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

IN RE:	)	**Case No. 09-10832-m11**
	)	
PLATINUM OIL PROPERTIES, LLC,	)	**Chapter 11**
	)	
Debtor.	)	**Honorable Judge Jacobvitz**
	)	**United States Bankruptcy Judge**

NOTICE OF FILING

PLEASE TAKE NOTICE that the Jicarilla Apache Nation has filed a **Supplemental Memorandum of Law in Support of the Jicarilla Apache Nation's Motion for Summary Judgment and in Opposition to Platinum Oil Properties, LLC's Cross-Motion for Summary Judgment,** a copy of which is attached hereto and hereby served upon you.

Dated: June 15, 2010

/s/ Robert J. Labate
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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury that on June 15, 2010, a copy of the foregoing **Notice of Filing** and **Supplemental Memorandum of Law in Support of the Jicarilla Apache Nation's Motion for Summary Judgment and in Opposition to Platinum Oil Properties, LLC's Cross-Motion for Summary Judgment** were served on all parties consenting to service through the Court's CM/ECF system and by U.S. Mail, postage pre-paid, on June 16, 2010, upon the following counsel of record:

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PLATINUM OIL PROPERTIES, LLC,	)	**Chapter 11**
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Debtor.	)	**Honorable Judge Jacobvitz**
	)	**United States Bankruptcy Judge**

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF THE JICARILLA APACHE NATION'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLATINUM OIL PROPERTIES, LLC'S CROSS-MOTION FOR SUMMARY JUDGMENT

The Jicarilla Apache Nation (the "Nation"), a federally recognized sovereign Indian Nation, by its counsel Holland & Knight LLP, submits this Supplemental Memorandum in Support of the Nation's Motion for Summary Judgment and in Response to the Cross-Motion and Memorandum for Summary Judgment of Platinum Oil Properties, LLC ("Platinum").

PRELIMINARY STATEMENT

On May 25, 2010, at the end of oral argument, the Court asked for submission of supplemental briefing to assist the Court in deciding the pending motions. Specifically, the Court asked the Nation and Platinum to address the interplay (as related to the pending cross-motions for summary judgment) between and among:

1. the Indian Mineral Leasing Act ("IMLA") and the regulations promulgated pursuant to the IMLA;

2. the sovereignty of the Jicarilla Apache Nation; and

3. the Bankruptcy Code and orders entered by a bankruptcy court, including a confirmation order, with a discussion of the effect, if any, of the recent Supreme Court decision in *United States Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367 (2010).

The central dispute herein concerns the application of the IMLA, the Secretary of the Interior's ("Secretary") regulations implementing the IMLA and the Nation's laws with respect to

operating rights under an IMLA lease. As a matter of longstanding federal law, no encumbrance or lease of Indian lands is permitted without federal law authorization because the United States holds legal title to Indian lands in trust for the benefit of the Indian tribe. A lease of Indian lands is only valid if consistent with specific federal law authorization. The IMLA specifically authorizes oil and gas leasing on Indian lands, and defines a lessee's property rights in such a lease. The IMLA regulations set parameters on those property rights.

As discussed below, Congress granted *explicit and exclusive authority* over the regulation of mineral development and production on the Nation's land to the Secretary and to the Nation. Congress exercised its Constitutional authority under Article 1, sec 8 by enacting a law –the IMLA- embracing tribal regulatory authority, thereby grounding the Nation's jurisdiction in both federal law as well the Nation's own inherent sovereignty. Both on its face and through its implementing regulations, the IMLA expressly recognizes the applicability of tribal law, thereby placing tribal law on par with the IMLA's regulations. Additionally, the Supreme Court and the Secretary have repeatedly and expressly recognized that the Nation, as sovereign, possesses the inherent governmental authority to control and regulate oil and gas leasing activity conducted on the Nation's land. In essence, the IMLA and its implementing regulations recognize and confirm the inherent authority of Indian tribes to regulate oil and gas leasing activities on tribal lands. The exercise of inherent tribal authority is concurrent with the Secretary's delegated authority under the IMLA. Therefore, pursuant to the explicit authority granted through the IMLA and its implementing regulations and in recognition of the Nation's inherent authority, Congress established a comprehensive regulatory scheme, administered jointly by the Secretary and Nation, which is applicable all oil and gas production on the Nation's land.

Congress, and Congress alone, has the authority to relinquish the powers and obligations granted to the Secretary and to the Nation under the IMLA, and Congress alone has the ability to constrain tribal sovereignty. Thus, it is well established that a clear expression of Congressional intent is required before a court may override or construe a federal law or statute to override existing requirements set forth in the IMLA and its regulations or to impair tribal sovereignty or tribal self-government. These principles are reinforced by longstanding Congressional policy promoting and fostering tribal sovereignty and tribal self government, as well as by the application of the fundamental rule of construction that ambiguities in federal statutes and regulations must be resolved in favor of the Indian tribes.

An interest in Indian trust land can only be acquired through strict compliance with federal law.[1] *Sangre* concerned a lease to Indian trust lands that was rescinded when it was issued without satisfying applicable standards and procedures. *Sangre*, refutes the idea that compensable property interest can be acquired in trust lands without complying with applicable statutes: "the invalid lease contract between Sangre and the Pueblo vested no property interest in Sangre." *Id* at 895. An interest in a lease on Indian trust land derives its validity solely from the federal law that authorizes the granting of such leases. A claimant that asserts an interest in trust lands but rejects the laws, regulations, procedures, and approvals established to create and define such rights is comparable to a party claiming an interest in land from a grantor while simultaneously challenging the grantor's title. Certainly nothing in the Bankruptcy Code provides a basis for displacing the statutory and regulatory requirements for reviewing, approving, and granting any interest in an IMLA lease. Compliance with the IMLA, its implementing regulations and tribal law are required by and made part of the lease so the debtor must act in accordance and fully comply with the IMLA statute and its regulations, both of

[1] *Sangre De Cristo Development Company, Inc., v. U.S.*, 932 F.2d 891 (10th Cir. 1991) ("Sangre").

which expressly recognize tribal law regulations of IMLA leases. Otherwise, the debtor is seeking property rights outside the limits of federal law, and therefore outside the bounds of a bankruptcy court's authority to confirm such rights. In other words, the IMLA creates the exclusive authority for the lease, defines the rights thereunder, and the debtor must accept the burden of compliance with the IMLA when it seeks to assume the leasing rights authorized by that law. Thus, in order for the debtor to sustain its argument that a bankruptcy court can preempt or override the regulatory scheme created by the IMLA and its implementing regulations and by the Nation's Code, it must find a clear expression of Congressional intent. Given that nothing in the Code § 365, or elsewhere in the Bankruptcy Code, contains a clear expression of Congressional intent to allow such preemption of the IMLA and the Nation's Code such preemption is not permitted. Moreover, no provision of Golden Oil Plan or Confirmation Order attempts to override the IMLA or the Tribal Code. To the contrary, each document requires execution of the Nation's forms necessary to effect a transfer of any rights such as the following:

> **7.2 Authority to Sign Title Transfer Documents on Behalf of Chace.**
>
> On the date the Confirmation Order is entered, the Debtor or Reorganized Debtor may sign the documents necessary to effectuate the transfer of assets under the 1991 asset purchase agreement between Chace and the Debtor, specifically including forms **required by** the Jicarilla Apache Nation, even though Chace Oil Company may no longer exist. The Debtor and Reorganized Debtor shall incur no liability for signing these required forms, or actions taken in reliance thereof.

