UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 13-10926

In the Matter of: VALLECITO GAS, L.L.C.,

Debtor

HARVEY LEON MORTON, Trustee

Appellant

v.

JOHN YONKERS; JUDY YONKERS; S. FRANK CULBERSON; TOM KIEVIT; KYLE KIEVIT; KERRY BURLESON; DAVID ESPOSITO; KATHLEEN ESPOSITO; STEPHEN MURDOCH; J.L. BRADSHAW TRUST; LYNETTE ESCH; ESCH FAMILY TRUST; ROLAND MURPHY; LEWIS P. LANE; LYNN C. LANE; GRAHAM HADDOCK; R. DAVE ADAMS; CONNIE ADAMS; RAY KOREN; JUDITH ARMOGIDA; THE ROBERT E. AND ROSALIE T. DETTLE LIVING TRUST; DANIEL MANCHA; THE DICKINSON FAMILY REVOCABLE LIVING TRUST; JOHN WOLZ; MILTON DIGREGORIO; BEVERLY DIGREGORIO; ET AL,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS

THE KIEVIT APPELLEES' BRIEF

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No. 13-10926

In the Matter of: VALLECITO GAS, L.L.C.,

Debtor

HARVEY LEON MORTON, TRUSTEE,

Appellant

v.

JOHN YONKERS, ET AL,

Appellees

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.

1) A complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent or subsidiary corporations, or other legal entities that are, or may be, financially interested in the outcome of the appeal:

- The Kievit Appellees (Defendants):

  John Yonkers
  Judy Yonkers
  S. Frank Culberson
  Tom Kievit
  Kyle Kievit
  Kerry Burleson
  David Esposito
  Kathleen Esposito
  Stephen Murdoch

J.L. Bradshaw Trust
Lynette Esch
Esch Family Trust
Roland Murphy
Lewis P. Lane
Lynn C. Lane
Graham Haddock
R. Dave Adams
Connie Adams
Judith Armogida
The Robert E. and Rosalie T. Dettle Living Trust
Daniel Mancha
The Dickinson Family Revocable Living Trust
John Wolz
Milton DiGregorio
Beverly DiGregorio
Lewis C. Wright, Jr.
Terri Wright
Michael Noonan
Patricia H. Brammer
William M. Brammer Living Trust
R.M. Elliott
Eileen Elliott
James T. Martin, Sr.
Richard V. Halter
Robert L. Romine
Beth Ann Cutsinger
Dennis Price
Donald G. Harney and Connie J. Harney, as Trustees of the Donald G. Harney and Connie J. Harney Joint Living Trust dated September 23, 1997
Ronald Foster
Charles Wall
Marion Wall
Harry E. Diezel
The Virginia Judd Diezel Revocable Living Trust
The Williams Family Living Trust
Matthew Diezel
The Lee Family Revocable Trust
Colt Production Company, LLC

- Other Appellees (Defendants):

  Ray Koren
  Kenneth Neuenschwander
  Anna B. Neuenschwander
  John Joel Pugh
  Stanley M. Plato
  Charles Pringle
  Ann Pringle
  Dennis J. Rambo

- Appellant (Plaintiff):

  Harvey Leon Morton, Chapter 11 Trustee for Vallecito Gas, L.L.C.

- Miscellaneous:

  The Navajo Nation
  Vision Energy, LLC

2) The name of the opposing law firm and counsel (Counsel for Appellant):

Kevin D. McCullough
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/s/ Russell R. Barton
Russell R. Barton
Attorney of record for the
Kievit Appellees

STATEMENT REGARDING ORAL ARGUMENT

The Trustee appeals a District Court decision affirming a Bankruptcy Court Opinion and Judgment regarding the Trustee's attempt to invalidate contractual assignments of overriding royalty interests to the Kievit Appellees and others. Although the Trustee contends that this case involves a matter of first impression, the Trustee's arguments are resolved by the Bankruptcy Court's discretionary ruling excluding "evidence" created by the Trustee for purposes of this lawsuit and by other Bankruptcy Court rulings that were not challenged on appeal. The Trustee also appeals a ruling rejecting his contention that a notice of lis pendens regarding a New Mexico federal court lawsuit provided constructive notice of the later-filed bankruptcy case, even though judgment was entered in the New Mexico lawsuit, and the case was closed, prior to the filing of the bankruptcy proceeding.

Thus, the Kievit Appellees believe that oral argument is not necessary because the facts and legal arguments are adequately presented in the briefs and record, and the Court's decisional process will not be significantly aided by oral argument. FED. R. APP. P. 34(a)(2). However, in the event the Court affords oral argument to the Trustee, the Kievit Appellees also request the opportunity to present oral argument.

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STANDARD OF REVIEW

Appellant's Brief ignores the standard of review.

In a bankruptcy appeal, the court's findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. *Robertson v. Dennis (In re Dennis)*, 330 F.3d 696, 701 (5th Cir. 2003); *Century Indem. Co. v. Nat'l Gypsum Co. Settlement Trust (In re Nat'l Gypsum Co.)*, 208 F.3d 498, 504 (5th Cir.), *cert. denied*, 531 U.S. 871 (2000). A finding of fact is clearly erroneous only if, based on all of the evidence, the appellate court is left with a definite and firm conviction that a mistake has been made. *In re Dennis*, 330 F.3d at 701.

The bankruptcy court's evidentiary rulings are reviewed for an abuse of discretion. *See In re Rapine*, 536 F.3d 512, 518 (5th Cir. 2008), *cert. denied*, 555 U.S. 1138 (2009). Bankruptcy courts have wide latitude and discretion in making evidentiary rulings, and an abuse of discretion "only occurs where no reasonable person could take the view adopted" by the bankruptcy court. *See Fleming & Assoc. v. Newby & Tittle*, 529 F.3d 631, 641 (5th Cir. 2008).

STATEMENT OF THE CASE

Contrary to FED. R. APP. P. 28, the Trustee's Statement of the Case consists of argumentative statements and ad hominem attacks on the Kievit Appellees.

The Trustee appeals an Opinion and Order by the Hon. Sam A. Lindsey, United States Judge for the Northern District of Texas, affirming a Final Judgment entered by the Hon. Barbara J. Houser, Chief Bankruptcy Judge for the United States Bankruptcy Court for Northern District of Texas, in an adversary proceeding arising out of a Chapter 11 bankruptcy styled *In re Vallecito Gas, LLC*. [R. 13-10926.54-.61]. The Trustee sued the Kievit Appellees and others seeking declarations that assignments of overriding royalty interests to the Defendants were void. [R. 13-10926.1058-.1095].

The case was tried on May 9, 2011 and the Bankruptcy Court issued an Opinion on July 19, 2011 ("July 2011 Op."). [R. 13-10926.62-.143]. The Trustee appealed. The District Court issued its Order affirming the Bankruptcy Court, and Judgment was entered, on August 7, 2013 (the "Opinion" or "Op."). [R. 13-10926.4536]. The Trustee filed the notice of appeal on August 27, 2013.

STATEMENT OF FACTS

The District Court noted that the complicated history of this case is contained in the Bankruptcy Court's July 11 Opinion and prior orders referred to in that opinion. [Op., R. 13-10926.4536]. And, despite two courts having held in favor of the Kievit Appellees, the Trustee's Brief continues to contain invective, personal attacks, and false characterizations about the Kievit Appellees. Br. of App. at 4, 5, 40, 41. The Kievit Appellees offer this statement so that the Court will have a full recitation of the material facts.

A. The Kievit Appellees and other ORRI Purchasers.

This case deals with a Tribal Mining Lease (the "Hogback Lease") located on Navajo Nation land in New Mexico. [R. 13-10926.2841-.2842, ¶¶ 3, 7]. The Kievit Appellees are identified in the Certificate of Interested Persons, p. i-ii, s*upra*.[1]

Between June 2007 and January 2009, the Kievit Appellees and other Defendants (collectively, "ORRI Purchasers") received assignments of overriding royalty interests ("ORRI Assignments") from Briggs-Cockerham LLC. [R. 13-10926.2844-.2845, ¶ 26].[2] There were 66 ORRI Assignments from Briggs-

[1]The Kievit Appellees are, for the most part, comprised of the "Kievit Defendants" and the "Wolz Defendants," as they were referred to in the Bankruptcy Court. [R. 13-10926.2840; .4277].

[2]Exhibit A to the Bankruptcy Court Judgment is a summary of the dates of assignment, percentage royalty interest purchased, purchase price paid and the date of recording of each assignment. [R. 13-10926.57-.61].

