitution, approved by the Secretary on August 4, 1937, preserved all powers conferred by § 16 of the

[23] Even those individuals or entities holding approved Operating Rights must obtain a Vendor Operating Permit in order to physically enter the Reservation and operate a well. Sandoval Declaration at ¶ 8 attached as **Exhibit M**; Nation's Code § 18-1-3.

> Indian Reorganization Act of 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476. In 1968, the Tribe revised its Constitution to specify:
>
> "The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution." Revised Constitution of the Jicarilla Apache Tribe, Art. XI, § 1.
>
> The Revised Constitution provides that "[t]he tribal council may enact ordinances to govern the development of tribal lands and other resources," Art. XI, § 1(a)(3) . . . . The Revised Constitution was approved by the Secretary on February 13, 1969.

Merrion , 455 U.S. at 134-135.

The Supreme Court determined that the Nation's sovereign authority to regulate business activities conducted on Jicarilla Apache Nation does not depend on whether a commercial agreement such as an IMLA lease authorized such regulation:

> Most important, petitioners and the dissent confuse the Tribe's role as commercial partner with its role as sovereign. This confusion relegates the powers of sovereignty to the bargaining process undertaken in each of the sovereign's commercial agreements. It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable minerals; it is quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract.

Id. at 146-147.

Therefore, the mere fact that the underlying Jicarilla Leases do not include a requirement that the Nation approve transfers of Operating Rights does not limit or restrict the Nation's inherent sovereign authority to separately legislate such a requirement.[24] Indeed, in 1993 the BIA expressly approved the use of the Nation's administrative forms, including the JAT-2 form

[24] Indeed, even if Platinum could demonstrate any question or ambiguity concerning the Nation's authority (there is none) *Merrion*, nevertheless, directs that any ambiguity is to be construed in the Nation's favor in accordance with the "federal policy of encouraging tribal independence." *Merrion* at 152, quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144.

that must be signed by the BIA and approved by the Nation. *See*, March 24, 1993 Letter from the BIA Area Director to the BIA Jicarilla Agency Superintendent, attached hereto as **Exhibit N**.

It is undisputed that the Nation has never approved any assignment of Operating Rights to Platinum (or to MLG, Star or Sagebrush) and its temporary Vendor Operating Permit expired in January 2006, so Platinum (like MLG, Star and Sagebrush) is prohibited from entering the Nation's Reservation to conduct business and from exercising the asserting Operating Rights to the Jicarilla Leases. Under these circumstances, even if this court finds that Platinum holds bare title to the Operating Rights, under *Merrion,* Platinum is unquestionably barred from exercising such rights.

B. ***The Nation's Code Works in Tandem with, and is Not Preempted by, the IMLA***

Platinum's alternative theory is that the IMLA's implementing regulations somehow preempt the requirements of the Nation's Code.[25] *See* Platinum's Response In Support of Assumption at 6. Platinum is plainly wrong, again.

The IMLA and its implementing regulations are a "comprehensive statutory and regulatory scheme covering mineral leasing on tribal lands." *See U.S.A. v. 9,345.33 Acres of Land, More or Less, In Cattaraugus County, New York*, 256 F. Supp. 603, 605-608 (W.D.N.Y. 1966) (hereinafter "*Cattaraugus*").[26] The IMLA Regulations are set forth at Section 211.1, *ff.* of title 25 of the Code of Federal Regulations and, for example, provide that no lease in oil and gas wells on Indian trust lands can be granted, and no transfer of record title to such a lease is valid,

[25] Platinum admits that it must obtain a Vendor Operating Permit pursuant to Title 18, Chapter 1 of the Nation's Code and further admits that Platinum has not yet obtained such permit.

[26] 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.

except pursuant to the IMLA. 25 U.S.C. § 396a-396d; 25 C.F.R. § 211.53. Jurisdiction regarding leases on the Jicarilla Apache Nation, including the approval of any assignment of record title to the lease, resides with the Bureau of Indian Affairs in the U.S. Department of the Interior ("BIA"). *Cross Creek Corp.*, 131 IBLA at 33 n. 2; See 25 U.S.C. §§ 1a, 2, 396a and 25 C.F.R. § Part 211.

