Case No. 10-40785

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES, *ex rel.*
MARY JO KENNARD, as Attorney-in-fact
for her husband, DON KENNARD, n.c.m. and
ELIZABETH WRIGHT and BRADLEY SLOAN
WRIGHT, As Co-Executors of the Estate of
HARROLD E. (GENE) WRIGHT, Deceased

Plaintiffs/Appellants

v.

COMSTOCK RESOURCES, INC., *et al.*

Defendants/Appellees

On Appeal

BRIEF OF APPELLANTS

MARY JO KENNARD, AS ATTORNEY-IN-FACT FOR HER HUSBAND, DON KENNARD, N.C.M. AND ELIZABETH WRIGHT AND BRADLEY SLOAN WRIGHT, AS CO-EXECUTORS OF THE ESTATE OF HARROLD E. (GENE) WRIGHT, DECEASED

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November 8, 2010

CERTIFICATE OF INTERESTED PERSONS

United States ex rel., Mary Jo Kennard, as Attorney-in-Fact for her husband, Don Kennard, n.c.m. and Elizabeth Wright and Bradley Sloan Wright, as Co-Executors of the Estate of Harrold E. (Gene) Wright, Deceased v. Comstock Resources, Inc. and Comstock Oil & Gas Co., L.P., No. 10-40785, In the United States Court of Appeals for the Fifth Circuit

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.

Relators: Mary Jo Kennard, as Attorney-in-Fact for her husband, Don Kennard, n.c.m. and Elizabeth Wright and Bradley Sloan Wright, as Co-Executors of the Estate of Harrold E. (Gene) Wright, Deceased

Relators' Counsel:

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Relators' Former Counsel:

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Defendants:

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Other Interested Parties:

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STATEMENT REGARDING ORAL ARGUMENT

Relators respectfully request oral argument. This case presents a fundamental question: Are the laws of this nation pertaining to Indian lands and the environment to be followed or ignored? While the answer to this question is obvious, the answer raises yet another question: Can the *qui tam* provisions the False Claims Act be used to correct violations of these laws when those violations result in the submission of false claims to the United States?

These are important questions. And they arise from an extensive factual record spanning three decades, ten tracts of land and nine separate agreements purporting to convey Indian mineral interests. Oral argument will assist the Court to sift through the extensive factual record in this case and likewise ensure that this Court's specific questions regarding the facts and the law are adequately answered. Since oral argument will significantly aid this Court's decisional process, the Court should hear arguments in this cause.

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JURISIDICTIONAL STATEMENT

The district court exercised subject-matter jurisdiction over this case pursuant to 28 U.S.C. §1331. This suit was brought under *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729 *et. seq.* and therefore arises under the laws of the United States.

This is an appeal from a final judgment disposing of all claims entered by the district court on July 16, 2010. (Record Excerpts, Tab C). Appellants filed their Notice of Appeal on August 12, 2010. (Record Excerpts, Tab B). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291 as this is an appeal from a final judgment of the district court.

ISSUES PRESENTED FOR REVIEW

1. Is an oil and gas lease or minerals agreement with a recognized Indian Tribe valid if it is not made in compliance with the Indian Non-Intercourse Act, 25 U.S.C. §177, the Indian Mineral Development Act, 25 U.S.C. §§ 2102 *et. seq.*, the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et. seq.* or the Endangered Species Act, 16 U.S.C. §§ 1531 *et. seq*.?

2. Did the Restoration Act of 1987, 25 U.S.C. §§ 733-737, give the federal government the power to convey Alabama-Coushatta Tribe oil and gas interests to third parties before the federal government received title to the property in question?

3. Is a party who produces minerals from Indian land pursuant to an invalid or expired oil and gas lease a trespasser on the Indian property?

4. Did the district court err in determining as a matter of law that all of the leases at issue were valid and that the Defendants were not trespassers on the reservation?

5. Should this Court correct its pre-1986 requirement that *qui tam* Relators prove "guilty knowledge of a purpose on the part of the defendant to cheat the government" in light of the 1986 amendment to the False Claims Act which specifically defined the terms "knowing" and "knowingly" and provided that "no specific intent to defraud is required?"

6. Did the district court err in granting summary judgment for the Defendants on the issue of intent?

STATEMENT OF THE CASE

Relators filed this False Claims Act case in the Eastern District of Texas on October 27, 1998. Relators alleged that the Defendants Comstock Resources, Inc. and Comstock Oil & Gas, L.P. (collectively "Comstock") filed false claims as to the proceeds of oil and gas production from several tracts of land on the Alabama-Coushatta Indian Reservation.

On February 5, 2001 the Multi-District Litigation Panel transferred the case to MDL proceedings in the District of Wyoming. (R. Vol. 1: 137-138). The

Wyoming district court dismissed the case for lack of subject-matter jurisdiction, finding that Relators case was based on a previously filed complaint; that the public disclosure of these facts deprived the court of jurisdiction and that the Relators were not original sources of the allegations in the complaint. (R. Vol. 1: 292-306). The United States Court of Appeals for the Tenth Circuit reversed the district court on the ground that the Relators were original sources. *Kennard v. Comstock Resources*, 363 F.3d 1039 (10th Cir. 2004).

In 2007 the Wyoming district court remanded it to the Eastern District of Texas (R. Vol. 3: 1628-34). Relators filed a Motion For Summary Judgment that Defendants Are Trespassers on the Reservation on April 9, 2010. (R. Vol. 9-10: 5477-6108). Defendants responded by filing their own motion for summary judgment on the entire case. (R. Vol. 10-11: 6115-6961).

The district court stayed the case on June 3, 2010 so that it could consider the motions for summary judgment, (R. Vol. 13: 8307-8307), and on July 16, 2010 entered its order denying Relators' motion for partial summary judgment and granting Defendants' motion for summary judgment. On the same day the court entered judgment denying all of Relators' claims. (Record Excerpts Tab C). This appeal followed.

STATEMENT OF FACTS

This is a False Claims Act case based upon Comstock's trespass on Indian lands from 1983 to the present. Comstock and its predecessor in interest Black Stone Oil Company ("Black Stone") produced minerals from lands owned by the Alabama-Coushatta Indian Tribe. Comstock claimed authority to exploit these minerals from several leases issued by the State of Texas as well as two federal Minerals Agreements between Black Stone and the Bureau of Indian Affairs. ("BIA"). For various reasons explained in detail below, these agreements had expired, did not allow drilling operations or were invalid. 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).

The leases and federal Mineral Agreements covered ten tracts of land on the Alabama-Coushatta Indian Reservation. These tracts can be grouped into four groups as follows:

- **Tract 1:** Minerals produced pursuant to 1993 Federal Minerals Agreement. (R. Vol. 10: 6052-6077);
- **Tract 2 (partial), 3 and 4:** Minerals produced pursuant to State of Texas leases, (R. Vol. 9: 5566-5572, 5608-5614, 5654-5660), and purported lease extension (Record Excerpts Tab H);

- **Tract 2 (partial) 5 and 6:** Minerals produced pursuant to 1990 Federal Minerals Agreement. (R. Vol. 10: 6079-6106); and

- **Tracts 7,8,9 and 10:** Minerals produced pursuant to State of Texas leases. (R. Vol. 9: 5784-5791, 5841-5848; Vol. 10: 5907-5914, 5948-5955).

The facts in this case are largely undisputed and are established through the leases and other documents in the summary judgment record. Relators contend that these facts show that Black Stone and its successor Comstock were trespassers on the Alabama-Coushatta Reservation and that their claims regarding ownership of the minerals on the Reservation were false claims actionable under the False Claims Act.

I. FACTS RELATING TO TRACT 1.

Despite the fact that the 1993 Federal Minerals Agreement covering Reservation Tract 1 contained a "No-Surface-Occupancy" ("NSO") provision, (Record Excerpts, Tab F), Comstock drilled and produced two oil wells on Tract 1, its No. 6 Well and its No. 7 Well. (R. Vol. 10: 6489 at ¶¶ 6-7). Comstock obtained drilling permits for these wells from the Bureau of Land Management ("BLM") office in Tulsa, Oklahoma, by filing applications that did not disclose the NSO provision in the Tract 1 Minerals Agreement that had been filed with and approved by the BIA office in Anadarko, Oklahoma. (R. Vol. 11: 6583-84). The drilling permits were issued expressly subject to regulations requiring compliance

with lease terms and applicable laws and regulations, (Record Excerpts, Tab F and G; R. Vol. 11: 6630), and another regulation specifying that the granting of a drilling permit does not warrant or certify that the permit recipient had the legal right or title required for drilling operations.[1]

No officer or employee of the federal government ever signed any piece of paper purporting to amend or modify the Tract 1 Minerals Agreement to allow drilling or production on the surface of Tract 1. Because the lease was never amended to allow surface operations, Comstock trespassed on Tract 1 when it entered the tract to drill Wells 6 and 7.

The BLM did not discover the violation of the NSO provision until sometime in 2000. There is no evidence of compliance with the requirements of the Indian Nonintercourse Act ("INIA"), the Indian Mineral Development Act of 1982 ("IMDA"), the National Environmental Policy Act of 1969 ("NEPA"), or the Endangered Species Act of 1973 ("ESA") in connection with the drilling of either Well 6 or Well 7 on Tract 1.

