IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 10-40785

UNITED STATES OF AMERICA, *ex rel,* BRADLEY SLOAN WRIGHT, on behalf of HARROLD E. (GENE) WRIGHT, ELIZABETH ANN WRIGHT, on behalf of HARROLD E. (GENE) WRIGHT, MARY JO KENNARD, as Attorney-in-Fact for her husband DON KENNARD, n.c.m.,

Plaintiffs/Appellants

v.

COMSTOCK RESOURCES, INC., *et al.*

Defendants/Appellees

BRIEF OF APPELLEES COMSTOCK RESOURCES, INC. AND COMSTOCK OIL & GAS, L.P.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Harrold E. (Gene) Wright

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Black Stone Oil Co.

W. T. Carter & Brothers

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STATEMENT REGARDING ORAL ARGUMENT

Like the fictional *Jarndyce and Jarndyce*, this case has droned on for more than twelve years. As in Dickens' famous case, the original plaintiffs have died or become incapacitated while children and a spouse have come to take their place. Lawyers for the Relators have come and gone, repeatedly. This case is complicated, but, unlike *Jarndyce*, it is not "so complicated that no man alive knows what it means."[1] Appellees and their counsel have grappled with the jurisdictional and factual vagaries of this case since it was first filed. They welcome the opportunity to appear before this Court to explain why this case should be brought to an end.

[1] CHARLES DICKENS, BLEAK HOUSE, 4 (Oxford University Press, 1998) (1853).

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under 28 U.S.C. §1291. Comstock[2] will show, however, that the district court lacked subject matter jurisdiction to hear this case.

STATEMENT OF THE ISSUES

1. Whether the district court correctly granted summary judgment in Comstock's favor because (a) Comstock's Indian Leases are valid, (b) Comstock had permission to use the surface of Tract 1 to drill Well Nos. 6 & 7, (c) Relators lack the authority to challenge the validity of Comstock's leases or the actions of the Government, the Tribe, and Comstock with respect to those leases, and (d) Comstock did not act with the requisite intent to violate the False Claims Act.

2. Whether the district court should have dismissed this case for lack of subject matter jurisdiction under the public disclosure / original source bar, 31 U.S.C. §3730(e)(4).

3. Whether this case should have been dismissed for failure to join indispensable parties whose rights would be affected by the declarations of lease invalidity that Relators seek.

[2] For purposes of this brief, references to "Comstock" also include its predecessor-in-interest Black Stone Oil Company.

4. Whether the prior settlement agreement between Comstock, the Tribe, and the Government is res judicata on the issue of the validity of Comstock's Indian Leases.

STATEMENT OF THE CASE

This is a False Claims Act ("FCA") case in which Appellants (hereinafter "Relators") challenge Comstock's submission of MMS-2014 Forms to the Government between October 27, 1992 and January 4, 2006. (R14:8833 n.2). This is not a common law trespass action; nor is it an action under the Administrative Procedures Act to challenge government agency action.

Comstock produces oil and gas from nine leases (the "Leases") on the Reservation of the Alabama Coushatta Indian Tribes of Texas (the "Tribe"). Relators are not members of the Tribe or affiliated with any entity charged with administering the Leases. Relators are not parties to and hold no interests in the Leases; they are complete strangers to the Leases. (R4:1974-1976, 1979, 1985, 2030, 2037-2038). Nevertheless, Relators have spawned over twelve years of litigation challenging the Leases. The district court correctly held that the Leases are valid.

The facts of this case are not in dispute. This appeal turns primarily on the question of whether the FCA provides a vehicle for a relator to seek to challenge the prior actions and approvals of the Government. It does not.

A. Relators' "Investigation" and "Original Source" Status

In 1997, Gene Wright was investigating purported FCA claims he asserted against almost the entire oil and gas industry in a separate lawsuit challenging the manner in which natural gas royalties are calculated and paid on federal leases across the country.[3] (R7:4167). Don Kennard assisted, including investigating whether Comstock should be sued, too. (R7:4167). At the Texas General Land Office ("GLO"), Kennard noticed an "expired" stamp on the file jackets of some of Comstock's Leases. (R7:4170-4171). This whole case begins with that one-word stamp.

Wright did not claim to have any personal knowledge regarding the validity of the Leases.[4] (R4:1974-1976, 1979, 1985, 2037). Kennard's personal knowledge is limited to seeing that one-word stamp and he admitted not knowing what it meant. (R7:4170-4171, R4:2034-2035). Kennard turned this matter over to his lawyer, Pat Holloway, a title lawyer, who began to investigate the allegations. There is no evidence that either Wright or Kennard participated in Holloway's subsequent investigations. (R4:1977-1978, 2052).

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[3] *See United States ex rel. Wright v. AGIP Petroleum Co. et al.*, Civil Action No. 5:03CV264, in the United States District Court for the Eastern District of Texas.

[4] Although Wright held small interests in some private leases operated by Comstock in East Texas, those leases were over 100 miles away from the Reservation. (R4:1983-1985).

Holloway contacted the Tribe and its lawyers about the Leases. Holloway reviewed the Tribe's files and discussed the meaning of the documents found within those files with the Tribe and its lawyers. Holloway also visited branch offices of the United States Department of the Interior ("DOI") to review the government's files relating to the Leases. When Holloway found documents that were fatal to his proposed claims (such as lease extension and ratification agreements), he ignored them or dreamed up specious arguments to avoid them. Holloway shared the information he found with the Tribe and, during his investigation, he even worked as a lawyer for the Tribe with respect to claims concerning the Leases during his investigations. (*See* R3:1946-1954 (summarizing Holloway's investigation)).

B. Two Separate Litigation Tracks

In 1998, Relators and the Tribe elected to go forward on their own, starting two separate litigation tracks. On October 26, 1998, the Tribe filed its lawsuit against Comstock challenging the validity of the Leases. *See Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001).[5] On October 27, 1998, Relators filed this FCA *qui tam* case under seal

[5] The Tribe dismissed its case before Comstock's answer was due. Shortly thereafter the Tribe re-filed its claims against Comstock in an illegitimate "tribal court". In response, Comstock filed a declaratory judgment action against the Tribe, members of the Tribal council, and the United States Secretary of the

alleging that Comstock submitted false MMS-2014 Forms ("MMS-2014s") to the Government as a result of producing oil and gas on allegedly invalid leases. (R1:37-44). The Tenth Circuit has already found as a matter of law that the Tribe's lawsuit and Relators' lawsuit are "substantially similar" such that the Tribe's lawsuit triggered the FCA's public disclosure bar. *Kennard v. Comstock*, 363 F.3d 1039, 1042-44 (10th Cir. 2004).

Comstock did not learn of this FCA case until 2000, when it was unsealed and served on Comstock in March. (R1:9, 45-46). Prior to that time, Comstock had been actively litigating its claims involving the Tribe. *See Comstock Oil & Gas, Inc.*, 261 F.3d at 568-69 (summarizing procedural history). When Comstock learned about this FCA case, Comstock sought to consolidate this case with the pending litigation with the Tribe. (R1:71-74). Relators opposed those efforts. (R1:116). Ultimately, this case was transferred (over Comstock's objections) to Wyoming as part of MDL-1293, *In re Natural Gas Royalties Qui Tam Litigation*. (R1:137-138). Comstock's litigation with the Tribe and the DOI continued in the Eastern District of Texas before Judge Brown.

While this case was pending in Wyoming, Comstock, the Tribe, and DOI reached an agreement "to resolve and/or settle all of their outstanding disputes." (R4:2627-2629). In that agreement, the Tribe stipulated that each of the Leases

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Interior (the "Secretary") in the same court in which the Tribe had first sued Comstock. *See Comstock Oil & Gas, Inc.*, 261 F.3d at 568-69.

"is, and always has been, valid and in full force and effect, and binding upon the Tribe and Tribal Council in accordance with the terms of said Leases." (R4:2630). DOI, acting through Associate Deputy Secretary James Cason and Director of Minerals Management Service R.M. "Johnnie" Burton, expressly approved that agreement. (R4:2646). John Turner, the DOI's lawyer at the Department of Justice, also approved that agreement. (R4:2651). Despite being given notice of that agreement long before it was approved (*see, e.g.,* R1:350-351), Relators did not object, seek to intervene, or take any action to challenge the agreement. Comstock, the Tribe, and DOI stipulated "to the dismissal, with prejudice, of all claims and causes of action that have been asserted or could have been asserted in this action." (R5:2918-2923). Based on that stipulation, Judge Brown entered Final Judgment in Comstock's litigation with the Tribe and the DOI on January 24, 2006. (R5:2925).

While Comstock, the Tribe and the DOI were working together to resolve their disputes, Comstock vigorously defended this lawsuit because (i) it is not a proper FCA case, and (ii) Comstock had done nothing wrong. Before any discovery was conducted, Comstock filed a motion to dismiss for lack of subject matter jurisdiction because there had been a public disclosure of Relators' allegations, and Relators lack the personal knowledge required to be an "original source." That motion was directed at Relators' First Amended Original Complaint.

The Wyoming district court granted Comstock's motion, *In re Natural Gas Royalties Qui Tam Litigation,* 2002 WL 32714554 (D. Wyo. Nov. 6, 2002), but the Tenth Circuit reversed. Comstock filed a Petition for Writ of Certiorari. The Supreme Court ordered the Solicitor General to submit a brief presenting the views of the Government. Ultimately, the Supreme Court declined review. *See Kennard v. Comstock*, 545 U.S. 1139 (2005).[6]

All discovery in this case had been stayed by the Wyoming district court pending Comstock's jurisdictional challenge. On remand, the Wyoming district court transferred the case back to the Eastern District of Texas in late 2007. (R3:1628, 1642). On May 9, 2008, the Texas district court lifted the stay of discovery. (R3:1735). Comstock renewed its jurisdictional challenge based on *Rockwell* and the evidence obtained during discovery. (R3:1933). The district court declined to review its jurisdiction subsequent to *Rockwell*. (R8:4948). Comstock also moved to dismiss this case for failure to join the Tribe and other indispensable parties whose rights would be affected by an adverse determination on the validity of the Leases. (R1:335). The district court denied that motion. (R8:5052). Comstock also filed a summary judgment motion challenging Relators' claims on the merits and as being barred by res judicata. (R4:2530,

[6] The next term, the Supreme Court reversed the Tenth Circuit's flawed original source jurisprudence in *Rockwell International Corp. v. United States ex rel. Stone*, 549 U.S. 457 (2007).

2556-2562). The district court initially granted the motion, case finding that Relators' claims were barred by res judicata. (R8:5060, 5068-5085). Subsequently, the district court granted a new trial based on a flawed understanding of this Court's teachings in *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530 (5th Cir. 1978). (R9:5318-5329). Ultimately, the district court turned to the merits of this case and granted Comstock's motion for complete summary judgment. (R14:8831-8857). Relators appeal. (R14:8859).

C. Facts Concerning the Merits of Relators' Claims.

Relators' live pleading is their First Amended Original Complaint (the "FAC").[7] (R1:144). The district court performed a thorough review of the evidence regarding Relators' challenges to the Leases. (R14:8833-8839). Comstock provided an even more comprehensive statement of the undisputed facts regarding the Leases in its summary judgment briefing. (R10:6127-6140). The following summarizes important facts omitted from the Relators' Brief.

