

**FEDERAL ROYALTY MANAGEMENT:  
ADMINISTRATIVE & JUDICIAL UPDATE  
2004-2006\***

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After brief stints with the U.S. Environmental Protection Agency and Department of the Interior, Mr. Deal joined the American Petroleum Institute (API) in 1975. At API he worked on a variety of federal environmental matters, notably Clean Air Act motor fuels, and natural resources matters, notably public lands access, operations and royalty management, both onshore and offshore. For five years Mr. Deal served as director of API's Office of General Counsel.

After 1980 Mr. Deal managed most of API's royalty management matters on the legislative, administrative and litigation fronts. He was centrally involved in Linowes Commission proceedings and its offspring, the Federal Oil and Gas Royalty Management Act, the NTL-5 Act, and the Royalty Fairness and Simplification Act. He drafted API comments in myriad rulemakings, including the 2004 Oil Valuation Rule and 2005 Gas Valuation Rule. He managed API participation in many federal cases as a party or amicus curiae, including the 1988 Diamond Shamrock gas take-or-pay case, the 2002 DeWitt gas transportation case and the 2003 Fina Oil & Chemical Company gas marketing case and 2004 Baca oil valuation settlement.

Mr. Deal served two terms on the Secretary of the Interior's original Royalty Management Advisory Committee (1986-1992) and served for over 20 years as the managing attorney for API's nationally recognized Subcommittee on Exploration and Production Law.

In 2003 Mr. Deal received a Minerals Management Service Corporate Leadership Award (CORLA) for utilizing his royalty management expertise over many years in MMS regulatory initiatives to seek consensus on critical royalty issues among major integrated companies and independent producers, with a special emphasis on fair, simple and certain royalty requirements.

In 2003 Mr. Deal left API to join the Energy Practice Group of Fulbright & Jaworski's Washington, D.C. office, negotiating several major royalty settlements with the MMS. In late 2005 Mr. Deal formed Deal Consulting & Dispute Resolution, LLC, offering royalty counseling, regulatory consulting and dispute resolution on natural resources and environmental matters.

In 2006 Mr. Deal was appointed to the Department of the Interior's Royalty Policy Committee, serves as its vice chair, and also vice chair of its new Subcommittee on Royalty Management, which has undertaken a comprehensive policy assessment of the Department of the Interior's royalty management program.

Beyond the Rocky Mountain Mineral Law Foundation, Mr. Deal is an active member of the Association for Conflict Resolution, the ABA Section on Dispute Resolution and is vice chair of the ABA Section on Environment, Energy and Resources Global Oil and Gas Exploration and Production Committee.

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# **FEDERAL ROYALTY MANAGEMENT: ADMINISTRATIVE & JUDICIAL UPDATE\***

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## **I. Introduction**

This paper offers an administrative and judicial update on federal royalty matters for the period 2004-2006. While the paper's focus is agency and court decisions, major royalty-related Minerals Management Service rulemaking and policy making is discussed briefly for context-setting purposes.

Virtually all agency decisions for the 2004-2006 period have been included, although a few decisions may not be publicly available because of confidentiality concerns. Many of the decisions reported address several issues, hence many decisions show up in more than one issue category in this paper.

With two exceptions, all of the decisions reported are grounded on the mineral leasing statutes or royalty management statutes applicable to federal or Indian lands. One exception is a Supreme Court decision addressing a statute of limitations statute of general applicability. Another exception is the cluster of cases involving the Federal False Claims Act.

Finally, this paper addresses in summary fashion certain decisions addressed more fully in other papers presented at this special institute: John Price et al., "Federal Gas Valuation"; Robert O. Wilkinson, "Indian Oil Valuation"; J. Poe Leggette, "Royalty Relief and Incentives"; and Deborah Bahn Haglund et al., "The Federal Oil and Gas Marketable Condition Rule."

## **II. Policy Making: Minerals Management Service Rulemaking & Legislation**

Agency and court decisions are decided in a context. In the 2004-2006 period the Minerals Management Service (MMS) brought to closure several initiatives commenced in the mid-1990's, resolving some long-standing issues that generated many disputes, agency appeals and court decisions.

For example, for federal leases, oil valuation rulemaking revising the 1988 Federal and Indian Oil Rule<sup>†</sup> led to a 2000 Federal Oil Rule<sup>‡</sup> that, among other things, substituted market center index prices for benchmarks (most notably posted prices). Although 2000 Federal Oil Rule was challenged by industry, settlement discussions led to a 2004 Federal Oil Rule. Upon issuance of the 2004 Federal Oil Rule that, among other things, substituted NYMEX index prices for market center prices, IPAA and API elected not to reinstate their challenges of the 2000 Oil Rule

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\* The author wishes to acknowledge the assistance of Howard Chalker, Chief, Minerals Management Service Policy and Appeals Division, for his assistance in compiling agency royalty management decisions.

<sup>†</sup> 53 FR 1184 (Jan. 15, 1988).

<sup>‡</sup> 63 FR 14022 (March 15, 2000).

and to forego a challenge of the 2004 Oil Rule. Independent Petroleum Association of America et al., *cross motions for summary judgment denied without prejudice*, (March 17, 2003), *case dismissed without prejudice subject to reinstatement after agency issues revised rule* (Nov. 21, 2003), Civ. Nos. 00-761 & 00-887 (D.D.C. 2003).

Likewise, rulemaking revising the 1988 Federal and Indian Gas Rule,<sup>§</sup> led to a 1997 Federal Gas Rule<sup>\*\*</sup> reflecting an expansive view of non-deductible marketing costs that survived a legal challenge in Independent Petroleum Association of America et al. v. Dewitt, 279 F. 3d 1036 (D.C. Cir. 2002), *rev'g. in part Independent Petroleum Association et al. v. Armstrong*, 91 F. Supp. 2d 117, *amended* September 6, 2000 (D.D.C. 2000), *cert. denied sub nom. Independent Petroleum Association of America v. Watson*, No. 02-476, Jan 13, 2003, and led to a 2005 Federal Gas Rule.<sup>††</sup>

Valuation rule changes such as these, increased usage of Royalty Valuation Determinations and Future Valuation Agreements, and the sharply increasing use of Royalty-in-Kind (RIK) instead of Royalty-in-Value to satisfy royalty obligations together offer the prospect of fewer disputes. Indeed, there seems to be a downward trend in agency and court decisions: 10 in 2004, 17 in 2005 and 5 in 2006.

### III. Adjudication: Decisions of the Federal Courts and the Department of the Interior

The decisions summarized below encompass federal court decisions of district courts, circuit courts and the Supreme Court and Department of the Interior decisions of the Minerals Management Service (MMS), the Bureau of Indian Affairs (BIA), the Secretary and the Interior Board of Land Appeals (IBLA).