II. FACTS RELATING TO TRACTS 2, 3 AND 4.

The State leases on these tracts were for primary terms of three years that ended on April 1, 1989, and could be extended only by actual production in paying quantities on the primary term expiration date. (R. Vol. 9 5566, 5608, 5654). The

[1] 43 C.F.R. §§3162.3-1(i).

three tracts were purportedly pooled during March, 1989, but the drilling of the first well drilled on any of the tracts, the Alabama Coushatta Well No. 2 on Tract 3, was not even commenced until April 18, 1989, after all three leases had expired by their own terms. (R. Vol 10: 6133 at ¶6) The first production from that well did not occur until July 30, 1989, three months after the primary term expiration date of leases.

Black Stone and the Tribe signed a lease extension agreement on March 28, 1989, that was approved by the BIA three days later on March 31, 1989. (Record Excerpts Tab I). There is no evidence of compliance with INIA, IMDA, NEPA or ESA with respect to the lease extension agreement. Since the lease extension was invalid, the state leases expired on March 31, 1989, and Black Stone and Comstock were trespassers on those tracts after that date.

III. FACTS RELATING TO TRACTS 2, 5 AND 6.

These tracts were described in a federal Minerals Agreement effective September 10, 1990 that was for a three-year primary term ending on September 10, 1993. (R. Vol. 10: 6080, 6103) There is nothing in the record to evidence that there was any compliance with either the INIA, IMDA, NEPA or ESA with respect to this Minerals Agreement.

When the primary term ended on September 10, 1993, there was no production of oil or gas in any amount from any of the tracts described in the

Minerals Agreement. (R. Vol.3: 1542 at ¶4; Vol. 11: 6795) The Alabama Coushatta Well No. 4 had been drilled and completed on Tract 5 but was shut-in on September 10, 1993. (*Id.*) There was a Drilling or Reworking clause in the agreement which allowed lease extension beyond the primary term, (R. Vol. 10: 6091-92), but no drilling or reworking operations were ongoing when the primary term expired. There was also a shut-in royalty clause in the Minerals Agreement, (R. Vol. 10: 6085-6086), but it was applicable only to wells shut-in after the expiration of the primary term. This agreement therefore terminated at the end of its primary term, and Black Stone and Comstock were trespassers on Tract 5 after September 10, 1993.

IV. FACTS RELATING TO RESERVATION TRACTS 7, 8, 9 AND 10.

The State leases on Tracts 7 and 9 were for primary terms ending on October 22, 1982. (R. Vol.9:5784, Vol. 10: 5907). The State leases on Tracts 8 and 10 were for primary terms ending on May 6, 1983. (R. Vol. 9: 5841, Vol. 10:5948). The four tracts were purportedly pooled, and Well No. 1-9 drilled on Tract 9 produced some oil and gas prior to May of 1983. But there was no production of oil or gas from the well at any time during the months of May, June, July, August, or September of 1983, a period of 153 days. (R. Vol. 10: 6049). All of the leases had a 60-day cessation of production clause providing that after the expiration of the primary term, the leases terminated automatically upon the cessation of

production for more than sixty consecutive days. (R. Vol. 9: 5788, 5945; Vol. 10: 5911, 5952, all at ¶11) . Thus, these leases were terminated in June of 1983.

The Tribe and the BIA signed a ratification of these leases in November of 1989, (R. Vol. 11: 6551-6553). This ratification was made effective as of October of 1982, ten months prior to the lease termination in June, 1983. Additionally, there was no compliance with any of the requirements of either the INIA, IMDA, NEPA or ESA with respect to this ratification. As a result, the ratification was either ineffective or invalid, and Comstock was a trespasser on these tracts after June of 1983.

V. FACTS RELATING TO INTENT.

As explained in more detail below, Comstock can be liable under the False Claims Act if it acted in deliberate ignorance of the truth or falsity of information or with reckless disregard of the truth or falsity of information. 31 U.S.C. 3729(b). Many of the facts establishing the expiration or invalidity of the agreements in question are apparent from the face of the agreements. For example, the NSO clause on the Tract 1 appears in the agreement itself and is deemed to be within the knowledge of Black Stone and Comstock as parties to that agreement. (Record Excerpts, Tab F). Similarly, it is obvious to even the most casual observer, that the Lease Extension Agreement covering Tracts 2, 3 and 4 did not comply with the thirty-day notice of approval provisions of the IMDA. The extension agreement

was executed by the parties on March 28, 1989 and approved by the BIA on March 31, 1989. (Records Excerpts, Tab H).

In addition, the summary judgment evidence establishes that Comstock did not even make even the most fundamental inquires regarding the agreements' compliance with applicable federal statutes. Comstock's due diligence officer testified that he never inquired about whether an Environmental Impact Statement as required by NEPA was prepared for any of these tracts. (Record Excerpts, Tab J). He likewise failed to make any inquiries regarding a comprehensive biological opinion as required by the ESA (*Id.*).

When this evidence of intent is added to the facts establishing the termination or violation of lease provisions, the result is a False Claims Act case which should be submitted to a jury. Instead, the district court granted Comstock's motion for summary judgment and entered judgment against Relators on all claims. For the reasons detailed in the argument below, this result should not stand.

SUMMARY OF THE ARGUMENT

When this Court applies the appropriate federal statutory mosaic as interpreted by the Supreme Court to the undisputed facts of this case, it will conclude that Comstock and its predecessor, Black Stone, have been trespassers on Alabama-Coushatta Indian Reservation for decades. Similarly, when the

appropriate standard of review is applied to the evidence pertaining to Black Stone and Comstock's knowledge of their own trespasser status, it is clear that they 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).

The Court's analysis should begin with consideration of the underlying statutory framework. Specifically, this case involves an interplay between the INIA, the IMDA, the NEPA and the "ESA".

Under the INIA and the Supreme Court cases construing it, Indian conveyances without the consent of the federal government are void. The IMDA sets forth the manner in which the federal government may consent to Indian mineral conveyances and specifies clearly the procedures that the Secretary of Interior must follow in approving Indian mineral agreements and modifications to those agreements. The IMDA specifically requires compliance with NEPA and "other requirement[s] of federal law" which in this case includes the ESA. When these statutes are read together, it is clear that the government cannot consent to an Indian mineral agreement without compliance with the IMDA, NEPA and the ESA and, that in the absence of governmental consent, Indian mineral conveyances are void.

In this case there is no summary judgment evidence that the parties to the agreements at issue complied with any of these federal statutory mandates. The IMDA requires written findings by the Secretary of Interior thirty days before a minerals agreement can be approved. But there is no evidence that such findings were made. NEPA requires an environmental impact statement, and the ESA a comprehensive biological opinion. But there is no evidence that any of these legally required steps occurred before Black Stone began its began drilling operations. In the absence of these required steps, the leases at issue violate federal law and are invalid under the INIA which requires federal consent to Indian conveyances.

The summary judgment evidence in this case further establishes that even if the leases were valid, the Defendants were still trespassers because they violated the express terms of the leases. The federal Minerals Agreement covering Tract 1 prohibited surface operations. But Comstock's corporate predecessor drilled there anyway. The agreements and leases covering Tracts 2, 5 and 6 and Tracts 7, 8. 9 and 10 expired under their own terms. But Black Stone and Comstock produced minerals from those tracts without regard to the leases' expiration. As 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.

The evidence likewise supports a jury finding that Comstock and Black Stone acted "knowingly" as that term is defined in the False Claims Act. Termination of the leases for Tracts 2, 5, and 6 and Tracts 7, 8, 9, and 10 is obvious from the face of the leases and production records created by Black Stone and Comstock. The NSO provision is obvious from the face of the Tract 1 Minerals Agreement, as is Black Stone's violation of the provision through its own surface operations. Black Stone attempted to extend the leases on Tracts 2, 3 and 4, but it is obvious from the face of the purported extension that the BIA did not comply with the thirty-day notice of approval provisions of the IMDA. When these facts are considered with evidence establishing that Comstock wholly failed to make inquiry as to any of these matters, it is clear that the district court erred in granting Comstock's motion for summary judgment on the intent issue.

Because the evidence establishes as a matter of law that Black Stone and Comstock were trespassers on the reservation and because the evidence raises issues of fact regarding Comstock's intent, this Court should reverse the summary judgment granted by the district court and remand this case for trial on the disputed factual issues of intent, damages and attorneys fees.

ARGUMENT

I. THE STANDARD OF REVIEW.

This is an appeal from an order granting Defendants' motion for summary judgment and denying Relators' motion for partial summary judgment. This Court reviews summary judgments *de novo* and applies the same standard as the district court. *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 454 (5th Cir. 2006). District courts should grant summary judgments when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* FED. R. CIV. P. 56(c). In reviewing summary judgments this Court construes all facts and inferences in the light most favorable to the nonmoving party. *Cooper Tire & Rubber Co.,* 423 F.3d at 454.

