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**STATE CONSERVATION REGULATION -- SINGLE WELL SPACING AND POOLING -- VIS-À-VIS FEDERAL AND INDIAN LANDS** [[1]](#footnote-2)1

[\*1] **I. Introduction**

This paper addresses, and is limited to, the interplay between state spacing and pooling laws and practices with the communitization of federal and Indian lands. In general, spacing, pooling, and communitization all relate to the acreage needed to drill or that is attributable to the drilling of single well, although infill drilling-that is the drilling of additional wells within a previously established spaced, pooled or communitized area-may occur as development of a particular field or reservoir matures.

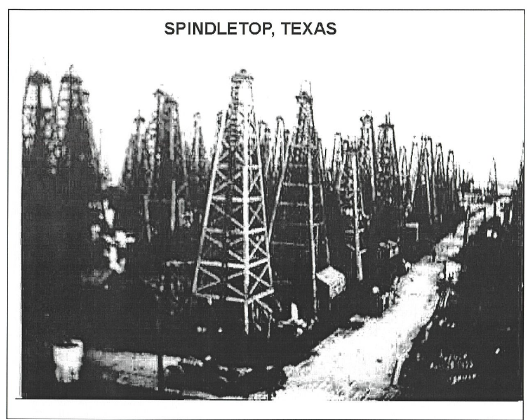
Readers beware that other forms of cooperative ***oil*** and gas agreements relating to federal or Indian lands, including exploratory units and enhanced recovery units, are beyond the scope of this paper. Likewise, voluntary and state-ordered compulsory unitizations are also beyond the scope of this paper.

[\*2] **II. The Rule of Capture**

*The owner of a tract of land acquires title to the* ***oil*** *and gas which he produces from wells drilled thereon, though it may be proved that part of such* ***oil*** *or gas migrated from adjoining lands. He may thus appropriate the* ***oil*** *and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage. The nonliability is based upon the theory that after the drainage the title or property interest of the former owner is gone*.[[2]](#footnote-3)2

This essay begins with a typical definition of the venerable rule of capture,[[3]](#footnote-4)3 which, although limited by modern ***oil*** and gas conservation law, continues to play an important role in promoting efficient and practical regulation. Without regulation, the rule of capture encouraged excessive drilling. Each owner overlying a common reservoir was inclined to drill as many wells as possible and to produce them as rapidly as possible to prevent drainage by neighbors. Excessive drilling was a reality, not mere behavioral theory, as is illustrated by the following picture of the Spindletop ***oil*** field in Texas in the 1903:

[\*3]



Spindletop's Boiler Avenue, 1903. Photograph courtesy of the American Petroleum Institute (Fred A. Schell).

Because the rule of capture encouraged excessive drilling and wasteful production,[[4]](#footnote-5)4 the rule served as a convenient whipping boy for New Deal politicians, federal officials, and others to advocate federal preemption of state regulation of oilfield development and production[[5]](#footnote-6)5 by passing a federal compulsory unitization act.[[6]](#footnote-7)6 In the end, this preemption effort did not succeed. [\*4] Instead, the Congress authorized the establishment of the Interstate ***Oil*** Compact Commission in 1935,[[7]](#footnote-8)7 under which the states cooperatively limited ***oil*** production based upon an assessment of "reasonable" market demand. In a sense, the IOCC was a harbinger of OPEC[[8]](#footnote-9)8 and was formed for similar reasons-to address falling ***oil*** prices.

**III. The Correlative Rights Doctrine**

Prior to the enactment of comprehensive state ***oil*** and gas conservation codes in the 1930s and 1940s, the principal common-law limitation on the rule of capture was the doctrine of correlative rights. This doctrine protects the opportunity of each common owner, through self-help, to secure a fair share of the ***oil*** and gas in a reservoir. In ownership-in-place states, like Texas, this doctrine might be more narrowly defined as the opportunity to secure the ***oil*** and gas in place beneath one's land. In either case, however, the key word is "opportunity." In other words, securing a fair share requires self-help. As initially applied, the doctrine of correlative rights served to protect common owners from negligent[[9]](#footnote-10)9 or egregiously wasteful[[10]](#footnote-11)10 operations that otherwise would have been protected by the rule of capture. This common-law doctrine, which also has constitutional underpinnings,[[11]](#footnote-12)11 is either expressly[[12]](#footnote-13)12 or implicitly[[13]](#footnote-14)13 included in state ***oil*** and gas conservation laws.