#### A. Statute of Limitations

In BP America Production Company v. Burton, 127 S. Ct. 1768, 164 L. Ed. 2d 515, 549 U.S. \_\_ (2006), the Supreme Court has finally resolved a statute of limitations issue that suffused agency royalty appeals for several years including many of the decisions reported below. At the core of this issue is a statute of limitations of general applicability, 28 USC §2415(a), which provides in pertinent part:

Every action for *money damages* brought by the United States or an . . . agency thereof which is founded upon any contract . . . , shall be barred unless the complaint is filed within six years after the right of *action* accrues or within one year after final decisions have been rendered in applicable administrative proceedings. (emphasis supplied).

For years, royalty practitioners have routinely asserted the statute of limitations as an affirmative defense in appeals of MMS orders to pay, citing the Tenth Circuit's decision in Oxy USA v. Babbitt, 268 F.3d 1001 (10<sup>th</sup> Cir. 2001) for the proposition that an order to pay royalties constitutes an "action" for purposes of 28 USC §2415(a) and that such an order seeks "money damages" within the meaning of 28 USC 2415(a). However, the MMS (and IBLA) have routinely rejected that defense, citing the Fifth Circuit's earlier conflicting decision in Phillips Petroleum

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<sup>§</sup> 53 FR 1230 (Jan. 15, 1988).

<sup>\*\*</sup> 62 FR 65753 (Dec. 16, 1997).

<sup>††</sup> 70 FR 11869 (March 10, 2005).

Co. v. Johnson, No. 93-1377 (5<sup>th</sup> Cir. 1994), notice of unpublished decision at 36 F.3d 89, *cert. denied*, 514 U.S. 1092 (1995) for the proposition that an administrative order is not an “action for money damages” and that claims for unpaid royalties are not claims for “money damages” within the meaning of 28 USC §2415(a).

However, in BP America the Supreme Court has resolved the conflict, holding for the Federal Government that 28 USC §2415(a) does not apply to MMS administrative payment orders. After granting certiorari on the statute of limitations issue in Amoco Production Co. v. Watson, 410 F.3d 722 (D.C. Cir. 2005), an important decision addressing valuation issues for which certiorari was not granted and addressed separately in the next section of this paper, the Supreme Court methodically rejected every point industry had raised.

Citing many case authorities and even *Black’s Law Dictionary*, the Court concluded that the statutory terms “action for money damages” and “complaint” generally apply to court actions. The Court also invoked the rule that statutes of limitation are construed narrowly against the government. The Court further saw no incongruity between confining the statute of limitations provisions of 28 USC §2415(a) to court actions and the 28 USC §2415(i) provisions allowing of administrative offsets. While sympathetic with the notion that a statute should be read where possible as effecting a “symmetrical and coherent regulatory scheme,” the Court simply rejected the argument that in the absence of a statute of limitations the MMS could issue administrative orders reaching back much farther than seven years, the Federal Oil and Gas Royalty Simplification Act’s requirement for recordkeeping. Finally, the Court acknowledged the policy argument that, absent a statute of limitations for agency actions, the statute’s interest in ensuring that actions are brought while the evidence is fresh might be frustrated, but concluded that this was a matter for Congress not the Court to address, observing further that Congress’ customary starting point was the traditional rule exempting the sovereign from any time bar.

Inasmuch as the BP America now resolves the statute of limitations issue that had become a fixture in many agency and court royalty appeals, the remainder of this paper does not revisit this issue as addressed, but unresolved, in many of the pre-BP America decisions addressed below.

## **B. Oil & Gas Valuation**

*Opposing economic interests and additional consideration.* In another hotly contested case, Vastar Resources, Inc., 167 IBLA 17 (September 26, 2005), producers fared better when the IBLA in a methodical, 21-page opinion reversed an MMS determination that certain gas contracts did not qualify as an arm’s length contract. In this case, Vastar had undertaken a massive restructuring of its gas marketing operations, which included a vigorously negotiated Formation Agreement by which Vastar acquired a stake in Southern Energy that decreased over time but amounted to forty percent for the period in dispute. Also involved were several ancillary agreements, including a gas purchase and sale agreement under which Southern Energy acquired the exclusive right to purchase virtually all of the gas produced by Vastar for an initial term of ten years.

While the MMS asserted that Vastar had control of the affiliate and that the selling arrangement was a non-arm’s length arrangement, Vastar offered extensive evidence about its restructuring and sales arrangements to buttress its view that the arrangement was arm’s length, showing convincingly that its interest did not control the affiliate. While the MMS also claimed that Vastar had received additional consideration not reflected in gas sales prices and argued that Vastar’s long term contract arrangement with Southern Energy also undercut claims of opposing

economic interest and led to valuations less than market price, the IBLA found no MMS evidence of either. Outcome aside, this case is especially instructive insofar as Vastar's advocacy included requests for valuation determinations, a court challenge of the MMS' initial value determination, and careful attention to marshalling situation specific evidence that is conspicuously absent in many MMS or IBLA failed appeals.

Amerada Hess Corporation, MMS-01-0003-O&G (October 20, 2006), involved three leases and buy/sell agreements for sales of onshore oil production and application of the 1988 oil valuation regulations. For the first lease, the MMS upheld its order, concluding that the transaction was arm's length and rejecting lessee's claim that the MMS had no authority to consider additional consideration and step beyond a buy/sell agreement that pegged value at the West Texas Intermediate index price less a discount of 48-58 cents per barrel. For the second lease, the MMS also upheld its order, concluding in this case that the transaction was non-arm's length, that the first benchmark for valuation should be used, and that additional consideration again needed to be added to the value for royalty purposes. For the third lease, however, the MMS rescinded its order and, citing Fina Oil and Chemical Co. v. Norton, 332 F. 3d at 674-75 (D.C. Cir 2003), granted the Amerada Hess claim that oil sold to a non-marketing affiliate could not be valued using the enhanced proceeds of the affiliate but must be based on the non-arm's length transaction between Amerada Hess and its affiliate.

*Affiliate sales.* In another earlier case citing Fina Oil & Chemical Co. v. Norton, the IBLA in Tom Brown, Inc., 162 IBLA 227 (July 27, 2004), vacated a BIA decision, holding that where gas is sold under a non-arm's length contract to an affiliate which is not a marketing affiliate, its value for royalty purposes must be calculated on the basis of the applicable benchmark not the resale price of an affiliate which sells gas exclusively for lessee.

*Comparable Sales.* In Samson Resources Co., MMS-98-0174-IND (October 22, 2004), a case involving valuation of gas produced from on federal and Indian leases and sold under non-arm's length contracts, the MMS explained that the mere fact that a non-arm's length contract has the same unit sales price as an arm's length contract in the area does not make the contracts comparable for valuation purposes, observing that numerous factors must be taken into account (e.g., the different markets for small and large producers and different volumes sold).

*POP Contracts.* On remand from an IBLA September 2003 decision, in Wiser Oil Company, MMS-02-0106-O&G (September 27, 2004), the MMS offered a summary of the tangled history of MMS percent-of-proceeds contract ("POP contract") valuation. In this particular case, the lease prescribed a royalty rate of 12½ percent for gas production under 3 million cubic feet per day, 16⅔ percent for higher gas production, and 16⅔ percent for natural gas liquids. The MMS confirmed that, after amending its gas valuation rules in 1991,<sup>††</sup> gas sold under POP contracts must be valued as unprocessed gas, subject however to the gross proceeds rule, i.e., 100 percent of the value of the residue gas or the lessee's gross proceeds, whichever is greater.