II. INDIAN OIL AND GAS LEASES ARE NOT VALID IF THEY DO NOT COMPLY WITH APPLICABLE FEDERAL STATUTES.

Federal law imposes strict requirements for the execution of mineral leases on Indian land. The statutory foundation undergirding these requirements is the Indian Non-Intercourse Act)("INIA"), 25 U.S.C. § 177. The INIA provides in plain terms that "No…lease or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity unless the same be made by treaty or convention entered pursuant to the constitution." The INIA thus codifies the well-established principle that a

conveyance of Indian land without consent of the sovereign is invalid. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 231-32 (1985)(*Oneida II*); *The Tonkawa Indian Tribe of Oklahoma v. Richards;* 75 F.3d 1039, 1045-46 (5th Cir. 1996).

Congress established the method for giving that consent with the IMDA of 1982. The IMDA allowed Indian tribes to enter Minerals Agreements but, consistent with the INIA, made those agreements and any amendments subject to approval of the Secretary of Interior. It likewise imposed procedures to be followed by the Secretary in giving approval. These procedures included consideration of the best interest of the tribe and the making of written findings forming the basis of the Secretary's intent to approve. 25 U.S.C. §§ 2102-2103.

The IMDA also required compliance with the National Environmental Policy Act (NEPA) and other applicable provisions of federal law before the Secretary could give consent to the execution or amendment of a Minerals Agreement. 25 U.S.C.A. §2103(a)(2). NEPA requires preparation of an Environmental Impact Statement ("EIS") whenever Indian lands are leased for the purpose of extracting minerals. 42 U.S.C. §4332(2)(C); *Sierra Club v. Peterson;* 717 F.2d 1409, 1414 (D.C.Cir. 1983); *Manygoats v. Kleppe*, 358 F.2d 556, 557(10th Cir. 1977). As a result, the Secretary cannot give his IMDA mandated consent unless an EIS as required by NEPA has been prepared.

In addition to requiring compliance with NEPA, the IMDA also required compliance with other provisions of federal law which in this case included the Endangered Species Act ("ESA"), 16 U.S.C. §§1531 *et. seq.* The ESA requires federal agencies to obtain a comprehensive biological assessment identifying endangered species likely to be affected by their action. 16 U.S.C.A. § 1536(a)(2), (c). Like NEPA, the ESA applies to mineral leases of Indian Lands. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988).

The central issue in this case is what effect does the violation of these statutory provisions have on the leases and mineral agreements in question. Does it invalidate them as the INIA explicitly provides? Or, can the violations be ignored in a way that may be satisfactory to the contracting parties but which in fact contravenes the Congressionally expressed Indian and environmental policies of the United States. The district court found that violations of the IMDA, NEPA and ESA did not invalidate the leases in question. (Opinion at 22). The applicable statutes dictate otherwise.

Consideration of these statutes must begin with an analysis of the INIA. In *Oneida II*, the Supreme Court made clear that the INIA embodies "Congress' clear policy that no person or entity should purchase Indian land without the acquiescence of the Federal Government." *Oneida II*, 470 U.S. at 282. Thus, under the INIA any conveyance without governmental consent is invalid. *Pueblo*

of Santa Rosa v. Fall; 273 U.S. 315, 320 (1927). After 1871, federal statutes replaced the treaties referenced in the INIA as the means for governmental approval of Indian conveyances and thus established the procedures to be followed in obtaining governmental consent. *See Golden Hills Paugussett Tribe*, 39 F.3d 51, 57 ("When formal treaty making was abandoned . . . government policy with respect to Indians was expressed through legislation and executive orders."); *Sioux Tribe of Indians v. U.S.,* 64 F.Supp. 312 (Ct.Cl. 1946), *vacated on other grounds,* 329 U.S. 685 ("The statutes dealing with the management and control of Indian properties and their affairs enacted after the act of March 3, 1871, 16 Stat. 544, 566, §2079, R.S., 25 U.S.C.A. §71, served the same purpose and had the same effect as treaties and agreements.").

For mineral agreements Congress set the policy for granting consent with the IMDA. That statute in Section 2102 allows Indian tribes to execute or amend leases or mineral agreements but makes such agreements "subject to the approval of the Secretary." Then, using mandatory language, Section 2103 describes conjunctively the steps which the Secretary must take before he can give his approval to a mineral agreement or lease. Section 2103(b) & (c) states that the Secretary shall:

- Determine if the agreement or modification is in the best interest of the Tribe;

- Consider, among other things, the potential economic return to the tribe and the potential environmental, social and cultural effects on the tribe or prepare an Environmental Impact Statement;

- Consider the provisions for resolving disputes that may arise between the parties to an agreement; and

- At least thirty days prior to formal approval or disapproval provide written findings forming the basis of the Secretary's intent to approve or disapprove such agreement to the affected Indian tribe.

In requiring the Secretary to make the best interest determination and to consider the economic, social and cultural effects on the tribe, the IMDA effectuates the long-recognized purpose of the INIA to "prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties." *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U. S. 99, 119 (1960); *Tonkawa Tribe of Oklahoma;* 75 F.3d at 1045.

Case law makes clear that if consent is not given as required by the IMDA, then the conveyance is not valid. *Quantum Exploration Inc.* v. *Clark*, 780 F. 2d 1457, 1459-60 (9th Cir. 1986). Evaluation of this statutory mosaic in its entirety also reveals something else. If a government representative signs off on the agreements, but the appropriate agency does not engage in the required procedures to approve them, then the approval required under the IMDA and the INIA has not been given, and the statutory requirements have not been satisfied. This conclusion follows from basic tenets of statutory interpretation. Under the canon of construction *expressio unius*, when a "law directs a thing to be done in a certain

manner, it may not be done in any other manner and have legal effect under the act." 3 Sutherland Statutes and Statutory Construction § 57:10 (7th ed.).

Avoidance of surplusage, an even more elementary canon of construction, dictates that a statutory scheme must be interpreted so as not to render one part inoperative. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U. S. 237, 249-250 (1985). In order to observe this canon, every part of a statute must be viewed in connection with the whole so as to harmonize all parts, if practicable, and give sensible and intelligent effect to each, for it is not to be presumed that the legislature intended any part of a statute to be without a meaning. *General Motors Acceptance Corp. v. Whisnant*, 387 F. 2d 774, 777-778 (5th Cir. 1968). Here, the legislature clearly has identified the conjunctive requirements requisite for the Secretary to give approval under the statute. To find that consent can be given without compliance with the requirements for consent is to disregard the requirements as surplusage and to construe the IMDA in a manner contrary to its plain meaning. This Court should avoid such a construction and instead ascribe meaning to all portions of the statute. In this case, it should hold that IMDA consent cannot be given without complying with the IMDA requirements for consent. Where these requirements are not satisfied, consent is not given.

The district court completely ignored the agreements' non-compliance with the IMDA, and instead held that noncompliance with NEPA or the ESA was not

grounds for invalidating the leases but only for enjoining use of the land pending compliance with the statute. (Opinion at 22). The court noted that the "enjoining use" remedy was employed by the cases holding that compliance with NEPA and the ESA was necessary for Indian leases[2] and rejected *Pit River Tribe v. U.S. Forest Serv.,* 469 F.3d 768, 788 (9th Cir. 2006) which invalidated Indian leases executed without compliance with NEPA and the ESA. (*Id.*).

The district court's distinction between the remedies of enjoining use of the leased premises and lease invalidation is incorrect for two reasons. First, it embraces an incorrect reading of *Sierra Club, Conner* and *Bob Marshall Alliance*, and second, it completely ignores the effect of the INIA. *Sierra Club, Conner,* and *Bob Marshall Alliance* all very clearly held that under NEPA, oil and gas operations on a lease could not occur until an EIS had been prepared.[3] Indeed, in *Sierra Club,* the plaintiff sought declaratory judgment that the leases were invalid as well as injunctive relief, and the circuit court held that "the Department cannot issue leases . . . without first preparing an EIS." *Sierra Club,* 717 F.2d at 1415. Under the teaching of these cases then, a lease or an amendment to a lease which allowed any surface oil and gas operations without an EIS was invalid and gave the

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[2] *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983); *Conner v. Burford*, 848 F.2d 1441 (9th Cir.1988); *Bob Marshall Alliance v. Hodel* 852 F.2d 1223 (9th Cir. 1988).

[3] *Sierra Club,* 717 F.2d at 1414-15; *Conner* 848 F.2d at 1447-1450; *Bob Marshall Alliance*, 852 F.2d at 1227.

lessee no right to occupy the surface of the land. In the absence of invalidity, the courts could not have enjoined use of the land under those leases.

Further, the district court's analysis completely ignores the INIA which expressly invalidates conveyances executed without proper government consent. In *Pit River Tribe*, the court set aside the leases at issue because the federal agencies violated statutory procedures and thereby breached their fiduciary duties to the tribe.[4] The order setting aside the leases in *Pit River Tribe*, while not mentioning the INIA, was completely consistent with the INIA which declares non-approved Indian conveyances to be invalid. Indeed, federal courts applying the INIA have not hesitated to find such conveyances to be void even after decades have elapsed. In *Oneida II*, the Supreme Court recognized as void a deed executed in 1795 in violation of the INIA. *Oneida II*, 470 U.S. at 1256-57 n. 16. Similarly, in *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 698-99 (9th Cir. 1976), the court held that railroad rights of way which had been granted by Indians in 1881 and approved by the Secretary of the Interior were void for INIA violations. These cases together with *Pit River Tribe* stand for the proposition that a conveyance of Indian land executed without properly given governmental consent is invalid and cannot stand. The district court therefore erred when it ignored mandatory

[4] "Because we conclude that the agencies violated both NEPA and NHPA during the leasing and approval process, it follows that the agencies violated their minimum fiduciary duty to the Pit River Tribe when they violated the statutes." *Pit River Tribe*, 469 F.3d at 788.

statutory provisions and held that lease validity was unaffected by noncompliance with the INIA, IMDA, NEPA, or the ESA. (Opinion at 22).