**IV. Well Spacing and Density**

One of the earliest forms of conservation regulation is well spacing and density restrictions that govern the development of a newly discovered reservoir. In addition, state-wide well-location or state-wide spacing rules govern the drilling of wildcat wells.

[\*5] Spacing and density regulation greatly limits the rule of capture by regulating the number of wells that can be drilled to develop a common reservoir of ***oil*** or gas.[[14]](#footnote-15)14 In theory, a spacing order for a given reservoir determines the area that one well will effectively and efficiently drain. The traditional goals of spacing are to prevent surface waste, underground waste, and economic waste. Within the last 30+ years, the details of spacing rules may also serve to prevent avoidable environmental waste by locating particular well sites to avoid environmentally sensitive areas or, at least, to mitigate potential adverse environmental impacts. In addition, a uniform pattern of consistently spaced wells, together with compulsory pooling where needed, serves to protect correlative rights.

Surface waste is the unnecessary proliferation of valves, pipes, and storage facilities used to handle produced ***oil*** when more wells are drilled than are necessary to effectively and efficiently drain the reservoir. This unnecessary proliferation creates a greater likelihood for leaks and spills of ***oil***. Thus, the concern is the loss of ***oil***.

More serious is underground waste, which refers to ***oil*** that is left in the reservoir due to the inefficient use of reservoir energy-e.g., gas or water-that drives ***oil*** into well bores. Excessive drilling can result in the inefficient dissipation of reservoir energy. Thus, again, the concern is the loss of ***oil*** by failing to recover reserves that, through efficient and prudent development, could be recovered.

Economic waste refers to the costs incurred in drilling unnecessary or uneconomic wells. Unnecessary wells are wells that are not necessary for the effective and efficient drainage of ***oil*** or gas from a reservoir. Uneconomic wells are wells that fail to make a sufficient rate of return to justify their drilling. Thus, the concern is the excessive, unnecessary, and perhaps unprofitable expenditure of money, not the direct loss of hydrocarbons. Historically, not all conservation acts authorized conservation agencies to consider economic waste,[[15]](#footnote-16)15 but today most conservation agencies may do so. For the reasons suggested, economic waste should be considered. Moreover, if spacing is set too dense for an adequate rate of return, a reservoir is not likely to be fully developed on that density, which then affects correlative rights. As a general rule, operators may be obliged to develop on behalf of their lessor-royalty owners, but only if it would be reasonable and prudent-that is reasonably profitable-to do so.[[16]](#footnote-17)16

Environmental waste, which involves balancing the utility of ***oil*** and gas development against the harm that development may cause to the overall environment, was not historically a consideration of conservation agencies. Nevertheless, fewer wells do lessen the environmental impact of development, and some conservation agencies may consider environmental impact when crafting the details of a spacing order. For example, historically, conservation agencies often required wells to be drilled in the center of a square drilling unit or in the center of one of [\*6] the halves of a rectangular drilling unit. Today, spacing orders may allow wells to be located anywhere within a "window" within a drilling unit. This allows operators to avoid troublesome topography, to better accommodate conflicting land uses, or to lessen environmental impact. A flexible drilling-location rule may in some circumstances decrease drilling costs, thereby preventing economic waste. On the other hand, a flexible well-location pattern may raise correlative-rights concerns because this flexibility does lessen the uniformity of drilling patterns.

Typically, both distance and density are regulated, although some early forms of regulation only regulated distance. Distance regulation simply requires that wells drilled to develop a common reservoir be a minimum distance from each other and typically a minimum-distance from the boundary of tracts that will not share in the production from a particular well. The relevant distances are based upon the reservoir location of the well bore, not the surface location. Establishing minimum distances indirectly regulates drilling density in that minimum-distance requirements necessarily limit the total number of wells that may be drilled. In fields where only distances were regulated, the acreage assigned to a well, perhaps as a result of voluntary or compulsory pooling, was sometimes called a "proration unit."

The establishment of a minimum acreage area for wells, usually called spacing units or drilling units and sometimes called proration units,[[17]](#footnote-18)17 directly regulates density and, together with distance and well-location regulations, creates a uniform drilling pattern. Modern drilling units establish a minimum tract size, and the units are commonly consistent with government cadastral surveys. Thus, modern drilling units range in size from 40 to 640 acres, plus or minus tolerances for nonstandard sections of land. Details vary from state to state. The more restrictive drilling-unit practices confine a 640-acre unit to one surveyed section; a 320-acre unit to half of one surveyed section-*i.e.*, north, south, east, or west half; a 160-acre unit to a surveyed quarter section-*i.e.*, northwest, southwest, southeast, or northeast quarter; an 80-acre unit to half on one of a quarter section-*i.e.*, north, south, east, or west half; and a 40-acre unit to one quarter of a surveyed quarter section-*i.e.*, northwest, southwest, southeast, or northeast quarter of quarter section. Some states may be more liberal in allowing drilling units to cross section or quarter lines. Historically, drilling units in shallow ***oil*** fields were as small as 2.5 acres and sometime even smaller. The common size for drilling units in California is still one acre. Today, drilling units for gas wells are generally larger than are drilling units for ***oil*** wells because gas generally flows more freely through reservoir rock. In a few states, drilling units for deep gas fields may encompass two or perhaps even four surveyed sections of land.