Cockerham LLC to various Kievit Appellees or other ORRI Purchasers, who collectively paid approximately $4,700,000 for the ORRI Assignments. [R. 13-10926.57-.61, .3356-.3501, .4277].

One of the ORRI Purchasers is John Joel Pugh (referred to as ORRI # 57). [R. 13-10926.60]. Mr. Pugh is not a Kievit Appellee, but was a Defendant. [R. 13-10926.4170]. Mr. Pugh had an arrangement with Briggs-Cockerham, LLC to solicit persons to purchase overriding royalty interests in the Hogback Lease. [R. 13-10926.4176]. The Kievit Appellees and other ORRI Purchasers obtained their ORRI Assignments as a result of being contacted by Mr. Pugh. [R. 13-10926.4176, .4193]. With the exception of the Kievit ORRI Assignment (known as ORRI # 1), which was filed of record on June 7, 2007, Mr. Pugh filed the ORRI Assignments in the San Juan County Deed Records in either March 2008 or April 2009. [R. 13-10926.2843, ¶ 14; .3358-.4277; .4178-.79]. The Kievit Appellees had no notice of the Vallecito bankruptcy, the Plan of Reorganization, the Plan Confirmation hearing, or the Confirmation Order, and did not learn of the bankruptcy until approximately November 2009, long after the ORRI Assignments had been filed of record. [R. 13-10926.2846, ¶¶ 34-36]. The Kievit Appellees are not creditors of the Vallecito bankruptcy and are not bound by the Plan and Confirmation Order. [*Id.*, ¶ 38].

B. The conveyances upon which the ORRI Assignments are based.

On or about March 1, 2006, Vallecito Gas, LLC entered into an agreement with Tiffany Gas Co., LLC to purchase the Hogback Lease. [R. 13-10926.2841, ¶ 3]. The assignment from Tiffany to Vallecito was recorded on May 12, 2006. [R. 13-10926.2842, ¶ 6].

Briggs-Cockerham LLC ("B-C") is the parent company of Vallecito. [R. 13-10926.1354]. Effective May 21, 2006, Vallecito assigned the Hogback Lease to B-C (the "B-C Assignment") and the B-C Assignment was filed of record in April 2007, well before Vallecito filed for bankruptcy. [R. 13-10926.2842, ¶ 11]. This vested title to the Hogback Lease in B-C. [July 2011 Op., R. 13-10926.83; .4104]. The ORRI Purchasers received a copy of the B-C Assignment prior to obtaining their respective ORRI Assignments from B-C. [R. 13-10926.2845-.2846, ¶ 32].

The ORRI Assignments contained a warranty of title and the following provision:

> Assignor [B-C] shall, upon request, deliver to Assignee such ***additional*** documents as may be required by applicable governmental regulations, including, but not limited to, the rules and regulations of the Bureau of Indian Affairs and/or Bureau of Land Management, United States Department of the Interior, in order ***to fully effectuate*** or properly evidence ***the conveyance made herein***, and Assignor ***shall cooperate*** with Assignee in obtaining the timely approval by such agency or agencies of any such documents.

> This Assignment ***shall bind*** and inure to the benefit of Assignor and Assignee and their ***respective successors and assigns***.

[R. 13-10926.3356-.3501(emphasis added)].

The ORRI Assignments are not conditioned on, and contain no deadline for, obtaining approval by the Navajo Nation. [*Id*.]. The Kievit Appellees have not sought approval of their ORRI Assignments by the Navajo Nation because of the uncertainty caused by the Trustee's suit against them in the Vallecito bankruptcy, and because the Trustee unilaterally contacted an attorney with the Navajo Nation Department of Justice while the suit was pending and attempted to cause the Navajo Nation to be predisposed to reject any approval application filed by the Kievit Appellees. [R. 13-10926.4052-.4053, .4057, .4290-.4291]; *see* pp. 11-12, *infra*.

C. The right of the Bureau of Indian Affairs and/or the Navajo Nation to approve transfers of interests in the Hogback Lease.

Because the Hogback Lease is on Navajo Nation land, the Bureau of Indian Affairs ("BIA") or the Navajo Nation, or both, have the statutory right to approve various transfers of interests related to the lease. *See, e.g*., 25 C.F.R. § 211.53. The transfer of the leasehold estate from Vallecito to B-C required BIA approval, but not Navajo Nation approval, because Navajo Nation consent was not expressly required in the B-C Assignment. [July 2011 Op., R. 13-10926.82 n.18]; 25 C.F.R. § 211.53 (requiring BIA approval of transfers of interests in leases, but

conditioning Indian approval on whether it is required in the instrument itself). The Trustee did not challenge this holding in the appeal to the District Court. Conversely, the overriding royalty interests made the subject of the ORRI Assignments are subject to Navajo Nation approval, but do not require BIA approval. [July 2011 Op., R. 13-10926.93]; *see* 18 N.N.C. § 605(A)(6); 25 C.F.R. § 211.53 ("Agreements creating overriding royalties … are hereby authorized and the approval of the Secretary shall not be required with respect thereto ….").

D. The Trustee's inaction after his appointment.

Vallecito filed for bankruptcy on November 14, 2007, and the Trustee was appointed on January 14, 2008. [R. 13-10926.2844, ¶¶ 19, 21]. The Trustee wholly failed to conduct a title search in the San Juan County Deed Records. [R. 13-10926.2845, ¶ 31]. Had he done so, he would have learned of the B-C Assignment and ORRI Assignment # 1.[3] The Trustee also did not file a copy of the Vallecito bankruptcy petition in the deed records. [Op., R. 13-10926.4549; .2846, ¶ 40]. Thus, neither the Kievit Appellees nor other ORRI Purchasers were put on constructive notice of the Vallecito bankruptcy. [July 2011 Op., R. 13-10926.130-.137]. The only document filed by the Trustee in the deed records was a copy of the Confirmation Order, which was filed in January 2010, long after the

[3] As of the Trustee's appointment, ORRI Assignment #1 had been recorded in the Deed Records. [R. 13-10926.57]. At that time, ORRI Assignment #s 2-15 had been executed, but not filed of record. [R. 13-10926.57, .3358-.3385].

ORRI Assignments were made and filed of record. [Op., R. 13-10926.4549-.4550].

Despite his lack of diligence, the Trustee proposed a Plan of Reorganization requiring the Trustee to convey 100% of the working and net revenue interests in the Hogback Lease to Vision Energy, LLC, subject only to the Navajo Nation's lease royalty interest. [R. 13-10926.3308]. The Plan was confirmed by an Order signed on March 17, 2009. [R. 13-10926.3326]. The existence of the ORRI Assignments prevents the Trustee from conveying 100% of the working and net revenue interests, as required by the Plan. The Bankruptcy Court noted that the Trustee put himself in that position by ignoring "storm warnings" in the bankruptcy that, with diligence, would have alerted the Trustee to the existence of transfers of interests in the Hogback Lease, such as the ORRI Assignments. [July 2011 Op., R. 13-10926.116-.120].

E. The Burle Lis Pendens and Lawsuit.

In 2006, Vallecito assigned operating rights interests to Sandia Development and Consulting Service, Inc. and John Burle in the "shallow formations" of the Hogback Lease—from the surface down to the base of the Dakota formation (the "Burle Assignments"). [R. 13-10926.2841-.2842, ¶¶ 4-5; .2893-.2898].[4]

[4] In contrast, the ORRI Assignments relate to the "deep" formations—"from the base of the Entrada formation to the center of the Earth." [R. 13-10926.3356-.3501]. Thus, the ORRI Assignments effectively relate to different property than the Burle Assignments.

In September 2006, the Burles and Sandia sued Vallecito and Michael Briggs in Federal Court in New Mexico (the "Burle Lawsuit"), including a claim for specific performance. [R. 13-10926.2842, ¶ 8; .3592-.3598]. On September 13, 2006, the Burle Plaintiffs filed a notice of lis pendens (the "Burle Lis Pendens") in the San Juan County Deed Records. [R. 13-10926.2842, ¶ 8; .3602]. The ORRI Purchasers did not have actual notice of the Burle Lawsuit. [R. 13-10926.2843, ¶ 17].