The district court attempted to justify its conclusion by holding that a purported failure of the Government should not operate in favor of the government in FCA cases. (Opinion 23). This conclusion ignores the fact that the government here is acting in a fiduciary relationship with the Indians. *Pit River Tribe*, 469 F.3d at 788. Thus, the government's failure to comply with the statutory leasing requirements does not merely affect its own interest, it also affects the interests of the Indians for whom it acts as 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.

Even if the fiduciary relationship between the Indians and the government did not negate the district court's reasoning, basic precepts of federal contract law would. The Supreme Court has made clear that persons who contract with the federal government cannot rely on the conduct of government agents which is contrary to the law, and further, that contracting parties take the risk of accurately ascertaining that the person purporting to act for the government stays within the bounds of his authority. *Heckler v. Cmty. Health Serv.,* 67 U.S. 51, 63 (1984),

Fed. Crop Ins. v. Merrill, 322 U.S. 380, 384 (1947). In this case, Black Stone and then Comstock had a duty to ascertain that the government officials they were dealing with were acting in accordance with the law. Their failure to do so cannot bind the government to oil and gas leases that contravene federal law. The district court's refusal to recognize consequences for the government's failure to follow statutory procedures ignores the teaching of *Heckler* and *Merrill.*

Instead of addressing *Heckler* and *Merrill*, the district court concluded that that the False Claims Act does not allow the Relators to question the government's discretionary decisions. (Opinion at 23). In support of this proposition the court relied on *United States ex rel. Laird Lockheed Martin Eng'g & Science Serv's Co.,* 491 F.3d 254, 262-63 (5th Cir. 2007) and *Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999). But these cases do not support the district court's holding because the federal agencies here do not have discretion to approve Indian minerals agreements without compliance with the IMDA, NEPA and the ESA.

The district court's reliance on Judge Jones concurring opinion in *United States v. Southland Mgmt. Cor*., 326 F.3d 669, 684 (5th Cir. 2003) is similarly misplaced. (Opinion 23). In *Southland Mgmt.,* Judge Jones stated that FCA remedies are not available for breach of contract cases. But this is not a breach of contract case. Comstock's submission of false claims arises from its own trespass and unauthorized mineral production from the leases in question. As a trespasser

who has willfully removed minerals from real property, Comstock is liable to the owner for the full value of the minerals at the time it converted them to its use. *United States v. Wyoming*, 331 U.S. 440, 458 (1947)("…one who 'willfully' or 'in bad faith' trespasses on the land of another, and removes minerals is liable to the owner for their full value…."); *Brown v. Lundell*, 162 Tex. 84, 87, 344 S.W.2d 863, 866 (1961)("The rights of the lessor and lessee are reciprocal. If either party exceeds those rights, he is a trespasser.").[5]

As shown in more detail below Comstock is a trespasser because the leases on which it relied were invalid for noncompliance with mandatory statutes and/or because the leases had expired under their own terms. Comstock's claims to the proceeds of production on those leases therefore constitute false claims to the United States.

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[5] *See also Guffey v. Smith,* 237 U. S. 101, 118-19 (1915); *Cage Bros. v. Whiteman,* 139 Tex. 522, 528 (1942); *Houston Prod. Co. v. Mecom Oil Co.,* 62 S. W. 2d 75, 77 (Tex. Comm'n App. 1933 (judgment adopted); *Bender v. Brooks,* 103 Tex. 329, 335-36 (1910); *Moore v. Jet Stream Invs., Ltd.,* 261 S. W. 3d 412, 428-29 (Tex. App. – Texarkana, 2008, pet. denied); *BP Am. Prod. Co. v. Marshall,* 288 S. W. 3d 430, 455 (Tex. App. – San Antonio 2008, petition filed); *Hunt v. HNG Oil Co.,* 791 S. W. 2d 191, 193 (Tex. App.- Corpus Christi, 1990, pet. denied); *Mayfield v. de Benevides,* 693 S. W. 2d 500, 504-06 (Tex. App. – San Antonio 1985, writ ref'd n.r.e); *Sowell v. Nat. Gas Pipeline Co. of Am.,* 604 F. Supp. 371, 381 (N.D. Tex. 1985), *aff'd,* 789 F.2d 1151 (5th Cir. 1986). "In order to administer plaintiff's mineral estate and collect royalties, the government must remove trespassers who take oil or gas illegally. *Cherokee Nation of Oklahoma v. United States,* 21 Ct. Cl. 565, 576 (1990).

III. COMSTOCK WAS A TRESPASSER ON THE RESERVATION.

A. Comstock Was a Trespasser on Reservation Tract 1.

It is undisputed that the 1993 Minerals Agreement covering Tract 1 of the Reservation, on which Comstock drilled and has produced the No. 6 and No. 7 wells, contained a "No Surface Occupancy" ("NSO") provision.[6]

The summary judgment record does not contain one single jot, tittle or iota of evidence that any employee of the federal government – whether or not acting in accordance with, or in violation of, any federal statute – ever signed any piece of paper purporting to modify or amend the 1993 Tract 1 Minerals Agreement to allow the drilling or production of any well on the surface of Tract 1. Moreover, there is not any evidence that Comstock ever even asked any employee of the federal government to sign any such amendment or modification.

The Tract 1 Minerals Agreement was approved and filed in the office of the Bureau of Indian Affairs in Anadarko, Oklahoma. (R.Vol. 10: 6075). Comstock filed its applications for permits to drill the No. 6 and No. 7 Wells with the Bureau of Land Management in Tulsa, Oklahoma, and did not disclose the NSO restriction of the Tract 1 Minerals Agreement in those permit applications. (R. Vol. 11: 6583-

[6] "24. USE OF LEASE PREMISES. 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 or nature." (Record Excerpts, Tab F).

6584). Moreover, none of Comstock's letters to the BLM relating to these wells disclose the NSO provision (R.Vol. 11: 6564, 6566, 6622).

The first page of the BLM drilling permits for the No. 6 and No. 7 wells states in large capital letters"

> **"APPROVAL TO DRILL THE WELL IDENTIFIED ABOVE IS GRANTED SUBJECT TO ALL OF THE GENERAL REQUIREMENTS FOR OIL AND GAS OPERATIONS ON FEDERAL AND INDIAN LEASES, COPY ENCLOSED . . . ."** (Record Excerpts, Tab G).

The first sentence of those General Requirements begins as follows:

> "The operating rights owner or operator, as appropriate, shall comply with applicable laws and regulations, **with the lease terms** * * * *.[7]

Thus the drilling permits were granted only on the condition that Comstock comply with the lease terms – which categorically prohibited any drilling on the surface of Tract 1.

The drilling permits were also granted "subject to" and thus conditioned upon Comstock's compliance with "applicable laws." Comstock cannot and does not deny that those "applicable laws" included IMDA, NEPA and ESA. Comstock cannot deny that there was no compliance with any of those applicable laws.

In addition, the General Requirements specifically mandated that "[a]ny well drilled on restricted Indian land shall be subject to the location requirements specified in the lease and/or Title 25 of the CFR."[8]

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[7] 43 C.F.R. § 3162.1.

The district court did not address any of these governing regulations. While the opinion mentions the drilling permits (Opinion at 4-5), it does not mention that the governing regulations provide as follows:

> "(i) Approval of the Application for Permit to Drill does not warrant or certify that the applicant holds legal or equitable title to the subject lease(s) which would entitle the applicant to conduct drilling operations."[9]

Nowhere in the district court's opinion is there any discussion of the fact that there simply does not exist any amendment of the Tract 1 Minerals Agreement approved by any employee of the government modifying the NSO provision. Nowhere in the opinion is there any discussion of the effect on the drilling permits of the NSO lease terms, the applicable statutes, or the governing regulations.

The courts of appeals for both the District of Columbia and the Ninth Circuit have held that an NSO Lease such as the Tract 1 Minerals Agreement cannot be modified to permit drilling operations without preparation and issuance of a multi-agency Environmental Impact Statement "("EIS") issued in compliance with NEPA. *Sierra Club,* 717 F.2d at 1414-15 (D.C. Cir. 1983); *Conner v. Burford,* 848 F.2d 1441, 1447-48 (9th Cir. 1988); *Bob Marshall Alliance v. Hodel,* 852 F.2d 1223, 1228 (9th Cir. 1988). It is undisputed that no such EIS was issued with respect to either Well No. 6 or Well No. 7.

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[8] 43 C.F.R. § 3162.3 – 1(b) .

[9] 43 C.F.R. § 3162.3 -1 (i).

Apart from the drilling permits, the only document signed by the government mentioned by the district court in its opinion with respect to Tract 1 is a pipeline easement for Well No. 6. (Opinion at 4). At least until this opinion by the district court, no court has ever held – or even suggested or implied -- that a landowner, by granting a right-of-way easement for a pipeline, has granted authority to drill and produce an oil well on his land.