To illustrate, a 160-acre drilling-unit order allows for initial development of one well on each quarter section of land for a total of four wells on each section. If accompanying distance regulation is strict (*e.g.*, 1320 feet from the quarter and section lines and 2640 feet between wells), each well would be drilled at the center of each standard quarter section, which would then result to a uniform well drilling pattern. This strict approach to spacing is intended to assure that the reservoir will be effectively and efficiently drained and also serves to protect correlative [\*7] rights by allowing one well on each uniformly sized unit. Of course, this pattern does not hold strictly true due to survey correction lines and other variations in the size of sections. Moreover, with more modern "window" spacing, mentioned above, a strictly uniform pattern of well drilling is somewhat compromised.

Well spacing and density regulation is grounded in three related assumptions: First, an ***oil*** or reservoir is assumed homogeneous-that is, a common reservoir has the same characteristics, *e.g*, porosity, permeability, thickness, hydrocarbon content, throughout. Second, each well completed in a homogenous reservoir will each drain similar radial patterns of acreage. Third, the matching drainage patterns of each well assures all interest owners a fair share of hydrocarbons even though the rectangular or square drilling units fail to coincide with the actual drainage pattern of the wells.[[18]](#footnote-19)18 This latter assumption is often called the doctrine of "compensatory drainage."

In reality, the first assumption is usually false. Reservoirs are typically heterogeneous, not homogeneous. The typical reservoir has varying porosity and permeability throughout, varying thickness throughout, and varying quantities and types of hydrocarbons. The falsity of the first assumption necessarily makes the second and third assumptions false. The third assumption is further nullified by "window" spacing, see above, and by off-pattern exception-location wells-wells that are specially permitted for locations that are inconsistent with the well-location pattern specified in the general spacing and density order. Exception wells are common and may be authorized to prevent waste, protect correlative rights, or both.[[19]](#footnote-20)19

Relying on the above three assumptions, which though false, is still useful for planning the orderly development of a reservoir that has not been unitized.[[20]](#footnote-21)20 Accordingly, the conservation agency will usually treat all drilling units the same. Even if treated differently for production-allocation purposes, units having structural advantage (*e.g.*, tracts located above the apex of an anticline and above the thickest part of the reservoir) may not receive the full benefit of that advantage.[[21]](#footnote-22)21

[\*8] In other situations, production regulations aimed at preventing waste may even appear to harm units with structural advantage. For example, productive drilling units that produce excessive ratios of reservoir energy (*e.g.*, gas to ***oil*** in a solution-gas or gas-cap reservoir), may have their production curtailed in a manner that appears to violate correlative rights.[[22]](#footnote-23)22

The bottom line on drilling-unit regulation is that, while far from perfect, it is a great improvement over unfettered drilling under the rule of capture. Nevertheless, even today, too many wells have been and are being drilled at less than ideal locations. While these wells may even fail to protect correlative rights fully, that concern is answered by the fact that the primary goal of conservation regulation is to prevent waste.[[23]](#footnote-24)23 In theory, if the prevention of waste results in a far greater ultimate recovery of hydrocarbons, then all interest owners benefit, including those owners who may appear to have suffered a violation of their correlative rights. Although early unitization of reservoirs could eliminate the need for the present system of well spacing and density regulation, the current system may be best that can be achieved until state officials have the courage to mandate early unitization.

While spacing theory is generally consistent, spacing practices vary from state to state. Modern practices can be loosely grouped as follows: Some states, such as Nebraska, allow development to proceed according to state-wide spacing regulation. State-wide rules may build in variables for ***oil*** versus gas, variations in drilling depths, or other factors. Some states, like North Dakota, may prospectively space new discoveries by adopting temporary field-wide spacing and density rules for the area believed to encompass the reservoir and then revisit and perhaps revise these temporary rules when the field becomes more fully developed. Still other states, like Oklahoma, may issue a spacing order for each well, which order will then often include a compulsory pooling order. Some states may have features of all three of these groupings, depending upon the area in question or upon the date of initial development.