In re Golden Oil Co., Third Amended and Restated Plan of Re-organization, Dkt. 224 (03-36974) (S.D. Tex. April 23, 2004)

This case falls squarely within relevant Supreme Court precedents protecting and upholding the sovereignty of the Nation. No clear expression of Congressional intent exists so as to allow Platinum to disregard the IMLA and the Nation's Code. Thus, Platinum's attempt to

convince the Court that the Golden Oil bankruptcy proceeding, by implication, preempted or supplanted the IMLA regulatory scheme must be rejected because no clear expression of Congressional intent exists to support Platinum's argument. Nor does any provision of the Golden Oil Plan or Confirmation Order provide for preemption of IMLA regulations.

Finally, the Supreme Court's recent decision in *Espinosa* is inapplicable to this case because the Nation does not seek to overturn the Confirmation Order and Plan entered in the Golden Oil case. Rather, the Nation asks this Court to interpret the Golden Oil Plan and Confirmation Order in a manner consistent with the plain meaning of each document and as required by the IMLA and its regulations and the Nation's Code, the rules of federal preemption and the long-standing principles applicable to laws promoting and fostering tribal sovereignty and self-government.

BACKGROUND: TRIBAL SOVEREIGNTY & THE IMLA

A. Indian Nations Possess Inherent Governmental Authority to Regulate within their Territorial Jurisdiction Unless Expressly Divested of Such Authority.

American Indian nations are "self-governing political communities that were formed long before Europeans first settled in North America."[2] Although they accepted "the protection of the United States of America" through treaties,[3] Indian nations retain the sovereign status of "domestic dependent nations,"[4] and continue to "'possess[] attributes of sovereignty over both their members and their territory.'"[5]

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[2] *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). *See also*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-543 (1832) (recognizing that Indians are "a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws").

[3] *See, e.g.*, *Treaty with the Teton*, 1815, Art. 3 (7 Stat. 125), *reprinted in* II KAPPLER'S INDIAN AFFAIRS: LAWS AND TREATIES 112 (1904).

[4] *United States v. Lara*, 541 U.S. 193, 204-205 (2004). *See also, Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

[5] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982), *quoting United States v. Mazurie*, 419 U.S. 544, 557 (1975). *See also*, *Worcester*, 31 U.S. at 557 (1832).

The United States has consistently recognized Indian nations as "distinct, independent political communities, retaining their original natural rights,"[6] including the rights to make treaties, manage their own affairs, and govern themselves.[7] These rights flow not from a delegation of Federal power, but from the inherent, preexisting sovereignty of the Indian nations themselves.[8]

The sovereign political status of Indian nations is expressly recognized in the U.S. Constitution. For example:

> The Indian Commerce Clause provides that "Congress shall have the power to ... regulate Commerce ... with the Indian tribes."[9] This clause recognizes Indian nations as sovereigns with which the United States may engage in commerce and on whose behalf Congress may enact legislation.[10]
>
> The Treaty Making Clause gives the President the "power, by and with the advice and consent of the Senate, to make treaties,"[11] and the Supremacy Clause provides that "all treaties made, and which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[12] Before the Constitution was ratified, the United States entered into numerous treaties with Indian nations.[13] The Supremacy Clause ratifies those treaties as the "supreme Law of the Land," and acknowledges Indian nations as sovereigns with which the United States has diplomatic, nation-to-nation relationships. After ratification of the Constitution, the United States entered into hundreds of treaties with Indian nations,

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[6] *Worcester*, 31 U.S., at 559.
[7] *Lara*, 541 U.S. 193, 204-205, *quoting Cherokee Nation*, 30 U.S., at 16. *See also, Williams v. Lee*, 358 U.S. 217, 220 (1959) (recognizing "the right of reservation Indians to make their own laws and be ruled by them").
[8] *Unites States v. Wheeler*, 435 U.S. 313, 322-324 (1975).
[9] U.S. Const., art. I, § 8, cl. 3.
[10] *See*, *Worcester*, 31 U.S. at 556-557 (recognizing that, "[f]rom the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate.") *See also*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 207 (2005 ed.) (hereafter "COHEN'S HANDBOOK: 2005 EDITION").
[11] U.S. Const., art. I, § 2, cl. 2.
[12] U.S. Const., art. VI, cl. 2.
[13] Treaty with Delawares, 1778, arts. 1-5, 7 Stat. 13 (Sept. 17, 1778); Treaty at Fort Stanwix with the Six Nations of the Iroquois Confederacy, 1784, 7 Stat. 15 (Oct. 22, 1784); Treaty with the Wyandot, etc., 1785, 7 Stat. 16 (Jan. 21, 1785); Treaty of Hopewell with the Cherokee, 1785, 7 Stat. 18 (Nov. 28, 1785); Treaty with the Chocktaw, 1786, 7 Stat. 21 (Jan. 3, 1786); Treaty with the Chickasaw, 1786, 7 Stat. 24 (Jan. 10, 1786); Treaty with the Shawnee, 1786, 7 Stat. 26 (Jan. 31, 1786); Treaty with the Wyandot, etc., 1789, 7 Stat. 28 (Jan. 9, 1789); Treaty with the Six Nations, 1789, 7 Stat. 33 (Jan. 9, 1789).

> most of which were "similar in many respects to international treaties."[14]
>
> The Constitution excludes "Indians not taxed" from apportionment of Representatives in the House of Representatives,[15] and from the Citizenship Clause of the Fourteenth Amendment.[16] These exclusions recognize Indian people as citizens of distinct sovereigns.[17]

The history of Federal-Indian relations confirms the sovereign status of Indian nations. "[F]or much of the Nation's history, treaties, and legislation made pursuant to those treaties, governed relations between the Federal Government and the Indian tribes."[18] Although the Federal government no longer engages in treaty-making with Indian nations,[19] it continues to maintain a government-to-government relationship with Indian nations,[20] and it continues to enact legislation on behalf of Indian nations.