[7] Relators voluntarily dismissed their royalty underpayment claims. (FAC ¶¶16B and 233–275; R9:5454). Perhaps recognizing that many of their current legal claims and theories are outside of the First Amended Complaint, Relators requested leave to file a Second Amended Complaint. (R9:5372). The district court initially granted that motion, but later vacated its decision at Relators' request. (R9:5442).

Tract 1 – Relators argue that Comstock violated the "no surface use" provision of the 1993 Minerals Agreement governing Tract 1, but the evidence shows:

- The 1993 Minerals Agreement was approved by DOI and is maintained in DOI's file (R10:6052-6077);
- Comstock negotiated and paid the Tribe for the right to conduct operations on the surface of Tract 1 (R10:6485-6488, R11:6560-6646, 6737-6738, 6769-6780, R4:2570-2571, 2602-2625);[8]
- DOI approved the surface locations of Wells No. 6 & 7 after receiving environmental assessments from Comstock (R11:6571-6584, 6630-6641, R10:6198-6207, 6307-6309, 6327-6329);
- DOI's drilling permits expressly address environmental and surface use terms for Tract 1 (R11:6579-6581, 6638-6641);
- Prior to filing suit, Relators' counsel, Pat Holloway, admitted there was no merit to the Tract 1 surface use allegations (R10:6381-6383, 6397-6399, 6411); and
- In 2001, DOI reviewed Comstock's operations on Tract 1 and found "the drilling of the Alabama-Coushatta No. 6 and No. 7 wells is in the

[8] The paper copy of the record on appeal is missing Exhibits J–N to the Tribe's Affidavit filed as Attachment 15 of Docket No. 253. A full version of the Tribe's Affidavit may be found at R4:2569-2656.

> tribes best interest, since these wells protect the lease from any potential drainage from off-set wells to the east of this lease and are the better Woodbine producers." (R10:6454, 6466).

Ignoring most of these undisputed facts, Relators argue that Comstock duped the Government into approving the well locations by failing to tell branches of the DOI about the express terms of a lease that was admittedly in DOI's possession. (*See* Appellants' Brief at 25-26, 48).

Tracts 2, 3, and 4 – Based upon seeing the "expired" stamp on the file jackets for these leases in the GLO files, Relators argue that Comstock conducted operations on expired leases, but the evidence shows:

- The State of Texas Leases governing Tracts 2, 3, and 4 had an original expiration date of April 1, 1989;
- The Alabama Coushatta Restoration Act of 1987 conferred authority over those leases to DOI effective August 18, 1987 (*see* Part III.C. below);
- At least as early as December 1988, Comstock, the Tribe, and DOI discussed extending the primary terms of those leases (R10:6178-6194);
- On March 28, 1989, Comstock and the Tribe signed the lease extension agreement (R11:6756-6758);

- Comstock paid a substantial sum of money to the Tribe for that extension (R10:6194, R11:6760-6761);
- On March 31, 1989, DOI approved the extension agreement (R11:6756-6758); and
- Comstock drilled a well and obtained production within the extended term of the leases for Tracts 2, 3, and 4, and has maintained production from those leases ever since (R10:6489).

Although it is not even mentioned in their First Amended Complaint (R1:186-201), Relators now argue that the lease extension is invalid under federal law.

Tracts 2, 5, 6, and 11 – Relators did not challenge the 1990 Minerals Agreement governing Tracts 2, 5, 6, and 11 in their First Amended Complaint (their live Complaint). Instead, Relators challenged an old GLO lease that expired before Comstock acquired interests in the same tracts under the 1990 Minerals Agreement. But even if Relators could challenge the 1990 Minerals Agreement, that claims fails because:

- DOI expressly approved issuance of the lease on September 10, 1990 (R11:6786, 6834-6862);
- Comstock commenced drilling Well No. 4 on April 6, 1993, completed it on July 31, 1993, and obtained production on September 24, 1993 (*see* R10:6135); and

- From July 31 until September 24, 1993, Comstock worked to connect Well No. 4 to a pipeline to obtain production from that well (R11:6789-6808).

Tracts 7, 8, 9 and 10 – In their First Amended Complaint, Relators allege various theories as to why they believe Comstock's leases on Tracts 7, 8, 9, and 10 lapsed long ago, before 1989. The dispositive, undisputed facts, however, show:

- In a report from the GLO to DOI dated August 28, 1989, the GLO recognized that these leases are valid and held by production (R10:6412-6413);
- Comstock entered into a Ratification Agreement (which included present words of grant) with the Tribe on November 17, 1989 to confirm the validity of the leases (R11:6763-6766); and
- The Government confirmed that these leases were valid on December 15, 1989 (R11:6556-6557, 6559).

Undeterred, Relators now say the Ratification Agreement was entered into in violation of federal law and is ineffective. Relators' current theory does not appear in their First Amended Complaint.

On the merits, each of Relators' claims turns on a challenge to the actions of the Government (*i.e.* approving lease extensions, entering into new leases, approving lease ratifications, and issuing drilling permits). After the Tribe sued

Comstock, though, the Government investigated the allegations against Comstock and found them to be without merit. DOI's Bureau of Indian Affairs explained:

> This is to acknowledge receipt of your March 3, 2000, request and March 10, 2000, amended request that this office inspect the Alabama-Coushatta leases to determine if there has been a violation of the contracts. We have undertaken an investigation to determine if there have been any violations of the leases or applicable regulations such that notice should be sent to any or all of the lessees on the Alabama-Coushatta Reservation allowing them to show cause why the leases(s) should not be canceled.
>
> We have gone through all of the contracts to determine if there are any violations that would initiate action under 25 CFR 211.54. There are none of record.

(R10:6420).

On July 16, 2010, the district court correctly granted summary judgment in Comstock's favor on all of Relators' claims. (R14:8831-8857).

SUMMARY OF THE ARGUMENT

Relators seek to use the FCA in ways not permitted by Congress. Even though Comstock, the Tribe, and DOI are each satisfied that the Leases are (and for all relevant times have been) valid and in full force and effect, Relators seek to litigate whether the Leases are valid for the sole purpose of creating a "false claim" upon which Relators might recover a statutory bounty. Relators are not members of the Tribe and hold no interest in the Leases. The district court correctly granted summary judgment against Relators because (a) as a matter of undisputed fact, the

Leases are valid, and (b) as a matter of law, the FCA does not clothe Relators with governmental authority to pursue the claims alleged.

Not only was Comstock entitled to judgment in its favor on the merits of Relators' claims, the district court should have dismissed this case without reaching the merits for the following independent reasons:

- the district court lacks subject matter jurisdiction over this case because Relators cannot qualify as the "original source" under 31 U.S.C. §3730(e)(4);
- Relators failed to join the Tribe and other indispensable parties whose rights would be affected by the relief Relators requested, as required by FED. R. CIV. P. 19; and
- the real-parties-in-interest to the Leases have already resolved all questions regarding the validity of the Leases, and the final judgment entered by the agreement of those parties is entitled to res judicata effect.

This Court should affirm the dismissal of this lawsuit.

ARGUMENT

I. STANDARDS OF REVIEW.

This Court reviews the district court's summary judgment decisions *de novo*. *Doré Energy Corp. v. The Prospective Investment & Trading Co. Ltd.*, 570 F.3d

219, 224 (5th Cir. 2009). The district court's denial of Comstock's motion to dismiss for failure to join indispensable parties is reviewed for abuse of discretion. *Id.* at 231. A district court abuses its discretion when it premises its analysis on an erroneous understanding of governing law. *Regents of Univ. of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007).

II. COMSTOCK SUBMITTED NO "FALSE RECORDS OR STATEMENTS" TO THE GOVERNMENT ON FORMS MMS-2014.

Although this is an FCA case in which Relators accuse Comstock of submitting false Forms MMS-2014s to the Government, Relators devote little attention to the actual forms that they allege are false. In the district court, Relators did not offer the allegedly false forms into evidence. In their appellate brief, Relators mention Forms MMS-2014 only once by name:

> Deliberately ignoring these lease validity issues, Black Stone and Comstock produced minerals from the Alabama-Coushatta Reservation and then filed MMS 2014 forms claiming the lion's share of that production. Because Comstock and Black Stone did not own the minerals in question, these reports were false claims as defined by 29 U.S.C. §3729(a)(7).

(Appellants' Brief at 4) and then twice more inferentially.[9] For FCA liability to attach, though, Relators must establish that the defendant submitted a false record or statement to the government. 31 U.S.C. §3729(a).

[9] "[Comstock] violated the False Claims Act by knowingly submitting false records and statements to decrease their obligation to transmit money to the government in violation of 29 U.S.C. §3729(a)(7)." (Appellants' Brief at 11) "As

The reason for Relators' omission is simple: when the form is reviewed, it is obvious that Comstock did not make any false statements on any of those forms. MMS-2014s do not require the operator to provide any statement or certification as to whether the lease itself is valid or in effect. To the contrary, the form is "[u]sed monthly to report ***lease-related*** transactions essential for royalty management to determine the correct royalty amount due, reconcile or audit data, and distribute data to appropriate accounts." 30 C.F.R. §210.10(c)(1) (2005) (emphasis added). The MMS-2014 requires the operator to identify a particular lease (by Accounting Identification Number ("AID")),[10] the royalty percentage associated with that lease, the total sales volume and value for the month, and the royalty volume and value for the month calculated using the lease terms. (*See* R11:6726-6734 (sample MMS-2014)). Regardless whether Relators believe that the Leases are valid, it is undisputed that Comstock identified the specific leases on the MMS-2014s that Comstock relied upon as the source of its rights to produce minerals. Relators do not dispute that, for the identified Leases, Comstock has correctly reported (i) the royalty percentage for each well and (ii) the volumes and values of production

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trespassers, Comstock and Black Stone did not own the minerals they removed from the Alabama-Coushatta lands, but they kept the lessee's share of the revenues from those minerals and falsely reported their ownership of the minerals to the Mineral Management Service." (Appellants' Brief at 12-13).

[10] The AID number associated with a lease is assigned by the Minerals Management Service and provided to the operator for use on its MMS-2014s. (R10:6170-71).

from each Lease. Accordingly, Relators cannot establish any actionable false statement on the MMS-2014s.

If the Leases are valid, Relators' claims must fail. And because Relators have no authority to challenge the validity of the Leases, Relators cannot show that Comstock submitted any false MMS-2014s to the government. Nothing in the FCA or the case law interpreting it allows Relators to usurp governmental authority to litigate the validity of government or Indian contracts for the purpose of creating FCA liability. "The FCA is not a general 'enforcement device' for federal statutes, regulations, and contracts." *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010).

III. RELATORS' CHALLENGE TO COMSTOCK'S RIGHTS ON TRACTS 1, 2, 3, 4, 7, 8, 9, AND 10 FAILS AS A MATTER OF LAW.

A. The Government Expressly Approved Comstock's Operations as to Each of These Tracts.

The district court correctly granted summary judgment on all Relators' claims relating to Tracts 1, 2, 3, 4, 7, 8, 9, and 10[11] because the Government expressly approved the operations Relators now challenge. The Government approved:

- the surface locations for the operations on Tract 1;
- the extension of the State of Texas leases on Tracts 2, 3, and 4;

[11] Tracts 5, 6, and 11 are dealt with in Section IV, below at pages 37-40.