In early November 2006, the parties entered into a settlement agreement which gave Vallecito and Michael Briggs two options: (1) assign interests in the Hogback Lease to one or more of the Burle Plaintiffs, or (2) buy back the interests previously assigned from Vallecito to Sandia and Burle. [R. 13-10926.3604-.3609]. Vallecito and Briggs elected option two. [R. 13-10926.3610, .3620]. On March 15, 2007, the Burle Plaintiffs filed a "Motion for Order Determining Enforceability of Settlement Agreement Dated November 2, 2006." [R. 13-10926.3610]. On September 28, 2007, the court granted summary judgment to Vallecito and Briggs, decreed the settlement agreement "valid and enforceable," dismissed the lawsuit, and the case was closed. [R. 13-10926.3614-.3615, .3627]. The judgment was not appealed. [R. 13-10926.2843, ¶ 15].[5] The Burle Lawsuit

[5] The Burle Plaintiffs subsequently filed a motion to reconsider which was struck as deficient and untimely filed. [R. 13-10926.3616-.3617, .3627].

file makes no reference to the Vallecito bankruptcy. [July 2011 Op., R. 13-10926.134].

F. The November 2010 Ruling.

In November 2010, the Bankruptcy Court issued an Opinion denying a motion for partial summary judgment filed by the Trustee against Mr. Pugh. [R. 13-10926.3539-.3577]. The Trustee argued that the B-C Assignment from Vallecito to B-C was void because neither the Navajo Nation nor the BIA had approved it. [R. 13-10926.3547].[6] In the November Ruling, the Bankruptcy Court held that the B-C Assignment was not void, although it may be subsequently avoided if the BIA fails to approve it. [R. 13-10926.3563-.3564]. Likewise, the court also held that the lack of Navajo Nation approval did not render the ORRI Assignment to Mr. Pugh void. [*See* R. 13-10926.3564].

The court also ruled that Vallecito held a contingent reversionary interest in the Hogback Lease because of the possibility that the approvals may not be obtained in the future. [R. 13-10926.3566 ("If the B-C Assignment is not approved by the BIA, title to the Hogback Lease would revert to Vallecito, the last

[6] The Trustee had taken the exact opposite position in a prior adversary proceeding filed by Tiffany. [R. 13-10926.3556 n.10]. In that case, Tiffany claimed that the assignment from Tiffany to Vallecito was void for lack of approval, and the Trustee argued that the assignment was still effective as between the parties despite the lack of approval. [R. 13-10926.3107-.3109]. The Bankruptcy Court stated that the "irony of the Trustee's dramatic shift in position is not lost upon the Court." [July 2011 Op., R. 13-10926.74 n. 14].

party to hold title that had received such approvals.")]. The Trustee did not challenge these rulings in the District Court appeal.

G. The circumstances behind the October 12, 2010 letter from Mr. Johnson of the Navajo Nation Department of Justice.

The Trustee claims the District Court erred in affirming Judge Houser's ruling excluding a letter dated October 12, 2010, purporting to be signed by William A. Johnson, an attorney in the Natural Resources Unit of the Office of the Attorney General, Navajo Nation Department of Justice (the "Letter"). [R. 13-10926.2712-.2713]. The Trustee ignores the facts that occurred prior to the signing of the letter.

The Bankruptcy Court held a hearing on the Trustee's motion for partial summary judgment against Mr. Pugh in September 2010, and Judge Houser inquired about the status of the ORRI Assignments should the Navajo Nation not approve them when they are submitted for approval. [R. 13-10926.3908-.3913]. Six days later, the Trustee's counsel emailed Mr. Johnson regarding a conversation between them about the ORRI Assignments. [R. 13-10926.2730]. There is no evidence as to the contents of the conversation.

The email attached a report purporting to show title into Vallecito, along with a copy of the Plan and Confirmation Order. [*Id.*]. The Trustee's counsel told Mr. Johnson that Briggs had sold ORRIs through B-C and attached a bankruptcy order finding Briggs and B-C in contempt. [*Id.*]. While giving the impression that

the ORRI Purchasers were complicit with Briggs and B-C, the Trustee's counsel did not tell Mr. Johnson that ORRI Purchasers such as the Kievit Appellees had no notice of the bankruptcy and were not bound by the Plan and Confirmation Order. [*Id*.].

The email also falsely states that B-C never had any title—despite the fact that Vallecito assigned the Hogback Lease to B-C. [*Id*.]. The Trustee's counsel also did not tell Mr. Johnson that, under the terms of the ORRI Assignments, the ORRI Purchasers had the right to seek approval from the Navajo Nation and B-C had the obligation to cooperate in obtaining approval, which was binding on B-C's successors and assigns. Judge Houser noted that the Trustee's counsel "may have poisoned the well" with respect to the Kievit Appellees' attempts to obtain Navajo Nation approval in the future. [R. 13-10926.4057].

Thereafter, the Trustee's counsel created and forwarded drafts of the Letter to Mr. Johnson. [R. 13-10926.l2734-.2740]. The top of each draft stated: "TO BE RE-TYPED ON NAVAJO NATION LETTERHEAD." [R. 13-10926.2736, .2739]. Each draft was to be signed by the Director of the Navajo Nation Minerals Department, and not by Mr. Johnson. [*Id*.].

The Trustee filed a motion to determine the admissibility of the Letter. [R. 13-10926.2698]. The Kievit Appellees objected because the letter (1) was not authenticated, and (2) did not meet the hearsay exceptions claimed by the Trustee.

[R. 13-10926.2719-.2728]. The court held the Letter was inadmissible. [R. 13-10926.2850].

H. The July 2011 Opinion and Final Judgment.

At trial, the Trustee sought a declaration that all of the ORRI Assignments were void ab initio for lack of Navajo consent. [July 2011 Op., R. 13-10926.71]. Except as to ORRI # 1, the Trustee also claimed that the ORRI Assignments were avoidable under Bankruptcy Code Sections 362 and 549. [*Id*., R. 13-10926.71-.73].

The Bankruptcy Court held that "the Trustee cannot raise the issue of lack of Navajo Nation consent to the ORRI Assignments as a basis to attack their validity." [July 2011 Op., R. 13-10926.93]. This holding disposed of the Trustee's sole claim against ORRI # 1. [*Id*., R. 13-10926.92-.93 n.24]. Judge Houser further and alternatively held that, even if the Trustee could assert lack of Navajo Nation approval, the ORRI Assignments are valid unless and until consent is not obtained, and the Trustee, as successor to B-C, is bound by the contractual obligation to cooperate and assist the ORRI Purchasers in obtaining approval. [*Id*., R. 13-10926.97-.100]. The Trustee did not challenge this alternative holding in the District Court appeal.

Regarding the remainder of the Trustee's claims, the court held that Section 362 did not apply and the Section 549 claim against ORRI #s 11-27 was barred by

limitations. [*Id*., R. 13-10926.106, .122]. These holdings disposed of the claims against ORRI #s 2-27, and were not appealed. And, Judge Houser held that, although the Trustee could avoid ORRI #s 28-56 and 58-66, they were entitled to a lien under Section 549(c) in the amount of the purchase price paid for their ORRI Assignments. [*Id*., R. 13-10926.137].[7]

The District Court affirmed the Bankruptcy Court, holding that (1) the Bankruptcy Court did not err in excluding the Letter, (2) the issue of whether the Trustee may assert lack of Navajo Nation consent as a basis for invalidating the ORRI Assignments is moot, and (3) the Bankruptcy Court properly rejected the Trustee's lis pendens arguments. [Op., R. 13-10926.4541-.4559].

SUMMARY OF THE ARGUMENT

The District Court did not err in affirming the Bankruptcy Court's Judgment. The Trustee may not invalidate the ORRI Assignments for lack of Navajo Nation approval. First, the District Court did not err in holding that the issue of whether the Trustee may assert lack of Navajo Nation consent is moot. Under the Bankruptcy Court's alternative holding, the ORRI Assignments are valid and the Trustee, as B-C's successor-in-title, is bound by the contractual obligations in the ORRI Assignments, including the obligation to cooperate with the ORRI Purchasers in obtaining Navajo approval. Thus, the ORRI Assignments can only

[7] The court avoided ORRI #57 (held by Mr. Pugh) because he had actual notice of the Vallecito bankruptcy. [*Id*., R. 13-10926.137].

be invalidated by proof that Navajo Nation approval was denied. Since the Trustee took the position that the excluded Letter was the only evidence that the ORRI Assignments would not be approved, the District Court correctly held that the issue of whether the Trustee could assert lack of consent was moot. Second, even if the District Court erred in not deciding the issue, the Bankruptcy Court correctly held that the Trustee cannot raise lack of consent to invalidate the ORRI Assignments because (1) only the Navajo Nation, for whose benefit the statute requiring consent was enacted, can assert lack of consent to invalidate the ORRI Assignments, and (2) a party to the assignment cannot claim the assignment is invalid for lack of approval. Here, the Trustee, as successor-in-title, effectively stands in B-C's shoes and cannot claim that the ORRI Assignments are invalid.