The Federal government has enacted numerous statutes to promote Indian self-governance and self-determination.[21] For example, Congress passed the Indian Mineral Leasing Act in 1938, [22] at issue here. This law was designed to achieve uniformity in mineral leasing laws and to promote tribal self-government and economic development by ensuring the greatest return on tribal

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[14] COHEN'S HANDBOOK: 2005 EDITION 27. *See also*, *id.* at 27-32 (collecting examples).
[15] U.S. Const., art. I, § 2, cl. 3 & amend. 14, § 2.
[16] U.S. Const., amend. 14, § 1. *See*, *Elk v. Wilkins*, 112 U.S. 94, 99-102 (1884) (holding that Indian tribes are "alien nations, distinct political communities, with whom the United States dealt with through treaties and acts of Congress" and Indians are not United States citizens, under the Citizenship Clause of the Fourteenth Amendment, because they are not "completely subject" to political jurisdiction of the United States"). Indians were made citizens of the United States in the 1924 Indian Citizenship Act. Act of June 2, 1924, 43 Stat. 253 (1924).
[17] *See*, COHEN'S HANDBOOK: 2005 EDITION 207.
[18] *Lara*, 541 U.S. at 201, *citing* F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 109-111 (1982 ed.) F. Prucha, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 44-49 (1962). Treaty-making between the United States and Indian nations ended in 1871. *See*, Act of Mar. 3, 1871, § 1 (16 Stat. 544).
[19] Treaty-making between the United States and Indian nations ended in 1871. *See*, Act of Mar. 3, 1871, § 1 (16 Stat. 544).
[20] This relationship has been affirmed in statutes, Executive Orders, and other directives. *See*, *e.g.*, 25 U.S.C. §§ 3601(1), 3701(1); Executive Order 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000); Executive Memorandum, 74 FR 57,881 (Nov. 5, 2009); Executive Memorandum, 59 Fed. Reg. 22,951 (April 29, 1994).
[21] *See*, COHEN'S HANDBOOK: 2005 EDITION 97-113 (collecting and discussing various Indian self-determination statutes enacted in the last half century).
[22] 25 U.S.C. §§ 396a-396g.

minerals.[23] Further, Congress passed the Indian Mineral Development Act in 1982.[24] This law was designed "to further the policy of self-determination," by giving Indian nations greater control over their mineral resources, and "to maximize the financial return tribes can expect for their valuable mineral resources."[25]

Tribal powers of self-government are protected under Federal law. Indian nations retain inherent rights of self-governance over their people and their territory.[26] Chief among them are the right to control tribal lands and natural resources and the right to regulate and tax all persons engaged in mining and other business activities on tribal lands with Indian nations and their members.[27]

The Federal government has "plenary and exclusive authority" over Indian affairs.[28] Thus, the courts have held that Congress has broad power to impose Federal law on Indian nations and their members.[29] This power is subject to specific constitutional limitations,[30] and courts are careful to rely on long-standing canons of statutory construction when they interpret treaties, laws, and regulations. These canons provide, among other things, that "statutes are to be liberally construed in favor of Indians,"[31] and "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous."[32] The Supreme

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[23] S. Rep. No. 75-985, 75th Cong., 1st Sess. 2-3 (1937).
[24] 25 U.S.C. §§ 2101-2108.
[25] S. Rep. No. 97-472, 97th Cong., 2d Sess. 2 (1982).
[26] *See*, *Merrion*, 455 U.S., at 140.
[27] *Id.*, at 137-144.
[28] *Lara*, 541 U.S., at 200.
[29] *Lara*, 541 U.S. at 200, citing *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470-471 (1979). *See also*, *United States v. Kagama* 118 U.S. 375 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
[30] *See, e.g., United States v. Sioux Nation*, 448 U.S. 371, 413 (1980) (takings clause); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1976) (equal protection component of due process clause).
[31] *Montana v. Blackfeet*, 471 U.S. 759, 766 (1985).
[32] COHEN'S HANDBOOK: 2005 EDITION at 120, *citing United States v. Dion*, 476 U.S. 734, 739-40 (1986); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968); and other cases.

Court has also held that, "[r]epeal by implication of an established tradition of [tribal] immunity or self-governance is disfavored."[33]

The Federal government has a "unique trust relationship" with Indian nations,[34] and with it, a "'distinctive obligation of trust'" to protect tribal sovereignty and property.[35] The Federal government manages Indian lands and resources, in a variety of contexts, and in so doing, it abides by strict fiduciary standards of care.[36]

B. Leasing of Indian Lands and Minerals Under the 1938 Indian Mineral Leasing Act.

As part of the history of and trust relationship between the United States and Indian nations, the United States holds legal title to Indian lands in trust for the Indian beneficiary, as such, Federal law exclusively defines these property rights.[37] Among other things, Federal law prohibits the alienation, sale, exchange, transfer or encumbrance of Indian lands without clear Federal authorization.[38] Just as rights to Indian lands may only be acquired by complying with federal law, concomitantly, title to tribal trust property may only be altered by act of Congress..[39] For instance, in western states, the United States holds the title to Indian lands to protect Indian tribes and Indian allottees from the loss of their lands through theft, fraud, taxation, foreclosure or other means.[40] Because Indian lands are held in trust for the Indian beneficiaries, Indian lands may not be alienated or encumbered without the consent of the Federal Government. These

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[33] *Rice v. Rehner*, 463 U.S. 713, 720 (1983).
[34] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).
[35] *See*, United States v. Mitchell, 463 U.S. 206, 225 (1983), *quoting Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). *See also*, *Mitchell*, 463 U.S. at 225-226.
[36] *See, e.g., Mitchell,* 463 U.S. at 226 (recognizing that Federal law establishes fiduciary obligations on the part of the Federal government in the management of Indian timber resources).
[37] *United States v. Noble*, 234 U.S. at 80-81.
[38] The Indian Non-Intercourse Act of 1790 rendered transfers of land by Indian tribes to third parties absolutely void without the approval of the Federal Government. Title 25 U.S.C. sec. 177 provides:

> No purchase, grant, 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 into pursuant to the Constitution....

[39] *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1985).
[40] *Poafybitty v. Skelly Oil Co.,* 390 U.S. 365, 368 (1968) ("restrictions on the Indian's control of his lands are mere incidents of the promises made by the United States in various treaties to protect Indian land").

protections are among the fundamental hallmarks of the historic trust relationship between the United States and Indian nations.

A lease is an encumbrance of Indian lands. Under Federal law, Indian tribes have authority to lease, assign or encumber Indian trust lands only to the extent permitted by Federal statute.[41] Concomitantly, a land, timber, or mineral lease of tribal trust lands is valid under Federal law only if the United States authorizes the lease.[42]

Historically, the law relating to title to the sub-surface mineral estate underlying Indian lands on Indian reservations created by Executive Order (such as the Jicarilla Apache Reservation) was confusing. In 1924, then Attorney General Harlan F. Stone opined that Indian lands set aside by Executive Order could not be leased as public lands because *the governing Indian tribe owned the beneficial interest in the mineral estate*.[43]

The IMLA:

In 1938, Congress enacted the Indian Mineral Leasing Act ("IMLA") to provide uniform Federal standards and procedures for mineral leasing on Indian lands.[44] Federal Courts have explained that: "[T]he United States, ***acting to safeguard the Indians in the conduct of their affairs***, has established a comprehensive statutory and regulatory scheme covering mineral leasing on tribal lands."[45] (Emphasis added).