*Take-or-Pay.* In Southern Union Exploration Company, MMS-94-0184-IND (August 23, 2005), the Assistant Secretary offered a useful summary of gross proceeds and take-or-pay principles and took up a settlement agreement where the lessee entered into a settlement totaling \$14.6 million to terminate all existing gas purchase contracts and the release of all past pricing, take-or-pay and no ratable take claims. Citing SCANA Petroleum Resources, Inc., MMS-96-

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<sup>††</sup> 56 FR 46530 (Sept. 13, 1991); 30 CFR § 206.152(a)(1).

0394-O&G (July 27, 1999) (“In allocating portions of a settlement payment to the issues resolved by the settlement, MMS will generally accept reasonable allocations contained in the settlement agreement itself or as indicated by supporting documents used in the settlement negotiations.”), the Assistant Secretary vacated the challenged MMS allocation of \$12.9 million in settlement proceeds and adopted lessee’s allocation of \$4.8 million. However, the Assistant Secretary also concluded that royalty was due on the entire \$4.8 million allocated, applying the gross proceeds rule and citing several old cases to reject lessee’s claim that tax reimbursements and interest on late payments are not part of the gross proceeds. Finally, citing a string of take-or pay agency and court decisions, the Assistant Secretary decided that no royalty is due on payments allocated to compromise accrued take-or-pay liabilities or to buy out of the contracts.

### C. Allowances and Marketable Condition

In a closely watched coalbed methane case, Devon Energy Corp. v. Norton, No. 04-00821 (D.D.C. filed July 2004), Devon has maintained its challenge of the Assistant Secretary’s October 2003 valuation determination decision denying deductions for dehydration and compression costs incurred downstream of the agency-approved Central Delivery Point as previously reported and discussed in detail.<sup>§§</sup> Devon’s situation involved multiple stages of compression and, while the agency decision did state that a lessee need only place gas in marketable condition once, Devon has argued that in denying some of the claimed deductions the agency’s decision is at odds with its 1995 Coalbed Methane Guidelines and 1995 Compression Guidance effectively transmuting the “marketable condition” rule (looking at contracts “typical for the field or area”) into a “marketed condition” rule (looking at specific contract used). Mediation proved unsuccessful, but a hearing on cross motions for summary judgment in this case has been scheduled for late January 2007 and court disposition is expected later in the year.

In another closely watched coalbed methane case involving the marketable condition rule, Amoco Production Company v. Rebecca Watson, 410 F.3d 722 (D.C. Cir. 2005), *cert. denied except for statute of limitations issue, sub nom. BP America Production Company v. Watson*, 126 S. Ct. 1768, 164 L. Ed. 2d 515, 2006 U.S. LEXIS 2851 (U.S., 2006), a final decision has been issued: the D.C. Circuit affirmed a district court decision upholding the Assistant Secretary’s determination that the costs of removing excess carbon dioxide from natural gas produced in the San Juan Basin were not deductible.

While the agency had allowed the producers to deduct from gross proceeds the costs of transporting the royalty-bearing methane and three percent carbon dioxide waste product to the treatment plant, it had balked at allowing deduction of costs associated with excess carbon dioxide, about another seven percent. The producers argued that, while most of the gas was slated for a downstream market, where excess carbon dioxide had to be removed to satisfy pipeline specifications, the gas without excess carbon dioxide removed was still in marketable condition at the lease and that the agency could not lawfully use a “dominant end-use” rationale to apply the marketable condition rule. The court rejected this theory, holding that the marketable condition rule has no geographic limit and, citing California Co. v. Udall, 296 F.2d 384, 388, stated that an ability to sell gas was not the same as marketing it for royalty purposes. The court also rejected producers’ argument that the agency had departed from Xeno, Inc., 134 IBLA 172 (1975), observing that the gas in that case was demonstrably marketable because it was suitable for pipeline access even at the wellhead.

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<sup>§§</sup> See Deborah Bahn Haglund, “Significant Judicial and Administrative Cases From 2000-2003,” Federal & Indian Oil & Gas Royalty Valuation & Management, (Rocky Mtn. Min. L. Fdn. 2004).

The court similarly rejected other elements of the producers' careful and comprehensive case: that the removal of excess carbon dioxide was akin to firm demand charges which are expressly deductible after Independent Petroleum Association of America et al. v. Dewitt, 279 F. 3d 1036 (D.C. Cir. 2002); that carbon dioxide is waste irrespective of its concentration; that agency reliance on a Dear Payor Letter was unlawful because it was a de facto rule requiring notice-and-comment rulemaking and, that the agency decision was violative of the six-year statute of limitations. While the Supreme Court granted certiorari on the case, as noted above, certiorari was limited to the statute of limitations issue.

Citing a litany of marketable condition authorities in yet another coalbed methane case, the MMS in Williams Production Company, MMS-02-0007-O&G (October 22, 2004), rejected lessee's claim that application of the marketable condition to coalbed methane was unfair, that coalbed methane was in marketable condition at the well without further treating, and that downstream CO<sub>2</sub> removal costs were for deductible "value enhancements." Citing IPAA v. Babbitt, 92 F. 3d 1248 (D.C. Cir. 1996) and Amoco v. Baca, 300 F. Supp. 2d 1 (D.D.C. 2003), the MMS also rejected lessee's Administrative Procedure Act-type claim that a Dear Payor Letter was either a rule binding on the agency or that notice-and-comment rulemaking was required for its issuance.

Granting lessee's appeal in part, the MMS in Wasatch Oil & Gas, MMS-03-0025-O&G, (August 13, 2004), acknowledged that lessee did not have a "central treatment point" and that its Nine Mile Canyon Gathering System effectively functioned as a transportation system. And while lessee had dehydration and separator units at the well pad and compression was still needed to overcome pipeline pressure and place the gas in marketable condition, the MMS held that lessee was not required to compress the gas to interstate pipeline pressure more than once, thereby permitting lessee to deduct intermediate compression costs, a position taken in the agency's 2003 Devon Energy Corp. v. Norton coalbed methane decision now in litigation on other issues.

However, in Marathon Oil Company, MMS-00-0063-OCS, (October 20, 2005), the Assistant Secretary denied a transportation allowance for OCS oil and gas produced from seven platforms on one OCS block and transported by subsea pipeline to another OCS block where it was separated and measured, then shipped by pipeline onshore. Citing CXY Energy, Inc. (Nexen Petroleum U.S.A.), 157 IBLA 286 (2002), *aff'd* 2004 U.S. LEXIS 5471, E.D. La. March 31, 2004), Kerr-McGee Corp., 147 IBLA 277 (1999), and rejecting Marathon's proposal to apply the MMS' 1999 Subsea Guidance, the agency's rationale was that before oil and gas reaches "marketable condition" it is "bulk" production and its movement from several platforms is non-deductible gathering until it is accumulated at a central gathering point.