The District Court properly affirmed the Bankruptcy Court's exclusion of the Letter from evidence. Contrary to the Trustee's argument, the Bankruptcy Court excluded the Letter both because it was not authenticated and because it is hearsay. There is no evidence that Mr. Johnson's signature is genuine or that he was authorized by the Navajo Nation Minerals Department to sign the Letter. Moreover, none of the hearsay exceptions claimed by the Trustee apply because the Letter is not trustworthy due to the circumstances under which it was created by the Trustee.

The District Court also properly rejected the Trustee's Lis Pendens arguments. The Burle Lawsuit file contained no reference to the later-filed bankruptcy. Indeed, a final, unappealed judgment was entered in favor of Vallecito and Briggs that disposed of the lawsuit, and the case was closed, prior to Vallecito filing bankruptcy. The District Court also correctly held that a lis pendens notice is case-specific and does not bind a non-party to the outcome of other litigation.

ARGUMENT AND AUTHORITIES

I. The Trustee May Not Invalidate the ORRI Assignments For Lack of Navajo Nation Approval.

Instead of addressing the issues in the logical progression utilized by the District Court, the Trustee first addresses whether it may raise lack of Navajo Nation approval to invalidate the ORRI Assignments. Neither the District Court nor the Bankruptcy Court erred in rejecting the Trustee's arguments.

A. The District Court did not err by not addressing whether the Trustee may raise lack of Navajo Nation approval.

After affirming the evidentiary ruling excluding the Letter, the District Court held that the issue of whether the Trustee may assert lack of Navajo Nation consent is moot because the Trustee acknowledged that, other than the Letter, there is no evidence indicating how the Navajo Nation would respond to a request for approval from the ORRI Purchasers. [Op., R. 13-10926.4546]; *see* Br. of App. at 40. The Trustee argues that he should be able to assert the lack of Navajo Nation

approval to invalidate the ORRI Assignments, even if the Letter is inadmissible. Br. of App. at 18. The Trustee is wrong. The District Court's ruling is correct and easily explained by the Bankruptcy Court's alternative holding.

The gist of the alternative holding is that, as B-C's successor-in-interest, the Trustee is subject to the terms of the ORRI Assignments that were made by B-C. Thus, the Trustee is bound by the contractual obligations in the ORRI Assignments, including the obligation to cooperate with the ORRI Purchasers in obtaining Navajo Nation approval of the overriding royalty interests.

(1) Under the alternative holding, the ORRI Assignments are valid contracts and the ORRI Purchasers' contractual right to seek Navajo Nation consent is binding on the Trustee..

The Trustee recognizes that the Bankruptcy Court made an alternative holding because he relies on a portion of it—taken out of context—to claim that the ORRIs are void because Navajo Nation approval has not been given. Br. of App. at 17-18. However, contrary to the Trustee's cherry-picking, the Bankruptcy Court's complete alternative holding actually reached the same result as its holding that the Trustee could not assert lack of Navajo Nation approval—"the Trustee is not entitled to the declarations he seeks … to the extent he seeks declarations that

the Defendant's interests are void for lack of Navajo Nation consent." [July 2011 Op., R. 13-10926.99-.100, .141].[8]

In the November 2010 Ruling, the court held that the B-C Assignment from Vallecito to B-C was not void, but was valid subject to obtaining BIA approval of the transfer. [R. 13-10926.1822-.1823]. Thus, under the B-C Assignment, B-C held title to the Hogback Lease, subject to Vallecito's contingent, reversionary interest in the event approval was not subsequently obtained. [July 2011 Op., R. 13-10926.83; 4104]. In other words, the court viewed the requirement of either BIA or Navajo Nation approval as a condition subsequent. [*See* R. 13-10926.4293, line 19—.4294, line 5). The Trustee did not challenge any of these holdings, which were re-affirmed in the July 2011 Opinion. [*See* July 2011 Op., R. 13-10926.100].

Since the requirement of Navajo Nation approval is a condition subsequent, the Bankruptcy Court correctly held that the fact that the Navajo Nation had not yet approved the ORRI Assignments did not render the ORRI Assignments void, because no deadline for seeking approval was imposed by either Section 605 or the ORRI Assignments. [*Id.*, R. 13-10926.93-.94]. Thus, in construing Section

[8] If, as argued by the Trustee, the Bankruptcy Court's alternative holding was limited to the court's initial statement that the overriding royalty interests are void because Navajo Nation approval has not been obtained, there would have been no reason for the next six pages of the July 2011 Opinion. Instead, as shown below, that extensive analysis included further explanation of the limited nature of the statement relied on by the Trustee and the court's ultimate conclusion that the Trustee is not entitled to invalidate the ORRI Assignments.

605(6), the court held that "***at the present time***, the interests purportedly conveyed by the ORRI Assignments were not created" because Navajo Nation consent had not been sought. [*Id*., R. 13-10926.100 (emphasis added)]. However, that was not determinative because the ORRI Purchasers have the contractual right under the ORRI Assignments to seek Navajo consent and the Trustee is bound by the contractual obligation to assist them in obtaining approval.

The court correctly distinguished the "[overriding royalty] interests," which "have not yet been created," and are "void" *in the sense of not being fully effectuated* until Navajo consent is obtained, from the ORRI Assignments themselves which are valid and effective contracts unless and until consent is not obtained. [*See id*., R. 13-10926.100,.93]. In the ORRI Assignments, B-C agreed, upon request, to deliver to the ORRI Purchasers such additional documents as may be required to obtain the necessary approval "in order to fully effectuate" the conveyance, and to "cooperate with" the assignees in obtaining the required approval. *See* p. 5-6, *supra*.[9]

Because B-C held title to the Hogback Lease, it was necessary for title to be conveyed by B-C to the Vallecito estate for the Trustee to be able to convey the

[9] In the District Court, the Trustee wrongly argued that the obligation to cooperate and assist was limited to delivering documents that already exist. [R. 13-10926.4480, ¶ 4]. Instead, the obligation requires the delivery of "such *additional* documents as may be required," which clearly contemplates documents that the Navajo Nation may require to be signed in the future. *See* p. 5-6, *supra* (emphasis added).

lease to Vision pursuant to the Plan.[10] The Trustee argued that the Hogback Lease was re-conveyed from B-C to the estate under paragraph 17 of the Confirmation Order. [July 2011 Op., R. 13-10926.97-.98]. The Bankruptcy Court disagreed, holding that paragraph 17 did not "excuse[] the need for a re-conveyance of the Hogback lease back to the Vallecito estate." [*Id*., R. 13-10926.100]. But, the court further held:

> In other words, the Court concludes that even assuming the Trustee is correct, such that the Vallecito estate got the Hogback Lease back on March 17, 2009 [pursuant to paragraph 17], the Vallecito estate got it back subject to what B-C had done with it in the interim–*i.e*., subject to the ORRI Assignments. ***Because the Vallecito estate was, at that point, the successor to B-C, it was therefore bound by the terms of the ORRI Assignments***.

[*Id*., R. 13-10926.99 (emphasis added)].

In the District Court, the Trustee argued that this holding was meaningless because the Bankruptcy Court held that paragraph 17 did not re-convey title to the estate. [R. 13-10926.4481]. The Trustee simply misses the point. Regardless of whether title was already re-conveyed from B-C to the estate, the Trustee, as successor to B-C's title, is subject to and bound by the terms of the ORRI

[10] In the District Court, the Trustee argued that B-C's interest was not reflected in the BIA's title records (which the Trustee claimed are the only relevant records), and that a buyer might be comfortable closing without a reconveyance. [R. 13-10926.4481]. Of course, a buyer's comfort has no bearing on actual title. Here, the Bankruptcy Court's holding that B-C had title, which was not appealed, forecloses the Trustee's argument. [R. 13-10926.83;.4104]. And, the Trustee's claim that the BIA title records are the only relevant title records flies in the face of his Lis Pendens arguments based on a Lis Pendens notice filed in the San Juan County deed records.