The IMLA Regulations are set forth in Part 211 of Title 25 of the Code of Federal Regulations. They provide, for example, that no lease in oil and gas wells on Indian trust lands can be granted, and no transfer of record title to such a lease is valid, except pursuant to the

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[41] For example, in *Gray v. Johnson*, 395 F.2d 533, 537 (10th Cir.), *cert. denied*, 392 U.S. 906 (1968) and *Black Hills Institute of Geological Research v. South Dakota School of Mines and Technology*, 12 F.3d 737 (8th Cir.1993), courts invalidated an effort to convey an interest in Indian land not authorized by federal law.
[42] *Id.*
[43] 34 Op. Att'y Gen. 171 (1924).
[44] 25 U.S.C. § 396a-396g.
[45] *See U.S.A. v. 9,345.33 Acres of Land, More or Less, In Cattaraugus County, New York*, 256 F. Supp. 603, 605-608 (W.D.N.Y. 1966) (hereinafter "*Cattaraugus*").[45]

IMLA. [46] Jurisdiction over leases on the Jicarilla Apache Indian Reservation, including the approval of any assignment of record title to the lease, resides with the Bureau of Indian Affairs ("BIA") in the U.S. Department of the Interior.[47] The IMLA provides an established process, as well as administrative law judges, for resolving such disputes.[48]

The basic purpose of the IMLA is to *"maximize tribal revenues from reservation lands."*[49] The IMLA provides that:

> [Tribal lands] may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council ... for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities, that [l]eases for oil and or gas-mining purposes ... shall be offered to the highest responsible qualified bidder at public auction or on sealed bids.[50]

Under the IMLA, the Secretary serves as both the administrator and the trustee of tribal government oil and gas resources. Acting for the Secretary, the respective Superintendent of the BIA must take the Indian tribe's best interests into account when making any decision involving leases on tribal lands, and has broad discretion to consider all factors that may affect tribal interests, including long-term economic interests, conservation of tribal mineral resources, and production.[51] The Secretary's regulations implementing the IMLA explain:

> These regulations are intended to ensure that Indian mineral owners desiring to have their resources developed are assured that

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[46] *See* 25 U.S.C. § 396a-396d; 25 C.F.R. § 211.53. The IMLA Regulations describe, among other things, the authority and responsibilities of certain federal agencies (25 C.F.R. §.211.4-6); procedures for acquisition of an IMLA-governed lease (25 C.F.R. § 211.20-29); procedures related to the payment of royalties (25 C.F.R. § 211.40-43); provisions for the surrender, transfer or assignment of an IMLA-governed lease (25 C.F.R. § 211.51, § 211.53); and procedures for cancellation of leases and penalties for non-compliance with the regulations (25 C.F.R. § 211.54-55). In addition, the regulations provide that "leases, bonds, permits, assignments and other instruments relating to mineral leasing shall be on forms prescribed by the Secretary, that may be obtained from the superintendent or area director. . ." 25 C.F.R. § 211.57.

[47] *See Cross Creek Corp.*, 131 IBLA at 33 n. 2; 25 U.S.C. §§ 1a, 2, 396a and 25 C.F.R. § Part 211.

[48] See 30 C.F.R. 290, et seq.

[49] *Kerr McGee v. Navajo Nation*, 471 U.S. 195, 200 (1985) (emphasis added), *citing* S.Rep. No. 985, 75th Cong., 1st Sess., 2-3 (1937).

[50] *United States v. 9,345.53 Acres of Land, Etc.*, 256 F. Supp. at 605 (quoting 25 U.S.C. sec. 396a-396d) ("*9,4345.53 Acres of Land*").

[51] *Kenai Oil and Gas v. Dept. of Interior*, 671 F.2d 383 (10th Cir. Utah).

> they will be developed in a manner that maximizes their best economic interests and minimizes any adverse environmental or cultural impacts resulting from such development.[52]

Oil and gas leases on Indian lands entered into under the authority of the IMLA, and which violate the IMLA are void.[53]

As discussed more fully below, the IMLA's comprehensive regulatory scheme contemplates and provides for concurrent regulation by the Indian tribal governments along side the federal government, and under certain circumstances, authorizes the Indian tribe to enact laws that supersede the IMLA's implementing regulatory requirements. Courts have determined that in enacting the IMLA, Congress intended to do so for the benefit of the Indian tribes while expressly preserving tribal authority to co-regulate oil and gas leasing activities on tribal lands. Moreover, the statutory regulatory scheme created by the IMLA must be viewed with an understanding that for 220 years, federal law prohibits any encumbrance of Indian trust land or property without clear Federal approval, and, for more than 70 years since the enactment of the IMLA, Congress has expressly and repeatedly sought to foster tribal self-government and to promote tribal sovereignty.

In addition to establishing a comprehensive regulatory scheme, Courts have determined that the IMLA and the promulgation of regulations thereunder create enforceable fiduciary trust duties requiring that the Secretary, acting as trustee, "must not merely meet the minimal requirement of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary."[54] In *Supron*, the Tenth Circuit sitting *en banc* rejected reliance on

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[52] 25 C.F.R. § 211.1(a).

[53] *See 9,4345.53 Acres of Land* at 607-608 ("The leases in question, entered into in violation of the provisions of sections 396a, 396b, 396c, and 396d … are void").

[54] *Jicarilla Apache Tribe v. Supron Energy Corp.* 738 F.2d 1555, 1563 (10th Cir. 1984), on reh'g, 782 F.2d 855 (1986), opinion modified, F.2d 793 1171 (1986) (adopting en banc Judge Seymour's dissent reported at 728 F.2d 1555, 1563) (finding that the Secretary breached fiduciary trust duties owed to the Nation set forth in the IMLA and its regulations to enforce royalty accounting obligations).

administrative law standards in evaluating the Secretary's obligations and duties owed to the Indian tribal mineral owners, specifically noting that the IMLA regulations "stress that the Secretary must act in the best interests of the tribes."[55] The *Supron* court explained:

> When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable" choice as that term is used in administrative law, ***he must choose*** the alternative that is in the best interests of the Indian tribe. In short, he cannot escape his role as trustee by donning the mantle of administrator[.][56]

The Tenth Circuit specifically applied the longstanding rule of statutory construction that any ambiguities in a federal statute should be resolved liberally "in favor of Indians for whose protection these provisions were promulgated" and extended this rule to the interpretation of the regulations.[57]

Therefore, the mandate of the IMLA not only restricts oil and gas lessees who secure leases under this law, but also constrains the Secretary, as trustee and administrator of the leases and the law. There is no authority to disregard the IMLA provisions that define and limit the leases and rights thereunder. The court order at issue in Golden Oil pertained to the facts there presented and included a requirement of compliance with the IMLA, Federal and tribal regulations. Here, Platinum seeks to avoid the law and regulations. That is foreclosed by the IMLA, as discussed below.

