NORDHAUS HALTOM TAYLOR
TARADASH & FRYE, LLP

ATTORNEYS AT LAW

B. REID HALTOM
LESTER K. TAYLOR
ALAN R. TARADASH
PAUL E. FRYE
WAYNE H. BLACK
LEE BERGEN
TERESA LEGER DE FERNANDEZ
JILL E. GRANT

JESSICA R. ABERLY
SHENAN R. ATCITTY
CYNTHIA A. KIERSNOWSKI
SHAWN R. FRANK
DANIEL I.& J. REY-BEAR
LEE W. RAMIREZ
SUSAN G. JORDAN
STELLA SAUNDERS
TOM J. PECKHAM*
LISA D. BROWN

*ADMITTED IN CA & MN ONLY

ALBUQUERQUE OFFICE
SUITE 1050
500 MARQUETTE AVENUE, N.W.
ALBUQUERQUE, NEW MEXICO 87102

TELEPHONE (505) 243-4275
TELEFAX (505) 243-4464

SANTA FE OFFICE
SUITE 9
200 W. DE VARGAS STREET
SANTA FE, NEW MEXICO 87501

TELEPHONE (505) 982-3622
TELEFAX (505) 982-1827

WASHINGTON, D.C. OFFICE
SUITE 300
816 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20006

TELEPHONE (202) 530-1270
TELEFAX (202) 530-1920

TELEFAX MEMO

Please deliver the following pages:

TO: Paula Neuroth
MMS-Denver

FAX NUMBER: 303-231-3700

FROM: Amy S. Titus, Secretary to Alan R. Taradash, Esq.

DATE: April 27, 1999

NO. OF PAGES: 6 (including this page)

RE: Jicarilla Apache Tribe Corrected Comments on 64 Fed. Reg. 8835, 8844

MESSAGE: Ms. Neuroth - Attached is a copy of an e-mail that Mr. Taradash sent to you late last night. A hard copy will be sent via first class mail today as well.

CONF. NUMBER: (303) 231-3287

IN-HOUSE CC: 100.007

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Nordhaus Haltom Taylor Taradash and Frye, LLP
Attorneys at Law
Suite 1050
500 Marquette NW
Albuquerque, New Mexico 87102
505-243-4275

April 26, 1999

Ms. Paula Neuroth
Rules and Publications Staff
Royalty Management Program
Minerals Management Service
PO Box 25165 MS 3021
Denver, Colorado 80225-0165

Via e-mail to paula.neuroth@mms.gov

Re: MMS Notices at 64 Fed Reg 8835 and 8844

Dear Ms. Neuroth,

The following comments are submitted on behalf of the Jicarilla Apache Tribe with regard to the Minerals Management Service's ("MMS") requests for comments contained in the above referenced Notices as published in the Federal Register.

Regrettably, MMS has a long, uniform, and undistinguished history of its failure to gather completely and accurately, and to evaluate, all pertinent information necessary for the Secretary of Interior ("Secretary") to assure compliance with Indian oil and gas lease terms, with the requirements of the Indian Mineral Leasing Act of 1938, 25 USC Secs 396a-g (and other appropriate Indian mineral leasing acts that require the Secretary to account for all production from leases issued pursuant to such statutory authority as well as to assure proper payment pursuant to such statutes and leases issued pursuant thereto), the requirements of the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"), 30 USC Secs 1701 et seq., and the Secretary's trust responsibility to the tribal lessor. This failure has resulted in the unrecoverable loss to tribal lessors of hundreds of millions of dollars in the sixteen year history of MMS, in addition to the millions and millions of dollars of losses suffered during the time of its predecessor agencies (well documented in the "Linowes Commission" Report of 1982). A comprehensive listing of the MMS deficiencies would be too lengthy to list here but some selected examples would be instructive.[1]

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[1] The fundamental nature of oil and gas production and the methods of computing value as well as measuring the volumes upon which royalties are to be computed has resulted in accounting and auditing that is inherently complex. This is so because of the methodologies that