Assignments made by the Trustee's predecessor in title. [*See* July 2011 Op., R. 13-10926.100, .141; .4104 ("And while [B-C] held legal title, [it] transferred interest to third parties [the ORRI Purchasers]."].[11] The court's analysis is consistent with the doctrine of estoppel by deed—a successor in title is bound by, and estopped to deny, the terms of its predecessor's conveyances. *See Angell v. Bailey*, 225 S.W.3d 834, 841-42 (Tex. App.—El Paso 2007, no pet.); *Rendleman v. Heinley*, 149 P.3d 1009, 1012-13 (N.M. Ct. App. 2006). The court correctly recognized that the estate could only acquire the title that B-C had.

(2) Because the ORRI Assignments are valid unless consent is not obtained, the District Court did not err by not deciding whether the Trustee may raise lack of Navajo Nation approval.

Thus, because the contractual obligations in the ORRI Assignments are valid and remain in effect, the ORRI Assignments can only be invalidated by proof that Navajo Nation approval was sought and denied. [*See* July 2011 Op., R. 13-10926.93-.94 ("… the fact that the Navajo Nation had not yet approved the ORRI Assignments did not render them void ab initio because there was no evidence in the summary judgment record that Navajo Nation consent could not still be obtained."). Since the Trustee took the position that the excluded Letter was the only evidence allegedly "indicat[ing] how the Navajo Nation would respond to a

[11] Indeed, recognizing that his title is subject to what B-C did with it, the best the Trustee could argue to the District Court was that "the Trustee has not ***yet*** succeeded to" B-C's obligations. [R. 13-10926.4481 (emphasis added)].

request for approval from the ORRI holders," the District Court correctly held that the issue of whether the Trustee could assert lack of consent was moot because the Letter is not admissible. [Op., R. 13-10926.4546]. *See* BLACK'S LAW DICTIONARY 1008 (6th ed. 1990) (an issue is moot when a determination cannot have a practical effect on an existing controversy).[12]

B. Even if the District Court erred in not deciding the issue, the Bankruptcy Court correctly held that the Trustee cannot raise lack of Navajo Nation consent to invalidate the ORRI Assignments.

The Trustee does not cite ***any*** cases to support his argument that he can assert lack of Navajo Nation consent—he only argues that the cases relied on by the Bankruptcy Court are distinguishable. Br. of App. at 19-30. Contrary to the Trustee's arguments, the cases relied on by the Bankruptcy Court set forth well-established principles precluding the Trustee from raising lack of consent to invalidate the ORRI Assignments.

The cases relied on by the Bankruptcy Court establish two primary principles: (1) that only the BIA or the Navajo Nation, for whose benefit the regulation or statute requiring consent was enacted, can assert lack of consent to invalidate the assignment, and (2) a party to the assignment cannot claim the

[12] The Trustee's failure to appeal the alternative holding waives any complaint by the Trustee that the Kievit Appellees' interests are invalid for lack of Navajo consent. *See R.R. Mgmt.Co. v. CFS La. Midstream Co.*, 428 F.3d 214, 220 n. 3 (5th Cir. 2005); *United States v. Perez*, 303 F. App'x. 193, 2008 WL 5231859, at * 2 (5th Cir. Dec. 16, 2008).

assignment is invalid for lack of approval. [July 2011 Op., R. 13-10926.77-.80, .91-.92]. The court correctly applied these principles.

(1) A statutory remedy may only be raised by those for whom the statute was designed to protect.

The Bankruptcy Court held that "no one, other than the BIA or the tribe for whose benefit the regulation requiring tribal and BIA approval was promulgated, could raise the issue [of lack of consent]." [*Id*., R. 13-10926.92]. This holding is supported by this Court's decision in *Chuska Energy Co. v. Mobil Exploration & Producing N. Am., Inc.*, 854 F.2d 727 (5th Cir. 1988).

In *Chuska*, the Court, in holding that a statute requiring Secretary of the Interior approval of Navajo mineral agreements did not support removal to federal court, held "[t]hat the Navajos or the Secretary of the Interior could have standing in federal court to challenge the assignment does not confer a similar right on non-tribal or non-governmental litigants ***whom it was not designed to protect***." *Id*. at 732 (emphasis added). Likewise, in *Hertzel v. Weber*, 283 F. 921, 928 (8th Cir. 1922), the court set out a general rule of statutory and contract construction:

> an act declared to be void by statute which is malum in se or against public policy is utterly void and incapable of ratification, but an act or contract so declared void, which is neither wrong in itself nor against public policy, ***but which has been declared void for the protection or benefit of a certain party, or class of parties, is voidable only and is capable of ratification by the acts or silence of the beneficiary or beneficiaries … Such an act or***

> ***contract is valid until avoided, not void until validated, and it is subject to ratification and estoppel.***

(citing *Westerlund v. Black Bear Mining Co.*, 203 F. 599, 611 (8th Cir. 1913)) (emphasis added). The principle applied in *Chuska* and *Hertzel* has been applied by other courts.[13]

In *San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149, 1150 (9th Cir. 2001), the Development Authority was the lessee of a master lease with owners of land located within the San Xavier Indian Reservation. The Development Authority subleased part of the land to Charles, and subsequently sued to invalidate the sublease based on statutes requiring BIA approval of leases. *Id*. at 1151-52. The district court dismissed the Development Authority's claims and the court of appeals affirmed, holding that the "district court properly cited *Chuska* for the principle that a non-Indian party to a contract does not have the right to employ statutory remedies enacted to protect Indian tribes and their members." *Id*. at 1153.

In *McDivitt*, the Rosebud Sioux Tribe's lease to Sun Prairie required BIA approval. 286 F.3d at 1034. After the Department of the Interior voided the lease, Sun Prairie and the Tribe sued and obtained a permanent injunction, from which

[13] The principle is consistent with the requirement of prudential (or zone-of-interests) standing. *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036 (8th Cir. 2002) ("Prudential limits require a plaintiff to show the grievance arguably falls within the zone of interests protected or regulated by the statutory provision invoked in the suit.").

the Government appealed. *Id.* at 1035.[14] On appeal, the court noted the holdings in *San Xavier* and *Chuska*, and held that the statutes were enacted to protect Indian interests and, thus, a non-tribal or non-governmental party like Sun Prairie could not rely on the statutes. *Id.*

The Trustee argues that the ORRI Assignments are invalid by virtue of Section 605(6) of the Navajo Nation Code, which provides that the Navajo Nation Minerals Department must consent to an overriding royalty interest. Br. of App. at 18-19 (citing 18 N.N.C. § 605(A)(6)). Section 605 is a statute enacted to protect the interests of the Navajo Nation. 18 N.N.C. § 605(B) (stating that assignments shall not be approved if the Navajo "Minerals Department determines that it is not in the best economic interest of the Navajo Nation."); *see also* 18 N.N.C. § 1 (providing that the Navajo Resources Committee may adopt regulations governing mining operations "as in its discretion would be in the best interests of the Navajo Nation and the individual members thereof."). Thus, the Bankruptcy Court correctly held that the Trustee could not raise lack of consent by the Navajo Nation to claim that the ORRI Assignments are invalid. [July 2011 Op., R. 13-10926.92].

(2) A party to the assignment cannot claim the assignment is invalid for lack of approval.

[14] After the entry of the permanent injunction, the Tribe determined that the Department of the Interior's voiding of the lease should be upheld, and the Tribe was re-aligned as an appellant. *Id.*

The second principle relied on by the Bankruptcy Court is that a party to an assignment cannot claim the assignment is invalid for lack of approval. [*Id.*, R. 13-10926.81-.92]. In *Wood v. Cunningham*, 147 P.3d 1132, 1135 (N.M. Ct. App. 2006), the court held that BIA approval was not a condition precedent to formation, or to performance, of the contract because the agreement did not expressly state that its validity or performance was conditioned on BIA approval. Thus, the court held that the "assignee has a right to the assignment as per the agreement and its validity is solely a matter between the assignee and the government." *Id*. at 1136; *see also Ganas v. Tselos*, 11 P.2d 751, 753 (Okla. 1932) ("The plaintiff had a right to the assignment as per agreement, and it would then be a matter between [the assignee] and the Secretary of the Interior as to its approval.").

Hertzel confirms this principle by holding that, even if a contract says that a conveyance is void for the protection or benefit of a certain person or group, the contract is construed to be "valid until avoided" by that person or group. *Hertzel*, 283 F. at 928. Thus, the Bankruptcy Court held that "the Trustee, standing in Vallecito's shoes as assignor," could not assert that the B-C Assignment was void or invalid. [July 2011 Op., R. 13-10926.79].