DISCUSSION

A. The Interplay of the IMLA, the Nation's Sovereignty, and the Authority of the Court.

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[55] *Id.* at 1565 citing relevant IMLA regulations found at 25 CFR Part 211 noting that "[t]hese regulations detail in exhausting thoroughness the government's management and regulatory responsibilities."
[56] *Id.* at 1567 (emphasis added), citing a principle then recently issued by the Tenth Circuit in *Jicarilla Apache Tribe v. Andrus* , 687 F.2d 1324, 1332 (1982).
[57] *Id.*

An analysis of the interplay of the IMLA, the Nation's Sovereignty (here, as an exercise of the Nation's Legislative Council enacting the Nation's Code governing the regulation of oil and gas activities) and bankruptcy law begins with an understanding of how the IMLA operates in tandem with Tribal Law. As of matter of federal law, the IMLA and its regulations establish a comprehensive regulatory scheme that is jointly administered by the Secretary and Indian tribes. The IMLA and its regulations specifically permit Indian tribes to enact laws that supersede the IMLA's implementing regulatory requirements.

The IMLA's implementing regulations expressly recognize the sovereign authority of the Nation to concurrently regulate alongside the federal government oil and gas mining activities on the Nation's reservation. In particular, Section 211.1 (d) provides:

> Nothing in the regulations in this part is intended to prevent Indian tribes from exercising their lawful governmental authority to regulate the conduct of persons, businesses, operations or mining within their territorial jurisdiction.

Moreover, the IMLA regulations expressly permit a tribe to enact laws to *supersede* these regulatory requirements, as long as such laws do not attempt to supersede applicable federal statutory provisions. Specifically, Section 211.29 provides:

> The regulations in this part may be superseded by the provision of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act .... or by ordinance, resolution, or other action authorized under such constitution, bylaw or charter; Provided, that such tribal law may not supersede the requirements of Federal statutes applicable to Indian mineral leases.

The plain language of the IMLA itself makes clear that Congress intended and in fact recognized and confirmed the authority of tribal law,[58] and therefore Congress rendered tribal law as part of the overall regulatory scheme created by the statute and its regulations.

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[58] *See* 25 U.S.C. § 396b.

As discussed more fully in the Nation's brief supporting its Motion for Summary Judgment, the seminal U.S. Supreme Court case, *Merrion v. Jicarilla Apache Tribe*[59] is controlling on this point. In *Merrion*, certain oil and gas lessees argued, among others, that the Nation's inherent authority to impose a severance tax was preempted by the IMLA because the tribal tax amounted to an additional burden that was "inconsistent with the [IMLA's] regulatory scheme."[60] The Supreme Court squarely rejected this argument, finding that the Congress did not intend to preempt the Nation's power to tax when it enacted the IMLA such that neither the IMLA nor its implementing regulations were designed to or have the effect of preempting the Nation's right to regulate matters related to oil and gas leases of its territory:

> [The IMLA] and the regulations promulgated by the Department of the Interior for its enforcement, establish the procedures to be followed for leasing oil and gas interests on tribal lands. However, the proviso to 25 U.S.C. 396b states that "the foregoing provisions shall in no manner restrict the right of tribes . . . to lease lands for mining purposes . . . in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, [464-475, 476-478], and 479 of this title" (emphasis added). Therefore, this Act does not prohibit the Tribe from imposing a severance tax on petitioners' mining activities pursuant to its Revised Constitution, when both the Revised Constitution and the ordinance authorizing the tax are approved by the Secretary.[61]

The Supreme Court ruled that an Indian tribe's inherent power to tax "is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[62] Clearly, the Nation's authority to enact laws governing the regulation of oil an gas activities on the Nation's lands is similarly an exercise of tribal self-government and territorial management. Like the Nation's inherent authority to tax, upheld by the Supreme Court

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[59] 455 U.S. 130, 102 S. Ct. 894 (1982).
[60] *Id.* at 150.
[61] *Merrion*, 455 U.S. at 150, 152; 102 S. Ct. 894.
[62] *Id.* at 137.

as a "fundamental attribute of sovereignty"[63] which "enables a tribal government to raise revenues for its essential services",[64] the Nation's authority to regulate oil and gas activities, generally, is "necessary to control economic activity within its jurisdiction"[65] and moreover, is in furtherance of a sovereign providing for the general health, safety and welfare of tribal members and others residing and working on Indian lands.

The transcendent importance of tribal sovereignty in the context of the IMLA is reinforced by a recent decision of the Supreme Court, which defines the purpose of the 1938 statute as "foster[ing] tribal self-determination", as follows:

> Prior to enactment of the IMLA, decisions whether to grant mineral leases on Indian land generally rested with the Government. See, *e.g.,* Act of June 30, 1919, ch. 4, § 26, 41 Stat. 31, as amended, 25 U.S.C. § 399; see also *infra,* at 1092-1093 (describing § 399). Indian consent was not required, and leases were sometimes granted over tribal objections. See H.R.Rep. No. 1872, 75th Cong., 3d Sess., 2 (1938); S.Rep. No. 985, 75th Cong., 1st Sess., 2 (1937); 46 Fed.Cl. 217, 230 (2000). The IMLA, designed to advance tribal independence, empowers Tribes to negotiate mining leases themselves, and, as to coal leasing, assigns primarily an approval role to the Secretary.[66]

This principle was strongly reinforced by the BIA when it comprehensively revised the applicable leasing regulations in 1996. In particular, Indian tribes were adamantly opposed to a proposed change in the IMLA regulations that was viewed as undermining tribal authority.

> (9) Several commentators state that the placement of the provisions of Sec. 211.29, from regulations formerly in place, at proposed Sec. 211.1(c) does not: (1) adequately recognize the regulatory authority of tribes; (2) specifically provide that the proposed regulations may be superseded by the provisions of any tribal constitution, bylaw, or ordinance; nor (3) provide the proper platform for the adoption of tribal bylaws, ordinances, and other measures governing assignments, taxation, and other matters of regulation of the Indian mineral estate.

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[63] *Id.* quoting *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 135, 100 S. Ct. 2069 (1980).
[64] *Id.*
[65] *Id.*
[66] *U.S. v. Navajo*, 537 U.S. 488, 494, 123 S.Ct. 1079, 1084-85 (2003).

> Response: In response to this and other comments the regulation in 25 CFR Sec. 211.29 has been reinstated in the same place, with minor revisions for clarification purposes. In addition to the tribal regulatory authority recognized in the new Section 211.1(d) (211.1(c) in the proposed rules), Section 211.29 recognizes that tribes may enact laws which supersede these regulations, but not Federal statutes.
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> Section 211.29. Exemption of Leases and Permits Made by Organized Tribes
> At the suggestion of tribal commentators, the regulation currently found in 25 CFR Sec. 211.29, acknowledging that tribal laws may supersede these regulations, has been retained in this final rule. However, for clarification purposes, a proviso has been added, stating that tribal law may not supersede the requirements of Federal statutes governing Indian mineral leasing, for example, the requirement in 25 U.S.C. Sec. 396a that a tribal lease must be approved by the Secretary of the Interior.[67]

Thus, tribal codes and ordinances are essential attributes of the Nation's sovereignty and right of self governance, because they are necessary tools to raise revenues for governmental operations, including to provide for the health, safety and welfare of tribal members.