In Samson Resources Co., MMS-98-0174-IND (October 22, 2004), the MMS reversed its order and approved lessee's use of lease gas even if used as fuel for a compressor to boost gas pressure to pipeline requirements, citing NTL-4A and several court decisions leading to the overturning of NTL-4 which for a time reversed longstanding agency policy of not assessing royalty on gas used as fuel on the lease. However, in the same decision, the MMS upheld its order rejecting appellant's imaginative claim of a transportation allowance: Even though lessee had sold the gas at the wellhead (thereby determining the point of valuation) and had not transported the gas to distant markets, lessee claimed that, if Samson had been the transporter, it could have deducted transportation costs and that such costs should therefore not be included in its gross proceeds.

Two other agency decisions are of lesser interest: Pogo Producing Company, MMS-03-0112-OCS (March 25, 2005)(processing costs overstated where lessee attributed 100% of

processing plant costs to its own share of production when about 50% was attributable to third party production) and Citation Oil & Gas Corporation, MMS-03-0115 and -0116-O&G (May 12, 2005) (MMS allowance of an inappropriate deduction does not give lessee the right to take other deductions not authorized by MMS' regulations).

#### **D. Production Measurement and Allocation**

In Byron Oil Industries, Inc., 161 IBLA 1 (February 23, 2004), the IBLA affirmed a New Mexico BLM State Office recalculating the volumes of gas produced onshore. In this case, without first procuring BLM approval, lessee Byron had measured its gas off lease after commingling, and in BLM's view had used a flawed allocation methodology that understated produced gas volumes. Byron's volumes were also understated because it had included only residue gas and failed to include natural gas liquids.

However, in another gas production measurement case, Conoco, Inc., 164 IBLA 237 (January 6, 2005), the IBLA overturned a New Mexico State Office decision to recalculate gas production volumes. Citing Luff Exploration Co., 115 IBLA 134, 137 (1990), IBLA recognized BLM's general authority to prescribe methods and procedures for gas measurement, but found that without a rational basis for its decision BLM's unannounced interpretation of a 1985 AGA Report, ruling out use of the "FW factor" and without notice to lessee Conoco, was arbitrary and capricious.

In Seneca Resources Corp., MMS-03-0010-O&G (January 13, 2005), the MMS overturned a California audit-based order, noting that the lessee had improperly designated fuel gas as "gas lost to sweetening" but had nonetheless reported the correct volumes. In Samson Resources Co., MMS-98-0174-IND (October 22, 2004), however, the MMS required the lessee to make up royalty payments attributable to allocating production to actual unit size of 643.84 acres instead of the BLM-approved unit size of 640 acres

#### **E. Rentals and Late Payment Interest**

*Rentals.* Three decisions address rentals: Merrill Energy, Inc., MMS-03-0037-O&G (October 5, 2004) (under RSFA the record title holder of a lease is liable for payment of minimum royalties); Wilco Oil & Gas Co., MMS-04-0008-IND (June 3, 2005) (in the absence of record evidence of Indian lease assignment, lessees are required to pay annual rentals); Ward Petroleum Corporation, MMS-03-0068-IND (August 10, 2005)(upon plugging and abandonment, a lease is terminated and liability for annual rentals ceases).

*Interest.* Four decisions address the propriety of interest on late payments: Exxon Mobil Corporation, 166 IBLA 226 (July 28, 2005) (obligation to pay royalty is triggered by production and sale of gas and period for calculating interest on late payment charges is not delayed until MMS calculates major portion prices); Dugan Production Corp., MMS-04-0038-IND (September 16, 2005) (late charges properly based on additional royalties determined through major portion analysis and dual accounting; interest runs from the time the additional royalty was due not when lessee is notified of underpayment); Montana Power Company, MMS-00-0082-IND (September 3, 2004) (interest assessments are not penalties but represent the time value of owed money and must be imposed under FOGPMA and the Debt Collection Act), citing American Central Gas, 156 IBLA 369; Williams Production Company, MMS-02-0007-O&G (October 22, 2004)(absent a change in the standards for accounting or the marketable condition rule, imposition of late payment interest not unfair).

## **F. Audits and Restructured Accounting**

In Devon Energy Production Company, L.P., MMS-03-0107-IND (August 14, 2006), the BIA upheld an order for restructured accounting extending to periods outside selected audit test months. Citing Forest Oil Corp., 111 IBLA 284, 288 (1989), Union Texas Petroleum Energy Corporation, 153 IBLA 170, 179-180 (2000), Phillips Petroleum Co. v. Lujan, 963 F.2d 1380 (10<sup>th</sup> Cir. 1992) and Amoco Production Co., 123 IBLA 278 (1992), the MMS explained that finding irregularities in test months justifies inquiries for other time periods, especially where systemic errors are found.

In Samson Resources Co., MMS-98-0174-IND (October 22, 2004), the MMS upheld a restructured accounting order on the basis that lessee's use of the wrong benchmark for several years amounted to a systemic error, and that, citing Union Texas Petroleum Energy Corporation, 153 IBLA 170, 179-180 (2000), the MMS emphasized that it need not show that the systemic error of incorrectly reporting resulted in a royalty underpayment to justify the restructured accounting order.

In Citation Oil & Gas Corporation, MMS-03-0115 and -0116-O&G (May 12, 2005) held that absent lessee gas sales information, auditor use of gas plant operator information to calculate lessee royalties is proper.

## **G. Agency Appellate Practice and Procedure**

*Standing to Appeal.* In an unusual case, with low dollar stakes (\$22,000) but significant appeals procedures implications, California State Controller, 166 IBLA 5 (May 18, 2005), the IBLA dismissed the appeal of the California State Controller challenging an MMS decision obtained by a lessee. At issue was an August 5, 2003, decision of the Associate Director for Policy and Management Improvement which had overturned an August 20, 2002, decision of the MMS Acting Manager, Onshore Compliance and Asset Management. The August 2002 MMS decision had ordered Aera, a Shell affiliate, to pay \$44,000 in connection with a dispute involving the applicable royalty rate for a stripper oil well following an audit by the State of California.

On appeal the MMS Director found that the order was inconsistent with the Director's policy against pursuing underpaid royalties for periods more than seven years before the MMS issues an order to pay. While Aera logically filed no appeal of this favorable decision, the California Controller did. In its lengthy decision, the IBLA viewed the matter as presenting issues of first impression and offered an instructive discourse on the statutory timeframe for processing appeals of MMS royalty orders or decisions under 30 U.S.C. § 1724 (h) and MMS' 1999 administrative appeals rulemaking. In its 1999 rulemaking, the IBLA explained, the MMS' proposed rule concluded that "unlike Indian lessors, States do not have a property interest in leases" but may be "adversely affected by the MMS Director's actions regarding an order." For this reason the MMS proposal considered allowing states a role as intervenors but not as appellants, but in the final rules even the intervenor role was eliminated.<sup>\*\*\*</sup> In a nutshell, under 43 CFR § 4.906(b)(3) MMS Director decisions not appealed by the lessee or its designee are final decisions of the Department and, therefore, not appealable to the IBLA.

