Indian Oil Valuation Negotiated Rulemaking Committee
Meeting 2, June 18-19, 2012
Building 85 Auditorium, Denver Federal Center,
Lakewood, Colorado

INDIAN MINERAL LEASING:
TRUST DUTIES AND OBLIGATIONS TO INDIAN MINERAL OWNERS

I. INDIAN MINERAL OWNERSHIP CARRIES TRUST MANDATE

- Indian tribes are the beneficial owners of the mineral interests. *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

- The same is generally true for Indian allottees. When Indian lands were allotted, the mineral estate followed the surface estate, unless specifically specified otherwise. *See, e.g. United States v. Bruisedhead*, 248 F. Supp. 999, 1001 (D. Mont. 1966); 34 Op. Atty. Gen. 181, 189 (1924).

- The Secretary of Interior's trust responsibility to Indian Tribes and allottees stems from the fact that Indian Tribes and allottees are the beneficial owners of Indian minerals.

II. INDIAN MINERAL LEASES ARE ISSUED PURSUANT TO THE INDIAN MINERAL LEASING ACT, 25 U.S.C. §§396a-396g

- 1938 Congress enacted a comprehensive statute governing the mineral leasing of tribal lands.

- The Indian Mineral Leasing Act ("IMLA") was enacted because "the present law is [in]adequate to give the Indians the greatest return from their property." S. Rep. No. 75-985, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 75-1872, 75th Cong., 3d Sess. 2 (1938).

- All leases granted after 1938 are governed by its provisions.

- **Congress' Stated Purpose:**

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- (1) To achieve uniformity in Indian mineral leasing laws;

- (2) Revitalize Indian tribal governments

- (3) To promote economic development, by ensuring that Indian tribes receive the maximum benefit from mineral deposits on their lands through leasing.

  See S. Rep. No. 75-985, 75th Cong., 1st Sess. 2-3 (1937); H.R. Rep. No. 75-1872, 75th Cong., 3d Sess. 1-3 (1938). *See also Jicarilla Apache Tribe v. Supron Energy Corp.* ("*Supron*"), 728 F.2d 1555, 1565 (10th Cir.1984) (Seymour, J., concurring in part and dissenting in part), *adopted as majority opinion as modified en banc*, 782 F.2d 855 (10th Cir.1986), *supplemented*, 793 F.2d 1171 (10th Cir. 1986), *cert. denied*, 479 U.S. 970 (1986).

- **Interior has promulgated extensive regulations under the IMLA**

  - The Secretary must act in the best economic interests of the tribes. *See, e.g.*, 25 C.F.R. pt. 211 *et seq*.

  - Consistent with that, the Indian gas valuation regulations were enacted for the purpose of "ensur[ing] that Indian lessors receive maximum revenues from their mineral resources as required by . . . leases and MMS' trust responsibility[.]" 64 Fed. Reg. 43506, 43506 (Aug. 10, 1999) (final rule).

  - Additionally, the government is required to maintain comprehensive records of price and productions, and to determine royalties. 25 C.F.R. 211 *et seq*. Regulations detail the government's management and regulatory responsibilities. *Id.*

III. INDIAN MINERAL LEASING ACT INTERPRETED AND TRUST DUTIES OWED TO INDIAN MINERAL LESSORS

- ***Seminole Nation v. United States***

The federal government is "charged with the highest responsibility and trust [duties]. Its conduct, . . . , should therefore be judged by the most exacting fiduciary standards." 316 U.S. at 1054.

- ***Kenai Oil & Gas Co. v. DOI***

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DOI "must manage Indian lands. . . to make them profitable for the Indians[,]" which necessarily includes "a duty to maximize lease revenues." 671 F.2d at 386 (emphasis added).

In carrying out his duties, the Secretary "must take the Indians' best interests into account when making any decision involving leases on tribal lands[.]" *Id.* at 387 (emphasis added).

- ***Jicarilla Apache Tribe v. Supron***:

The *Supron* decisions again affirm the legal obligations of the United States in the context of Indian minerals and resources.

Judge Seymour affirmed the duties the federal government owes Indian tribes in the context of the Indian Minerals Leasing Act.

Judge Seymour expressly recognized "'the distinctive obligation of trust incumbent upon the Government' in its dealings with the Indian tribes" per *Seminole*, under which the Government "is held to a high standard of conduct." 728 F.2d at 1563 (quoting 316 U.S. at 296).

Judge Seymour specifically recognized that when acting as a fiduciary for Indian beneficiaries "stricter standards apply to federal agencies when administering Indian programs[,]" 728 F.2d at 1567, and the Secretary's "actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Id.* at 1563.

With respect to specific duties under the IMLA, Judge Seymour stated that the purpose of Indian mineral leasing and associated regulations was to "ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands[,]" 728 F.2d at 1565 (emphasis added), and DOI through the Secretary "must act in the best interests of the tribes." *Id.*

Secretary is bound by *Supron*, because it was a party defendant.

- ***Pawnee v. United States*:**

The Federal Circuit expressly "agree[d] with the *en banc* Tenth Circuit in . . . *Supron* . . . that the United States is a general trustee within respect to Indian [oil and gas] leases . . ." 830 F.2d at 191.

- ***Cheyenne-Arapaho v. United States***:

The U.S. Court of Claims held that "the legal standards applied by the Tenth Circuit courts and this court regarding breach of trust are the same." 33 Fed. Cl. at 467.