As noted above, under the IMLA Tribal codes are on par with the federal regulations and, as such, are not a mere adjunct to the IMLA nor are they merely incorporated by reference into the federal regulatory scheme. Congress expressly provided that, once approved by the Secretary of the Interior, tribal regulations supersede the IMLA regulations as a matter of federal law.

The distinction between incorporation/adjunct into the federal regulations versus superseding them (*i.e.* supplanting otherwise applicable federal regulations) is compelled by the fact that Indian tribes exercise inherent and distinct sovereign authority over their lands, territory and people.

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[67] *See id. at* 494, 123 S.Ct. at 1084-85 (2003).

To be sure, tribal sovereignty is subject to Congressionally-imposed limitation.[68] But Congress alone may impose such limits:

> "The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority [by a treaty], and has done so ever since. If this power is to be taken away from them, it is for Congress to do it."[69]

The clear expression of Congressional intent is, for example, found in 25 C.F.R. § 211.1(d) which specifically provides:

> Nothing in the regulations in this part is intended to prevent Indian tribes from exercising their lawful governmental authority to regulate the conduct of persons, businesses, operations or mining within their territorial jurisdiction.

This provision authorizes the Secretary and the Nation to exercise concurrent jurisdiction over the development of the Nation's land and resources.[70] The Nation's Revised Constitution, which was approved by the Secretary on February 13, 1969, likewise provides that "[t]he tribal council may enact ordinances to govern the development of tribal lands and other resources," Art. XI, § 1(a)(3).

B. The Interplay of the IMLA's Comprehensive Regulation Scheme and the Bankruptcy Code and Orders entered by a Bankrupcty Court, including a Confirmation Order.

Leasing federally protected oil and gas reserves on Indian Reservations is that is it a "creature of Federal statute"[71] and is strictly governed by Federal law and concurrent tribal law. Federal courts may not disregard such framework even where they might do so under otherwise

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[68] *See Merrion* at 149, noting that Congress may limit tribal sovereignty to divest a tribe of its inherent authority ("[We] reiterate here our admonition in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 98 S.Ct. 1670, 1678, 56 L.Ed.2d 106 (1978): 'a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.'").

[69] Williams v. Lee, 458 U.S. 217, 222 (1959).

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

[71] *Merrion* at 1564

do so. For example, the Bankruptcy Court in *In re: Epic Capital*[72] refused to impose an equitable lien in the absence of Secretarial approval because: "The imposition of an equitable lien would conflict with the Federal law requiring *BIA's approval of* ***any*** *lien*." So here too, neither may a Bankruptcy Court create an interest or even construct an equitable interest comparable to a working interest in an IMLA lease. To do so would impose the same 'conflict with the Federal law' -in this case the IMLA- that requires both Secretarial and Tribal approval. In other words, federal courts have long recognized that they may not risk usurping Congressional delegations of *exclusive* authority to grant an interest in Indian lands (*i.e.* the right to extract the valuable oil and gas reserves from Indian lands). Platinum erroneously maintains that these express delegations can be waived, deemed satisfied, displaced, and/or simply ignored whenever a debtor seeks relief under the Bankruptcy Code. Platinum also audaciously asserts that this may be accomplished even if a prior Bankruptcy order does not even expressly call for this result.

In fact, it is only Congress that has the authority to override the obligations and requirements set forth in the IMLA and its implementing regulations. And, through authority delegated by Congress, the Secretary may override or explicitly waive IMLA regulatory requirements, but only if permitted by law and upon a finding that such waiver "is in the best interest of the Indians."[73]

In this case, the Secretary did not expressly waive any IMLA requirements with respect to the transfer of asserted operating rights at issue in this case, nor did the Golden Oil Plan or Confirmation Order seek or order the Secretary to waive the IMLA regulatory requirements. To the contrary, the Golden Oil Plan and Order specifically contemplated and required the

[72] 290 B.R. 514 (2003).
[73] 25 C.F.R. §1.2

parties (Debtor/Golden Oil, prior holder of the operating rights/Chace Oil, and the putuative successor in interest/MLG) to cooperate with each in completing the necessary BIA and Nation's forms, including securing the respective governmental approvals necessary to effectuate the transfer of any rights.

C. The Bankruptcy Code Does Not Preempt the IMLA or the Tribal Code

Platinum has argued that the Golden Oil Court's orders excuse it from complying with the approval requirements of the IMLA and the Tribal Code. Given that not a single provision of the Confirmation Order or the Plan, entered in the Golden Oil Case, attempts to override the IMLA or the Nation's Tribal Code, Platinum cannot prevail unless this Court determines that the Bankruptcy Code, as a matter of law, stays the enforcement of those regulations or otherwise preempts their enforcement. Neither is the case.

First, it is undisputed that a debtor remains obligated to abide by applicable regulations concerning health, safety and general welfare, and the enforcement of such regulations is not stayed by a bankruptcy filing. See 11 U.S.C. § 362(b). For example, in *MidAtlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection,* a bankruptcy trustee sought to use the abandonment power provided for in Section 554(a) of the Bankruptcy Code to enable it to an oil processing facility, "in contravention of state or local laws designed to protect public health or safety." 474 U.S. 494, 502, 106 S.Ct. 755, 760 (1986). The Supreme Court held that the trustee could not do so:

> Congress has repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law. Where the Bankruptcy Code has conferred special powers upon the trustee and where there was no common-law limitation on that power, Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety.

MidAtlantic, 474 U.S. at 502, 106 S.Ct. at 760. Nonbankruptcy law protecting the public's health safety and welfare is given special consideration throughout the bankruptcy code. For example, § 362(b)(4) provides an exception to the automatic stay for "enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power." The IMLA and Tribal codes and ordinances at issue here – which are specifically designed to protect and promote the welfare of the Indian owners and to regulate ownership and operation of mineral leases -- are exactly the type of general welfare regulations that Golden Oil and its purported assignees, MLG and Platinum, remained bound to obey in order to obtain enforceable operating rights.

Second, the filing of a bankruptcy case does not permit a debtor to avoid otherwise applicable non-bankruptcy law governing the scope of its assets and enforceability of its rights and liabilities unless those laws are specifically preempted by the Bankruptcy Code. For example, in *Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F.3d 487 (3d Cir. 1997), the plaintiff sought to assert a tort claim purchased from a bankruptcy trustee. The District Court dismissed Integrated's tort claim, concluding that Integrated lacked standing to pursue the state law claims because its purchase of the claims from a trustee in bankruptcy was void *ab initio* under New Jersey law. *Integrated Solutions,* 124 F.3d at 489.