- the ratification of the State of Texas leases on Tracts 7, 8, 9, and 10.

Accordingly, Comstock did not make any false statements to the Government regarding its rights to conduct operations on these Tracts.

B. Relators Do Not Have Authority to Challenge the Government's Actions.

In an attempt to try to create a "false claim" where none otherwise exists, Relators admit that they are challenging the alleged actions or inactions of various Government officials. (*See* Appellants' Brief at 22 (discussing "the government's failure to comply")).[12] But the FCA does not grant Relators authority to challenge the Government's actions, nor does it grant Relators authority to police technical compliance with statutes and regulations (such as Relators attempt to do in this case with respect to the IMDA, NEPA, ESA, and Non-Intercourse Acts). *See Steury*, 625 F.3d at 268; *see also United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999) ("the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations"); *United States ex*

[12] With respect to the 1990 Minerals Agreement, Relators go even further, arguing that Comstock should have the burden of proving that the Government acted properly even though Comstock is the defendant in this case. (Appellants' Brief at 39). Government official are presumed to do their duty, and one who contends otherwise must establish that defect by "clear evidence." *United States Postal Service v. Gregory*, 534 U.S. 1, 5 (2001); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *Rizzo v. Shinseki*, 580 F.3d 1288, 1292 (Fed. Cir. 2009); *Carolina Tobacco Co. v. Bureau of Customs and Border Protection*, 402 F.3d 1345, 1350 (Fed. Cir. 2005).

rel. Hopper v. Anton, 91 F.3d 1261, 1266-67 (9th Cir. 1996) ("violations of laws, rules, or regulations alone do not create a cause of action under the FCA").

And, Relators attempt to manufacture an issue concerning the validity of the Leases does not state a claim under the FCA. The existence of a disputed legal issue does make a claim "false" for purposes of the FCA. *See Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1477 (9th Cir. 1996). Moreover, "[n]ot every breach of a federal contract is an FCA problem." *Steury*, 625 F.3d at 268. Under the controlling standards, Relators cannot establish a false claim.

1. The FCA Authorizes Relators to Bring Claims "For the United States" Not Against It.

Relators' allegations are baseless because the FCA authorizes a relator to bring an action "***for*** the United States Government," see 31 U.S.C. §3730(b)(1) (emphasis added), not "***against*** the United States." Relators are merely the partial assignee of the Government's damages claim. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). As an assignee, Relators are bound by the prior actions of the assignor (here the Government). *See* WIGMORE ON EVIDENCE §1080 at 190 (1972). Yet Relators' entire case is premised on challenging the validity of the Government's actions that affirm and confirm the validity of the Leases.

Numerous courts recognize that the FCA does not allow Relators to challenge the actions of the Government. *See United States ex rel. Durcholz v.*

FKW Inc., 189 F.3d 542, 545 (7th Cir. 1999) (there is no "false claim" "[i]f the government knows and approves of" the conduct allegedly giving rise to relator's cause of action).[13] The FCA does not create liability where, as here, a defendant has acted openly with the Government. This Court explains:

> Most of our sister circuits have recognized that '[w]here the government and a contractor have been working together, albeit outside the written provisions of the contract, to reach a common solution to a problem, no claim arises.' Or, stated more broadly, '[i]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim.'

United States ex rel. Laird v. Lockheed Martin Engineering & Science Services Co., 491 F.3d 254, 262-63 (5th Cir. 2007) (footnotes omitted). Accordingly, Relators have no basis to challenge the joint actions of the Government, the Tribe, and Comstock to address the issues that arose during the course of their operations, including the decisions to ratify and/or extend the Leases, to grant new leases, and to permit surface use on Tract 1.

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[13] S*ee also United States ex rel. Windsor v. Dyncorp, Inc.*, 895 F. Supp. 844, 851-52 (E.D. Va. 1995) (refusing to allow a relator to usurp the Department of Labor's role in classifying employees under the Davis-Bacon Act for the purposes of pursuing an FCA claim); *United States ex rel. Hughes v. Cook*, 498 F. Supp. 784, 788-89 (S.D. Miss. 1980) (FCA did not grant standing to a relator to challenge the validity of a medical license for purposes of creating an allegedly actionable false claim).

2. The FCA Grants No Right to Challenge Government Contracts.

Relators' attempt to set aside agreements approved by the Government is also contrary to the D.C. Circuit's opinion in *United States ex rel. Siewick v. Jamieson Science and Eng., Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000). That court recognized that granting authority to a relator to set aside government-approved agreements would deprive the Government of its authority to determine how to act with respect to its contracts. *Id.* It would create havoc for the Government and its contractors who could be subjected to litigation filed by disinterested outsiders seeking to cancel government agreements. *Id.* Relators cannot avoid the rule in *Siewick* because, no matter how this case is viewed, Relators are seeking to set aside or avoid application of the prior actions and approvals of the Secretary. The FCA does not grant Relators the authority they are attempting to exercise.

3. The FCA Does Not Authorize Relators to Bring Claims on Behalf of the Tribe.

Relators are mistaken when they argue that they can challenge the Government's actions based on the fact that the Government is acting as a fiduciary for the Tribe. Relators write:

> the government's failure to comply with statutory leasing requirements does not merely affects its own interest, it also effects the interests of the Indians for whom it acts as a fiduciary. It is the Indians and not the government who were injured by Defendants'

> trespasses, and it is the Indians who stand to benefit from this *qui tam* action. They should not be deprived of their interests because of the government's failure to comply with laws designed for the protection of Indian interests.

(Appellants' Brief at 22). Relators' argument directly conflicts with the Tenth Circuit's opinion in this case and, if accepted, would render the FCA unconstitutional as applied. It also ignores the Tribe's own intentions. Indeed, the Tribe already has asserted and settled claims based on the validity of the Leases.

Years ago, Comstock argued that the FCA should not be interpreted to allow parties to pursue claims asserting the rights of a Tribe when the Government's role in the matter is merely acting as a fiduciary for the Tribe. The Tenth Circuit rejected Comstock's argument explaining:

> Comstock's argument that the FCA does not authorize Relators to sue on behalf of the Tribe misstates the issue because a *qui tam* suit is on behalf of the Government, not the Tribe. . . . The fraud is that which occurs when the person or entity makes a false statement to the Government. The fraud at issue is not that which occurs when the Indian Tribe receives less royalties than those which are due pursuant to the lease.

Kennard, 363 F.3d at 1047-48. Relators should not be allowed to argue to the contrary now.

Moreover, this Court should not interpret the FCA to allow Relators to pursue common law claims of trespass by Comstock or breach of fiduciary duties by the Government as part of this lawsuit because doing so would result in an unconstitutional interpretation of the FCA. In *Phillips Petroleum Co. v. Shutts*,

472 U.S. 797 (1985), the Supreme Court explained that the Due Process Clause of the United States Constitution grants protection to an absent plaintiff when another person attempts to pursue litigation on its behalf:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request from exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. at 812. The FCA does not provide the Tribe with any of the protections required to satisfy due process—because the FCA was never intended to provided a vehicle for a Relator to pursue the Tribe's claims for trespass against Comstock or breach of fiduciary duties against the Government.[14] Accordingly, Relators are seeking to apply the FCA in a manner that would render it unconstitutional.

This Due Process concern is not just hypothetical. The Tribe unquestionably has the authority to act to protect its own rights. *See Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373-74 (1968); *Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 78 F. Supp. 2d 589, 594 (E.D. Tex. 1999). The Tribe has already stipulated that the Leases are and always have been valid and in full force and effect. The Tribe acted in accordance with that fact when it approved lease

[14] The FCA provides ample protections to satisfy Due Process for traditional claims filed by Relators on behalf of the Government. *See* 31 U.S.C. §3730.

extensions, ratifications, surface locations, and new leases. The Tribe reaffirmed its position in the 2006 Settlement Agreement when it stipulated to the validity of the Leases and agreed to support Comstock's efforts to seek dismissal of this case. Due Process does not allow Relators to represent parties who do not want to be represented by Relators, nor does the FCA allow Relators to take positions contrary to those taken by the Tribe, whom Relators now say they represent.

4. Relators Cannot Use the Indian Non-Intercourse Act or the Indian Minerals Development Act to Negate the Government's Approvals.

Relators cannot invoke the Indian Non-Intercourse Act, 25 U.S.C. § 177 ("INIA"), or the Indian Mineral Development Act, 25 U.S.C. §2101 et seq., ("IMDA") to challenge the Government's actions and approvals.[15] Contrary to Relators' suggestions, the primary statute governing the Leases at issue is the IMDA, and not the INIA.[16] The IMDA is a comprehensive statute that specifically governs Indian tribes' rights to negotiate and sign oil and gas leases and

[15] Relators argue that the IMDA also required the Secretary to comply with the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). Relators do not assert independent claims under those statutes. Nevertheless, Comstock has previously explained why Relators cannot pursue independent claims under those acts. (*See* R10:6152-6157).

[16] To the extent that the INIA has any application to the present case, it does not change the result. Only Indian tribes and their authorized representatives have standing to bring challenges under the INIA. *San Xavier Development Authority v. Charles*, 237 F.3d 1149, 1152 (9th Cir. 2001); *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1044 (5th Cir. 1996); *James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983).

amendments thereto, and it controls over the general provisions of the INIA. *Cf. United States v. City of McAlester, Oklahoma*, 604 F.2d 42, 49 (10th Cir. 1979) (Curtis Act controls over INIA).

The legislative history of the IMDA makes clear that Congress intended the act to supersede the INIA. H.R. REP. No. 97-746, at 3-4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3465, 3465–66. Congress explained that the IMDA's purposes were "first, to further the policy of self-determination [by the Indian Tribe] and second, to maximize the financial returns tribes can expect for their valuable mineral resources." S. REP. No. 97-472, at 2 (1982); *see also* 25 C.F.R. § 225.1(a) (explaining purpose of IMDA). Congress recognized that earlier statutes such as the INIA and the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396, had hindered the ability of tribes to negotiate the best mineral leases and arrangements to promote the tribes' interests. S. REP. No. 97-472, at 2-3. Accordingly, Congress wanted to provide tribes greater flexibility to negotiate advantageous mineral agreements, while preserving the Secretary's role as a fiduciary for the tribes. *See* H. REP. No. 97-746, at 1.

Under the IMDA, the tribes have the primary authority to determine whether to enter into mineral agreements because, without the tribe's consent and approval, the Secretary is powerless to act. *See Wilson v. United States Department of the Interior*, 799 F.2d 591, 592 (9th Cir. 1986). Congress also constrained the

Secretary's ability to disapprove mineral agreements negotiated by tribes by limiting the ability to delegate that authority to lower-level officials and by providing a right to immediate judicial review of such decisions (without the usual constraints imposed by the Administrative Procedures Act ("APA"). *See* 25 U.S.C. §2103(d); *see also* H. REP. No. 97-746, at 6; S. REP. No. 97-472, at 6. In contrast, Congress enacted no provisions that would exempt any aggrieved parties from complying with the APA when seeking review of the Secretary's decisions to approve the tribe's requested agreements. Of course, once the Secretary's approval is final and the time for review under the APA has past, only the Secretary may seek to cancel that action.[17] *See* 25 C.F.R. §211.54; *Compare Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1074-76 (9th Cir. 1983) (holding that a Tribe could not unilaterally cancel a lease after it was approved by the Secretary) *with Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1459-61 (9th Cir. 1986) (holding that a Tribe could rescind an agreement prior to approval of the Secretary under the IMDA).