The Court of Federal Claims also specifically followed the point in *Kenai* that "'[a]s a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian

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lessors, and has a duty to maximize lease revenue.'" *Id.* at 468 (quoting *Kenai*, 671 F.2d at 386) (additional citation omitted).

Cheyenne-Arapaho also specifically applied the point in *Supron* that when the Secretary is required to act as a fiduciary, "'his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under more stringent standards demanded of a fiduciary.'" *Id.* at 469 (quoting *Supron*, 728 F.2d at 1563) (additional citation omitted).

- ***Cobell v. Norton*:**

The D.C. Circuit specifically followed and quoted *Supron* for the points that "'stricter standards apply to federal agencies when administering Indian programs'" and that "the Secretary 'cannot escape his role as trustee by donning the mantle of administrator . . . .'" 240 F.3d at 1081 (quoting 728 F.2d at 1567); *see also id.* at 1104 (quoting 728 F.2d at 1563).

IV. DUTY TO MAXIMIZE REVENUES

- Getting "the best possible price" for the Indian. *Gray v. Johnson*, 395 F.2d 533, 536 (10th Cir. 1968) (citing *Bailey v. Banister*, 200 F.2d 683, 685 (10th Cir. 1952).

- "[A]pply whichever method resulted in the greatest income to the Tribe[,]" *Supron*, 728 F.2d at 1566., and "better promotes the Tribe's interest." *Id.* at 1567.

- Interior's trust responsibilities require it to apply whichever accounting method [that] yields the Tribe the greatest royalties." *Supron*, 728 F.2d at 1569.

- If higher royalty payments and bonuses can be secured, the federal government has the duty to secure them. *Kenai Oil & Gas, Inc. v. DOI*, 671 F.2d 383, 387 (10th Cir. 1982).

V. DUTY TO CONSIDER INDIAN BEST INTERESTS

- Generally, ex. when approving a lease:

    - *In the best interest of the Indian mineral owner* refers to the standards to be applied by the Secretary in considering whether to take an administrative action affecting the interests of an Indian mineral owner. In considering whether it is "in the best interest of the Indian mineral owner" to take a certain action (such as approval of a lease, permit, unitization or communitization agreement), the Secretary shall consider any relevant factor, including, but not limited to: economic considerations, such as date of lease expiration; probable financial effect on the Indian mineral owner; leasability of land concerned; need for change in the terms of the existing lease; marketability; and potential environmental, social, and cultural effects. 25 CFR § 211 (definitions).

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- As interpreted by Judge Seymour:
    - When the Secretary "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." *Supron*, 728 F.2d at 1567.
- Indian Oil Valuation Rulemaking Context:
    - Keeping in mind the purpose of the oil valuation regulation and the duty to maximize revenue, when faced with more than one reasonable alternative the Secretary must choose that alternative that most benefits the Indian mineral owner.

VI. SECRATRY'S DISCRETION TO DETERMINE VALUE AND MAXIMIZE REVENUE TO INDAIN LESSORS

- Secretary has broad discretion to determine the value of production in the way he considers will best protect the royalty interest of the lessor. *Supron*, 728 F.2d at 1566.
- The Secretary has broad discretion but it is not unfettered rather it is directed.
    - Because the Secretary's discretion is limited by the fiduciary responsibilities as supervisor and administer of Indian oil and gas leases, as such he "must manage Indian lands so as to make them profitable to the Indians." *Cheyenne-Arapaho v. United States*, 966 F.2d 583, 589 (10th Cir. 1992).
    - The Secretary's discretion must be exercised consistent with lease terms and governing law.
- Where the Secretary has discretion, he must exercise it.
    - The Secretary "has the authority and responsibility to establish the reasonable value of production for royalty purposes, and possess considerable discretion in determining that value." *Anadarko*, 122 IBLA 147, 148 (1992).
    - The Gas Valuation Regulation evinces the Secretary's discretion to explore all reasonable valuation alternatives available to maximize tribal mineral lease revenue. *See* 64 Fed. Reg. 43506 (Aug. 10, 1999).
- There is no "relevance [of] 'industry practices' [] to the Secretary's interpretation of federal law." *Supron*, 728 F.2d at 1566.
- The Secretary cannot escape his role as trustee by donning the mantel of administrator. *Supron*, 728 F.2d at 1567.

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VII. SECRETARY MAY NOT RENDER SELECT PROVISIONS OF INDIAN LEASES MEANINGLESS.

- The 1998 Final Rules on Gas Valuation "expressly recognize that where provisions of any Indian lease, or any statute or treaty affecting Indian leases, are inconsistent with the regulations, the lease term, statute, or treaty governs to the extent of the inconsistency." 53 Fed. Reg. 1231 (Jan. 15, 1988).

- Standard Lease Form 5-157 ¶ 3(c) states: The major portion requirement requires the Secretary 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. DOI, BIA, Oil and Gas Mining Lease-Tribal Indian Lands, Form 5-157 (July 1964).

- An example of MMS recognizing such is found in 1996 when MMS recognized that "median is not synonymous with major." 61 Fed. Reg. 49894, 49899 (Sept. 23, 1996) (agreeing that "the 25th percentile from the top was a reasonable safeguard for royalty payments[.]") (emphasis added).

VIII. TRUST RESPONSIBILITY IN LIGHT OF THE PURPOSE OF INDIAN OIL VALUATION RULE

- The purpose of these negotiations must be to create regulations that ensure that the Indian tribes receive the maximum benefit, finically and otherwise, from the leasing of their oil reserves and, in doing so, the United States must act in the best interests of the tribes while maintaining the highest responsibility and trust duty to the tribes.

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