Contrary to Platinum's preemption argument, the IMLA's implementing regulations expressly recognize the sovereign authority of the Nation to regulate of oil and gas mining activities on the Nation's reservation. Specifically, 25 C.F.R. § 211.1(d) provides that: "Nothing in the regulations in this part is intended to prevent Indian tribes from exercising their lawful governmental authority to regulate the conduct of persons, businesses, operations or mining within their territorial jurisdiction." This provision authorizes the Secretary and the Nation to exercise concurrent jurisdiction over the development of the Nation's land and resources.[27] The Nation's Revised Constitution, which was approved by the Secretary on February 13, 1969, likewise provides that "[t]he tribal council may enact ordinances to govern the development of tribal lands and other resources," Art. XI, § 1(a)(3).

Merrion is controlling on this point, as well. In *Merrion*, the oil and gas lessees argued that the Nation's right to impose a severance tax was preempted by the IMLA. The Supreme Court rejected this argument, finding that the IMLA and its implementing regulations were not designed to and did not have the effect of preempting the Nation's right to regulate matters related to oil and gas leases of its territory:

> [The IMLA] and the regulations promulgated by the Department of the Interior for its enforcement, establish the procedures to be followed for leasing oil and gas

[27] Congress knows how to draft language that clearly and explicitly provides for pre-emption. *See, e.g.*, 25 C.F.R. § 1.4 (no state law governing, regulating or controlling the use or development of land shall apply to Indian lands); *See also In re Epic Capital Corporation (Bank of New York v. Epic Resorts-Palm Springs Marquis Villas, LLC),* 290 B.R. 514, 521 (Bankr. Del. 2003).

> interests on tribal lands. However, the proviso to 25 U.S.C. 396b states that "the foregoing provisions shall in no manner restrict the right of tribes . . . to lease lands for mining purposes . . . in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, [464-475, 476-478], and 479 of this title" (emphasis added). Therefore, this Act does not prohibit the Tribe from imposing a severance tax on petitioners' mining activities pursuant to its Revised Constitution, when both the Revised Constitution and the ordinance authorizing the tax are approved by the Secretary.

Merrion, 455 U.S. at 150, 152.

In the bankruptcy context, courts have adopted a "restrained approach" to concluding that Congress has intended to preempt non-bankruptcy law. *Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F.3d 487, 492-93 (3d Cir. 1997). *See also Butner v. United States* 440 U.S. 48, 57 (1979) (absent a countervailing federal interest, "the basic federal rule is that state law governs."); *In re Schauer*, 835 F.2d 1222, 1225 (8th Cir. 1987) (Minnesota farm cooperative statute and a cooperative's by-laws imposing transfer restriction on a "patronage margin certificate" held by the debtor were not preempted by Bankruptcy Code); *In re Crossman*, 259 B.R. 301, 307 (Bankr. N.D. Ill. 2001) ("Federal and state statutes should be construed in a congruent fashion, rather than summarily found in conflict as an important application of the principle of comity between the federal and state statutory schemes.").

Clearly, neither the IMLA nor its implementing regulations preempt the Nation's Code nor its requirement that Operating Rights must be approved by the Nation to be enforceable. In fact, the IMLA Regulations and the Secretary recognize the Nation's sovereign authority to regulate oil and gas activities concurrently with the IMLA's procedures. *See* 25 C.F.R. § 211(d). *Merrion*, 455 U.S. at 150, 152. Thus, as a matter of law, the Nation's Code is not preempted by the IMLA or its implementing regulations and, instead, the Nation's Code and the IMLA Regulations work in tandem to regulate oil and gas activities on the Nation's Reservation.

CONCLUSION

WHEREFORE, the Jicarilla Apache Nation respectfully requests entry of an Order: (i) declaring that Platinum has no Operating Rights in the Jicarilla Leases; or, in the alternative, (ii) declaring that any Operating Rights Platinum may have are limited to those it took under the Stipulated Order, are unenforceable because such transfer was not approved by the Nation and not subject to assumption under section 365; and (iii) granting such other relief as this Court deems just and proper.

Respectfully submitted,

THE JICARILLA APACHE NATION

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