UNITED STATES GOVERNMENT

Memorandum

NOV 1996
RECEIVED

DATE: NOV 22 1996

REPLY TO ATTN OF: Acting Phoenix Area Director

SUBJECT: Proposed Amendments to 30 CFR Parts 202 and 206

TO: Minerals Management Service Royalty Management Program
Rules and Procedures Staff

We submit the following comments on your proposed Amendments to Gas Valuation Regulations for Indian Leases as published in the Federal Register, September 23, 1996.

In the preamble, under "III. Description of the Regulatory Proposal, 30 CFR Part 202", you request comment on whether the Department should provide "approval" for allotted leases rather than seeking approval of the many individual allottees who may share in a single lease. The Secretary now has the statutory and/or regulatory authority to "execute" mineral leases on behalf of minors, incompetents, undetermined heirs, and owners who cannot be located. Although a new rule for prospecting permits (now set forth at 25 CFR 212.56) was recently promulgated to allow issuance by the Secretary when he determines that it would be impractical to obtain the consent of all the owners and no substantial injury would result, it has traditionally been a Bureau of Indian Affairs (BIA) requirement that all (100%) of the owners of an allotment consent to the obligation of their mineral resources to an oil and gas lease, authorizing a lessee to drill and produce oil and/or gas from the land. When oil or gas is discovered and produced on Indian land (Allotted/Tribal) this has been thought of as diminishing a non-renewable natural resource; accordingly, the consent of all of the owners, vested and otherwise, must be given before such a "taking" is allowed.

The newly-final version of the BIA's regulations for oil and gas leasing of individual Indian land (effective August 7, 1996) states in the "Purpose and Scope" section (25 CFR 212.1) that, "These regulations are intended to ensure that Indian mineral **owners** desiring to have their resources developed are assured that they will be developed in a manner that maximizes their best economic interests. . . ." (Emphasis added.) Under Section 212.20(b), which applies to leases executed on behalf of undetermined heirs and "unlocatables", reference is made to, ". . . one or more of the Indian mineral owners of a tract. . . ." who may request to negotiate, also implying that consent is needed from all of the owners. Sections 212.20(c) and 212.21 further define who should execute a lease; here stated, the Indian mineral owner is interpreted to be all of

the owners. Section 212.28(d), Unitization and communitization agreements, and well spacing, states: "All Indian mineral owners of any right, title or interest in the mineral resources to be included in a cooperative agreement must be notified by the lessee at the time the agreement is submitted to the superintendent or area director." It can be concluded that if this part requires full acceptance and acknowledgment, then the regulations relative to the initial lease which qualified the land for participation in a cooperative area must also require that all Indian owners be parties to the lease.

Over the past several years this topic has been discussed and researched. In 1987, a broader, more comprehensive rule for Indian mineral leasing was published, but it was withdrawn in the face of public pressure and a federal court decision in New Mexico which held that 100% consent is required by 25 U.S.C. 396. While the 1955 amendment to 25 U.S.C. 396 makes provisions for leasing the interests of undetermined heirs and heirs who cannot be located (so long as the lease is advertised for bid), no express authority is given to lease the interests of other nonconsenting adult owners. In McClanahan v. Hodel, No. 83-161-M Civ (D.N.M., Order filed Aug. 14, 1987) it was held that 25 U.S.C. 396 is the only act of Congress authorizing the leasing of allotted lands for mining purposes, and that it prohibited the Secretary of the Interior from approving a uranium mining lease of allotted lands in the absence of unanimous consent on the part of the Indian owners. Throughout 25 CFR 212, the implication is given that all owners should execute an oil and gas lease, and the Act of March 3, 1909 (35 Stat. 783), as amended, fails to provide any clear direction regarding who must consent to a lease. Another amendment to the law must be enacted, with subsequent regulations being developed to allow the Secretary of Interior to approve without full consent. We hope that this clarifies our position and answers your inquiry.

In reference to the proposed 30 CFR 202.550(a)(2), which states that "if you take less than your entitled share of AFA (approved Federal agreement) production for any month, . . . you will owe no additional royalty for that lease for the month when you later take more than your . . . ," it is felt that the word "later" in the first sentence should be explained, either in the definitions or in the wording of this subsection (i.e., how long is later). In the proposed 30 CFR 202.550(c)(2), which states that "this also applies when the other AFA participants pay you money to balance your account," some time frame definition may also be necessary.

This concludes our comments. If you should have any questions, please contact Bill Titchywy in our Real Estate Services Branch at (602) 379-6781.

Attachment