Interestingly, the California State Controller has pending a law suit raising the same issue, Westly v. Norton, No. 1:04CV00199 (D.D.C. filed Feb. 10, 2004), filed prior to the IBLA

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<sup>\*\*\*</sup> 64 FR 26245, -46, 58-59 (1999).

appeal. While stayed pending the IBLA proceeding, the court case has now moved ahead and cross motions for summary judgment were filed in late 2006.

*Seven Year Limitation Policy.* In Samson Resources Co., MMS-98-0174-IND (October 22, 2004), the MMS cited the same October 2002 agency policy directive that led to its reversal of an order underlying the standing to appeal decision in California State Controller, but observed that its policy of not issuing orders to pay for periods more than seven years before the date of MMS' orders was expressly inapplicable when "compelling circumstances" justify otherwise. In this case, the MMS decided that the lessee should not benefit from application of the seven year limitation policy, finding that the need for issuance of a subpoena to overcome lessee's resistance to the audit constituted compelling circumstances.

*Time Period for Appeal.* Citing Red Rock Golf and Recreational Association, Inc. 77 IBLA 87 (1983) and D.R. Johnson Lumber Co., 106 IBLA 140 (1989), in Dugan Production Corp., MMS-04-0038-IND (August 21, 2006), the BIA denied an appeal to the IBLA filed 56 days after the lessee had received the contested BIA decision, well over the 30 days plus 10 days grace period prescribed by 43 CFR §§ 4.411(a) and 4.401(a) and deemed jurisdictional for appeals purposes.

*Evidence in Support of Appeal.* In Devon Energy Production Company, L.P., MMS-03-0107-IND (August 14, 2006), the BIA reaffirmed that "when a statement of reason does not, with some particularity, show adequate reasons for appeal, and support the allegations with evidence showing error, the appeal cannot be afforded favorable consideration," citing United States v. Connor, 72 IBLA 254, 256 (1983).

Similarly, in Citation Oil & Gas Corporation, MMS-03-0115 and -0116-O&G (May 12, 2005), the MMS rejected a series of claims that MMS royalty calculations were arbitrary and capricious when appellant either failed to adduce evidence showing the claimed error or ignored contrary evidence in the record, citing United States v. Reavely, 53 IBLA 320 (1981), and other IBLA cases ("Failure on appeal to point out affirmatively why the decision appealed from is in error may be treated in the same manner as an appeal in which no statement of reasons has been filed.") and United States v. Fisher, 92 IBLA 226 (1986) ("Conclusory allegations of error, standing alone, do not suffice.").

*Administrative Procedure Act.* Several of the 2004-2006 decisions summarized elsewhere in this paper address Administrative Procedure Act-type issues: Although not often the basis for a successful appeal, in Conoco, Inc., 164 IBLA 237 (January 6, 2005), agency action was deemed "arbitrary and capricious." Several decisions reiterate the agency view that a Dear Payor Letter and other guidance documents are not themselves regulations. *See, e.g.*, Williams Production Company, MMS-02-0007-O&G; Amoco Production Company v. Rebecca Watson, 410 F.3d 722 (D.C. Cir. 2005); Devon Energy Production Company, L.P., MMS-03-0107-IND (August 14, 2006).

## **H. Indian Lands: Dual Accounting and Major Portion Analysis**

Three decisions offer useful discourses on the law surrounding major portion analysis or dual accounting. Citing Phillips Petroleum Co., 152 IBLA 109 (2000) and Burlington Resources Oil and Gas Co., 151 IBLA 144 (1999), in Exxon Mobil Corporation, MMS-02-0034-IND (July 16, 2004), the BIA rescinded, without prejudice to the MMS to recalculate, an order to pay additional royalties stemming from a major portion analysis because the worksheets underlying the order failed to distinguish between arm's length and non-arm's length transactions.

In a case involving wet gas sold at the wellhead, Union Oil Company of California, 167 IBLA 263 (December 28, 2005), the IBLA carefully construed its earlier decision in Alexander Energy Corp., 153 IBLA 238 (2000), upheld the requirement to perform theoretical dual accounting and affirmed that failure to timely file Form MMS-4109 subjects lessee to forfeiture of any processing allowance on Form MMS-2014 until the failure is cured even though no actual processing occurred. *See also* Berenergy Corporation, MMS-04-0027-IND (June 3, 2005) (lease term expressly requiring dual accounting applicable whether lessee processes gas or not).

Several other majority portion or dual accounting decisions are of lesser interest. Two decisions address the propriety of interest on late payments: Exxon Mobil Corporation, 166 IBLA 226 (July 28, 2005) (obligation to pay royalty is triggered by production and sale of gas and period for calculating interest on late payment charges is not delayed until MMS calculates major portion prices); Dugan Production Corp., MMS-04-0038-IND (September 16, 2005) (late charges properly based on additional royalties determined through major portion analysis and dual accounting).

Two MMS decisions address the time period or burden of proof for filing a dual accounting appeal: appeal: Dugan Production Corp., MMS-04-0038-IND (August 21, 2006) (appeal not filed within 30 days of an agency decision and a 10-day grace period is untimely); Quinex Energy Corporation, MMS-01-0094 and -0095-IND (September 7, 2004) (appeal denied in absence of evidence that lessee performed dual accounting).

Two MMS decisions reject theories that would make dual accounting inapplicable in certain situations: Huntington Energy, L.L.C., MMS-03-0105-IND (May 20, 2005) (that index zone price leads to price higher than actual price provides no basis for appeal); Helton Oil Company, MMS-02-0066-IND (June 13, 2005) (low gas volume and quality does not negate obligation to perform dual accounting).

Finally, in a case involving pre-1991 rules and the relationship of majority portion analysis and dual accounting, the MMS in Devon Energy Production Company, L.P., MMS-03-0107-IND (August 14, 2006), addressed several issues stemming from Indian leases subject to a Settlement Agreement applicable for the 1997-1999 period. It concluded that to accomplish dual accounting properly gas produced from leases to which the index-based valuation rules of the 2000 Indian gas valuation rules do not apply must be valued using pre-1991 valuation rules under which gas sold pursuant to arm's length POP contracts is treated as processed gas. The MMS decision also concludes that major portion analysis is not separate from but a part of dual accounting.

## **I. Indian Lands: Indian Trust Responsibility**

In Apache Corporation, MMS-03-0067-IND (June 7, 2005), a case involving an MMS order to report overriding royalty to the Jicarilla Apache Tribe, the BIA granted Apache's appeal and rejected the MMS' argument that any decision that contravenes the preferences of an Indian Tribe constitutes a per se violation of the Department's trust authority. Citing Northern Arapaho Tribe v. Hodel, 808 F.2d 741 (10<sup>th</sup> Cir. 1987) (upholding the Department's disapproval of Tribe-favored emergency hunting regulations), the BIA concluded that, notwithstanding the Department's duties to administer royalty reporting and collections under FOGDRA, no statute or regulation extends the contours of the trust responsibility to authorize the MMS to manage an overriding royalty interest.