The Trustee admits it "makes sense that a party to an agreement to assign an oil and gas lease should not be allowed to raise the assignment's lack of approval

to invalidate it." Br. of App. at 20. However, the Trustee ignores the fact that the Vallecito estate (the Trustee) is subject to and bound by B-C's obligation in the ORRI Assignments to assist, and cooperate with, the Kievit Appellees in obtaining Navajo Nation consent. *See* pp. 17-21, *supra*. Thus, the Trustee effectively stands in B-C's shoes regarding the obligation to cooperate and assist the Kievit Appellees and cannot assert that the ORRI Agreements are invalid for lack of Navajo consent.

Ganas and *Hertzel* also stand for another principle that defeats the Trustee's attempt to invalidate the ORRI Assignments—a party who prevents another from seeking the necessary consent cannot turn around and claim the agreement is void or invalid for lack of consent. *Ganas*, 11 P.2d at 753; *Hertzel*, 283 F. at 928; *see also Worley v. Carroll*, 237 P. 120, 123-24 (Okla. 1925). Based on the Trustee's own position in the Bankruptcy Court that the re-conveyance from B-C to the Vallecito estate occurred upon confirmation of the Plan [*see* R. 13-10926.97-.98], the Trustee on behalf of the estate would have already owed the Kievit Appellees the obligation to assist and cooperate in obtaining Navajo consent to the ORRI Assignments at the time the Trustee's counsel contacted Mr. Johnson to obtain the October 12 Letter. The Trustee's counsel deliberately "poisoned the well" to try to prevent the Kievit Appellees from obtaining Navajo approval in the future—the very opposite of assisting and cooperating with the Kievit Appellees to obtain

approval. *See* pp. 11-12, *supra*. The Trustee is not "permitted to take advantage of his own wrong" by claiming that the ORRI Assignments are invalid. *Ganas*, 11 P.2d at 753.

C. The Trustee's arguments are without merit.

The Trustee argues that *Wood* and *Ganas* are distinguishable, and he should be allowed to raise lack of Navajo Nation consent because neither Vallecito nor the Trustee was a party to the ORRI Assignments. Br. of App. at 20. That argument fails for the simple reason that the cases do not hold that *only* the parties to a contract are precluded from raising lack of consent—indeed, the Bankruptcy Court correctly noted that "it would be anomalous to conclude that non-protected third parties, who are strangers to the agreement, have greater rights than the parties to the agreement themselves." [July 2011 Op., R. 13-10926.92].

The Trustee also argues that *Chuska* only stands for the proposition that a statute's consent requirement does not confer federal court standing on anyone but the Navajos or Secretary of the Interior, but that third parties can assert lack of Navajo consent in other courts with jurisdiction. Br. of App. at 23 (citing to *Chuska*'s statement that Mobil's defense of illegality may be raised in state court). The Trustee's argument misconstrues the *Chuska* facts and holding.[15]

[15] The Trustee previously quoted the same language from *Chuska* for the exact principle held by Bankruptcy Court, but now asserts an inconsistent argument. [R. 13-10926.3109].

In that case, Mobil was the assignee and the assignment expressly conditioned Mobil's performance on approval by the government and the Navajos. *Chuska*, 854 F.2d at 729. Thus, *Chuska*'s statement that Mobil could raise its defense in state court simply recognized Mobil's *contractual* right to raise a contractual condition precedent—the court did not hold that Mobil could assert a *statutory* right to claim lack of consent. *Chuska*'s recognition of Mobil's contractual rights in no way contradicts or negates the Court's holding that a non-Indian party to a contract cannot raise statutory remedies enacted to protect Indian tribes. *See San Xavier*, 237 F.3d at 1153.

The Trustee further argues that he should be allowed to raise lack of consent under Navajo Code Section 605 because the cases relied on by the Bankruptcy Court deal with United States statutes enacted to effectuate the fiduciary duty owed by the United States government to Indian Tribes, and not to statutes enacted by the Tribe itself. Br. of App. at 29. That argument gains no traction.

Section 605 itself provides that an assignment of mineral interests shall not be approved if the "[Navajo Nation] Minerals Department determines that it is not in the best economic interest ***of the Navajo Nation***." 18 N.N.C. § 605(B) (emphasis added). Further, Navajo Code Section 1 provides:

> The Resources Committee is authorized to adopt regulations governing all mining operations on Navajo Nation lands, and from time to time amend, alter, modify or repeal such regulations, or any portions thereof, ***as in***

> ***its discretion would be in the best interests of the Navajo Nation and the individual members thereof***.

18 N.N.C. § 1 (emphasis added).[16]

Consistent with United States statutes and regulations, Navajo Code Section 605 is clearly intended to benefit and protect the Navajo People. The legal principle is the same whether dealing with a Navajo Nation statute for the benefit of the Navajo People or a United States statute for the benefit of the Navajo People—a non-Indian party (like the Trustee) cannot rely on a statute enacted to protect Indian interests.

II. The District Court properly affirmed the Bankruptcy Court's exclusion of the Letter from evidence.

The District Court properly affirmed the Bankruptcy Court's ruling excluding the Letter from evidence. Because evidentiary rulings are reviewed for an abuse of discretion, the Trustee must show that "no reasonable person could take the view adopted" by the Bankruptcy Court. *Fleming & Assoc.*, 529 F.3d at 641.

A. The Letter was properly excluded because it is not authenticated.

(1) Evidence of authentication is required.

The District Court correctly held that, under Rule 901, a letter must either be self-authenticating or authenticated by extrinsic evidence. [Op., R. 13-

[16] The purpose of the Resources Committee "is to insure the optimum utilization of all resources of the Navajo nation and to protect the rights, and interests and freedoms of the Navajo Nation and People to such resources." 2 N.N.C. § 693.

10926.4542-.4543 (citing *Recursion Software Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 771 n.8 (N.D. Tex. 2006)). The Letter is not self-authenticated—it does not contain any seal, certification of authenticity, or declaration by a custodian. *See* FED. R. EVID. 902(1)-(4), (11)-(12). And, there is no extrinsic evidence of authentication—there is no evidence of the genuineness of the signature on the Letter or that Mr. Johnson was authorized to sign the Letter for the Navajo Nation Minerals Department. Indeed, the Trustee never argues in his brief that the Letter is authenticated. Br. of App. at 30-34.

(2) The Bankruptcy Court excluded the Letter for lack of authentication.

Instead, the crux of the Trustee's argument, as it was in his Reply Brief in the District Court, is that authenticity was not at issue in the hearing, the Bankruptcy Court never ruled on authenticity, and that the Trustee intended to authenticate the Letter at trial (although he made no such attempt). Br. of App. at 31-32. Indeed, the Trustee asks the Court to remand the case for another trial so that the Bankruptcy Court can *now* rule on authenticity. *Id*. at 33. The Trustee's argument simply is belied by the Record.

The authenticity objection was front and center at the hearing. The Kievit Appellees objected to the admissibility of the Letter because it was not authenticated. [Op., R.. 13-10926.4543; *see* R. 13-10926.2726]. The District Court correctly held that the Bankruptcy Court addressed authentication at length

during the hearing, and rejected the Trustee's arguments, both as to how the Letter could be authenticated at trial, and that the Letter is self-authenticating. [Op., R. 13-10926.4543 (citing R. 3747-49, 3770 [now R. 13-10926.4047-.4049, .4070])].

The District Court correctly concluded that the Bankruptcy Court excluded the Letter on both authentication and hearsay grounds. [*Id*.]. The Bankruptcy Court held:

> I do not believe that the Navajo Nation letter is admissible. I believe that it is hearsay. *And*, at least, I am unpersuaded that any of the hearsay exceptions that are relied upon by the Trustee apply such to make this document self-authenticating, *or* generally admissible over a hearsay objection.

[R. 13-10926.4070 (emphasis added)]. The last phrase was in reference to the Trustee's counsel's argument that he himself could authenticate the Letter at trial, which the court rejected:

> But how do you prove it up? You got this, but you – you can't prove who Mr. Johnson is. I mean, that would all be hearsay, wouldn't it?

[R. 13-10926.4047]. Contrary to the Trustee's argument, the Bankruptcy Court expressly sustained both the hearsay and the authenticity objections.

(3) The District Court properly held that the Trustee failed to appeal the authenticity ruling.