Congress did not intend the FCA to provide an independent vehicle to challenge Government actions under the IMDA. The FCA does not (1) trump the rights, responsibilities, and roles of the respective parties under the IMDA, (2) confer standing on Relators to act on behalf of the Tribe, or (3) empower Relators

[17] This limitation is also reflected in the terms of federal minerals agreements. (*See* R10:6066).

to challenge the Secretary's approval. Because the Tribe is satisfied with the agreements it has made and the Secretary has approved those agreements, the plain language, purpose, and intent of the IMDA is satisfied. Relators have no basis for interfering with the Tribe's business relationships.

5. The Administrative Procedures Act Bars Relators' Collateral Challenge to Government's Approvals.

It is black-letter law that a party cannot collaterally attack agency action in a lawsuit such as this. *See Baros v. Texas Mexican Railway Company*, 400 F.3d 228, 238 (5th Cir. 2005); *Harr v. Prudential Federal Sav. & Loan Ass'n*, 557 F.2d 751, 754 (10th Cir. 1977). Even if Relators had standing to raise a complaint under the IMDA, which they do not, Relators' ability to challenge the Secretary's approval would be limited to the right to seek relief under the Administrative Procedures Act, 5 U.S.C. §§701-706 (the "APA"). If Relators had wanted to challenge the Secretary's approvals, Relators should have followed the full requirements of the APA and the procedures established by the BIA to challenge its decisions. *See* 25 C.F.R. §§2.1–2.21. Under the APA, an aggrieved party (which Relators are not)[18] had 30 days to appeal, and had to file the appeal in the office rendering the decision. 25 C.F.R. §2.9(a). Relators did not perfect an appeal under the APA.

[18] Only a party who has suffered a legal wrong or has been "adversely affected or aggrieved" may file an appeal under the APA. *See* 5 U.S.C. §702; *Baker v. Bell*, 630 F.2d 1046, 1051 (5th Cir. 1980); *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1055 (10th Cir. 1993).

Moreover, it is far too late now because, in addition to the 30-day deadline to appeal, Relators did not act within the general six-year statute of limitations applicable to all actions challenging agency action. *See* 28 U.S.C. § 2401(a); *Geyen v. Marsh*, 775 F.2d 1303, 1306-07 (5th Cir. 1985); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999).

The Secretary's approvals are now final. Relators' attempt to challenge those approvals fails as a matter of law.

6. Relators' Legal Authorities Are Not to the Contrary.

The cases cited by Relators are not to the contrary. Of the twenty-six federal court cases cited in pages 15 to 34 of Appellants' Brief, only three cases arise under the FCA, but none of those cases presents a situation in which it was the alleged misfeasance of the Government that gave rise to the relators' claims.[19] Seven cases were claims timely brought under the Administrative Procedures Act by persons with Article III standing to challenge final government agency action.[20]

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[19] *United States ex rel. Laird v. Lockheed Martin Engineering & Science Services Co.*, 491 F.3d 254 (5th Cir. 2007); *United States v. Southland Management Corp.*, 326 F.3d 669 (5th Cir. 2003); *United States ex rel. Lamers v. City of Green Bay* 168 F.3d 1013 (7th Cir. 1999).

[20] *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972); *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983); *Quantum Exploration Inc. v. Clark*, 780 F.2d 1457 (9th Cir. 1986); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988).

None of those cases has any bearing on the question of whether a relator can use the FCA to collaterally attack final agency action to create a false claim. Ten cases were actions brought by Indian tribes against state or the federal government to protect some right or interest of the tribe.[21] The remaining six cases are not on point and are of no significance to the issues in this appeal.[22]

Properly read, Relators' cases demonstrate that Relators lack standing to use the FCA as a vehicle to attack the actions by the Tribe and the Government in working with Comstock to reach mutually desired results. Of especial significance is *Pit River Tribe v. United States Forest Service*, 469 F.3d 768 (9th Cir. 2006), in

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[21] *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51 (2d Cir. 1994); *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315 (1927); *Sioux Tribe of Indians v. United States*, 64 F. Supp. 312 (Ct. Cl. 1946); *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976); *Pit River Tribe v. United States Forest Serv.*, 469 F.3d 768 (9th Cir. 2006); *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039 (5th Cir. 1996); *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985); *Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565 (1990).

[22] *Guffey v. Smith*, 237 U.S. 101 (1915) (diversity action–private Illinois oil & gas lease dispute); *United States v. Wyoming*, 331 U.S. 440 (1947) (federal lands vs. state lands–no Indian lands); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (denial of crop insurance claim–no coverage; insurance agent's statement to contrary not binding on gov't.); *Heckler v. Community Health Services*, 467 U.S. 51 (1984) (Medicare case–reliance on misstatements by private insurance agent not binding on gov't.); *Sowell v. Natural Gas Pipeline Company of America*, 604 F. Supp. 371 (N.D. Tex 1985), *aff'd*, 789 F.2d 1151 (5th Cir. 1986) (diversity action–private oil & gas royalty dispute); *General Motors Acceptance Corp. v. Whisnant*, 387 F.2d 774 (5th Cir. 1968) (bankruptcy-priority of security interest in vehicle).

which the Court devoted a substantial amount of its opinion to analyzing whether the Indian tribe and the environmental plaintiffs in that case had Article III standing to challenge the Government's actions. *Id*. at 778-781. In *Pit River Tribe*, the Ninth Circuit applied the three constitutional standing requirements identified by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154, 167 (1997). *Id*. at 788-89. Applying the *Pit River Tribe* analysis to this case, Relators lack Article III standing to attack the DOI's approvals of the Tribe's ratifications of leases, lease amendments, lease extensions, and new leases. First, Relators have not suffered any injury, let alone an "injury in fact." Relators failed to demonstrate that the procedures in question are designed to protect some threatened concrete interest of theirs that is the ultimate basis of Relators' standing. Second, any injury that Relators may have suffered (and there is none) is not fairly traceable to defendant's conduct because Relators freely admit that it is the Government, not Comstock, that allegedly failed to act or acted improperly. Third, Relators failed to establish that a favorable federal court decision would be likely to redress the injury. The FCA does not clothe Relators with Article III standing to challenge actions by the Government.

C. DOI Had the Authority to Extend the Leases on Tracts 2, 3, and 4 in 1989.

Not only do Relators challenge the general right of the Government to approve Comstock's operations on the Reservation, Relators specifically challenge

the leases covering Tracts 2, 3, and 4, arguing the Government lacked the authority to extend the terms of those leases in 1989. Initially, Relators' counsel and counsel for the Tribe admitted that the Government had authority over the Reservation effective August 18, 1987. (R10:6392). Now, Relators argue that the Government did not have any authority to extend those leases until Texas executed a conveyance of title to the Reservation to the Government in August 1989. Relators' new argument is wrong.

The Alabama and Coushatta Restoration Act of 1987, 25 U.S.C. §§731-737 (the "Act") restored the Tribe to federal trust status immediately upon the effective date of the Act on August 18, 1987. Section 733(a) provides: "The federal recognition of the tribe and of the trust relationship between the United States and the tribe *is hereby restored*." 25 U.S.C. §733(a) (emphasis added). Section 733(a) continues:

> all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations . . . shall apply to members of the tribe, the tribe, and the reservation.

25 U.S.C. §733(a). Section 736(a) of the Act establishes the Reservation as being under the trust supervision of the Secretary of the Interior, without regard to whether a formal conveyance of the property to the Government has been delivered:

> The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

25 U.S.C. §736(a). Nothing in the Act delayed until a later time the authority of the Government to act with respect to the Tribe or its Reservation.[23] The U.S. Supreme Court expressly recognized that the question of whether the federal government has legal authority to regulate Indian lands is a different issue than the question of whether the Government held bare legal title to such lands. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); *see also Alabama-Coushatta Indian Tribes v. Mattox*, 650 F. Supp. 282, 287 (W.D. Tex. 1986) ("While fee title to Indian lands may well reside in a state, the federal government nevertheless possesses trust responsibility to that land.").

But even if this were an issue of Texas state law, the Texas Supreme Court has made it clear repeatedly that parties may agree to extend or ratify a lease, or

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[23] Other sections of the Restoration Act confirm that the Act was fully effective on August 18, 1987. *See, e.g.,* Section 733(b) (which "hereby restored" all of the Tribe's rights and privileges as a federally-recognized tribe), Section 733(c) (which granted the Tribe and its members "on and after the date of the enactment of this title," all benefits and services furnished to federally-recognized Indian tribes), and Section 734 (which gave the Tribal Counsel full authority "to enter into contracts, grant agreements, or other arrangements with any Federal department or agency"). The fact that Section 736(e) authorizes the Tribe or the Secretary to "erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary . . . ." is consistent with the right to use the Reservation and allow valuable wells to be drilled and operations to be conducted thereon. Section 736(e) is not a limitation on the rights of the Tribe or the United States with respect to Reservation lands.

even revive a lease after it has already terminated. *See Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.*, 161 S.W.3d 482, 489 (Tex. 2005); *Westbrook v. Atlantic Richfield Co.*, 502 S.W.2d 551, 553-54 (Tex. 1973); *Humble Oil & Refining Co. v. Clark*, 87 S.W.2d 471, 474 (Tex. 1935). The Tribe and Comstock's predecessor agreed to extend and ratify the State of Texas leases. (R11:6756-6758, 6763-6766).

D. Relators Cannot Establish an Actionable False Claim Based on the "No Surface Use" Provision of the 1993 Minerals Agreement.

Relators' claim challenging Comstock's MMS-2014s relating to Tract 1 of the Reservation fails as a matter of law for the additional reasons that (a) the 1993 Minerals Agreement does not impose an absolute ban on surface operations (as Relators argue) and (b) even if it did, Relators have not pleaded and cannot prove that Comstock was a trespasser as to the mineral estate and minerals produced from Tract 1.

1. Paragraph 24 Does Not Bar All Surface Use.

Relators' Tract 1 claim is based on a false premise—that Paragraph 24 of the 1993 Minerals Agreement (entitled "Use of Lease Premises") absolutely barred surface operations on Tract 1. It does not. Relators' argument is based entirely on the first sentence of that paragraph, which provides:

> Notwithstanding any provision of this lease to the contrary, Lessee shall not conduct drilling operations or otherwise use the surface of

> the lands covered by this lease for any operations of any kind whatsoever.

(R10:6070). When construing a contract, though, it is necessary to review all terms of the contract, and not just one sentence in isolation. *Mustang Tractor & Equipment Co. v. Liberty Mutual Ins. Co.*, 76 F.3d 89, 91 (5th Cir. 1996). It is also important to avoid construing the contract in such a way that it would render provisions of the contract meaningless. *Millennium Petrochemicals, Inc. v. Brown & Root Holdings, Inc.*, 390 F.3d 336, 342 (5th Cir. 2004). Contrary to Relators' argument (and the incomplete copy of Paragraph 24 contained under Tab F to Relators' Record Excerpts),[24] Paragraph 24 continues by providing that, *inter alia*:

- "Lessee shall pay Lessor or Lessor's tenant for any damage done to crops, livestock, or timber *by reason of operations hereunder*;"
- "Lessee . . . shall pay for damages to roads, culverts, drainage, installations, bridges, fences or other improvements, on Lessor's land *resulting from use by Lessee*;"
- "upon the *abandonment of any well, facility on this lease*, or the surrender thereof, Lessee shall level all levees, fill all slushpits and other excavations and generally restore surface of the land covered hereby as nearly to its present condition as reasonably possible;"

[24] Comstock is providing a complete copy of Paragraphs 24 and 25 of the 1993 Minerals Agreement under Tab G of its Record Excerpts.