Comstock was a more egregious trespasser on Tract 1 than Relators would have been if they had drilled the wells on that tract. Relators were not parties to a solemn written agreement approved by the United States Government prohibiting them from drilling on Tract 1. Comstock was.

B. Comstock Was A Trespasser on Reservation Tracts 2, 3 and 4.

The leases from the State of Texas on Reservation Tracts 2, 3 and 4 all expired at the end of their primary terms on April 1, 1989 in the absence of actual production. (R.Vol. 9: 5566, 5608, 5654). Unlike some of the other state leases, these leases could not be extended beyond their primary terms by drilling or reworking operations. (R.Vol. 9: 5566-5572, 5608-5614, 5654-5660). But this is irrelevant. Comstock admits that the well claimed to extend these leases was commenced on April 18, 1989, completed on July 3, 1989, and began producing on July 30, 1989." (R.Vol. 10: 6133 at ¶6). Under these facts, without more, the

leases expired by their own terms on April 1, 1989. Comstock does not dispute this.

Comstock relies on the fact that "BSOC [now Comstock] and the Tribe entered into a Lease Extension Agreement dated March 28, 1989," and "[t]he BIA approved the Lease Extension Agreement on March 31, 1989." (R.Vol. 10: 6133 at ¶ 4). On these undisputed facts, the issue for this Court to decide is whether that Lease Extension Agreement was legally valid and effective to extend the State Leases.

If leasing jurisdiction over the Reservation remained with the State of Texas until it conveyed title to the Reservation to the Federal Government effective August 1, 1989 – as both the State of Texas and Relators contend – then the Extension Agreement clearly had no legal effect. That is simply because neither the Tribe nor any agency of the Federal Government had any jurisdiction to grant a new lease or extend an existing lease. Only the State of Texas that issued the original leases and still had leasing jurisdiction could have done that.

1. Leasing Jurisdiction Was Not Transferred To The Federal Government Until August 1, 1989.

On August 29, 1989, Mr. Garry Mauro, the Commissioner of the GLO, wrote to Mr. Thomas L. Carter, Jr., President of Black Stone Oil Company (now Comstock), advising him as follows:

> "As you may already know, the State of Texas has conveyed to the Federal Government all of the land that the State held in trust for the Alabama Coushatta Tribe. This conveyance was made pursuant to Article 5421z-2 of Vernon's Texas Civil Statutes and Title 24 [sic] Section 736 of the United States Code. **The transfer was effective August 1, 1989. From that date forward the management of your mineral leases and easements, as well as the management of all other interests in the transferred land, is under the jurisdiction of the Bureau of Indian Affairs in the United States Department of the Interior.** All future royalty payments should be made as required by the Bureau of Indian Affairs." (R.Vol. 9: 5642-5643) (emphasis added).

The Restoration Act of 1987, 25 U.S.C. §§733-737, was enacted on August 18, 1987. Section 733(a) restored Federal recognition of the Tribe and the trust relationship between the United States and the Tribe. It also provided that Indian laws which were not inconsistent with any provisions contained in the Restoration Act would apply to the Alabama-Coushatta Tribe. Section 733(b) restored to the Tribe and its members all rights and privileges under Federal law.

Section 736(a) and (b) provides:

> (a) Federal Reservation established. 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.
>
> (b) Conveyance of land by State. The Secretary shall –
>
> > (1) accept any offer from the State to convey title to any lands held in trust by the State or the Texas Indian Commission for the benefit of the tribe to the Secretary, and
> >
> > (2) hold such title, **upon conveyance by the tribe,** in trust for the benefit of the tribe." (emphasis added)

Congress could have provided in Section 736(e) as follows:

> "(e) Permanent improvements **and oil and gas leases authorized.** Notwithstanding any provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or other improvements authorized by law, **and execute oil and gas leases and amendments thereto,** on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe."

But Congress did not enact such a provision. Instead, Congress enacted the provision exactly as quoted above **except for the words in bold type.** Congress authorized the Secretary, before legal title to the reservation had been conveyed to him, to make improvements of a specified nature, **but not to issue oil and gas leases or amend existing oil and gas leases.**

By application of the accepted rule of construction that *expressio unius est exclusio alterius,* the expression of those specific powers that were to vest in the Secretary "without regard to whether legal title to such lands had been conveyed to the Secretary by the State" excluded the unexpressed oil and gas leasing power.

It is not proper for the courts to add language to the Restoration Act which Congress decided to exclude. This is especially so here when the Restoration At provides in §733(a) that only laws which are not inconsistent with the Restoration Act shall apply to the Alabama-Coushatta Tribe. The oil and gas leasing power is one of the attributes of title, and always follows the transfer of fee title absent some provision in the transfer document reserving that power to the transferor. Congress

must have been familiar with this basic principle familiar to all lawyers and most lay persons.

In rejecting the general rule of statutory construction, the district court relied on the decision of the Supreme Court in *Oneida Indian Nation of N.Y v. County of Oneida,* 414 U.S. 661 (1974) ("*Oneida I"*). That case involved entirely different issues that support Relators' position, not Comstock's.

Oneida I did not involve any transfer of Indian title from a state to the federal government. Instead, it involved an unlawful transfer of Indian title from the tribe to a state in violation of the INIA. The issue in *Oneida I* was whether the INIA applied to Indian lands in the original thirteen states as to which fee title was never vested in the United States.

The Supreme Court held the INIA did apply to Indian lands in the original thirteen states, so that the Oneida Tribe was entitled to sue in federal court for damages for the rental value of 300,000 acres of land that had been transferred by the tribe to the State of New York in 1788 and 1795 without the consent of the United States as required by the INIA:

> "The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that 'no sale of lands made by any Indians … within the United States, shall be valid as to any person…or to any state…unless same shall be made and duly executed at some public treaty, held under the authority of the United States.' This has remained the policy of the United States to this day. See 25 U.S.C. § 177.

Oneida I, 414 U.S. at 667-8. The Supreme Court also held:

> "Finally, the complaint states a claim under the Nonintercourse Act which puts in statutory form what was or came to be the accepted rule – that the extinguishment of Indian land title required the consent of the United States."

Id. at 678.

These rulings of the Supreme Court in *Oneida I* do not support the district court's construction of the 1987 Restoration Act that oil and gas leasing powers Congress did not grant to the federal government prior to acquisition of title should nevertheless be accorded to it. Instead, these rulings by the Supreme Court support the position of Relators that oil and gas leases on Indian land made in violation of INIA and the other applicable federal statutes "have no validity in law or equity" as the INIA specifically provides, instead of being "valid" notwithstanding violation of federal statutes as the district court ruled.

2. If the Federal Government Did Have Leasing Jurisdiction on April 1, 1989, Then the Lease Extensions Were Invalid for Statutory Non-Compliance.

The Tribe signed the purported Lease Extension Agreement on March 28, 1989, and the BIA approved it two days later on March 31, 1989, one day before the leases on Tracts 2, 3 and 4 expired on April 1, 1989. (Record Excerpts, Tab H).

Thus, if leasing jurisdiction had been vested in the federal government on these dates, it would have been a physical impossibility to have complied with the requirements of the IMDA that "the Secretary must prepare written findings

forming the basis of his intent to approve or disapprove a minerals agreement[10] and provide them to the tribe at least thirty days prior to formal approval or disapproval." 25 U.S.C. §2103(c). And as already explained, "the agreements simply are invalid absent the requisite approval." *Quantum Exploration, Inc. v. Clark,* 780 F.2d 1457, 1459-1460 (9th Cir. 1986).

Similarly, it would have been a physical impossibility, in the two-day period between the Tribe's execution of the purported extension agreement and the BIA approval of it, to prepare an EIS to allow the drilling of Well No. 2 on Tract 3. The preparation of an EIS is a multi-agency process requiring the comments and views of all governmental agencies involved be furnished to the public by publication in the Federal Register.[11]

In the two-day period involved, it also would have been a physical impossibility to obtain the comprehensive biological opinion required by the ESA. 16 U.S.C. § 1536(a). As explained in §II.B, *supra*, the INIA requires that the government consent before a lease can be extended. Since the government cannot consent without compliance with the IMDA, NEPA and the ESA, the government did not consent to the extension of the lease covering Tracts 2, 3 and 4. The lease

[10] The IMDA defines "Minerals Agreement" specifically as including "any amendment, supplement or modification" of a Minerals Agreement. 25 U.S.C. §2102(a).

[11] 42 U.S.C. § 4332(2)(C).

extension was invalid under the INIA, and Comstock was a trespasser on those tracts after March 31, 1989.

C. Comstock Was A Trespasser on Reservation Tracts 2, 5, and 6.

Comstock was a trespasser on these tracts because the 1990 Minerals Agreement had expired or was invalid.

1. The 1990 Minerals Agreement Expired at the End of its Primary Term.

Comstock has admitted that the No. 4 Well on Tract 5 was not producing on September 10, 1993 when the primary term of the 1990 Minerals Agreement ended, and that it did not begin production until September 24, 1993, two weeks after the lease had expired. (R. Vol. 3: 1542 at ¶4).