The District Court did not err in holding that the Trustee waived any challenge to the authenticity ruling on appeal. [Op., R. 13-10926.4543-.4544

(citing *Lockamy v. Carillo*, 432 F. App'x 283, 287 (5th Cir. 2011) (per curiam) (citing *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993)). The Trustee's Statement of Issues only addressed the hearsay ruling, but not authenticity.[17] *Zimmerman v. Jenkins (In re GGM, P.C.)*, 165 F.3d 1026, 1032 (5th Cir. 1999). The Trustee said nothing about authenticity until filing his Reply Brief, as noted by the District Court. [Op., R. 13-10926.4543].[18] Indeed, the Trustee's argument that the Bankruptcy Court never ruled on authenticity is inconsistent with the notion that the Statement of Issues was intended to challenge the ruling on authenticity.

In any event, the Bankruptcy Court did not abuse its discretion in sustaining the Kievit Appellees' hearsay objection.

B. The Letter was properly excluded because it is hearsay.

(1) The Letter is not trustworthy.

Trustworthiness is "at the core to admissibility" under the Rule 803 and Rule 807 exceptions. *United States v. Williams*, 661 F.2d 528, 531 (5th Cir. 1981); *see also Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 280 (5th Cir. 1991); FED. R. EVID. 807. The District Court correctly held that "the Letter is not trustworthy

[17] The Statement of Issues apparently was inadvertently omitted from the record below, but is available at Dkt.. No. 197. [*See* R. 13-10926.177]. Likewise, the Trustee's Statement of the Issues to this Court only addresses the hearsay ruling, but not authenticity. [R. 13-10926.4585].

[18] *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.), *cert. denied*, 513 U.S. 868 (1994) ("An appellant abandons all issues not raised and argued in its *initial* brief on appeal.") (emphasis in original).

because of the circumstances under which it was created." [Op., R. 13-10926.4545]. The Trustee's Brief is silent about these circumstances.

The Trustee's counsel drafted the Letter to create evidence supporting his position in the pending litigation. *See* pp. 11-12, *supra*. The District Court correctly held that "[t]his alone makes it untrustworthy." [Op., R. 13-10926.4544].[19] The Bankruptcy Court was overtly skeptical about the trustworthiness of the letter:

> THE COURT: Well, who is this person [referring to Mr. Johnson]? Because I thought it was the Minerals Department that would have to make this decision.
>
> MR. DEWOLF: The Minerals Department —
>
> THE COURT: And, frankly, how can they make a decision until somebody formally applies? This is all just odd to me that they would based upon one side's perspective, they would make a decision like this. That just seems odd to me.
>
> MR. DEWOLF: I think that there's —
>
> THE COURT: They haven't heard from the Ori's. The Ori's haven't asked them to approve anything yet. And unilaterally ***with a little push from***

[19] *See, e.g.*, *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1342 (3d Cir. 2002) (holding a report "may be untrustworthy where it is made in contemplation of litigation."); *Wilander v. McDermott Int'l, Inc.*, 887 F.2d 88, 92 (5th Cir. 1989), *aff'd on other grounds*, 498 U.S. 337 (1991) (Rule 807); *Harris v. Birmingham Bd. of Educ.*, 537 F. Supp. 716, 721 (N.D. Ala. 1982), *aff'd in part, rev'd in part on other grounds*, 712 F.2d 1377 (11th Cir. 1983).

> ***you***, they come down with a pretty harsh decision before anybody has asked them to do anything. That seems, one, very advisory; and, two, odd.

[R. 13-10926.4045-.4046 (emphasis added)].

The Bankruptcy Court was concerned that the statements in the Letter were "merely advisory in nature because Appellees had not" yet requested approval. [Op., R. 13-10926.4545]. *See Smith v. Isuzu Motors Ltd.*, 137 F.3d 859, 862 (5th Cir. 1998); *Koonce v. Quaker Safety Prod. & Mfg. Co.*, 798 F.2d 700, 720 (5th Cir. 1986) (holding that memo outlining future inquiries and opinions on expected results was not admissible). And, as noted by the District Court, although the Trustee "recognized that the Navajo Nation Mineral Department was the entity with authority to approve overriding royalties" (citing R. 3745, 2521 [now 13-10926.4045, .2737]), there is no evidence that Mr. Johnson, as an attorney for the Natural Resources Unit of the Navajo Nation Department of Justice, "had authority to make the statements in the Letter and speak on behalf of the Navajo Nation Mineral Department …." [Op., R. 13-10926.4545].

Moreover, there is no evidence of the content of the conversations between the Trustee's counsel and Mr. Johnson, but the emails from the Trustee's counsel "presented the information and his views in a one-sided manner … for the sole purpose of obtaining a favorable opinion in support of the Trustee's position in the

bankruptcy litigation." [*Id*., R. 13-10926.4544]. Thus, it is doubtful that Mr. Johnson's "review" or "investigation" was anything more than simply relying on the false and misleading information provided by the Trustee. *See* pp. 11-12, *supra*. Lastly, the District Court correctly rejected the Trustee's argument under Rule 807 that he could not obtain the evidence by any other means, because "the Trustee could have sought to depose a representative of the Navajo Nation." [Op., R. 13-10926.4545]. *See* FED. R. CIV. P. 45(a)(2); FED. R. BANK. P. 9016.

The District Court properly affirmed the Bankruptcy Court's evidentiary ruling. The Trustee simply cannot show an abuse of discretion—that "no reasonable person could take the view adopted" by the Bankruptcy Court. *Fleming & Assoc.*, 529 F.3d at 641.

III. The Burle Lis Pendens did not put the ORRI Purchasers[20] on constructive notice of the Vallecito bankruptcy case.

The District Court summarized the Trustee's constructive notice argument: "the ORRI Purchasers had constructive knowledge of the Vallecito bankruptcy case simply because the Burle Lis Pendens and Litigation involved a dispute over title to the Hogback Lease that was ultimately resolved at a later date in a separate bankruptcy proceeding involving Vallecito." [Op., R. 13-10926.4551-.4552]. The

[20] Because of other rulings by the Bankruptcy Court regarding ORRI Assignment #'s 1-27, the District Court correctly recognized that the constructive notice issue only applied to ORRI Assignment #'s 28-66. [Op., R. 13-10926.4549]. *See* p. 13-14, *supra*. As in the District Court, the Trustee's Brief acknowledges the limited applicability of this issue. Br. of App. at 43-44, 46-47.

District Court held that the Trustee's argument was "fundamentally flawed for a number of reasons." [*Id.*, R. 13-10926.4552].

A. The Burle Lis Pendens did not provide constructive notice of the Vallecito bankruptcy case.

In step-by-step fashion, the District Court rejected the Trustee's arguments that the Burle Lis Pendens provided constructive notice of the subsequent commencement of the Vallecito bankruptcy.

(1) The issue is whether the lis pendens provided notice of the bankruptcy, not notice of a title dispute.

First, the District Court, agreeing with Judge Houser, held:

> Section 549(c) deals with the issue of whether a purchaser had knowledge of the commencement of a bankruptcy case, not a title dispute involving the purchaser's grantor. Here, the title dispute in the Burle Litigation did not involve the ORRI Purchasers' grantor B-C, and even if it did, notice of the title dispute and papers filed in the Burle Litigation would not have necessarily caused a reasonable person to inquire as to whether Vallecito subsequently filed for bankruptcy.

[Op., R. 13-10926.4552, .4550-.4551]. Indeed, the Burle Lis Pendens was filed over a year prior to Vallecito filing for bankruptcy. [*Cf.* R. 13-10926.2842, ¶ 8 *with* R. 13-10926.2844, ¶ 19]. Contrary to the Trustee's argument, the Burle Lawsuit file contained no reference to the Vallecito bankruptcy. [July 2011 Op., R. 13-10926.133-.134; *see also* R. 13-10926.3592-.3634].

(2) A lis pendens notice only creates a duty to investigate the pending litigation in which the notice is filed.