- "Lessee will build and use only such roads as are reasonably necessary to conduct operations under this lease . . . .;" and
- "Lessee agrees that by no later than ten (10) days prior to the construction of any pipeline, any road, or the commencement of operations in or about any drilling site, it will furnish to Lessor a map or plat showing the proposed location thereof."

(R10:6070-6071). Paragraph 25 of the 1993 Minerals Agreement also "grants to Lessee the right to install pipelines, telephone lines, power facilities, compressors, separators, tanks, and such other facilities on tribal contract acreage reasonably necessary for the exploration and development of the contract substances." (R10:6071). Paragraph 25 continues:

> The location of said facilities shall be determined by Lessee after consultation with designated representatives of the Lessor and federal officials in compliance with applicable tribal and federal statutes, rules, regulations, and written policies.

(R10:6071). Each of these quoted provisions would be absolutely meaningless if the 1993 Minerals Agreement (a) absolutely prohibited from using the surface of Tract 1 and (b) had to be formally amended if such use were to be allowed.

To harmonize all provisions of the 1993 Minerals Agreement, this Court should conclude that Paragraphs 24 and 25 allows the Lessee (here Comstock) to use the surface of Tract 1 without obtaining a formal amendment of the lease so long as Comstock has obtained approval from the Tribe and federal officials, and

has compensated the Tribe for any surface damages that may occur. The undisputed evidence shows that this is exactly what Comstock did when it negotiated for the right to drill Well No. 6 and No. 7 on the surface of Tract 1. Accordingly, there is not merit to Relators' surface use claim.

2. Relators Also Confuse an Alleged Surface Trespass with a Trespass on the Mineral Estate.

Even if Relators could establish (which they cannot) that Comstock violated the "no surface use" provision of the 1993 Minerals Agreement, the undisputed evidence shows that Comstock has the rights to produce the minerals under Tract 1. Paragraph 16 of the 1993 Minerals Agreement provides:

> [T]he material breach by Lessee of any obligation arising hereunder shall not work a forfeiture or termination of this lease or cause a termination or reversion of the estate hereby created nor be grounds for cancellation hereof in whole or in part unless the Secretary of Interior [gives notice of a breach and an opportunity to cure] . . . .

(R10:6066). It is undisputed that the Secretary has not challenged Comstock's operations on the surface of Tract 1. DOI investigated and found no violations of the Indian Leases that would support an action seeking to terminate Comstock's rights. (R10:6420). Instead, DOI found:

> Obviously, the drilling of the Alabama-Coushatta No. 6 and No. 7 wells is in the tribes best interest, since these wells protect the lease from any potential drainage from off-set wells to the east of this lease and are the better Woodbine producers.

(R10:6454, 6466). Accordingly, a violation of the "no surface use" provision of the 1993 Minerals Agreement would, at most, give rise to a cause of action by the

Tribe (not the Relators) against Comstock for surface damages under a breach of contract or trespass theory. The Tribe, however, approved Comstock's surface use and released all claims that it may have had against Comstock. More important for this case, the FCA does not grant Relators the authority to pursue trespass claims for surface damages—such a claim would not involve a "false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government" as required to establish a violation of 31 U.S.C. §3729(a)(7).

IV. RELATORS' CHALLENGE TO COMSTOCK'S RIGHTS TO CONDUCT OPERATIONS ON TRACTS 2, 5, 6, AND 11 UNDER THE 1990 MINERALS AGREEMENT FAILS AS A MATTER OF LAW.

The district court correctly refused to reach the merits of Relators' challenge to the 1990 Minerals Agreement governing Tracts 2, 5, 6, and 11 because Relators did not challenge that agreement in their First Amended Complaint even though Relators' counsel knew of the 1990 Minerals Agreement since at least July 1998 (R10:6389-6390). *See Northern States Power Co. v. Federal Transit Administration*, 358 F.3d 1050, 1057 (8th Cir. 2004) (a party may not manufacture claims that were not pled in an attempt to avoid summary judgment). Even on the merits, though, Relators' arguments are wrong.

For the reasons explained above, Relators do not have authority to challenge whether the 1990 Minerals Agreement was issued in accordance with federal law. Moreover, Relators cannot shift the burden to Comstock to prove the validity of

the 1990 Minerals Agreement by analogizing this case to a "trespass action." It is not. Under the FCA, Relators bear the burden to prove that a false claim was submitted to the Government. Relators allege that the false statements are contained on MMS-2014s. Those forms, in turn, reference specific leases by AID numbers.

The 1990 Minerals Agreement is not a "defense" to a "trespass action"—it is the lease specifically referenced by AID number on the MMS-2014s. Accordingly, if Relators wanted to prove an FCA claim based on the alleged invalidity of the 1990 Minerals Agreement, Relators needed to come forward with evidence to prove their claim. Relators did not. Relators cannot avoid summary judgment based on a mere allegation that the 1990 Minerals Agreement is invalid when the face of the agreement shows that it was signed by the Government and Relators offered no evidence to undermine that evidence of approval.

Not only was the 1990 Minerals Agreement valid when signed, it was also perpetuated beyond its primary term by drilling operations in accordance with Paragraph 9 of the agreement.[25] (R10:6062-6063). The 1990 Minerals Agreement is governed by federal law, not Texas law. (R10:6080). DOI has defined drilling

[25] In expert witness designations filed after the summary judgment motions were fully briefed, Comstock and its expert witness also explained that the 1990 Minerals Agreement was perpetuated beyond its primary term under the shut-in royalty clause of that lease. (R13:8278-8282).

operations broadly: "*Actual drilling operations* includes not only the physical drilling of a well, but the testing, completing or equipping of such well for production." 43 C.F.R. §3100.0-5(g). Beginning in April 1993, and continuing until production began on September 24, 1993, Comstock was taking affirmative steps to drill Well No. 4 and bring it into production. (R11:6793-6828). At the time when Relators claim that the Minerals Agreement lapsed (on September 10, 1993), Comstock was working on connecting Well No. 4 to a pipeline, including clearing the right-of-way for that pipeline. (R11:6795). That physical activity to obtain production of minerals qualifies as to "drilling operations" under DOI's definition and is sufficient to perpetuate the lease beyond its primary term.

The same result follows under Texas law. Physical activity to establish a pipeline connection for a well qualifies as "drilling or re-working operations." *See* 1 ERNEST E. SMITH AND JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 4.5[A] (2d ed. 2010); *Union Oil Co. v. Ogden*, 278 S.W.2d 246, 249 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.) (distinguishing between physical activity to connect to a pipeline and mere negotiations for a contract). None of the cases cited by Relators addresses the situation here in which the lessee was physically taking steps to obtain production from the lease at the time when the primary term allegedly ended. *See. e.g., Gulf Oil Corp. v. Reid*, 337 S.W.2d 267, 270 (Tex. 1960) (opinion addresses situation where "no manual operations were conducted");

Freeman v. Magnolia Petroleum Co., 171 S.W.2d 339, 341-42 (Tex. 1943) (no evidence produced of physical activities underway to drill or produce minerals).

There is no merit to Relators' challenge to the 1990 Minerals Agreement.

V. RELATORS ARE NOT ENTITLED TO A PARTIAL JUDGMENT ON LEASE VALIDITY, LEASE TERMINATION, AND TRESPASS ISSUES.

Relators ask this Court to not only reverse and remand this case to the district court, but also to instruct the district court to enter judgment for Relators on lease validity, lease termination, and trespass issues. (Appellants' Brief at 55-56). As demonstrated above, the district court did not err in granting summary judgment to Comstock. At a minimum, though, the evidence produce by Comstock and discussed above is at least sufficient to raise a fact issue that would preclude entry of judgment in Relators' favor on these issues.

VI. COMSTOCK LACKED THE REQUISITE INTENT TO VIOLATE THE FCA.

The district court did not err in following this Court's precedent on the level of intent required to show an FCA violation. To prove an FCA claim, a relator must show that the defendant acted "knowingly" when it submitted any allegedly false statements to the Government. 31 U.S.C. §3729(a) & (b). This Court has explained that, "[i]t is a long-established rule of this Circuit that to show a violation of the FCA, the evidence must demonstrate 'guilty knowledge of a purpose on the part of [the defendant] to cheat the Government,' or 'knowledge or

guilty intent'." *United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 231 (5th Cir. 2008) (citations omitted). Relators criticize *Taylor-Vick* for allegedly failing to follow the 1986 amendments to the FCA's definition of "knowingly." Relators' criticisms are meritless as the *Taylor-Vick* opinion quotes the amendment at length, including the portion quoted in Relators' brief. 513 F.3d at 230.

As shown above, Comstock did not act with the scienter required under revised FCA Section 3729(b). There was no evidence that Comstock had any actual knowledge that the Leases may have been defective in the manner alleged by Relators. To the contrary, the evidence is that Comstock worked with the Tribe and the Government to obtain ratifications, extensions and amendments to the Leases, and even new leases where necessary. There was no evidence that Comstock acted in deliberate ignorance of the truth or falsity of any alleged deficiencies in the Government's actions and approvals with respect to the Leases. Again, the record is full of evidence that Comstock, the Tribe and the Government were working together to achieve those mutually-desired ends. Finally there is no evidence that Comstock acted in reckless disregard of the truth or falsity of the status of the Leases. It speaks volumes that Relators attack the sufficiency of Comstock's due diligence review during Comstock's 1996 acquisition of Black Stone, years after most of the events showing that Black Stone, the Tribe and the Government were in accord.

Where, as here, a party has worked openly with the Government to address issues arising during the course of operations, that party does not have the requisite level of intent to violate the FCA. *See Laird*, 491 F.3d at 262-63.[26] In cases such as this, a court should dismiss a *qui tam* relator's action because the Government has approved of or reached an accord with the defendant regarding the matter in dispute.[27] Comstock did not "knowingly" submit false claims to the Government.

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[26] Numerous courts apply the same rule and reject FCA claims for lack of scienter when the defendant has been dealing openly with the Government regarding the matters at issue. *See, e.g., United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1156 (2d Cir. 1993); *United States ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d 1416, 1421 (9th Cir. 1991); *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 454 (6th Cir. 2005); *United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 544-45 (7th Cir. 1999); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999); *United States ex rel. Grynberg v. Praxair, Inc.,* 207 F. Supp. 2d 1163, 1181 (D. Colo. 2001), *aff'd in part and rev'd in part on other grounds,* 389 F.3d 1038 (10th Cir. 2004).

[27] Courts, on multiple occasions, have dismissed relators' actions when the government (or its agents) reached accord with the defendant regarding the matter in dispute but the relator, nonetheless, continued to pursue a *qui tam* action to challenge the discretionary decisions made by the United States. *See, e.g., United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999); *United States ex rel. Stebner v. Stewart & Stevenson Serv., Inc.*, 305 F. Supp. 2d 694, 703-04 (S.D. Tex. 2004); *cf. United States ex rel. Swan v. Covenant Care, Inc.*, 279 F. Supp. 2d 1212, 1222 (E.D. Cal. 2002).