[\*9] In the past twenty years, spacing theory has been modified and spacing practices have been adjusted to accommodate horizontal drilling.[[24]](#footnote-25)24 The doctrine of compensatory drainage, which assumes that a well will drain a circular area of a reservoir, has been altered by dividing the assumed circle in half and then inserting a rectangle in between the two halves to take into account the horizontal portion of the wellbore. Thus, drilling units for horizontal wells are generally rectangular, with the length of the unit determined by the area of the reservoir that is horizontally penetrated by a particular well. Horizontal spacing, as well as pooling, may be further complicated where several horizontal wellbores are drilled from one well like spokes emanating from the hub of a wheel.

In any of these cases, the conservation agency, through the exercise of its continuing jurisdiction,[[25]](#footnote-26)25 may alter the spacing over time by allowing additional drilling. Sound spacing practice requires that initial drilling density not be more dense than necessary to drain the reservoir efficiently and effectively. In other words, as a practical matter, it is more problematic to first establish 160-acre drilling units and then later increase drilling-unit size to 320 acres. This may create thorny correlative-rights issues that are not easily resolved. On the other hand, increasing density, *e.g.*, allowing the drilling of an additional well in each drilling unit, is feasible. If no drilling has occurred on particular units, those wells can be "despaced" from say 320-acre spacing to 160-acre spacing. On units where drilling has occurred, those units can be preserved while allowing the drilling of a second well.[[26]](#footnote-27)26

The regulatory practice of creating large units at the outset followed by possible infill drilling can create tension with mineral owners, including the federal government, that view the practice as facilitating "resource banking" by lessees. For example, a field developed on 640-acre spacing will hold twice as much acreage per well as a field spaced on 320-acre spacing. As a practical matter, holding more acreage per well often means that lessees are also perpetuating more leases per well. Mineral owners (lessors) who have issued leases with primary terms that [\*10] are nearing expiration may prefer smaller units to increase the chances that they will be able to issue new leases for a new lease bonus and perhaps a higher royalty.

In conclusion, recognize that spacing density rules are promulgated on a formation basis. Although some spacing rules may apply to multiple formations beneath particular tracts, more commonly there will be different spacing requirements in place for each formation.[[27]](#footnote-28)27 This affects pooling and communitization because each formation is force pooled and customarily communitized separately for each formation because of differences in spacing and density as well as because of the increasing likelihood that ownership may vary by depth.

**V. Compulsory Pooling**

Spacing is distinguishable from compulsory pooling. A compulsory pooling or force pooling order combines the royalty and working interests in small tracts or of undivided interests in a drilling unit to allow for the drilling of one well on behalf of all owners.[[28]](#footnote-29)28 Of course, pooling may be accomplished voluntarily if all necessary parties agree.

In Texas, a *jurisdictional* prerequisite to force pooling is that the applicant must show that it made a fair and reasonable offer to pool voluntarily.[[29]](#footnote-30)29 Some other states require a similar showing as part of the factual proof necessary to justify the issuance of a pooling order, but the amount of proof required to satisfy this element ranges from a simple statement in the application that no voluntary pooling has occurred to a showing that a reasonable offer to pool voluntarily was made.

In much of the West, working-interest parties involuntarily pooled by regulatory action are given the choice of participating in the upfront risk of drilling a well in accordance with their proportionate interest in the drilling unit or of being "carried" by those willing to participate in the upfront risk. But parties who elect to be carried may be subject to the recovery of a "risk penalty" by those who assumed the risk of drilling a dry or unprofitable well.[[30]](#footnote-31)30

For example, assume that Opportunistic ***Oil*** Company holds the working interest to 40 acres in a 160-acre drilling unit and is force pooled. The pooling order will typically give Opportunistic the right to take a "risk-free ride" ride on the well by being "carried by" those [\*11] parties willing to assume the risk of drilling. As a carried party, Opportunistic incurs no drilling costs and does not participate in the risk that a dry or unprofitable well may be drilled. Thus, if the well is a dry hole, the parties participating in the risk of drilling will simply have to absorb Opportunistic's proportionate share of costs along with their own share. On the other hand, if the well is completed as a producer, the participating parties are allowed to recover Opportunistic's 1/4 share of costs from Opportunistic's 1/4 share of production. And assuming that a risk penalty is imposed on Opportunistic, the participating parties will also be allowed to recover a risk penalty from Opportunistic's 1/4 share of production. The amount of the risk penalty is a multiple-*e.g.*, 200% of Opportunistic's share of costs. The actual costs subject to risk penalty-drilling, completion, and operating costs-vary from state to state and even from pooling order to pooling order. Typically, the pooling order specifies that the carried option is deemed to be Opportunistic's default option if Opportunistic fails to make an actual election within a specified time-*e.g.*, within 30 days of the issuance of the order. Regardless of Opportunistic's election, if Opportunistic is a lessee, the lessors and any overriding royalty owners will ordinarily receive their royalty shares from first production. If Opportunistic is an unleased mineral interest area, then Opportunistic will ordinarily be given a royalty interest in addition to a working interest.