## J. Royalty Relief

Royalty relief has always been available under federal oil and gas mineral leasing statutes, but is largely an exercise of Secretarial discretion and, up until very recently, has rarely generated decisions for onshore or offshore leases. With passage of the Deep Water Royalty Relief Act of 1995 (DWRRA),<sup>†††</sup> however, some important interpretative issues with very high dollar stakes have been generated. A detailed description of the MMS offshore royalty relief programs is beyond the scope of this paper, but the topic has been addressed recently and expansively elsewhere.<sup>‡‡‡</sup>

The MMS maintains four offshore royalty programs at the present time,<sup>§§§</sup> but only the DWRRA royalty relief program has generated any agency or court decisions. In a nutshell, the DWRRA was enacted as an incentive to promote very costly and very risky deep water oil and gas development outside the Eastern Gulf of Mexico Planning Region and offers a lessee a royalty holiday in effect until prescribed suspension volumes or, at least for certain vintage leases, prescribed market price thresholds are reached. As the term is most commonly used, “deep water” is water of depths 200 meters or greater. The specific program requirements of deep water royalty relief depend on lease vintage.

Under DWRRA one category of leases eligible for royalty relief are § 302 leases, so called “Pre-Act Leases,” issued before November 1995.<sup>\*\*\*\*</sup> To date about ten applications for Pre-Act royalty relief have been filed and seven have been granted. In the one application whose denial was appealed, ConocoPhillips asserted that the MMS wrongfully applied its application criteria and procedures; however, with the precipitous rise in market prices beyond statute-prescribed price thresholds that terminate royalty relief where applicable, the parties have obtained a dismissal without prejudice. ConocoPhillips Company v. Norton, No. 05-0716, *dismissed without prejudice*, July 20, 2006 (W. D. La.).

Under DWRRA another category of leases eligible for royalty relief are § 304 leases, so-called “Eligible Leases” issued after DWRRA was passed in late 1995 and up to 2000.<sup>††††</sup> Eligible leases have been much more controversial and one issue has already led to the celebrated decision in Santa Fe Snyder v. Norton, 383 F.3d 884 (5th Cir. 2004). In Santa Fe the MMS had assigned a lease issued in 1997 to a field, which had previously produced, and denied royalty relief to lessee because its regulations for eligible leases applied royalty relief on a field basis and included the “new production” requirement of Pre-Act leases. Affirming a district court decision, and citing the unambiguous language of the DWRRA, the Fifth Circuit held that the MMS regulations were unlawful by applying royalty relief on a field basis and imposing a new production requirement. The Federal Government has acceded to the Fifth Circuit’s decision, the

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<sup>†††</sup> Outer Continental Shelf Deep water Royalty Relief Act of 1995 (DWRRA), Pub. L. 104-58, 109 Stat. 557 (Nov. 28, 1995, codified at 43 U.S.C. 1337 (a)(1)(H), - (a)(3)(B), -(a)(C).

<sup>‡‡‡</sup> See, e.g., L. Poe Leggette, “Royalty Relief and Incentives,” presented at this institute; see also David T. Deal, “Federal Royalty Relief Overview and Forecast,” Proceedings of South Texas College of Law Energy Law Institute for Attorneys and Landmen, Paper G, September 7-8, 2006.

<sup>§§§</sup> See MMS web site at [www.mms.gov/econ](http://www.mms.gov/econ) and [www.gomr.mms.gov/homepg/offshore/rorrelief.html](http://www.gomr.mms.gov/homepg/offshore/rorrelief.html).

<sup>\*\*\*\*</sup> DWRRA § 302, codified at 43 U.S.C. §1337 (a)(3)(C)(v)-(vii).

<sup>††††</sup> DWRRA § 304, codified at 43 U.S.C. § 1337 Note.

field v. lease and new production issues have been resolved, and in due course the MMS will revise its regulations to conform to the Santa Fe decision.<sup>\*\*\*\*</sup> During the litigation the Federal Government estimated the revenue impact of the case at \$200 million for the Santa Fe lease alone.

Another more recent case, as yet undecided, Kerr-McGee Oil & Gas Corporation v. Burton, No. 06-0439-LC, (W. D. La. filed March 17, 2006), presents an altogether different issue: the lawfulness of price thresholds for eligible leases. Given the express language of DWRRA § 302, no one has disputed for Pre-Act leases the applicability of price thresholds as a limit on royalty relief in addition to suspension volumes. However, DWRRA § 304, addressing leases issued in the 1996-2000 period, conspicuously lacks express price threshold language, although the MMS included price thresholds in OCS leases issued in 1996, 1997 and 2000. With oil and gas prices moving well above the price thresholds after 2000, the MMS issued orders to pay to several lessees in December 2005, which prompted many companies to file appeals given the uncertain legal status of price thresholds. However, only Kerr-McGee, the sole plaintiff in the pending litigation, has received an order to pay subject to judicial review; the appeals of several other parties, similarly situated to Kerr-McGee, remain on hold. In late June 2006, Kerr-McGee and the Federal Government agreed to explore mediation in this case, whose dollar stakes, depending on market price and other assumptions, are an estimated \$28-60 billion. However the Kerr-McGee price threshold issue is resolved, it seems to have little significance for leases issued outside the 1996-2000 window.<sup>§§§§</sup>

For Post-2000 OCS lease sales, no one has challenged the MMS' routine inclusion of price thresholds; moreover, the Energy Policy Act of 2005 plainly authorizes price thresholds,<sup>\*\*\*\*\*</sup> the MMS is routinely including price thresholds in OCS leases, and, as explained elsewhere, remedial legislation may require them.<sup>††††</sup> Indeed, this author is unaware of any appeals or litigation involving royalty relief for OCS leases issued after 2000. Likewise for deep gas royalty relief, a royalty relief program younger than and reflecting experience with the DWRRA deep water relief program, this author is unaware of any agency or court decisions or even disputes of consequence.

## **K. Federal False Claims Act**

In the biggest development for quite some time in this very slow moving category of litigation, 70 consolidated cases alleging royalty underpayments because of undermeasurement of

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<sup>\*\*\*\*</sup> See Information to Lessees and Operators, Thomas A. Readinger, Associate Director for Offshore Minerals Management, Minerals Management Service, August 8, 2005.

<sup>§§§§</sup> Not at issue in the Kerr-McGee litigation is the MMS' inadvertent failure to include price thresholds in 1998 and 1999 OCS leases. This controversial omission has led to some but not all affected lessees renegotiating their leases to include price thresholds and could lead to remedial legislation.

<sup>\*\*\*\*\*</sup> Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 599 (Aug. 8, 2005); see §§ 344 (c) (deep gas) and 345 (c) (deep water oil and gas).