VII. THIS CASE SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE RELATORS ARE NOT THE ORIGINAL SOURCE.

The Wyoming district court granted Comstock's first motion to dismiss for lack of subject matter jurisdiction, *In re Natural Gas Royalties Qui Tam Litigation,* 2002 WL 32714554 (D. Wyo. Nov. 6, 2002), but the Tenth Circuit reversed relying on its now-overruled original sources analysis in *United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787, 802-03 (10th Cir. 2002). This Court should dismiss Relators' claims for lack of subject matter jurisdiction under the FCA's "public disclosure / original source" bar, 31 U.S.C. §3730(e)(4), in light of *Rockwell International Corp. v. United States ex rel. Stone*, 549 U.S. 457 (2007).[28] The Tenth Circuit correctly determined that the public disclosure bar has been triggered as to all claims in this lawsuit. *Kennard*, 363 F.3d at 1042-44. Accordingly, this case must be dismissed because Relators cannot meet their burden to show that they are the original source of their allegations. *In re Natural Gas Royalties Qui Tam Litigation*, 562 F.3d 1032, 1045 (10th Cir. 2009).

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[28] Because this case involves alleged false claims submitted between 1992 and 2006, Comstock will focus its jurisdictional arguments on the version of Section 3730(e)(4) in existence during that time period. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 952 (1997). Congress amended Section 3730(e)(4) in 2010, *see* Pub. L. 111-148 §10104(j)(2) (March 23, 2010), but that amendment does not apply retroactively because there is no evidence of any intent by Congress to make that amendment retroactive. *See Hughes Aircraft Co.*, 520 U.S. at 952.

A. Relators' Allegations Have Been Publicly Disclosed.

In 2004, the Tenth Circuit decided that the public disclosure bar was triggered. *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1042-44 (10th Cir. 2004). Since then, there have been no changes in law or in fact that would save Relators' case from this jurisdictional bar. On page 40 of their brief, Relators suggest that the public disclosure bar should not apply to their claims relating to the 1990 Minerals Agreement covering Tract 5 because Relators are pursuing a new theory that is not mentioned in their First Amended Complaint. Relators' argument highlights exactly why this jurisdictional question must be reviewed now because, as recognized in *Rockwell*, jurisdiction (including "original source" status) must exist on each claim and at all points during the case. 549 U.S. at 473-74. But Relators cannot avoid the public disclosure bar on any of their claims because the bar is triggered by the disclosure of the "allegations or transactions," and not just the specific theory. *See* 31 U.S.C. §3730(e)(4)(A); *In re Natural Gas Royalties Qui Tam Litigation*, 562 F.3d at 1040. The public disclosure bar is triggered if a relator's action is based even in part on a prior public disclosure. *United States ex rel. Fried v. West Independent School Dist.*, 527 F.3d 439, 442 (5th Cir. 2008); *United States ex rel. Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1996).

The Tribe's Complaint (which was the prior public disclosure) alleged that "[a]ll of the leases either terminated prior to any production of oil or gas from covered lands, or were void or voidable *ab initio* under applicable law." (R5:2938). The only fair reading of the Tribe's Complaint is that it covered "all" of the leases and claims Relators now assert.

B. Relators Are Not the Original Source of Their Allegations.

In contrast to the public disclosure analysis that is triggered by the disclosure of "allegations or transactions," the "original source" inquiry turns on the "knowledge" and "information" possessed by the relator. *See* 31 U.S.C. §3730(e)(4)(A)&(B). An "original source" is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. §3730(e)(4)(B). Relators fail the original source test under both the "direct and independent knowledge" requirement and the "voluntary disclosure" requirement.

1. **Relators Do Not Have Direct and Independent Knowledge**

"In order to be 'direct,' the information must be firsthand knowledge."[29] *Fried*, 527 F.3d at 442-43. A person who acquires information "second-hand,"

[29] By refusing to revisit this issue, the Texas district court erroneously concluded that under the original source test: "it necessarily follows that first-hand knowledge of the fraud is not required in all cases." (R8:4975).

through the efforts of others, or through collateral research and investigations is not an original source. *Id.; United States ex rel. Reagan v. East Texas Medical Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 177 (5th Cir. 2004); *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699, 703 (8th Cir. 1995).

Rockwell explains that original source status must be assessed on a claim-by-claim basis.[30] 549 U.S. at 476. In *Rockwell*, the relator (James Stone) made allegations of fraud that resulted in the investigation and a substantial recovery for the Government. Nevertheless, the Supreme Court reversed the Tenth Circuit and held that Stone was not an original source because he lacked the requisite knowledge of the theory that prevailed at trial. *Id.* at 475-76. It turned out that Stone's personal knowledge, information, and predictions were wrong. *Id.*

The Wyoming district court compared Relators' claimed knowledge to that of Stone and concluded that Relators had far less knowledge than did Stone. *In re Natural Gas Royalties Qui Tam Litigation*, 2002 WL 32714554 at *5-6 (D. Wyo. Nov. 6, 2002). Unlike Stone, who worked for Rockwell, Wright and Kennard had no connection to Comstock or the Tribe. (R4:1974-1976, 1979, 1985, 2030, 2037-2038). Relators cannot qualify as the original source under *Rockwell* for any of the claims that they are pursuing against Comstock.

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[30] This also means that original source status should be assessed separately as to each Relator. *United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp.2d 25, 51 n.14 (D.D.C. 2007).

Wright testified that he had no knowledge regarding the lease validity claims. (R4:1974-1976, 1979, 1985, 2037). Moreover, Wright did not produce any evidence to attempt to show that he had knowledge regarding Relators' Tract 1 surface use claims. Accordingly, Wright is not an original source.

Kennard's knowledge of lease validity issues was limited to the records he reviewed during a single visit to the GLO. (R7:4170-4171). Kennard saw the file jackets of a few State of Texas leases with an "expired" stamp on the cover. (R7:4170-71). The only leases subject to this case that were stamped "expired" are Leases 92009, 92010, and 92011 governing Reservation Tracts 2, 3, and 4 respectively. Kennard did not know what that meant, so he asked the GLO and his own attorney. (R7:4170-4171; R4:2034-2035). Of course, the "expired" stamp by itself did not mean that the leases had terminated.[31] (R4:2050-2051). Parroting a public file and relying on someone else to explain what it means does not qualify Kennard as an original source. *See Fried*, 527 F.3d at 442-43; *Reagan*, 384 F.3d at 177-78. Kennard did not produce any evidence showing he had any knowledge regarding Relators' other lease validity claims or regarding Relators' Tract 1 surface use claims.

[31] Relators' counsel admitted that further investigation was necessary. When investigating lease title and validity issues, it is important to review all of the records; if records are missed in the review, it can make the ultimate conclusion wrong. (R4:2024-2025).

Even worse for Relators' supposed original source status, the bulk of Relators' current theories focus on challenges to the authority and actions of the Government. But there is no evidence that Wright and Kennard ever visited DOI's branch offices, reviewed its files, or interviewed witnesses to investigate their current theories. Instead, Relators' theories are based on their lawyer's legal interpretations of what he claims to have seen in those files. Applying expertise to information in the public domain does not qualify anyone as an original source. *Fried*, 527 F.3d at 442-43. Relators cannot overcome this jurisdictional bar by relying on their lawyer to investigate public records and concoct his own, creative theories of fraud based on the information found in those files. *See Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 921 (7th Cir. 2009); *see also United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1547-48 (10th Cir. 1996) (plaintiff who oversaw certain aspects of an investigation but was not the individual actually performing the investigation held not to be an "original source").

2. **Relators Did Not Voluntarily Disclose Their Claims Before Filing Suit.**

Relators are not the original source for the claims relating to the 1990 Minerals Agreement (Tract 5) and the 1993 Minerals Agreement (Tract 1) because they did not disclose any information regarding those claims under those Agreements to the Government before filing this lawsuit. (*See* R4:2107) (Relators'

Disclosure Statement which does not mention either Agreement). *See also* 31 U.S.C. §3730(e)(4)(B).

C. The Tenth Circuit's Original Source Ruling Is Not Binding.

Instead of addressing Comstock's jurisdictional challenge on the merits, the district court held that the Tenth Circuit's original source decision was "law of the case." (R8:4948-4977). The district court's decision is wrong both procedurally and substantively.

1. **The Tenth Circuit's Decision Viewing the Evidence in the Light Most Favorable to Relators Cannot Conclusively Resolve a Jurisdictional Issue Against Comstock**.

The law of the case doctrine does not bar the reconsideration of an issue when the factual record has changed or when the procedural posture / standard of review are different. *See Royal Insurance Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993); *International Union of Operating Engineers, Local Union 103 v. Indiana Construction Corp.*, 13 F.3d 253, 256 (7th Cir. 1994); *Wilmer v. Board of County Comm'rs*, 69 F.3d 406, 409 (10th Cir. 1995). The Tenth Circuit's *Kennard* decision cannot be treated as the "law of the case" such that it conclusively resolves the original source jurisdictional issue.

The district court correctly recognized that *Kennard* was decided on a summary judgment standard under which all evidence was viewed in the light most favorable to Relators. (R8:4964). Relators offered their own self-serving

affidavits into the record to oppose Comstock's motion. At the time, discovery was stayed, thereby preventing Comstock from cross-examining the substance of Relators' affidavits. Relators did not file a cross-motion for summary judgment. There is no authority that would support the district court's novel conclusion that it may conclusively resolve whether jurisdiction is proper throughout the entire case before any discovery has been conducted. *Rockwell* confirms that such a conclusion is improper. 549 U.S. at 473-74.

Facts revealed after discovery was permitted highlight why the Tenth Circuit's decision cannot be treated as conclusive:

- The Tenth Circuit believed Wright held interests in leases operated by Comstock "near the Indian Tribe's Reservation," but Wright admitted his leases were over 100 miles away (*compare* 363 F.3d at 1040 *with* R4:1983-1985);
- The Tenth Circuit believed that Relators used Wright's private royalty statements to craft their claims of fraud, but Wright admitted he knew nothing about the lease validity claims (*compare* 363 F.3d at 1046 *with* R4:1974-1976, 1979, 1985, 2037);
- The Tenth Circuit believed that "Mr. Kennard did not merely compile statistics; he did his own research and investigation" and that "Relators . . . conducted their own investigation," but it is undisputed

that Pat Holloway (Relators' counsel) conducted the research and investigation on the claims still pending in this case (*compare* 363 F.3d at 1046 *with* R3:1945-1954 (summarizing Holloway's investigation));

- The Tenth Circuit wrote that Relators cannot "be compared to an attorney who took someone else's labor and investigation and gave it legal meaning" (*see* 363 F.3d at 1046), but with respect to the Tract 2, 3, and 4 claims, that is precisely what Holloway is trying to do—offering a legal interpretation of the meaning behind the "expired" stamp placed on the state lease files by someone else; and
- The Tenth Circuit wrote that Relators "cannot be compared to mere cryptographers who translated a document" (*see* 363 F.3d at 1046), but all of Relators' claims depend on Relators' counsel merely reviewing and "translating" the public documents he saw in lease files.