Oklahoma and few other states take a different approach to pooling.[[31]](#footnote-32)31 In Oklahoma, the pooling applicant would offer evidence of the value of Opportunistic's working interest. The Corporation Commission would determine the market value of the interest prior to drilling, and Opportunistic would be given a series of choices. One choice would be to participate upfront in the drilling of the well, subjecting Opportunistic to the risk of drilling a dry hole or unprofitable well. Absent participation, the pooling order would allow Opportunistic to elect to assign its working interest in the unit to those parties willing to drill in return for various combinations of cash and royalty, or if Opportunistic is a lessee, an overriding royalty. One of these assigned choices would be designated as Opportunistic's default choice in the event Opportunistic fails to make an actual election by the deadline set forth in the pooling order. As with risk-penalty pooling, royalty owners and overriding royalty owners will ordinarily receive their royalty shares from first production.[[32]](#footnote-33)32

An important legal distinction between most states and Oklahoma is that the establishment of a drilling unit in Oklahoma serves to pool interests in the unit.[[33]](#footnote-34)33 Thus, the purpose of the pooling order is limited to designating an operator, addressing matters relating to the location and target for the unit well, and allocating costs among working interest owners. Thus, all interest owners in a drilling unit are entitled to their proportional production shares from date of spacing. This legal distinction is sometimes of little practical importance, however, [\*12] because the Oklahoma Corporation Commission often spaces and pools one drilling unit at a time in a combined order. In any event, because spacing pools production in Oklahoma, all production is allocable from date of spacing.

In states where spacing does not pool production, pooling orders may be retroactive.[[34]](#footnote-35)34 For example, the effective date of a pooling order may be retroactive to the date of the applicable *field-wide* spacing order. And in states where drilling of an offset well to a wildcat well is prohibited by regulation until field-wide spacing is established, a pooling order may even be retroactive to date of first production because the neighboring landowner is unable to exercise self help under the Rule of Capture. In a few states, pooling may be retroactive to the effective date of an applicable *state-wide* spacing order or this same result may be achieved by requiring that the operator and nonoperators of a wildcat well control the acreage that comprises the statewide unit where the well is to be drilled. As will be discussed below and in the subsequent paper, communitizations may also be retroactive.

**VI. State Spacing and Pooling of Federal Lands**

**A. Preemption and The Mineral Leasing Act of 1920**

Congress act to could preempt ***oil*** and gas conservation regulation under the Supremacy Clause or Commerce Clause of the Constitution or preempt state regulation of federal lands under the Property Clause of the Constitution. Of these, the most direct means of limiting state authority over federal lands is under the Property Clause, which provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.[[35]](#footnote-36)35

As construed, this clause bars the states from regulating federal lands in a manner that is inconsistent with federal legislation.[[36]](#footnote-37)36 Thus, the key to preemption is whether federal legislation has preempted or partially preempted state regulation.

The principal federal legislation dealing with leasin of federal lands for ***oil*** and gas development is the Mineral Leasing Act of 1920 (MLA).[[37]](#footnote-38)37 This MLA does not expressly [\*13] preempt state regulation. Indeed, the MLA expressly preserves state regulation by providing that none of its provisions "shall be in conflict with the laws of the State in which the leased property is situated."[[38]](#footnote-39)38 Another provision of the MLA provides that "[n]othing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."[[39]](#footnote-40)39 While federal courts have construed these provisions as negating Congressional intent to preempt state law, these provisions have also been construed as being limited by other provisions of the MLA that expressly confer authority on the Secretary of the Interior.[[40]](#footnote-41)40

For example, the MLA provides:

When separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease, or portion thereof, may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement providing for an apportionment of production or royalties among the separate tracts of land comprising the drilling or spacing unit when determined by the Secretary of the Interior to be in the public interest, and operations or production pursuant to such an agreement shall be deemed operations or production as to each such lease committed thereto.[[41]](#footnote-42)41

