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Re: Comments submitted on behalf of the Jicarilla Apache Nation (formerly known as the Jicarilla Apache Tribe) in reference to Federal Register Notice of the Minerals Management Service of the Department of Interior's proposed rule pertaining to Indian Oil Valuation, Proposed Rule, Fed. Reg. Vol. 71, page 7453, 30 CFR Part 206, Attn: RIN 1010-AD00.

Introduction

The Jicarilla Apache Nation (hereinafter "Jicarilla") is a federally recognized Indian tribe with significant oil and gas production on its lands which comprise nearly one million acres of land in the San Juan Basin located in central to northwest New Mexico. Jicarilla has been a major producer of natural gas and to a lesser extent oil since the early 1950's. The vast bulk of its leases which have been in production for some time are pursuant to the BIA standard lease form 5-157

Standard Lease Form 5-157

This standard lease form has language that the MMS notice correctly observes contains the so-called "major portion" pricing requirement. (Middle of paragraph 3(c) of lease form 5-157. The major portion requirement requires the Secretary of Interior to determine the highest price paid or offered for the "major portion" of like or similar production contemporaneous in time from the field or area.

Prior Litigation.... the Supron Decision

The duty of the Secretary has been judicially determined in litigation begun with a demand upon the Secretary of Interior in 1973 by the President of the Jicarilla Apache Tribe to properly enforce the Jicarilla oil and gas leases. After obdurate refusal by the Secretary Jicarilla sued the Secretary as well as a number of its oil and gas leasees to compel compliance with its lease terms. The Secretary, i.e., the United States, was expressly found to have violated its fiduciary trust duties to Jicarilla in a landmark decision issues by the United States Court of Appeals for the Tenth Circuit sitting en banc. Jicarilla Apache Tribe v. Supron Energy Corp., et al., 782 F.2d 855 (10th Cir. 1986)(hereinafter the "Supron" case or decision).

The Res Judicata Effect of the Supron Decision

The Court of Appeals's decision interpreted the 1938 Indian Minerals Act and required that the Secretary, in enforcing all aspects of the lease terms, when faced with more than one reasonable alternative, must choose the alternative that maximizes the revenue to the tribe. This decision is res judicata as to Jicarilla and is controlling precedent for all of the other oil and gas producing tribes in the Tenth Circuit which includes the states of Utah, Colorado, New Mexico, and Oklahoma and therefore many if not the majority of the oil and gas producing tribes.

The 1988 Indian Oil and Gas Valuation Regulations

No sooner had the Supreme Court denied the request to review the Supron case, than the MMS staff sought to revise the Indian oil and gas valuation regulations for the sole purpose of trying, through regulation rewriting, to gut the Supron decision and the benefits that that court said that Congress intended Indian lessors to enjoy when it passed the 1938 Indian Mineral Leasing Act. However, through a compromise with the oil and gas producing tribes, brokered by Jim Cason, primacy was given to lease terms, court decisions and settlement agreements whose terms differed from the median pricing methodology which was explicated in the body of those 1988 regulations.

Instead of the lease language of "major" portion MMS staff substituted the word "majority" which means something very different from the lease term. Morever, the 'median pricing methodology" which continues in the current proposal suffers from the same defect as the 1988 regulations. "Median pricing" by definition cannot be equal to "highest price paid or offered" which is the lease language.

The Current Proposal Is Legally Inconsistent with the terms of the Lease Form 5-157 and Supron

The current proposal is not in conformance with the requirements of the lease terms nor is it in compliance with the requirements of the Surpron decision. The negotiated Indian gas valuation regulation which became effective on January 1, 2000, properly states as its objective the maximization of revenue. That IS consistent with the lease terms and the Supron decision.

Is is strongly recommended that the current draft be withdrawn and that MMS convene a negotiated rulemaking committee as it did with the Indian gas valuation regulations of January 1, 2000 and write a lawful oil valuation regulation instead of attempting through rather transparently drafted proposed oil valuation regulations non complying regulations.

While it is possible to go into greater detail on all of the numerous problems and improprieties of the proposed regs, it ought not be necessary as it is too obvious to require any more detailed comments..