A more complete summary of the evidence developed during that discovery may be found at R3:1941-1954. It shows that Relators cannot qualify as an original source.

2. ***Rockwell* Is an Intervening Change in Law that Overruled the Tenth Circuit's Prior Decision.**

When the Supreme Court enters a new decision interpreting federal law, that decision applies to all cases then pending in the federal courts. *See Harper v. Virginia Department of Taxation*, 509 U.S. 96, 97 (1993). It is an abuse of discretion for a district court to invoke the law of the case doctrine to refuse to reconsider a prior decision when there has been an intervening change in the law. *See Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005); *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452-53 (9th Cir. 2000). A district court is not bound to follow the decision from a higher court where "the higher court might have based its decision entirely on a case that has since been overruled." *Cole Energy Dev. Co. v. Ingersoll-Rand Co.*, 8 F.3d 607, 609 (7th Cir. 1993).

The Supreme Court's *Rockwell* decision overruled the Tenth Circuit's prior erroneous interpretation of the FCA's original source provision, 31 U.S.C. §3730(e)(4), including the decision in *Kennard*. As a result, the district court erred by invoking the "law of the case" doctrine to avoid addressing the original source issue in light of *Rockwell* and the record developed during discovery.

Kennard has been rejected and overruled on at least the following points:

1. In *Kennard*, the Tenth Circuit analyzed original source status "in gross," focusing on Relators' overall investigation. *See* 363 F.3d at 1044-47. The

Tenth Circuit did not conduct a claim-by-claim jurisdictional analysis.[32] *Id.* *Rockwell* confirms that a claim-by-claim analysis was required. 549 F.3d at 476.

2. In *Kennard*, the Tenth Circuit explained: "This case would not exist but for Relators sniffing it out. Through discovery and deduction, Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source." 363 F.3d at 1046. In *Rockwell*, however, the Supreme Court held that Stone was not an original source even though it was undisputed that his efforts started the investigation that uncovered an actual fraud on the Government. 549 U.S. at 461-62, 475-76. "Ferreting out a fraud" is not the same as possessing "direct and independent knowledge." *Id*; *see also Fried,* 527 F.3d at 443 (Relators' "sleuthing" was insufficient to qualify him as an original source).

3. In *Kennard*, the Tenth Circuit applied a lenient original source standard, that allowed Relators to qualify without possessing "information about the particular fraud." *Kennard*, 363 F.3d at 1044. The Tenth Circuit explained:

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[32] The district court recognized that "the Tenth Circuit did not expressly spell out its claim-by-claim analysis." (R8:4971-4972). The district court erred by trying to craft an explanation of how an implicit claim-by-claim analysis was done when the Tenth Circuit's opinion reveals that the Court never focused on the individual claims. For example, there is no mention of Relators' claims relating to the 1990 and 1993 Minerals Agreements. Although the Tenth Circuit acknowledged that Kennard visited the GLO and reviewed its files, the Tenth Circuit did not address what specific information Kennard obtained that allowed him to discern Relators' lease validity claims. Rather than assuming the Tenth Circuit performed a proper jurisdictional analysis, the district court should have conducted a claim-by-claim analysis of the jurisdictional facts in light of *Rockwell*.

"Knowledge of the actual fraudulent conduct is not necessary." *Id.* (quoting *United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787, 803 (10th Cir. 2002)). The Supreme Court rejected that lenient approach, however, when it held that Stone could not qualify as an original source without "direct and independent knowledge" of the particular fraud claim that was tried to the jury.[33] 549 U.S. at 475-76.

4. In *Kennard*, the Tenth Circuit allowed Wright to be an original source because he "speculated that Comstock was underpaying him and others in the area, including the Tribe." 363 F.3d at 1041. Following *Rockwell*, "speculation" cannot possibly be sufficient to be an original source.

As the district court admitted, the Tenth Circuit's *Kennard* decision relied heavily on its now-overruled decision in *Stone v. Rockwell*. (R8:4958-4959). *See Kennard*, 363 F.3d at 1044-47 (citing *Stone* 8 times in just 3 pages). Now that *Stone v. Rockwell* has been overruled, it was error for the district court to refuse to revisit the original source analysis. As shown above, Relators cannot meet the original source standard following *Rockwell*.

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[33] In his dissent, Justice Stevens criticized the *Rockwell* majority on this point, writing: "I believe the Court has misinterpreted these provision to require that an 'original source' in a *qui tam* action have knowledge of the actual facts underlying the allegations on which he may ultimately prevail." 549 U.S. at 479 (Stevens, J., dissenting). Justice Stevens continued: "By contrast, the majority's approach suggests that the relator must have knowledge of the actual facts supporting the theory ultimately proven at trial—in other words, knowledge of the information underlying the prevailing claims." *Id.* at 480.

D. The Substitute Relators Cannot Acquire Original Source Status.

Even if Relators could overcome the original source hurdle on their own, this case must still be dismissed because Relators are no longer the persons "bringing" this action. (R8:4774-4786). Relator Wright is deceased. (R8:4757, 4767). Relator Kennard is mentally incapacitated. (R8:4744, 4750-4753). Under the plain language of Section 3730(e)(4), other parties may not substitute in for relators and piggy-back off their claimed original source status.[34] Section 3730(e)(4) provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. §3730(e)(4).

Section 3730(e)(4) is written in absolute terms: "No court shall have jurisdiction . . . unless . . . the person bringing the action is an original source . . . ." 31 U.S.C. §3730(e)(4). Because it is jurisdictional, *see Rockwell,* 549 U.S. at 467-

[34] The district court dodged this issue of statutory interpretation when it allowed others to substitute in for Wright and Kennard. (R8:4981). Contrary to the impression left by the district court's opinion, Comstock's objections to the substitute relators is not based on FED. R. CIV. P. 25 or on the general analysis of whether a claim survives the death of the plaintiff. The federal rules regarding survivability of claims cannot and does not expand the scope of the federal court's jurisdiction. *See Snyder v. Harris*, 394 U.S. 332, 341-42 (1969); *Waffenschmidt v. Mackay*, 763 F.2d 711, 720 (5th Cir. 1985). *See also* FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.").

69, the statute must be "strictly construed, and doubts resolved against federal jurisdiction." *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984). The word "bringing" is a verbal substantive. 2 OXFORD ENGLISH UNABRIDGED DICTIONARY 557 (2d ed. 2001). A verbal substantive is used as a present participle. THE NEW FOWLER'S MODERN ENGLISH USAGE 821 (W. H. Fowler & R. W. Burchfield eds., 3d ed. 1996). Thus, as used in Section 3730(e)(4)(A), the word "bringing" is a present participle, and its use, rather than some other form of the verb "to bring," reflects a present and continuing state of existence or affairs, not a past state of existence or affairs.

This distinction between present and past tense is further reflected in the language Congress chose for Section 3730(e)(4). In that section, Congress used both the words "brought" and "bringing," but used those words to address different situations: "No court shall have jurisdiction over an action . . . unless the action is *brought* by the Attorney General or the person *bringing* the action is an original source . . . ." 31 U.S.C. §3730(e)(4)(A) (emphasis added). If Congress intended for jurisdiction to exist so long as the person who filed or brought the action was an original source, Congress should have written: "no court shall have jurisdiction over an action . . . unless the action is brought by the Attorney General or by an original source of the information." This Court cannot re-write the statute. Moreover, this Court should not ignore Congress' intentional choice of words,

which evidences an intent for those words to have different meanings. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

Because the language of section 3730(e)(4) is plain and unambiguous, this Court should give effect to Congress' choice of words as written. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). It is undisputed that Wright and Kennard are no longer the persons "bringing" this action. It is also undisputed that the substitute relators do not have sufficient knowledge to qualify under the "original source" standard on their own. Accordingly, this case must be dismissed.

The conclusion asserted here—that original source status may not be transferred—is not new. Both this Court and the Tenth Circuit have correctly recognized that the plain language of section 3730(e)(4) does not allow a relator to transfer his claimed status as an "original source" to another entity. *See Federal Recovery Servs.*, 72 F.3d at 451-52; *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 554 (10th Cir. 1992). In both *Federal Recovery Services* and *Precision*, the individuals who claimed personal knowledge of the alleged fraud attempted to form corporations after they obtained that knowledge, arguing that the corporations could meet the original source standard based on the individuals' knowledge. Both courts rejected that argument. Those decisions are consistent with the general rule that a relator may *not* use the knowledge or the labors of another to claim original source status. *Reagan*, 384 F.3d at 177; *Fried*,

527 F.3d at 442-43. Taken together, these cases hold that (1) a relator cannot transfer his original source status to another or designate another to sue on his behalf while he is alive, and (2) a relator cannot accept a transfer of knowledge from another to qualify as an original source. There is nothing in the language of section 3730(e)(4) that would allow an exception to these rules upon the death or incapacity of a relator.

Any attempt to expand Section 3730(e)(4) beyond its plain language raises serious jurisdictional concerns. A relator is in unique, if not exclusive, possession of the evidence regarding his "knowledge" of the allegations raised in a *qui tam* complaint. *United States ex rel. Coppock v. Northrop Grumman Corp*., 2003 WL 22171707, at *4 (N.D. Tex. Mar. 6, 2003) (holding that proof of whether a relator was the "original source" was within his exclusive custody and control). Moreover, federal courts are courts of limited jurisdiction that have a duty to insure that jurisdiction is proper at all points throughout the case. *Rockwell*, 549 U.S. at 473-74; *In re Bass*, 171 F.3d 1016, 1022 (5th Cir. 1999). As a result, the question whether the relator's knowledge is sufficient to support the exercise of jurisdiction is one that is open for review at all points in the case, including (as in *Rockwell)* following trial. If the relator is no longer available to testify, it is not possible to conduct a full and fair review of the court's jurisdiction at trial, or any other future stages in the litigation.

VIII. RELATORS' COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN INDISPENSABLE PARTIES

The district court abused its discretion when it in denied Comstock's motion to dismiss for failure to join indispensable parties. "No procedural principle is more deeply embedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable." *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987); *accord Enterprise Management Consultants, Inc. v. Hodel*, 883 F.2d 890, 893 (10th Cir. 1989); *United States ex rel. Hall v. Tribal Development Corporation*, 100 F.3d 476, 479 (7th Cir. 1996). "[A] contracting party is the paradigm of an indispensable party." *Travelers Indemnity Co. v. Household International, Inc.*, 775 F. Supp. 518, 527 (D. Conn. 1991). Throughout their brief, Relators admit that they are challenging the validity of the Leases on the Tribe's Reservation and that the Tribe is either (a) the real party in interest in this case or (b) the ultimate beneficiary of the Relators' claims. (Appellants' Brief at 22). Of course, Relators, as strangers to the Leases and the other contracts they seek to invalidate, lack standing to challenge the existence or validity of those contracts. *See NRG Exploration, Inc. v. Rauch*, 905 S.W.2d 405, 410-11 (Tex. App.—Austin 1995, writ denied) ("NRG has no standing to request a determination of whether the 1982 lease has expired because it is neither a party to the 1982 lease agreement nor a party in interest to the lease agreement."). But even if Relators had standing,

this action should not be allowed to proceed without joining all parties whose rights would be adversely affected by a determination that one or more of the Leases is invalid.