This portion of the MLA authorizes the "communitization" of federal leases. Communitization, which is distinguishable both factually and in terms of legal ramifications from other types of [\*14] cooperative unit agreements involving ***oil*** and gas development on federal lands,[[42]](#footnote-43)42 is the federal term for the pooling of tracts to form a drilling unit.[[43]](#footnote-44)43

Under the above statute, communitization should be authorized "when determined by the Secretary of the Interior to be in the public interest."[[44]](#footnote-45)44 Current regulations provide:

Each well shall be drilled in conformity with an acceptable well-spacing program at a surveyed will location approved or prescribed by the authorized [federal] officer after appropriate environmental and technical reviews .... An acceptable well-spacing program may be either (1) one which conforms with a spacing order or field rule issued by a State Commission or Board and accepted by the authorized [federal] officer, or (2) one which is located on a lease committed to a communitized or unitized tract at a location approved by the authorized [federal] officer, or (3) any other program established by the authorized [federal] officer.[[45]](#footnote-46)45

Ordinarily, communitization is accomplished when the Secretary "consents" to the communitization of federal lands by agreeing to the terms of a communitization agreement;[[46]](#footnote-47)46 however, the Secretary may also corerce federal lessees to communitize.[[47]](#footnote-48)47 In either case, when a communization is consistent with state spacing and pooling orders, which is oftentimes the case, the Secretary has acceded to state regulatory authority for that particular communitization. Thus, [\*15] Secretary may and often does accede to state spacing and pooling regulatory authority because the Secretary decides that doing so is in the public interest. On the other hand, the Secretary may occasionally decline to accede to a state spacing or pooling order because the Secretary concludes that doing so is not in pubic interest. In any case, state and local regulations barring ***oil*** and gas development by a lessee of federal lands,[[48]](#footnote-49)48 as well as a state regulation that is inconsistent with mandatory provisions of the MLA or underlying federal regulations, are not enforceable.[[49]](#footnote-50)49

On the other hand, in a hard-rock mining case, *California Coastal Comm'n v. Granite Rock Co.*, the Supreme Court reasoned that states may impose reasonable regulations on the activities of federal ***oil*** and gas lessees so long as the effect of the regulations does not bar development.[[50]](#footnote-51)50 Thus, because state conservation regulations regarding well spacing and density do not completely bar ***oil*** and gas development, but only seek to assure orderly development, one might assume that federal lands are subject to them.[[51]](#footnote-52)51 However, that is not what current and more direct federal case law and administrative decisions hold regarding communitization. Rather, this case law, while finding no outright federal preemption, concludes that the [\*16] appropriate federal agency must consent to state spacing and pooling regulation.[[52]](#footnote-53)52 In other words, the Secretary of the Interior has discretion, on a case-by-case basis, to accept or reject-that is preempt-a state conservation agency's judgment regarding best conservation practices in the public interest. In the event of a conflict, the Secretary's decision prevails.[[53]](#footnote-54)53

Although some state conservation laws do not expressly address federal lands,[[54]](#footnote-55)54 others, including Nevada, do so. The Nevada conservation law provides as follows:

1. As the State of Nevada is a sovereign state and not disposed to jeopardize or surrender any of its sovereign rights, this chapter applies to all lands in the State of Nevada lawfully subject to its police powers. It applies to lands of the United States or to lands subject to the jurisdiction of the United States only to the extent that control and supervision of conservation of ***oil*** and gas by the United States on its lands fails to effect the intent and purposes of this chapter and otherwise applies to those lands to such extent as an officer of the United States having jurisdiction, or his authorized representative, approves any of the provisions of this chapter or the order or orders of the Division which affects those lands.
2. This chapter applies to any lands committed to a unit agreement approved by the Secretary of the Interior of the United States or his authorized representative, except that the Division may, under the unit agreements, suspend the application of this chapter or any part of this chapter so long as the conservation of ***oil*** and gas and the prevention of waste is accomplished thereby, but the suspension does not relieve any operator from making such reports as are necessary or advised to be fully informed as to operations under the agreement and as the Division may require under this chapter.[[55]](#footnote-56)55

The current Model ***Oil*** and Gas Conservation Act, revised in 2004 and approved by the Interstate ***Oil*** and Gas Compact Commission suggests the following optional jurisdictional provision for states with federal or Indian land:

This [Act] shall apply to all lands within this state, except as follows:

[\*17] (a) As to lands of the United States or lands which are subject to its supervision, this [Act] shall apply only to the extent necessary to permit the [commission] to protect the correlative rights, health, safety, and the environment. The other provisions of this [Act] shall also apply if the officer of the United States having jurisdiction over the lands approves an order, permit, rule, or regulation of the [commission] purporting to affect the lands.