Second, the District Court correctly held that the cases relied on by the Trustee (none of which deal with Section 549(c)), do not support the Trustee's argument that a lis pendens purchaser has a duty to investigate "for an indefinite period beyond the litigation in which the lis pendens was filed." [Op., R. 13-10926.4552]. Instead, these cases merely stand for the proposition that the duty to investigate extends only to the *pending* litigation in which the notice is filed, and a subsequent purchaser is bound only by the outcome of that litigation. [*Id*., R. 13-10926.4552-.4554 (discussing *High Mesa Gen. P'ship v. Patterson*, 242 P.3d 430 (N.M. Ct. App. 2010) and *Hamman v. Sw. Gas Pipeline, Inc.*, 821 F.2d 299 (5th Cir.), *vacated in part on other grounds*, 832 F.2d 55 (5th Cir. 1987))].[21]

Thus, the District Court properly held that the Burle Lawsuit file would not have put the ORRI Purchasers on notice that their title was being attacked because a judgment was entered in favor of Vallecito and Briggs that disposed of the Burle Lawsuit, and the case was closed, prior to Vallecito filing for bankruptcy. [Op., R. 13-10926.4554; *see* 13-10926.2843, ¶ 15; .3614; .3627]. The District Court also rejected the Trustee's argument that the subsequent motion for reconsideration filed in the Burle Lawsuit somehow put the ORRI Purchasers on notice that

[21] S*ee also Superior Constr., Inc. v. Linnerooth*, 712 P.2d 1378, 1381 (N.M. 1986) (noting that "[a] notice of lis pendens is purely incidental to the action wherein it is filed, and refers specifically to such action *and has no existence apart from that action*.") (emphasis added).

"further notice outside of the Burle Litigation might be required to resolve the dispute …." [Op., R. 13-10926.4554].[22]

The District Court correctly noted that the motion for reconsideration only sought to enforce the parties' settlement (that only required Briggs and Vallecito to pay money) and, thus, any breach of the settlement agreement would only entitle the Burle Plaintiffs to a money judgment and would not have affected the ORRI Purchasers' title. [*Id*., R. 13-10926.4555].[23] Thus, the District Court did not err in affirming the Bankruptcy Court's conclusion that The Burle Lis Pendens did not provide constructive notice of the Vallecito bankruptcy case.

IV. The Burle Lis Pendens did not bind the ORRI Purchasers to the settlement with the Burle Plaintiffs in the Plan.

The Trustee similarly argues that, under New Mexico lis pendens law, the ORRI Purchasers are bound by the Trustee's settlement with the Burle Plaintiffs in the bankruptcy that was incorporated into the Plan. Br. of App. at 47. The Trustee argues, as he did in the courts below, that he stepped into Briggs's shoes in the Burle Lawsuit, and that the dispute in the Burle Lawsuit "necessarily migrated"

[22] Contrary to the Trustee's speculative argument in the District Court that the motion for reconsideration may have been denied because of the existence of the bankruptcy [*see* R. 13-10926.4493, ¶ 44], the motion was stricken expressly because the case had already been closed. [R. 13-10926.3627].

[23] Indeed, once the parties settled for the payment of money and title was no longer at issue, the Burle Lis Pendens ceased to have any effect. *See Title Guar. & Ins. Co. v. Campbell*, 742 P.2d 8, 13 (N.M. Ct. App. 1987). And, since the Burle Assignments relate to different formations than the ORRI Assignments, they effectively relate to different property. *See* p. 8 n.4, *supra*. Because the lis pendens failed to provide constructive notice of the Vallecito bankruptcy, both the District Court and Bankruptcy Court assumed, without deciding, that the lis pendens remained valid and effective at all times. [Op., R. 13-10926.4550, .4555 n.10].

from New Mexico to the bankruptcy court in Dallas. Br. of App. at 48, 50 n.12.[24] The District Court correctly rejected the Trustee's fanciful arguments.

A. The Trustee ignores the fact that there were two separate Burle settlements.

The fundamental fallacy in the Trustee's argument is that there are two separate Burle settlements—one disposing of the Burle Lawsuit in New Mexico to which the Burle Lis Pendens applied, and a separate settlement in the Plan. The claims in the Burle Lawsuit and, thus, the Burle Lawsuit itself, were dismissed pursuant to an unappealed judgment that was entered (and the case closed) prior to Vallecito filing for bankruptcy. [R. 13-10926.2843, ¶15; .3614-.3615; .3627]. The Trustee could not have stepped into anyone's shoes in the Burle Lawsuit because he was not appointed until January 2008, after the final judgment disposing of the case and every other entry on the Burle Lawsuit docket sheet. [*Cf.* R. 13-10926.2844, ¶ 21 *with* R. 13-10926.3628-.3634].

In contrast, the settlement in the Plan relates only to a breach of contract claim arising out of an alleged breach of the settlement agreement executed in the Burle Lawsuit, not the Burle Lawsuit itself (or the underlying claims in that suit). Indeed, the Trustee's settlement with the Burle Plaintiffs in the Plan did not affect

[24] In the courts below, the Trustee argued that "the Burle Litigation necessarily changed venue from the District Court in New Mexico to the Bankruptcy Court in Dallas …." [Op., R. 13-10926.4556].

the Kievit Appellees' title because it simply was for the payment of money to the Burle Plaintiffs. [R. 13-10926.3305-.3306].

The Trustee's argument actually is that the ORRI Purchasers are bound by *B-C*'s settlement with the Trustee under the terms of the Plan, in which B-C purported to disclaim any interest to the Hogback Lease. Br. of App. at 51-52. [*See* R. 13-10926.3197]. The notion that the Burle Lis Pendens somehow put the ORRI Purchasers on constructive notice of the terms of the Plan containing the Trustee's settlement with some other party strains credulity.

B. The District Court correctly concluded that a lis pendens under New Mexico law does not bind parties to the outcome of different litigation.

The Trustee relies only on *Bragg v. Burlington Res. Oil & Gas Co., LP*, 763 N.W.2d 481 (N.D. 2009) and *Hamman*, 821 F.2d 299. Br. of App. at 49, 51-55. The District Court easily disposed of the Trustee's argument because notices of lis pendens are case specific.

The Bankruptcy Court rejected the Trustee's reliance on *Bragg* "because it stood for the 'unremarkable proposition' that a subsequent purchaser is bound by the outcome of the *pending* litigation in which a lis pendens is filed." [Op., R. 13-10926.4558 (emphasis in original)]. The Bankruptcy Court expressly held that "*Bragg* does *not* stand for the proposition that a non-party may be bound to the results of *other* litigation, even if that other litigation is what ultimately settles, for

once and for all, disputes in prior litigation in which a lis pendens has been filed …." [*Id*. (citing July 2011 Op., R. 13-10926.136-.137 (emphasis in original)]. The District Court agreed and restated its previous conclusion that *Hamman* and *High Mesa* do not support the Trustee's argument that his subsequent settlement with the Burle Plaintiffs in the bankruptcy is binding on the ORRI Purchasers. [Op., R. 13-10926.4559].

The District Court also made short shrift of the Trustee's argument that the Burle Lawsuit and the Vallecito bankruptcy are one and the same proceeding. The Trustee would have the Court believe that the Burle Lawsuit remained on-going despite the entry of a final, unappealed judgment disposing of the suit and closing the file, and that venue was somehow transferred to the Bankruptcy Court. Of course, there is nothing in the Burle Lawsuit file to support that and, although the Trustee and the Burles may have settled their dispute in the bankruptcy, there is not even any evidence that a lawsuit between them was ever filed in the Vallecito bankruptcy. As held by the court, the Trustee's "argument requires a quantum leap of logic that is not supported by the evidence in this case or the law." [*Id*.].

V. Conclusion and Prayer

The Trustee cannot establish that the District Court committed any, much less reversible, error in affirming the Bankruptcy Court's Judgment. The Kievit

Appellees respectfully request that this Court affirm the District Court's Judgment in its entirety.

In the alternative, if the Court reverses either the issue regarding lack of Navajo consent or the ruling on the admissibility of the Letter, the Judgment must still be affirmed because of the Bankruptcy Court's unchallenged alternative holding precluding the Trustee from invalidating the ORRI Assignments because the Trustee is bound by the contractual obligation to assist and cooperate with the Kievit Appellees in seeking Navajo consent. *See* pp. 17-21, *supra*. This disposes of all issues pertaining to ORRI Assignment #s 1-27, leaving only the constructive notice/lis pendens issue applicable to ORRI Assignment #s 28-56 and 58-66.

For all the reasons set forth above, the Kievit Appellees request that the Court affirm the District Court's ruling on the constructive notice/lis pendens issue. The Kievit Appellees further pray for such other and further relief to which they may be entitled.

Respectfully submitted,

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December 5, 2013

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the The Kievit Appellees' Brief was served either by ECF electronic noticing or by first class mail, postage prepaid, to the parties listed below, on this 5th day of December, 2013.

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