One must remember at the outset that when MMS was created it was in the wake of a fairly serious scandal of oil theft by major companies on a large scale from Indian oil and gas leases. When Congress passed FOGRMA it sought reform from the unacceptable losses that the Linowes Commission found that occurred while the oil and gas industry was essentially "on an honor system".[2] Congress sought to change this situation by requiring the Secretary to fully account for all production and payments due from Indian and federal oil and gas leases. The Secretary has never done this. In fact, the MMS' AFS and PAAS systems[3] were designed without an examination of all relevant lease terms that the systems would have to account for. In the context of the case Shii Shi Keyah Association v. Babbitt, 84-1622M (DNM) (consent decree entered in March 1989 requiring the Secretary to make systems and other changes to come into compliance with FOGRMA), the Plaintiffs had the MMS AFS system examined by oil and gas systems and accounting experts from Arthur Andersen LLP and from the Council of Energy Resource Tribes (its accounting expert formerly with Palmer Oil Company). Each independently

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the oil and gas industry has developed to benefit itself. In this respect it is not unlike the Internal Revenue Code and Regulations; the more special provisions have been added over the years to benefit a specific group of taxpayers, the more complex has been the accounting and auditing necessary to keep track of the transactions which, and the records for which, are generally in the sole custody and control of the taxpayer (or the lessee/payor for MMS purposes). For these reasons, before commenting on the MMS proposals to reduce collected information, it is relevant to examine how well the agency has been performing its statutorily required duties to date. A detailed examination of these duties and the Secretary's performance is shocking.

[2] Before too many of the undersigned's good friends in the oil and gas industry get too upset with these rather serious historical references, the author hastens to add that it is his personal belief that those companies and individuals who were engaged in such abuses and illegal activities were, no doubt, in the minority of those involved in the oil and gas business. The author knows too many good people and honorable companies in this industry to believe or assert that the improper activities of a few should be extended by extrapolation to the industry as a whole. Nevertheless, and unfortunately, the historical record is well documented and fully supports the assertions contained herein.

[3] A third system, the Bonus Rental Automated Accounting System ("BRAAS"), although planned by MMS was never implemented. The problems that the agency encountered in just trying to implement its AFS system were so great that it never implemented the BRAAS system and delayed for years any attempt to implement the PAAS system. An objective, detailed examination of the AFS and PAAS systems, unfortunately compel the observation that neither of those systems works in the sense that they do not produce accurate and complete information upon which the Secretary can rely to assure performance of his obligations under FOGRMA. For example, the Secretary routinely reported to the President and the Congress under the Federal Managers' Financial Integrity Act that one material weakness of his most significant material weaknesses was his inability to account for on shore fluid mineral production (oil and gas) that resulted in perhaps as much as $500,000,000.00 or more of money due on federal and Indian leases unaccounted for. This inability to establish "closed" accounting systems has never been compensated for by the utilization of alternative approaches to overcome this material deficiency.

arrived at the same conclusion. The AFS system was designed without regard to the lease and statutory requirements that it was intended to assure the performance of. This fundamental flaw (design from the "top down" rather than from the "bottom up") has never been cured. In fact, it has been exacerbated by the audit system that the agency has employed of a payor based audit rather than an audit designed and implemented from a lease compliance perspective. Other examples of system problems and MMS solutions are very instructive on the difference between institutional (and political) mandates which invariably prevail over legal requirements.

In the early days of MMS' existence, it was subjected to severe criticism due to the large number of payments that triggered various error edit codes that were designed to assure accuracy within its AFS systems. When these codes were triggered, the payment that accompanied that triggering report were kicked into "error suspense." MMS was subjected to severe criticism by oversight committees of Congress, the GAO and others. It responded to this criticism by disingenuously reporting that it had significantly reduced the "rate" of such error suspense occurrences. What it neglected to inform the oversight bodies was that it achieved this "rate" reduction by deactivating much of the computer code that triggered an error suspense occurrence. The errors were still present. They just went unidentified and uncorrected. Similar types of misleading information about its problems and just what it was doing have been as intentionally misleading and as costly to the Indian and federal lessor.

In 1987 MMS proposed new valuation regulations. Indian lessor tribes objected that the proposed regulations violated standard Indian lease terms that spelled out just how royalties were to be computed. These violations, it was asserted, would cost Indian lessors millions of dollars in direct violation of tribal lease terms. MMS responded to Congressional oversight by asserting that the valuation regulations would be "revenue neutral". It was not until 1992 that MMS revealed to the GAO just what it meant by "revenue neutral". MMS admitted and GAO reported that MMS concluded that the potential gains in off shore royalty collections by implementing the new regulations off set the royalty losses that Indian lessors would suffer and, therefore, the regulations could fairly be said to be revenue neutral in MMS' view. Since Indian lessors do not share in off shore royalties on federal leases, this MMS justification was fundamentally dishonest and it was intended to deceive. Although there are numerous examples which could be recounted of a similar nature, it will suffice for the purpose of these comments to merely mention two of the most recent flagrant MMS policy or system changes which are clearly illegal and violative of the Secretary's legal obligations mentioned above.