On appeal, Integrated argued that federal bankruptcy law preempted the New Jersey state law prohibition against assigning pre-judgment tort claims and permitted a bankruptcy trustee to assign tort claims in executing its duties to liquidate and distribute the bankruptcy estate. The essential issue, therefore, was whether Congress intended to permit bankruptcy trustees to dispose of tort claims belonging to the estate in violation of state laws that forbid the assignment of such claims.

The Third Circuit began its analysis by reviewing the preemption doctrine generally and in the bankruptcy context.

> In *In re Roach*, 824 F.2d 1370, 1373-74 (3d Cir.1987), we examined the preemption issue specifically in the bankruptcy context. We began our analysis by noting that under Article I, § 8 of the Constitution, Congress has the power to establish uniform bankruptcy laws throughout the United States and thus, "[w]here Congress has chosen to exercise its authority, contrary provisions of state law must accordingly give way." *Id.* at 1373 (citation and internal quotations omitted). Nonetheless, we immediately made clear that "the usual rule is that congressional intent to pre-empt will not be inferred lightly. ***Pre-emption must be either explicit, or compelled due to an unavoidable conflict between the state law and the federal law.***" *Id.* (citations and internal quotations omitted). Because we are reluctant to assume federal preemption, we noted that any analysis should begin with "the basic assumption that Congress did not intend to displace state law." *Id.* (citations and internal quotations omitted). Relying on these general observations, we said:
>
> > Our task is to ascertain and give effect to congressional intent. However, we must approach that task with the realization that the Bankruptcy Code was written with the expectation that it would be applied in the context of state law and that federal courts are not licensed to disregard interests created by state law when that course is not clearly required to effectuate federal interests.

Integrated Solutions, 124 F.3d at 491-92 (emphasis supplied).

In the context of bankruptcy, the Third Circuit concluded that courts have generally taken a restrained approach to federal preemption. In support of that conclusion, the Third Circuit quoted from *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 917-18 (1979):

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

Butner at 55, 99 S.Ct. at 918 (citations and internal quotations omitted).

Examining decisions of courts that have applied *Butner*, the Third Circuit reasoned that a bankruptcy trustee is subject to the same limitations imposed on the Debtor under applicable non-bankruptcy law.

> Courts applying the *Butner* analysis have relied on its holding to conclude that "once a property interest has passed to the estate, it is subject to the same limitations imposed upon the debtor by applicable nonbankruptcy law." *In re American Freight Sys., Inc.*, 179 B.R. 952, 960 (Bankr.D.Kan.1995); *see also In re Transcon Lines,* 58 F.3d 1432, 1438 (9th Cir.1995) (noting that "nonbankruptcy law defines the nature, scope, and extent of the property rights that come into the hands of the bankruptcy estate"), cert. denied sub nom. *Gumport v. Sterling Press, Inc.*, 516 U.S. 1146, 116 S.Ct. 1016, 134 L.Ed.2d 96 (1996); *In re Sanders*, 969 F.2d 591, 593 (7th Cir.1992) ("[A] bankruptcy trustee succeeds only to the title and rights in property that the debtor had at the time she filed the bankruptcy petition."); *In re FCX, Inc.*, 853 F.2d 1149, 1153 (4th Cir.1988) ("The estate under § 541(a) succeeds only to those interests that the debtor had in property prior to commencement of the bankruptcy case."); *In re Bishop College,* 151 B.R. 394, 398 (Bankr.N.D.Tex.1993) (holding that a bankrupt's estate receives trust assets "subject to any restrictions imposed by state law, pre-petition").
>
> These cases stand for the proposition that unless federal bankruptcy law has specifically preempted a state law restriction imposed on property of the estate, the trustee's rights in the property are limited to only those rights that the debtor possessed pre-petition. In other words, without explicit federal preemption, the trustee does not have greater rights in the property of the estate than the debtor had before filing for bankruptcy.

Integrated Solutions, 124 F.3d at 492-93.

Integrated, which had purchased the state law tort claim from a bankruptcy trustee, argued that the language of Bankruptcy Code §§ 363(b)(1) and 704(1) showed clear Congressional intent to preempt state law restrictions by including in the trustee's duties the obligation to: "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in

interest...." 11 U.S.C. § 704(1). Integrated also relied on similar language from Code § 363(b)(1) regarding the sale of estate property.

The Third Circuit, however, rejected Integrated's reading of the Bankruptcy Code and concluded that the language was far too general to justify preemption. Nothing in the Bankruptcy Code, the Court concluded, showed the requisite Congressional intent to preempt state law restrictions:

> Integrated's arguments, however, lack adequate legal support. For starters, neither § 363(b)(1) nor § 704(1) expressly authorizes the trustee to sell property in violation of state law transfer restrictions. Moreover, Integrated points to nothing in the legislative history that would even raise an inference that Congress intended to give the trustee such authority under these provisions. The clear lack of Congressional intent to preempt state law restrictions on transferring property of the estate is even more telling given the explicit language that Congress uses when it intends to displace state non-bankruptcy law in other provisions of the Bankruptcy Code.

Integrated Solutions, 124 F.3d at 493.

Recent case law makes clear that assumptions, assignments or sales of estate assets or leases remain subject to governmental regulations and rules adopted by organizations governing such rights. *See*, *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 590 (Bankr. D. Ariz. 2009). ("In the final analysis, the court can not find or conclude that the interests of the NHL can be adequately protected if the Coyotes are moved to Hamilton without first having a final decision regarding the claimed rights of the NHL and the claims of the debtors and PSE."); *In re Magness*, 972 F.2d 689, 697 (6th Cir. 1992) (court prohibited chapter 7 trustee from selling a golf club and country club membership where such sale would move the sale of that membership ahead of those on the country club's waiting list.)

In this case, none of the Golden Oil Plan , Confirmation Order attempts or June 2005 Stipulation explicitly preempt enforcement of the Tribal Code or the IMLA.[74] To the contrary, the Golden Oil Plan and Confirmation Order specifically require the Debtor and MLG to comply with JAN rules for effectuating the transfer of the operating rights at issue here. As such, there is no preemption of either the IMLA or the Tribal Code's requirements for obtaining enforceable operating rights .

D. Bankruptcy Does Not Enlarge Rights Held by Debtor in Pre-Petition Interests

Pursuant to Section § 541 of the Bankruptcy Code, "property" of the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case". 11 U.S.C. § 541(a). In view of Section § 541 it is well established law that Platinum is limited to rights it held at the commence of its Chapter 11 filing. Assuming, *arguendo*, that Platinum took Operating Rights from Golden Oil pursuant to the Golden Oil Plan and Confirmation Order,[75] then those rights can be no greater than those possessed by Golden Oil which had not complied with IMLA and Tribal Code regulations.[76]

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[74] Indeed, neither the Plan nor the Confirmation Order can be construed as a waiver of one of the Nation's sovereign powers unless Platinum can show that they constitute such a waiver by the Nation "in unmistakable terms." *Merrion v. Jicarilla Apache Nation*, 455 U.S. 130, 148 (failure to expressly reserve the right to tax production by an IMLA lessee held not to constitute a waiver of the right to impose taxes on production). Platinum makes no effort to satisfy this heavy burden, nor could it if it tried. Indeed, as discussed below, the IMLA also expressly recognizes continuing inherent tribal jurisdiction over such leases.