<sup>††††</sup> See David T. Deal, "Federal Royalty Relief Overview and Forecast," Proceedings of South Texas College of Law Energy Law Institute for Attorneys and Landmen, Paper G, September 7-8, 2006, at G-6 and G-7.

gas production<sup>\*\*\*\*</sup> were dismissed on the basis that relator Grynberg had not satisfied his burden of showing he qualifies as an original source.. In Re: Natural Gas Royalties Qui Tam Litigation, 99-MD-1293-D, *dismissed for lack of subject matter jurisdiction* (Oct. 20, 2006 D. Wy.), *notice of appeal* filed (Nov. 15, 2006 D. Wy.)

In two other cases, one alleging underpayment of royalties because of undervaluation of gas production, Wright et al. v AGIP, et al., 5:03-cv-00264-DF-CMC (D.E.D. Tex.), and another alleging royalty underpayment because of undervaluation of oil production, United States ex rel. Bobby L. Maxwell v. Kerr-McGee, No. 04-01224, (D. Co. filed Jan. 14, 2004), discovery is underway.

Finally, four additional *qui tam* cases filed by MMS auditors were unsealed: United States of America ex. rel. et al. v. ENI Petroleum Co., Inc. et al., 05-1397 (W.D. Ok. filed Nov. 30, 2005), alleging nonpayment of interest attributable to adjustment of oil sales prices; Little v. ENI Petroleum Co., Inc. et al., 06-0120 (W.D. Ok. filed Feb. 3, 2006), alleging royalty underpayment because of transportation deductions in excess of actual costs for RIK oil; Little et al. v. Royal Dutch Shell, 06-0156 (W.D. Ok. filed Feb. 15, 2006), alleging royalty underpayment because of improper transportation deductions for oil; and, Little et al. v. Royal Dutch Shell, 06-0260 (W.D. Ok. filed March 14, 2006), alleging royalty underpayment because of improper transportation deductions for oil.

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<sup>\*\*\*\*</sup> By separate order the court will address the Special Master's Report and Recommendations on certain defendant's motion to dismiss CO<sub>2</sub>-based royalty claims.

## Appendix A: 2004-2006 Decisions in Alphabetical Order

Amerada Hess Corporation, MMS-01-0003-O&G (October 20, 2006).

Amoco Production Company v. Rebecca Watson, 410 F.3d 722 (D.C. Cir. 2005), *cert. denied except for statute of limitations issue, sub nom.* BP America Production Company v. Burton, 126 S. Ct. 1768, 164 L. Ed. 2d 515 (2006).

Apache Corporation, MMS-03-0067-IND (June 7, 2005).

Berenergy Corporation, MMS-04-0027-IND (June 3, 2005).

BP America Production Company v. Burton, 126 S. Ct. 1768, 164 L. Ed. 2d 515, 2006 549 U.S. \_\_ (2006), 2006 U.S. LEXIS 9586 (U.S., Dec. 11, 2006).

Byron Oil Industries, Inc., 161 IBLA 1 (February 23, 2004).

California State Controller, 166 IBLA 5 (May 18, 2005).

Citation Oil & Gas Corporation, MMS-03-0115 and -0116-O&G (May 12, 2005).

Conoco, Inc., 164 IBLA 237 (January 6, 2005).

ConocoPhillips Company v. Norton, No. 05-0716, *dismissed without prejudice*, July 20, 2006 (W. D. La.).

Devon Energy Production Company, L.P., MMS-03-0107-IND (August 14, 2006).

Dugan Production Corp., MMS-04-0038-IND (August 21, 2006).

Dugan Production Corp., MMS-04-0038-IND (September 16, 2005).

Exxon Mobil Corporation, MMS-02-0034-IND (July 16, 2004).

Exxon Mobil Corporation, 166 IBLA 226 (July 28, 2005).

Helton Oil Company, MMS-02-0066-IND (June 13, 2005).

Huntington Energy, L.L.C., MMS-03-0105-IND (May 20, 2005).

In Re: Natural Gas Royalties Qui Tam Litigation, 99-MD-1293-D, *dismissed for lack of subject matter jurisdiction*, Oct. 20, 2006 (D. Wy.).

Marathon Oil Company, MMS-00-0063-OCS (October 20, 2005).

Merrill Energy, Inc., MMS-03-0037-O&G (October 5, 2004).

Montana Power Company, MMS-00-0082-IND (September 7, 2004).

Quinex Energy Corporation, MMS-01-0094 and -0095-IND (September 7, 2004).

Pogo Producing Company, MMS-03-0112-OCS (March 25, 2005).

Samson Resources Co., MMS-98-0174-IND (October 22, 2004).

Santa Fe Snyder v. Norton, 383 F.3d 884 (5th Cir. 2004).

Seneca Resources Corp., MMS-03-0010-O&G (January 13, 2005).

Southern Union Exploration Company, MMS-94-0184-IND (August 23, 2005).

Tom Brown, Inc. 162 IBLA 227 (July 27, 2004).

Union Oil Company of California, 167 IBLA 263 (December 28, 2005).

Vastar Resources, Inc., 167 IBLA 17 (September 26, 2005).

Ward Petroleum Corporation, MMS-03-0068-IND (August 10, 2005).

Wasatch Oil & Gas, MMS-03-0025-O&G, (August 13, 2004).

Wilco Oil & Gas Co., MMS-04-0008-IND (June 3, 2005).

Williams Production Company, MMS-02-0007-O&G (October 22, 2004).

Wiser Oil Company, MMS-02-0106-O&G (September 27, 2004).

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## Appendix B: 2004-2006 Decisions in Chronological Order

### 2004

Byron Oil Industries, Inc., 161 IBLA 1 (February 23, 2004).

Exxon Mobil Corporation, MMS-02-0034-IND (July 16, 2004).

Tom Brown, Inc. 162 IBLA 227 (July 27, 2004).

Wasatch Oil & Gas, MMS-03-0025-O&G, (August 13, 2004).

Quinex Energy Corporation, MMS-01-0094 and -0095-IND (September 7, 2004).

Montana Power Company, MMS-00-0082-IND (September 7, 2004).

Wiser Oil Company, MMS-02-0106-O&G (September 27, 2004).

Merrill Energy, Inc., MMS-03-0037-O&G (October 5, 2004).

Samson Resources Co., MMS-98-0174-IND (October 22, 2004).

Santa Fe Snyder v. Norton, 383 F.3d 884 (5th Cir. 2004).

Williams Production Company, MMS-02-0007-O&G (October 22, 2004).

### 2005

Conoco, Inc., 164 IBLA 237 (January 6, 2005).

Seneca Resources Corp., MMS-03-0010-O&G (January 13, 2005).

Pogo Producing Company, MMS-03-0112-OCS (March 25, 2005).

Citation Oil & Gas Corporation, MMS-03-0115 and -0116-O&G (May 12, 2005).

California State Controller, 166 IBLA 5 (May 18, 2005).

Huntington Energy, L.L.C., MMS-03-0105-IND (May 20, 2005).