(b) This article shall not apply to lands committed to federal exploratory unit or federal communized unit except to the extent approved by the Department of Interior and except as to affected privately owned or state lands.]

While the Nevada provision is wordy and vague, the model act provision, which is patterned after the Colorado statute[[56]](#footnote-57)56 seems consistent with the *Granite Rock* holding, but also acknowledges that the federal government must approve the pooling (*i.e.*, communitization) of federal lands.

**B. Communitization Pitfalls**

As with spacing and compulsory pooling, the principal benefits of communitization are the prevention of waste and the protection of correlative rights. In addition, like compulsory pooling, production within the communitized area will ordinarily constitute constructive production from all tracts within the unit.[[57]](#footnote-58)57 However, the failure to secure timely consent to state regulatory action can be critical because production from a nonfederal tract will not serve as constructive production from a federal tract within a compulsorily pooled drilling unit until the Secretary has consented to communitization. For example, in *Kirkpatrick* ***Oil*** *& Gas Co. v. United States*,[[58]](#footnote-59)58 production was established on nonfederal acreage within an established drilling unit in Oklahoma that included federal land; however, the primary term of the federal lease expired before the federal government consented to communitization. As stated in Section V, above, under Oklahoma law, the issuance of a state spacing order effectively pools all interests in the established drilling unit. Nevertheless, because the Secretary had not consented to communitization, the federal lease was found to have expired at the end of its primary term. The practical lesson is simple-not only must Secretarial consent be obtained, it must be timely obtained.[[59]](#footnote-60)59

[\*18] Similarly, in *Sameclan Petroleum Corp. v. Cotton Petroleum Corp.*,[[60]](#footnote-61)60 the court held that the conservation agency had no authority to force pool Indian lands without federal consent. In this case, a well was completed on non-Indian lands within a unit that was force pooled by the conservation agency. The lessee of the Indian lands contended that the force-pooling order coupled with the producing well perpetuated the Indian lease. But the court held that the Indian lease had expired because the Secretary of the Interior had not consented to a communitization prior to its expiration.

In *Kardokus v. Walsh*,[[61]](#footnote-62)61 a well was commenced on Indian lands within a unit that included fee acreage, and the conservation agency had issued a force-pooling order. The federal government approved communitization but had made its approval retroactive only to the date of the application for approval which date was after the expiration date of the primary term of the lease covering the fee acreage. The court, citing *Samedan*, held that, absent timely federal consent to communitization, the well on Indian lands could not perpetuate the fee lease, even though the lease contained a drilling-operations savings clause. While the fee lease might have been saved if the Secretary had approved the communitization retroactive to the date of commencement of the well, that issue was only reviewable through a federal administrative appeals process and the federal courts. *Kardokus* was a quiet title action filed in state court.

Operators must not only be careful to seek timely federal approval, they must be mindful that federal approvals can be retroactively effective. For example, in *Shearn v. Ward Petroleum Corp.*,[[62]](#footnote-63)62 the conservation agency established a drilling unit in 1976, and a producing well was drilled on fee lands within the unit in 1983. The unit contained an unleased federal tract, which was subsequently leased in 1990. Thereafter, the BLM consented to the retroactive inclusion of the federal tract into the drilling unit. This retroactive approval allowed the federal government to claim its proportionate share of unit production from date of first runs, and the federal lessee was allowed to claim its proportionate share from the date of its lease. The lesson here is that an operator contemplating the drilling of a well in a drilling unit that contains federal or Indian acreage should promptly seek the consent of the federal government to communitization or risk being communitized retroactively by parties who took no risk in drilling the well.[[63]](#footnote-64)63*Shearn* involved Oklahoma acreage and thus turns, in part, on the fact that the establishment of a drilling unit serves to pool production. Nevertheless, a similar result is possible in states where a spacing [\*19] order does not pool production, because pooling orders can be retroactive,[[64]](#footnote-65)64 and the federal government could consent to communitize retroactively.

Current regulations[[65]](#footnote-66)65 expressly address the retroactivity of communitization agreements. As to federal lands, communitization agreements are effective only if approved by the appropriate BLM official and are considered effective from the earlier of the date of the agreement or the date of first production from the communitized formation.[[66]](#footnote-67)66 However, where a spacing unit becomes subject to a state pooling order after the date of first sale of production, then the effective date of the communitization agreement may be the effective date of the pooling order.[[67]](#footnote-68)67 In any event, retroactive communitization is not effective to resurrect a federal lease that has already expired of its own terms prior to the date of application for approval of communitization.