In May of 1998, MMS implemented a new policy and methodology to apply to certain types of late payments for which interest must be computed. Instead of applying the statutory requirements of FOGRMA, the policy implemented ties the running of interest to an artificial date unrelated to the date when specific sums of money were due. Rather, an artificial date is selected that is related to numerosity of late payments not the amounts. Thus not only is the statutory mandate ignored, but the artificial point in time that is selected is not even related to the economic concept of the time value of money. The "solution" was achieved out of the overriding mandate of "institutional" or "bureaucratic" ease. Similarly, the Secretarial response to the industry designed and driven (and euphemistically labeled) Royalty Simplification and Fairness Act of 1996 ("RSFA"), PL 104-185, 110 Stat. 1700 (August 13, 1996), is rather astounding.

Politically, the Vice President has championed what has been referred to as "Re-engineering Government." The Department of Interior, like all other federal agencies, has been hard pressed to comply with this clarion call for government efficiency which it presumably would achieve. While there are certainly some areas of governmental activity which could benefit from this approach, mindlessly reducing information collected and utilized for all government activities is ignorant and could result in assuring government misfeasance. For example, is there anyone in government (even at the Vice President's office or the OMB) that would seriously argue that the information collected and utilized in space shuttle operations ought to be reduced unmindful of the purposes for which the information is intended to serve. In responding to incessant industry bleating for less and less reporting on oil and gas leases ("trust us the payment is correct" was the underlying predicate), Congress passed RSFA in 1996.

In July of 1998, the Secretary issued his long awaited report and plan detailing how he intended to correct his long standing deficiencies in his management and trusteeship of Indian trust property, including Indian oil and gas leases. In the Secretary's Trust Management Improvement Project: High Level Implementation Plan (July 1998) at pages 44-48 the Secretary details how he is going to implement the requirements of RSFA in his system changes. Keep in mind that this entire Plan only deals with Indian trust property. Also it is worth noting Section 9 of RSFA which is entitled "Indian Lands" and which states in its entirety:

> "The amendments made by this Act shall not apply with respect to Indian lands, and the provisions of the Federal Oil and Gas Royalty Management Act of 1982, as in effect on the day before the date of enactment of this Act shall continue to apply after such date with respect to Indian lands."

(Emphasis added).

And yet the Secretary, in his "High Level Plan" is intending to violate Section 9 of RSFA. When the undersigned brought this to the attention of the Acting Special Trustee when the Plan was released, the response was that they were unaware of RSFA's exclusion of Indian lands and leases.[4] Now the agency has solicited comments on reduction in information collection in a number of areas including production accounting information even though the legal requirements have not been decided upon.

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[4] It is very difficult to understand how one could read RSFA's requirements and overlook the one section that is labeled "Indian Lands" and wherein Indian oil and gas lease properties are expressly excluded from the changes required by RSFA. The more likely explanation for this stupidity is that those who wrote the Secretary's "High Level Plan", like many of the other things that MMS has done, never bothered to read RSFA and to assure that the Secretary's plan would be in compliance with his statutory mandates. Institutional and political demands prevailed once again. It is also interesting to note to date the Special Trustee and the Secretary have indicated no intention to change or modify this "High Level Plan" to accommodate Congressional requirements of RSFA.

Indian leases are value based leases. This means that the quality as well as the quantity of production are necessary to keep track of (viz., to report) in order to properly determine the accuracy and completeness of any proffered payment. Asking for comments on reducing the requested information without knowing what factors will be necessary for accurate and complete accounting for all oil and gas produced from the leases is an absurd request. It ought not be necessary to go into further detail on just how nonsensical this agency request is but, regrettably, in light of the MMS history, only a small portion of which is detailed above, it is not surprising. In a word though, in response to the agency's request as to what information to eliminate the collection of, in anticipation of some change in the regulations at some time in the future, the answer is NONE. The reasons are too self evident to require further explanation.

Respectfully yours,

Alan R. Taradash

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