On this precise fact situation of a well completed but shut in and not producing on the primary term expiration date, the Supreme Court of Texas twice has held that the lease terminated for lack of production. *Gulf Oil Corp. v. Reid,* 337 S.W.2d 267, 272 (Tex. 1960), and *Freeman v. Magnolia Petroleum Co.,* 171 S.W.2d 339, 342 (Tex. 1943). The controlling Texas law in this area remains unchanged. In *Anadarko Petroleum Corp. v. Thompson,* 94 S.W.3d 550, 554 (Tex. 2002), the Texas supreme court again approved the decision in the *Reid* case, ruling that "[i]n Texas, such an habendum clause requires actual production in paying quantities."

Comstock, seeks to avoid termination with two arguments: First it contends that it was engaged in drilling or reworking operations at the time the lease expired. Comstock's second argument, asserted only weeks before the summary judgment motions were heard, is that the lease was extended by its shut-in royalty provision. Neither of these arguments has merit.

a. Reworking Operations.

Comstock cites paragraph 9 of the Minerals Agreement and contends that it was engaged in drilling or reworking the No. 4 Well when the primary term ended. In support of that claim, it quotes the completion reports for that well that contain the following entry for each day from September 3, 1993 through September 12, 1993, including the September 10, 1993 lease expiration date:

> "SI [Shut In]–No Activity. Clearing right-of-way for pipeline. Daily Cost -- $ - 0 - " (R. Vol. 11: 6795).

The daily entry for each day from September 13, 1993 through September 23, 1993 is the same except it does not have any reference to daily cost. (*Id*. 6794-95).

Comstock argues that clearing right-of-way for pipeline constitutes "drilling or reworking" the previously completed Well No. 4 within the meaning of paragraph 9 of the Minerals Agreement. But the only case Comstock cited in support of this argument was *Union Oil Co. v. Ogden,* 278 S.W.2d 246, 249 (Tex.Civ.App. – El Paso 1955, writ ref'd n.r.e.). In *Ogden,* the court of civil appeals held that one of the two leases involved, the Deep Rock lease which had

no shut-in royalty clause, terminated for lack of production on the day the primary term ended. *Id* at 249. The court of appeals held that the other lease involved, the Ogden lease, was maintained in effect not by drilling or reworking operations, but by payment of a shut-in gas royalty as provided in the lease. *Id.* at 248. *Ogden* therefore does not apply, and under Relators' two supreme court decisions, the 1990 Minerals Agreement terminated on its primary term expiration date of September 10, 1993.

b. Shut-In Royalty.

Three weeks before the summary judgment hearing in this case Comstock submitted evidence suggesting that 1990 Minerals Agreement was extended beyond the primary term by the shut-in royalty clause, a ground not urged in Comstock's summary judgment motion or response. (R. Vol. 14: 8750-55). But by its own terms, that provision could not have extended the lease beyond it's primary term.

The shut-in royalty provision provides:

> Notwithstanding anything to the contrary herein contained, it is understood and agreed that **after the expiration of the primary term hereof**, if and while there is a gas well or wells on the leased premises…and such well or wells are shut in, then Lessee may pay Lessor. (R. Vol. 14: 8751)(emphasis added).

From the face of this provision, it is apparent that it applies only if a well is shut in after the expiration of the primary term. The summary judgment evidence

established that that Well No. 4 was had been shut in since at least September 1, 1993, (R. Vol. 11: 6796), which was ten days before the expiration of the primary term. Since the shut-in royalty provision did not extend the lease, it expired on September 10, 1993, and Comstock was a trespasser after that date.

2. There is No Evidence That the 1990 Minerals Agreement Was Made in Compliance With Applicable Federal Statutes.

In addition to the fact that the lease expired on its own terms, it was also invalid for failure to comply with the INIA, IMDA, NEPA or the ESA. Indeed, the summary judgment record is devoid of any proof that the 1990 Mineral Agreement was made in or executed after compliance with any of these statutes. In the district court Comstock contended that it did not have the summary judgment burden to prove compliance and that it did not have access to the documents required to do so. The law and the facts belie both of these arguments.

In *United States v. Wyoming*, 331 U.S. 440, 458 (1947), the Supreme Court held that once the plaintiff establishes the defendant's trespass, it is the defendant's burden to plead and prove that he was acting in good faith. This approach is consistent with Texas state law which provides that the defendant in a trespass action has the burden of proving that he received consent from someone acting on the authority of the landowner to enter the property. *Carr v. Mobile Video Tapes*, 893 S.W.2d 613, 623 (Tex. App.—Corpus Christi 1994, no writ); *Stone Resources*

v. Barnett, 661 S.W.2d 148, 151 (Tex. App.—Houston [1st Dist. 1983, no writ). These principles compel the conclusion that Comstock had the burden of proving that the BIA had authority to execute the Minerals Agreement and that it exercised that authority in accordance with federal statutory requirements. Comstock's failure to do so constitutes a failure to carry its summary judgment burden.

This is especially true here when Comstock had access to all of the documents required to prove compliance. Comstock claimed in the district court that it lacked access to documents relating to the Tribe's communications with the BIA. (R. Vol. 10: 6142 at ¶ 10). But this cannot stand in light of Comstock's agreement with the Tribe settling the declaratory judgment action. That agreement required the Tribe to provide Comstock with all documents, records and data in the Tribe's possession relating to the leases. (R. Vol. 4: 2637-2638)[12]. Since Comstock had both access to the proof and the burden of coming forward with it, the district court should have held that the 1990 Minerals Agreement was invalid for statutory non-compliance.

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[12] In paragraph 9 of the agreement, the Tribe agrees to support Comstock in the *qui tam* litigation and then defines that support as follows:

> Such support includes, but is not limited to, (a)providing truthful and accurate testimony in the Qui Tam litigation, (b) **providing Comstock and/or Kerr-McGee with access to and copies of any and all documents, records, and data that is or may be in the possession custody or control of the Tribe, the Tribal Council, and/or the Tribe's attorneys, consultants, agents, that refer or relate to (i) the Leaes and/or Comstock's and/or Kerr McGee's operations thereon and/or royalty payments thereunder… (**R. Vol. 4: 2637)(emphasis added)

Yet the district court did not deal with any of these issues pertaining to the validity or term of the 1990 Mineral Agreement. Instead, it turned to the original source rule and held that Relators were not an original source of claims pertaining to the validity of the 1990 Minerals agreement. The court also held that the validity of the 1990 Agreement was before the Court merely as defense to Relator's claim that Comstock could not conduct operations under the expired state leases covering Tracts 2 and 5. (Opinion at 9).

The district court's ruling overlooks the fact that the particular claims of the invalidity of the 1990 Minerals Agreement for violation of the INIA, IMDA, NEPA and ESA, and the lack of production at the expiration of its primary term were not "publicly disclosed" by the "Sydow Complaint" which does not even mention the 1990 federal Minerals Agreement. (R. Vol. 1: 89-94). Under the FCA, "the original source independent-knowledge requirement is only triggered if the claims are based on information that is publicly disclosed." *United States ex rel. Grubbs v. Kannegant;* 565 F.3d 180, 194 (5th Cir. 2009); 31 U.S.C. § 3730(e)(4).

In any event since the district court concluded that the validity of the 1990 Mineral Agreement was before the court as a defense to Relators' claims based on Tracts 2 and 5, and since Well No. 4 was drilled on Tract 5, the district court should have considered Relators' Tract 5 arguments. Had it applied correct legal principles to those arguments, it would have recognized that the 1990 agreement

was either invalid or had expired and that Comstock was a trespasser on those tracts.

D. Comstock Was A Trespasser On Reservation Tracts 7, 8, 9 and 10.

The State Leases on Reservation Tracts 7 and 9 were for primary terms that expired on October 22, 1982. (R.Vol. 9: 5784, Vol. 10: 5907). The State Leases on Reservation Tracts 8 and 10 had primary terms that expired on May 6, 1983. (R.Vol. 9: 5841, Vol. 10: 5948). If these leases were maintained in effect beyond their primary terms, they expired no later than the end of June, 1983 because of a cessation of production for more than sixty consecutive days.

It is undisputed that the only well producing on any of these four tracts in 1983 was the Alabama Coushatta Well No. 1-9 (or 19) well located on Tract 9. Relators included in the summary record a certified copy of the Railroad Commission well production records for this well for the year 1983. (R.Vol. 10: 6049). The records show that there was no production of either oil or gas for the five-month period of May, June, July, August and September of 1983, a period of 153 days. (*Id.*)

Each of the four State Leases had as Paragraph 11 a 60-day "cessation of production" provision allowing the lease to continue in effect notwithstanding a cessation of production after the primary term if there was no "cessation of more

than sixty (60) consecutive days." (R.Vol. 9: 5788, 5845; Vol. 10: 5911, 5952, all at ¶ 11).

In *Samano v. Sun Oil Co.,* 621 S.W.2d 580 (Tex. 1981), the lease had a 60-day cessation of production clause, and there was a cessation of production of 73 days after the expiration of the primary term. The Supreme Court of Texas held that "the lease by its express terms automatically terminated." *Id.* at 584.