Berenergy Corporation, MMS-04-0027-IND (June 3, 2005).

Wilco Oil & Gas Co., MMS-04-0008-IND (June 3, 2005).

Apache Corporation, MMS-03-0067-IND (June 7, 2005).

Amoco Production Company v. Rebecca Watson, 410 F.3d 722 (D.C. Cir. 2005), *cert. denied except for statute of limitations issue, sub nom.* BP America Production Company v. Watson, 126 S. Ct. 1768, 164 L. Ed. 2d 515 (2006).

Helton Oil Company, MMS-02-0066-IND (June 13, 2005).  
Exxon Mobil Corporation, 166 IBLA 226 (July 28, 2005).

Ward Petroleum Corporation, MMS-03-0068-IND (August 10, 2005).

Southern Union Exploration Company, MMS-94-0184-IND (August 23, 2005).

Dugan Production Corp., MMS-04-0038-IND (September 16, 2005).

Vastar Resources, Inc., 167 IBLA 17 (September 26, 2005).

Marathon Oil Company, MMS-00-0063-OCS (October 20, 2005).

Union Oil Company of California, 167 IBLA 263 (December 28, 2005).

### 2006

ConocoPhillips Company v. Norton, No. 05-0716, *dismissed without prejudice*, July 20, 2006 (W. D. La.).

Devon Energy Production Company, L.P., MMS-03-0107-IND (August 14, 2006).

Dugan Production Corp., MMS-04-0038-IND (August 21, 2006).

Amerada Hess Corporation, MMS-01-0003-O&G (October 20, 2006).

In Re: Natural Gas Royalties Qui Tam Litigation, 99-MD-1293-D, *dismissed for lack of subject matter jurisdiction*, Oct. 20, 2006 (D. Wy.).

BP America Production Company v. Burton, 126 S. Ct. 1768, 164 L. Ed. 2d 515, 549 U.S. \_\_\_ (2006).

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## Appendix C: 2004-2006 Decisions by Venue

### Court Decisions

Amoco Production Company v. Rebecca Watson, 410 F.3d 722 (D.C. Cir. 2005), *cert. denied except for statute of limitations issue, sub nom.* BP America Production Company v. Watson, 126 S. Ct. 1768, 164 L. Ed. 2d 515 (2006).

ConocoPhillips Company v. Norton, No. 05-0716, *dismissed without prejudice*, July 20, 2006 (W. D. La.).

Santa Fe Snyder v. Norton, 383 F.3d 884 (5th Cir. 2004).

In Re: Natural Gas Royalties Qui Tam Litigation, 99-MD-1293-D, *dismissed for lack of subject matter jurisdiction*, Oct. 20, 2006 (D. Wy.).

BP America Production Company v. Burton, 126 S. Ct. 1768, 164 L. Ed. 2d 515, 549 U.S. \_\_\_ (2006).

### Interior Board of Land Appeals

Byron Oil Industries, Inc., 161 IBLA 1 (February 23, 2004).

Tom Brown, Inc. 162 IBLA 227 (July 27, 2004).

Conoco, Inc., 164 IBLA 237 (January 6, 2005).

California State Controller, 166 IBLA 5 (May 18, 2005).

Exxon Mobil Corporation, 166 IBLA 226 (July 28, 2005).

Vastar Resources, Inc., 167 IBLA 17 (September 26, 2005).

Union Oil Company of California, 167 IBLA 263 (December 28, 2005).

### Minerals Management Service

Exxon Mobil Corporation, MMS-02-0034-IND (July 16, 2004).

Wasatch Oil & Gas, MMS-03-0025-O&G, (August 13, 2004).

Quinex Energy Corporation, MMS-01-0094 and -0095-IND (September 7, 2004).

Montana Power Company, MMS-00-0082-IND (September 7, 2004).

Wiser Oil Company, MMS-02-0106-O&G (September 27, 2004).

Merrill Energy, Inc., MMS-03-0037-O&G (October 5, 2004).

Samson Resources Co., MMS-98-0174-IND (October 22, 2004).

Williams Production Company, MMS-02-0007-O&G (October 22, 2004).

Seneca Resources Corp., MMS-03-0010-O&G (January 13, 2005).

Pogo Producing Company, MMS-03-0112-OCS (March 25, 2005).

Citation Oil & Gas Corporation, MMS-03-0115 and -0116-O&G (May 12, 2005).

Huntington Energy, L.L.C., MMS-03-0105-IND (May 20, 2005).

Berenergy Corporation, MMS-04-0027-IND (June 3, 2005).

Wilco Oil & Gas Co., MMS-04-0008-IND (June 3, 2005).

Apache Corporation, MMS-03-0067-IND (June 7, 2005).

Helton Oil Company, MMS-02-0066-IND (June 13, 2005).

Ward Petroleum Corporation, MMS-03-0068-IND (August 10, 2005).

Southern Union Exploration Company, MMS-94-0184-IND (August 23, 2005).

Dugan Production Corp., MMS-04-0038-IND (September 16, 2005).

Marathon Oil Company, MMS-00-0063-OCS (October 20, 2005).

Devon Energy Production Company, L.P., MMS-03-0107-IND (August 14, 2006).

Dugan Production Corp., MMS-04-0038-IND (August 21, 2006).

Amerada Hess Corporation, MMS-01-0003-O&G (October 20, 2006).

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## Appendix D: Pending Appeals

### Federal Courts

Westly v. Norton, No. 1: 04CV00199 (D.D.C. filed Feb. 10, 2004) (standing of states to appeal MMS royalty decisions).

Devon Energy Corp. v. Norton, No. 04-00821 (D.D.C. filed July 2004)(marketable condition).

Kerr-McGee Oil & Gas Corporation v. Burton, No. 06-0439-LC, (W. D. La. filed March 17, 2006) (price thresholds for royalty relief).

### Interior Board of Land Appeals

Fina Oil & Chemical Company, MMS 92-0487-OCS, IBLA 96-0557 (NGPA pricing, restructured accounting).

Robert L. Bayless, MMS 95-0287-IND (July 10, 1997), IBLA 98-0119 (calculation of major portion prices, late payment interest, effect of tribal court decree on assessment of royalties).

Exxon Company, U.S.A., MMS 92-0221-IND (March 13, 2003), IBLA 2003-0248 (dual accounting).

Pioneer Natural Resources, MMS 02-0011-IND (April 12, 2004), IBLA 2004-0259 (dual accounting).

Wiser Oil Company, MMS 02-0106-O&G (September 27, 2004), IBLA 2005-0072 (POP contracts).

Citation Oil & Gas Corp., MMS 03-0115 & -0116-O&G (May 12, 2005), IBLA2005-0245 (restructured accounting).

Huntington Energy L.L.C., MMS 03-0105-IND (May 20, 2005), IBLA 2005-0259 (index zone pricing).

Devon Energy Production Company, L.P., MMS-03-0107-IND (August 14, 2006), IBLA 2007-013 (dual accounting, major portion analysis).

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