[75] The June 2005 Stipulated Order shows that Platinum took rights only from limited partners of Golden Oil and MLG, not from Golden Oil directly, but, even if Platinum took rights directly from Golden Oil, those rights were taken "*cum onere*." *NLRB v. Bildisco & Bildisco*, 465 U.S.513, 531, 104 S.Ct. 1188, 1199 (1984).

[76] "Courts applying the *Butner* analysis have relied on its holding to conclude that 'once a property interest has passed to the estate, it is subject to the same limitations imposed upon the debtor by applicable nonbankruptcy law.'" *In re American Freight Sys., Inc.,* 179 B.R. 952, 960 (Bankr.D.Kan.1995); *see also In re Transcon Lines,* 58 F.3d 1432, 1438 (9th Cir.1995) (noting that "nonbankruptcy law defines the nature, scope, and extent of the property rights that come into the hands of the bankruptcy estate"), *cert. denied sub nom. Gumport v. Sterling Press, Inc.,* 516 U.S. 1146, 116 S.Ct. 1016, 134 L.Ed.2d 96 (1996); *In re Sanders,* 969 F.2d 591, 593 (7th Cir.1992) ("[A] bankruptcy trustee succeeds only to the title and rights in property that the debtor had at the time she filed the bankruptcy petition."); *In re FCX, Inc.,* 853 F.2d 1149, 1153 (4th Cir.1988) ("The estate under § 541(a) succeeds only to those interests that the debtor had in property prior to commencement of the bankruptcy case."); *In re Bishop College,* 151 B.R. 394, 398 (Bankr.N.D.Tex.1993) (holding that a bankrupt's estate receives trust assets "subject to

An assignment or transfer of interest in an oil and gas lease on tribal land is not effective until it is approved by the Secretary and in most cases the Indian tribe owner. 25 C.F.R. § 211.53. No lease or operating interest in oil and gas wells on tribal land can be granted or can a transfer of well interest be valid, except pursuant to the IMLA. 25 U.S.C. § 396a-396d; 25 C.F.R. § 211.53. In relevant part, 25 C.F.R. § 211.53 provides:

> 211.53 - Assignments, overriding royalties, and operating agreements.
> (a) Approved leases or any interest therein may be assigned or transferred only with the approval of the Secretary. The Indian mineral owner must also consent if approval of the Indian mineral owner is required in the lease. If consent is not required, then the Secretary shall notify the Indian mineral owner of the proposed assignment. To obtain the approval of the Secretary the assignee must be qualified to hold the lease under existing rules and regulations and shall furnish a satisfactory bond conditioned for the faithful performance of the covenants and conditions of the lease.(b) No lease or interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly, by working or drilling contract, or otherwise, without the consent of the Secretary.

Nothing in the Golden Oil Plan, Confirmation Order, or the Bankruptcy Code permit Platinum to use its bankruptcy filing to avoid the requirement of obtaining the approval of the Secretary and complying with the Tribal Code. Having failed to do so before its filing, Platinum came into this Case without enforceable rights against the Secretary and the Nation. Whatever rights were acquired by Platinum, remains incomplete and inchoate until Platinum, or some other entity on its behalf, complies with the IMLA and the Tribal Code.

E. Espinosa Does Not Apply Here

At oral argument, the Court asked whether the Supreme Court's recent decision in *Student Aid Funds, Inc. v. Espinosa (In re Espinosa),* 130 S. Ct. 1367 (2010) has any application here. Stated simply, it does not.

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any restrictions imposed by state law, pre-petition")." *Integrated Solutions,* 124 F.3d at 492.

In *Espinosa*, the Supreme Court held that a student debt collection agency could not obtain relief from debtor's confirmed chapter 13 plan. *Id.* at 1379. Even though the bankruptcy court failed to conduct an undue hardship analysis and discharged the student debt outside of an adversary proceeding, the Supreme Court concluded that these defects were merely procedural and did not render the confirmed plan void. *Id.*

While the creditor in *Espinosa* requested relief from a prior order of the Bankruptcy Court. By contrast, in this case JAN merely asks this Court to *interpret* and apply the Golden Oil Plan, Confirmation Order and the June 2005 Stipulated Order, which on their face do not excuse compliance with the Tribal Code and the IMLA,in a manner consistent with well-established law. Indeed, these prior orders anticipated MLG and Golden Oil working together to comply with the federal/tribal regulatory framework.

In any case, even assuming that the Golden Oil Court had entered an order excusing compliance with the IMLA and the Tribal Code, the defect would be *jurisdictional* because tribal immunity is not waived by Bankruptcy Code § 106, not procedural, as was the case in Espinosa.[77] "Section 523(a)(8)'s statutory requirement that a bankruptcy court find undue

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[77] In *In re Mayes (Mayes v. Cherokee Nation)*, 294 B.R. 145 (10th Cir. B.A.P. 2003), the Bankruptcy Appellate Panel of the Tenth Circuit held that an avoidance motion was a "suit" barred by Tribal immunity. In reaching its finding, the *Mayes* court concluded that Bankruptcy Code § 106(a) did not waive Tribal immunity:

> While several bankruptcy courts have either expressly or impliedly held that Indian nations or tribes are "domestic governments" to which §§ 101(27) and 106 apply, *see Warfield v. Navajo Nation (In re Davis Chevrolet, Inc.),* 282 B.R. 674, 678 n. 2 (Bankr.D.Ariz.2002); *Turning Stone Casino v. Vianese (In re Vianese),* 195 B.R. 572, 575-76 (Bankr.N.D.N.Y.1995); *In re Sandmar Corp.* 12 B.R. 910, 916 (Bankr.D.N.M.1981), we conclude that they probably are not. Accordingly, § 106(a) likely could not abrogate Appellee's immunity even if it were constitutional. *See In re National Cattle Congress,* 247 B.R. 259, 266-67 (Bankr.N.D.Iowa 2000). Our conclusion comports with the general proposition that Congress must make its intent to abrogate an Indian nation's immunity clear and unequivocal, and actions against tribes cannot merely be implied. *See, e.g., Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

In re Mayes, 294 B.R. at 148.

hardship before discharging a student loan debt is a precondition to obtaining a discharge order, not a limitation on the bankruptcy court's jurisdiction." *Id.* at 1377-1378. As *Integrated Solutions* provides, the bankruptcy code does not grant federal courts the power to preempt non-bankruptcy law, absent clear Congressional intent. 124 F.3d at 493. Under the circumstances, *Espinosa* would not bar the relief requested here.

CONCLUSION

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

Respectfully submitted,

THE JICARILLA APACHE NATION

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