This Court reached a similar conclusion in *Haby v. Stanolind Oil & Gas Co.,* 228 F.2d 298 (5th Cir. 1955). That case involved a cessation of production after the primary term for nine months because of a field-wide shut-in order by the Railroad Commission. The lease had a 60-day cessation of production clause. This Court held that the lease terminated automatically after cessation of production for sixty days. This Court also noted that "forfeiture has no application to the facts of this case, for there was no forfeiture; there was nothing to be forfeited, because the lease by its very terms had ceased to exist." *Id.* at 305.

The record in this case contains ratifications of these leases dated November 17, 1989 and signed on November 27, 1989, when the parties agree oil and gas leasing power was vested in the federal government. (R.Vol. 11: 6551-53). The record also contains a letter from the BIA stating that "the leases are considered to be active leases." (R.Vol. 11: 6559).

But there is nothing whatever in the record to indicate that any ratification of any of these leases was made in compliance with any of the federal statutes involved. Indeed, the BIA appears to have approved them eighteen days after their execution. All the federal case authority cited above is equally applicable to the purported ratification of the leases on Tracts 7, 8, 9 and 10. The ratification was not executed in compliance with those statutes and is therefore not valid.

Even if the ratifications were valid, by their own terms, they do not survive the 60-day cessation of production in 1983. The last line of the ratification provides that it is dated November 17, 1989. It provides further, however, that "for all purposes, this instrument shall be effective as of October 15, 1982." (R. Vol. 11: 6553). Because the ratification went into effect on October 15, 1982 before the Tract 7 and 9 leases expired on October 22, 1982, it does not save the leases from expiring at the end of their primary term. Further, because the ratification ratifies the leases in accordance with their original terms, (*Id.* at 6552), it likewise fails from the 153-day cessation of production in 1983. The ratification by its own terms does not save the leases, making Comstock a trespasser from at least 1983 forward.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON INTENT.

In addition to granting summary judgment that Defendants were not trespassers on the reservation, the district court also granted summary judgment for

Defendants on the issue of intent. (Opinion at 24-25). This Court has recognized on numerous occasions that issues of intent are best resolved by the trier of fact and not in summary proceedings. Thus, in *D&J Tire Inc. v. Hercules Tire & Rubber Co.,* 598 F.3d 200, 205 (5th Cir. 2010), this Court stated that summary judgment is rarely proper in fraud cases because the intent issue so depends on the credibility of the witnesses that it is better left for resolution by the trier of fact. Despite this precautionary admonition, the district court granted summary judgment for the Defendants on the intent question. In doing so, it applied the wrong standard and ignored a substantial amount of summary judgment evidence.

A. The "Guilty Knowledge" Standard Should Not Survive the 1986 Amendments to the False Claims Act.

The district court granted summary judgment for Comstock based upon its finding that Relators failed to demonstrate "guilty knowledge of a purpose on the part of the Defendant to cheat the government." (Opinion at 24-25). In applying this standard the district court relied on this Court's opinion in *United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 231 (5th Cir. 2008). While this Court in *Taylor-Vick* clearly embraced the guilty knowledge standard, Relators would respectfully suggest that it did so erroneously and without regard to the 1986 amendments to the False Claims Act. These amendments in fact repudiated that standard by adding language to the FCA that specified that "no specific intent to defraud is required." 31 U.S.C. §3729(b).

In 1986, Congress amended the False Claims Act and added new provisions expressly defining the terms "knowing" and "knowingly" to mean:

> that a person, with respect to information—
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information
>
> and no specific intent to defraud is required.

In adding these provisions, Congress intended to clarify and reduce the proof requirements for the scienter element of civil False Claims Act cases and to repudiate case law which had set the scienter requirement too high. Thus, the Senate Report on the False Claims Act Amendments stated:

> Compounding the investigative problems are also various litigative hurdles. As a civil remedy designed to make the Government whole for fraud losses, the civil False Claims Act currently provides that the Government need only prove that the defendant knowingly submitted a false claim. However, this standard has been construed by some courts to require the Government prove the defendant had actual knowledge of fraud, and even to establish that the defendant had specific intent to submit the false claim, for example *United States v. Aerodex Inc.,* 469 F.2d 1003 (5th Cir. 1972). The Committee believes this standard is inappropriate in a civil remedy and presently prohibits the filing of many civil actions to recover taxpayer funds lost to fraud.

S. REP. NO. 99-345 at 6 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272.

In spite of 1986 repudiation of a specific intent standard, this Court in *Taylor-Vick*, stated: "It 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.'" *Taylor-Vick*, 513 F.3d at 231. In support of that proposition, this Court cited *United States v. Aerodex Inc.,* 469 F.2d 1003, 1007 (5th Cir. 1972), the same case repudiated by the Senate report for setting the scienter requirement too high. *Id.* [13]

In relying on *Aerodex,* the *Taylor-Vick* Court reinstated the scienter standard which Congress rejected. It also created a confusing standard in this circuit where Relators are not required to prove "a specific intent to defraud" but are required to prove "guilty knowledge on the part of the defendant to cheat the government." These phrases have the same meaning, and this Court's continued application of the "guilty knowledge" standard creates confusion as to whether Relators in this circuit must prove that a Defendant intended to cheat the government.

Since the passage of the 1986 amendments, cases from other jurisdictions have recognized that the 1986 amendments repudiated the prior rule in this circuit which required the Relator to prove "guilty knowledge" on the part of the Defendant. *See United States v. TDC Mgmt. Corp. Inc.,* 24 F.3d 292, 297-98 (D.C. Cir. 1994) (disagreeing with *Aerodex*, and holding it to be inconsistent with the

[13] The *Taylor-Vick* Court also cited a number of other pre-1986 cases as support for "the guilty knowledge" standard including *United States v. Priola,* 272 F.2d 589, 594 (5th Cir. 1959); *United States v. Ridglea State Bank,* 357 F.2d 495, 498 (5th Cir. 1966); and *United States v. Hangar One*, 563 F.2d 1155, 1157 (5th Cir. 1977). *Taylor-Vick,* 513 F.3d at 231-232.

scienter requirements of both the pre-1986 and post-1986 version of the False Claims Act); *Shackleford v. Am. Mgmt. Inc.,* 484 F.Supp. 2d 669, 675 (E.D. Mich. 2007)(declining to apply *Ridglea State Bank* in light of the 1986 amendments which decreased the required level of scienter).

This Court likewise has recognized that the 1986 amendments reduced the scienter requirements, *United States v. Southland Management Corp.,* 288 F.3d 665, 675 (5th Cir. 2002), *vacated by grant of reh'g en banc,* 307 F.3d 352 (5th Cir. 2002) and also applied the amended scienter standard without commenting on the necessity of showing "guilty knowledge." *See, United States ex rel. Longhi v. United States*, 575 F.3d 458, 467-468 (5th Cir. 2009). Still, the *Taylor-Vick's* use of the "guilty knowledge" standard creates confusion, and in this case caused the district court to erroneously apply a higher standard to Relators than required by the statute. (Opinion at 24-25). When the evidence is viewed under the proper standard (or even the improper one), it is clear that fact issues exist regarding intent which require reversal of the district court's summary judgment on that issue.

B. Fact Issues Exist As to Whether Black Stone and Comstock Knew That They Were Claiming Royalties on Expired or Invalid Leases.

Comstock can be liable under the False Claims Act if, in claiming the full lessee's share of production, it was acting in deliberate ignorance or in reckless disregard of the facts relating to the terms or validity of the leases in question. 31 U.S.C. §3729(b). Circumstantial evidence can support a scienter inference.

Financial Acquisition Partners, L.P. v. Blackwell; 440 F3d 278, 287 (5th Cir. 2008), quoted in *Taylor-Vick,* 513 F.3d at 231. For each of the leases at issue here, there is evidence in the record from which a jury could infer that Comstock knew that it was claiming under expired or invalid leases.

1. Tract 1.

The evidence is undisputed that the 1993 Federal Minerals Agreement covering Tract 1 contained a "no surface occupancy" clause which stated that the "Lessee shall not conduct drilling operations or otherwise use the surface of the lands covered by this lease for any operations of any kind or nature." (Record Excerpts, Tab F). As a party to a this agreement Comstock is presumed to be aware of its contents, *Barfield v. Howard M. Smith Co.;* 426 S.W.2d 834, 838-39 (Tex. 1968). Yet, there is no summary judgment evidence that Black Stone or Comstock notified the BLM or the MMS of the NSO clause. Indeed, the summary judgment evidence establishes that the BLM was not aware of the NSO clause until 2000 when it reported it to the BIA. (R.Vol. 10: 6454).

In addition, Comstock offered no document into the summary judgment record which purported to amend the NSO clause in the Minerals Agreement covering Tract 1. Comstock's due diligence officer testified that he never looked for such a document. (Record Excerpts, Tab I at 66). He testified that instead of looking for such a document, he merely relied on the permit to drill issued by the

BLM. (Record Excerpts, Tab I at 68). But the Drilling Permits on their face were subject to all of the "general requirements for oil and gas operations on federal and Indian leases" (Record Excerpts, Tab G), and these requirements at the relevant time mandated that the lessee comply with "all applicable laws and regulations" and "with the lease terms." 43 C.F.R. §3162.1. The regulations likewise explicitly provide that approval of the drilling permit does not warrant or certify that the applicant holds legal or equitable title to the leases which would entitle the applicant to conduct drilling operations. 43 C.F.R. §3162.3-1(i).