The Tribe has previously demonstrated that its interests are not aligned with the Relators by (a) refusing to join Relators' *qui tam* FCA case and (b) negotiating and resolving all of its disagreements with Comstock and the other lessees, independent of Relators. (R1:349). The Tribe is a "person" (1) in whose absence complete relief cannot be accorded among those already parties, and (2) who claims an interest relating to the subject of the action and is so situated that the disposition of the action in the Tribe's absence may (a) as a practical matter impair or impede the Tribe's ability to protect that interest, or (b) leave Comstock subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the Tribe's interests. FED. R. CIV. P. 19(a). Relators' request for a judicial declaration invalidating the Leases "necessarily affects, 'as a practical matter,' the interests of both parties to the contract." *Hall*, 100 F.3d at 479.

This case raises issues nearly identical to those in *United States ex rel. Hall v. Tribal Development Corporation*, in which the Seventh Circuit affirmed the district court's dismissal of a federal *qui tam* action (not under the FCA) in which the relators sought to invalidate certain gaming contracts between the defendants

and non-party Indian tribes. The relators sought to rescind contracts that would prevent the tribes from receiving goods and services for which they had contracted. 100 F.3d at 478. The court determined that the non-party Indian tribes were necessary parties under FED. R. CIV. P. 19, and, after applying the four factors of Rule 19(b), found that the absent Indian tribes were indispensable parties. *Id.* at 478–81.

When a case presents issues of contract validity that could adversely impact the rights and interests of parties not before the Court and not adequately represented by the parties before the Court, the case cannot proceed unless those other interested parties are joined in the lawsuit. *See Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997-1001 (10th Cir. 2001). *See also Travelers Indemnity Co.*, 775 F. Supp. at 527-28.

The district court overruled Comstock's indispensable party motion based on conflicting reasoning. (R8:5052). Contrary to Relators' pleadings, the district court found that "Relators do not seek to invalidate the Indian Leases" (R8:5055), and that Relators' Complaint "is not an action to set aside a contract." (R8:5056). Inconsistently, the district court said "Relators must show that the Indian leases expired in order to reach the conclusion that Comstock submitted false claims to the Government – and thereby obtain recovery. However, Comstock has not shown that such a finding would invalidate the leases." (R8:5056). Amazingly,

the district court concluded that "it does not appear that any determination on the issues presented in this case will change the lease agreements between the Tribe and Comstock – nor their rights thereunder." (R8:5057). Nevertheless, the district court admitted that "[I]f Relators succeed in this action, Comstock could be subject to such inconsistent obligations because of its prior settlement with the Tribe and the Government." (R8:5058). The district court abused its discretion when it denied Comstock's motion based on these inconsistent and conflicting statements.

IX. RELATORS' CLAIMS ARE BARRED BY RES JUDICATA.

Relators' claims are also barred by res judicata arising from the settlement and agreed dismissal with prejudice of the related lawsuit between Comstock, the Tribe and DOI that involved the same facts, acts, and transactions as form the basis of Relators' FCA claims. (R4:2530, 2556-2562). The district court granted Comstock's motion on res judicata grounds and made detailed finding that all the requirements for res judicata existed. (R8:5060, 5068-5086) (the "Res Judicata Order"). Relators moved for a new trial, attacking the Res Judicata Order by relying on this Court's opinion in *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530 (5th Cir. 1978), and its limitation of the application of res judicata to consent judgments in anticipatory declaratory actions. (R8:5088, 5094-5096). After further briefing, the district court relied on this Court's opinion in *Kaspar*, withdrew the Res Judicata Order, and granted Relators a new trial.

(R9:5318, 5321-5329) (the "New Trial Order"). The district court was right when it granted Comstock summary judgment on res judicata but erred when it reversed itself because the *Kaspar* exception has no application to this case.

In *Kaspar*, this Court explained that "when determining the effect to be given a decree entered by consent of the parties, consideration is to be given to their intention with respect to the finality to be accorded the decree as reflected by the record and the words of their agreement." *Id.* at 540. An unadorned dismissal of a declaratory judgment act lawsuit by consent decree (without more) is not entitled to the same preclusive effect as an ordinary judgment on the merits. *Id.* at 535. But "[i]f they have in their compromise indicated clearly the intention that the decree to be entered shall not only terminate the litigation of claims but, also, determined finally certain issues, then their intention should be effectuated." *Id.* at 539.

The *Kaspar* Court refused to give preclusive effect to an agreed order dismissing the declaratory judgment act lawsuit seeking to hold the "608 patent" patent invalid. *Id.* at 540. That lawsuit was filed as "an *anticipatory* defense to a *potential* claim." *Id.* at 536 (emphasis added). The dismissal order included no language expressing an intent to preclude future litigation of patent infringement and patent validity issues. *Id.* at 533, 539-40. Moreover, the only evidence of the

parties' intent confirmed the contrary. *Id.* at 534 ("should we be sued, we are free to challenge validity.").

The present case is remarkably different than *Kaspar*. The language of the Settlement Agreement, the Joint Stipulation, and the Final Order of Dismissal With Prejudice confirm that the parties intended to conclusively resolve the lease validity issues that were raised in the lawsuit between Comstock, the Tribe, and DOI. The Settlement Agreement provides that "the Tribe, the DOI, Comstock and Kerr-McGee wish to resolve and/or settle all of their outstanding disputes, including . . . all related litigation, concerning the Leases and the Wells . . . ." (R4:2628-2629). Based on the Settlement Agreement, all parties (including DOI) stipulated "to the dismissal, with prejudice, of all claims and causes of action that have been asserted or that could have been asserted in this action." (R5:2918-2919). Accordingly, Judge Brown ordered:

> Based on that Joint Stipulation, the Court finds that all claims, causes of action, and matters in controversy between the parties with respect to the subject matter of this lawsuit have been fully compromised and settled. Therefore, the Court hereby orders that all claims and causes of action that have been asserted or that could have been asserted in this action are hereby dismissed with prejudice.

(R5:2925). The claims resolved by the Settlement Agreement and Final Order include the challenges to the Leases that are at issue in this case.[35]

Contrary to Relators' arguments in the district court, the Settlement Agreement and Final Order were approved by the proper government officials with authority to address lease validity issues. Under the IMDA, DOI (not DOJ) has the authority to administer mineral leases involving Indian tribes. *See* 25 U.S.C. §2103. The IMDA grants the Tribe first and primary authority to negotiate agreements relating to its mineral leases. *See* 25 U.S.C. §2102(a). In the Settlement Agreement, the Tribe "hereby stipulates that each of the Leases . . . is, and always has been, valid and in full force and effect . . . ." (R4:2630). That Settlement Agreement and stipulation were expressly approved by DOI, as required to make them effective under the IMDA.[36] (R4:2646). DOI's lawyer within the Department of Justice also approved the Settlement Agreement, Stipulation of Dismissal, and Final Order. (R4:2651). The fact that Relators are now trying to assert lease validity challenges in the context of an FCA case cannot

[35] The Wyoming district court found, and the Tenth Circuit affirmed, that there is a substantial identity between the claims involved in the Tribe's law suit against Comstock and the Relators' claims in this case. *Kennard*, 363 F.3d at 1043-44.

[36] Prior to signing the Settlement Agreement, DOI determined that there were no violations of the Leases that would support termination of those leases. (R10:6420).

change the fact that res judicata bars re-litigation of the underlying "trespass" theories that Relators wish to pursue.

The district court correctly recognized that "[t]here are admittedly elements of the Settlement Agreement that suggest an intent to preclude further litigation over the issues of lease validity, royalty payments and Comstock's other lease obligations." (R9:5326). But the district court erred in finding that there were "elements of the Settlement Agreement that muddy the waters of the parties' intent." (R9:5327). The three points cited by the district court do not undermine the clear statements of the parties' intent in the Settlement Agreement.

1. The district court wrote that "while the Tribe stipulated to the validity of the leases and Comstock's compliance with its lease obligations, the United States made no such stipulation." (R9:5327). But the district court's statement ignores the relationship between the Tribe and the Government with respect to mineral leasing under the IMDA. Under the IMDA, the Tribe could not enter into a binding stipulation regarding lease validity and compliance issues without approval from the Secretary. *See* 25 U.S.C. §2102(a). Accordingly, the only fair reading of the Settlement Agreement is that, when DOI approved the agreement, it bound all parties-in-interest to the stipulation.

2. The absence of a specific release from the Government is likewise irrelevant. Rather than negotiate a specific release with the Government, the

parties addressed this issue through the language of the Joint Stipulation under which all parties (including the Government) agreed "to the dismissal, with prejudice, of all claims and causes of action that have been asserted or could have been asserted in this action." (R5:2918-2919). That stipulation is clear and unambiguous, and is binding for res judicata purposes.

3. The Tribe's express agreement to support Comstock in seeking the dismissal of this *qui tam* lawsuit is no evidence of any party's intent or belief that this case should continue. Instead, the Tribe's agreement merely recognized the obvious point—that it would be necessary to litigate whether dismissal of this case was required given Relators' obvious opposition to Comstock's motion. Paragraph 9 of the Settlement Agreement says absolutely nothing about the intent of the Government with respect to this issue. (R4:2637-2638).

Not only is the language of the Settlement Agreement and Final Order clear on the intent of the parties, when viewed in context, the dismissal should be given full res judicata effect. Unlike the situation in *Kaspar*, Comstock's Declaratory Judgment action addressed an actual, not anticipated or potential, claim with the Tribe. On October 26, 1998, the Tribe sued Comstock in the Eastern District of Texas seeking to challenge the validity of Comstock's leases. (R5:2936). After that lawsuit was filed, the Tribe dismissed its case, tried to set up its own "court," hired a "judge," and then sued Comstock in its purported tribal court. (R5:2952).

The Tribe's case still focused on lease validity issues. (R5:2955-2956). Comstock initiated its Declaratory Judgment Action for the purpose of returning the case initiated by the Tribe to a proper, federal forum. (R5:2959). In the process, Comstock litigated and won the issue whether the Tribe's Court was legitimate. (R5:3050-3052). Comstock is aware of no authorities under which it should be penalized (and denied the protection of res judicata) just because Comstock had to file a Declaratory Judgment Act lawsuit to move a pending dispute from a "court" that did not legally exist to one that had jurisdiction to resolve the merits of that dispute.

This Court should hold that Relators' claims are barred by res judicata.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of this case.

Respectfully submitted,

/s/ J. Robert Beatty

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CERTIFICATE OF SERVICE

The undersigned certifies that Brief of Appellees Comstock Resources, Inc. and Comstock Oil & Gas, L.P. was filed electronically in compliance with Fifth Circuit Local Rule 25. As such, this brief was served on all counsel who are deemed to have consented to electronic service pursuant to Fifth Circuit Local Rule 25.2.3. In addition, the undersigned certifies that this brief was also served by first class United States mail to the counsel named below on this 12th day of January, 2011.

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ECF CERTIFICATION

Counsel for Appellees certifies that (i) all required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; 2); (ii) the electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; (iii) this electronic document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses; and (iv) the original paper document was signed by the attorney of record and will be maintained for a period of three years after mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.9.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P.32(a)(7)(B) because:

a. this brief (including Appendix A) contains 16,704 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and

b. on December 23, 2010, this Court granted Comstock's motion for leave to file an extra-length Appellees' Brief, not to exceed 17,000 words.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P.32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Word 97 in 14 pt. font, Times New Roman.

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Dated: January 12, 2011.