Comstock argues that the drilling permits negate intent on Tract 1, but based on these facts a jury could reasonably infer that Comstock ignored lease terms which prohibited drilling and deliberately ignored federal regulations that made clear that the drilling permits issued on Tract 1 did not give Black Stone or Comstock the right to drill if, in fact, drilling was not permitted by the lease. The Court erred in granting summary judgment on the intent question on Tract 1.

2. Tracts 2, 3 and 4.

A jury could likewise reasonably infer that Comstock knew that the lease covering Tracts 2, 3 and 4 expired on March 31, 1989 and that the purported extension by letter dated March 28, 1989 was not validly approved by the BIA. The date of the extension agreement was March 28, 1989, and the agreement shows that it was approved by the BIA on March 31, 1989. (Record Excerpts, Tab

H). Because the IMDA requires the Secretary to issue written findings thirty days in advance of his approval or disapproval of a mineral agreement extension, 25 U.S.C. §2103(c), and because the Secretary's designee issued his approval only three days after the date of the extension agreement, then it only follows that: 1) the Secretary's designee did not comply with the IMDA; 2) that the designee's approval was for that reason not valid; and 3) that the lease was therefore not extended past March 31, 1989.

Here, statutory non-compliance is obvious from the face of the lease extension. Black Stone and the Tribe executed the document on March 28, 1989 (Record Excerpts, Tab I). Since the BIA had not executed the agreement at that time, Black Stone knew that the BIA would have only three days to complete a process which under the IMDA was required to take at least thirty days. A jury could reasonably infer that Comstock recklessly disregarded or chose to remain ignorant of facts pointing to the expiration of the leases covering Tracts 2, 3 and 4 since non-compliance with the IMDA was obvious both to Black Stone and Comstock.

3. Tracts 2, 5 and 6.

As previously explained, the 1990 Mineral Agreement covering these tracts expired at the end of its primary term because the only well on the tracts had been shut in and was not producing in paying quantities at the time the primary term

expired. In the district court Comstock claimed that Minerals Agreement did not terminate but was extended pursuant to the shut-in royalty clause in the agreement. (R. Vol. 14: 8648, 8750-55).

Certainly, a jury could reasonably infer that Comstock knew of the lease's expiration from Black Stone's correspondence with the BIA on the day the primary term was set to expire (R.Vol. 14: 8750-55), and from the fact that Black Stone's own completion report for the primary term expiration date stated that the well was shut in and there was no activity. (R.Vol. 11: 6795). Further, a jury could infer that Comstock knew that the lease expired from the fact that the shut-in royalty provision on which Comstock relies cannot, under its own terms, apply to extend the lease. The shut-in royalty provision applies if the well is shut in after the primary term of the lease. Here, the well had been completed and shut in before September 10, 1993 when the primary expired under the Federal Minerals Agreement. (R.Vol. 11: 6796). As a result, the shut-in royalty provision which applies to wells shut in after the expiration of the primary term could not have applied, and the lease expired at the end of the primary term on September 10, 1993.

Again, these facts would have been readily apparent to Comstock if it had chosen to read the shut-in royalty provision in its own lease. A jury could infer from its reliance on the clause that Comstock willfully misunderstood its import

and chose instead to claim proceeds from the gas well on Tract 5 despite the fact that both the state lease and the federal Minerals Agreement had expired.

4. Tracts 7, 8, 9 and 10.

As previously detailed, the state leases covering Tracts 7,8, 9 and 10 expired or were terminated at various times between 1982 and 1989 for various reasons including: the end of their primary terms, the failure to pay rentals and the cessation of production. In the district court Comstock relied on various documents executed by the Tribe, the Texas General Land Office and the BIA which purported to extend or revive the leases. [14] Only the 1989 resolutions and ratifications purport to revive the leases after they terminated for the cessation of production in May through September of 1993.

The fact that Black Stone sought a Ratification in 1989 is evidence that it knew that these leases had terminated for cessation of production in 1983 and that Black Stone was trying to paper over the termination in order to continue to collect proceeds from the production on these leases. A jury certainly could reach that conclusion from the facts.

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[14] Letter dated April 13, 1983 from Jack Giberson of the GLO stating that the leases on Tracts 7 and 9 which had been forfeited for non-payment of rentals had been reinstated and were part of a pool. (R. Vol. 10: 6251); May 5, 1987 Amendment to Unit Pooling Agreement (*Id.* at 6270); August 28, 1989 GLO Report on Oil & Gas Leases (*Id.* at 6412-6417); November 27, 1989, Tribe Resolution 89-49 (R. Vol. 11: 6549); November 17, 1989 ratification between Black Stone and Tribe (*Id.* at 6551-6553); December 15, 1989 BIA letter acknowledging receipt of ratification. (*Id.* at 6559).

Further, it was obvious from the documents themselves and the BIA approval that the BIA did not comply with the mandates of the IMDA in approving this ratification. The ratification was presented to the BIA by letter dated December 5, 1989, (R. Vo.l. 11 6556-6557), and was approved by the BIA by letter dated December 15, 1989. (R. Vol. 11: 6559). The BIA could not have prepared written findings regarding this ratification and submitted them to the tribe thirty days prior to approval of this ratification. Further, there is no evidence that any kind of EIS had ever been performed with respect to these tracts as required by both the IMDA and NEPA. These facts are apparent from a review of the documents themselves and support the inference that Black Stone and Comstock were deliberately ignoring these lease validity issues in the hope that their status as trespassers would not be prosecuted.

C. Fact Issues Exist As to Whether Comstock Acted Knowingly with Respect to Invalidity of All the Leases As a Result of Statutory Non-Compliance.

In addition to the facts apparent from the documents themselves, testimony from Comstock's due diligence officer, Richard Powers, proved that he never even inquired whether Black Stone had complied with the applicable statutes in executing and extending the leases and mineral agreements at issue. A jury could therefore reasonably conclude that Comstock was aware of the statutory

requirements for the execution of leases on Indian land but deliberately remained ignorant of whether the statutes were followed. Mr. Powers testified:

- That he never asked an attorney whether the leases were executed in accordance with NEPA, (Record Excerpts, Tab I, Deposition pp. 73, l. 21-74, l. 11);
- That he never asked whether an EIS had been done or needed to be done,(Record Excerpts, Tab I, Deposition pp. 73, l. 21-74, l. 11);
- That he does not recall assigning out the task of ascertaining whether an EIS had been prepared, (Record Excerpts, Tab I, Deposition pp. 80, l.23-81, l. 2); and
- That he does not recall making any inquiry as to whether anyone ever prepared a comprehensive biological opinion in connection with any of the leases (Record Excerpts, Tab I, Deposition pp. 101 ll.8-22.).

Mr. Powers' failure to make these most basic inquires supports the conclusion that Comstock simply did not know and did not want to find out whether the leases it acquired from Black Stone were validly executed and were still in effect. A jury hearing this evidence could make this inference, and the district court therefore should not have granted summary judgment for Comstock on the issue of intent.

Because the district court applied an incorrect intent standard and because it ignored summary judgment evidence that would have supported a jury finding of intent under the FCA, this court should reverse the district court's decision to grant summary judgment on the intent issue.

CONCLUSION

The district court granted summary judgment for Comstock that all of the leases were valid and still in effect when in fact the leases were invalid for statutory non-compliance or had terminated under their own terms. Relators request that this Court reverse that judgment and instruct the district court to enter judgment for Relators on the lease validity, lease termination and trespass issues. Specifically, Relators request that this Court should instruct the District Court to:

1. Enter summary judgment that Comstock was a trespasser on Tract 1 for occupying the surface of Tract 1 when the lease prohibited surface occupancy;

2. Enter summary judgment that Comstock was a trespasser on Tracts 3 and 4 for drilling on those tracts after the state lease expired on March 31, 1989 because the attempt to extend the lease was invalid under either Texas or federal law;

3. Enter summary judgment that Comstock was a trespasser on Tracts 2, 5 and 6 on the grounds that the 1990 federal Minerals Agreement did not comply with federal statutory requirements and, in any event, expired at the end of its primary term because there was then no production in paying quantities;

4. Enter summary judgment that Comstock was a trespasser on Tracts 7, 8, 9, and 10 because these leases terminated due to a 153-day cessation of production in 1983 and were not legally revived in 1989.

The district court also erred in granting summary judgment on the issue of scienter in the face of summary evidence establishing that Black Stone and Comstock acted with deliberate indifference to facts regarding the validity of the leases or were recklessly indifferent to those facts. Relators request that this Court should reverse the district court's grant of summary judgment on the scienter issue.

For all these reasons, Relators pray that this Court reverse the judgment of the district court and instruct the district court to enter judgment as described above for Relators on the trespass issues. Alternatively, should this Court find that a fact issue exists with respect to any lease validity and trespass issue, Relators request that issue be submitted to a jury for trial. Relators further request this Court to reverse the judgment for the Defendants on the scienter issue and remand that issue for trial to a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the Brief of Appellants 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 electronic mail to the counsel named below on this 8th day of November, 2010.

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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:

this brief (including Appendix A) contains 13,990 words, excluding the parts of the brief exempted by FED.R.APP.P.32(a)(7)(B)(iii).

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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ECF CERTIFICATION

Counsel for Relators certify to the following:

1. All required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; 2);

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