[\*20] In addition to regulations, the BLM has a series of handbooks or manuals[[68]](#footnote-69)68 that provide guidance to interested parties. Although not having the force and effect of regulations,[[69]](#footnote-70)69 they may be binding on the BLM.[[70]](#footnote-71)70 Some of these materials repeat the regulations, but they do clarify some matters where the regulations may be silent or unclear. These materials and various model communitization agreements will be discussed in Angela Franklin's essay, *Communitization Agreements in the 21st Century*, Paper 3. Her paper includes an appendix of model communitization-agreement forms for use in specific circumstances.

**C. Federal-State Cooperation**

Only a few cases address the effect of state ***oil*** and gas conservation laws and regulations of federal land. The reason for this is simple: state conservation agencies and federal land management agencies, in particular the Bureau of Land Management (BLM) within the Department of the Interior, have often cooperated to assure orderly ***oil*** and gas development on federal lands. Regarding ***oil*** and gas development, the goal of both state conservation agencies and the BLM is conservation. Conservation is the obvious goal of state conservation agencies. Conceptually, one could imagine the BLM playing the role of a self-interested landowner. Indeed, the BLM, and more so its sister agency, the Minerals Management Service, do play this role in some situations. However, the very section of the MLA that authorizes the Secretary to agree to, or to even coerce, communitization, begins with the following words: "For the purpose of more properly conserving the natural resources of any ***oil*** or gas pool, field, or like area, or any part thereof ...,"[[71]](#footnote-72)71 Thus, because the goals are the same, cooperation has been the norm and [\*21] tension has been the exception. As the cases discussed above illustrate, problems arise most often when ***oil*** and gas developers fail to recognize the need for timely federal consent to state regulation.

Current custom and practice suggests the following accommodation: the state conservation agency recognizes that its spacing and pooling orders will not apply to federal lands absent federal consent; however, the BLM generally consents to or, at least, acts consistent with these orders. In some states, the BLM regularly appears before the conservation agency to express its views on conservation matters. In other states, the BLM rarely appears but may occasionally write a letter commenting on a particular spacing or pooling proceeding. Tension between the state conservation agency and the BLM is likely to arise in four situations:

1. When the BLM fails to receive timely notice of conservation agency proceedings;
2. When the BLM believes that the conservation agency's spacing order creates drilling units that are too large, thereby encouraging resource banking, discussed above;
3. When the BLM does not agree with the conservation agency's order designating the direction of a rectangular unit (north-south or east-west);[[72]](#footnote-73)72
4. When the BLM is concerned about certain exception location wells that could affect federal correlative rights; and
5. When the responsible BLM and conservation-agency bureaucrats have incompatible personalities or inflated egos.

This last situation is the most serious because it can cause problems for operators in recurring and routine circumstances. Although theoretically irrelevant to a conservation proceeding, a federal surface management agency, such as the Forest Service, in the Department of Agriculture, may occasionally request larger spacing units to reduce surface use and environmental impacts on federal lands such as forest reserves or grasslands.

In a few states, including Wyoming and Montana, a Memorandum of Understanding (M10U) between the BLM and the state conservation agency memorializes and formalizes this approach.[[73]](#footnote-74)73 In other states, such as Oklahoma and North Dakota, no MOU exists. In North Dakota, the BLM and state conservation agency enjoy a cooperative relationship without an MOU. On the other hand, as discussed in Appendix A, below, federal officials are desirous of entering into an MOU with Oklahoma, but the Corporation Commission has not been enthusiastic and relationships between the Corporation Commission and the BLM and BIA have been a bit tense. In New Mexico, the BLM and state conservation agency did have an MOU but it was allowed to expire and has not been renewed owing to a concern on the part of the conservation agency that it had ceded too much of its authority to the BLM. On the other hand, the BLM and the California conservation agency are in the process of negotiating an MOU even though state spacing and pooling regulations have not yet had much impact on federal lands in [\*22] California. In some states, such as Kansas, there are relatively few federal lands in the ***oil*** and gas prospect areas; thus, there is little need for a federal-state MOU.

MOUs serve to formalize state and federal cooperation and assist ***oil*** and gas operators in navigating both regulatory streams. Further, logic suggests that an MOU should assist operators in better predicting the few instances where the federal government may not consent to particular state regulatory action. On balance, MOUs seem desirable to encourage a coordinated and consistent approach to communitization and other conservation matters and to foster a more consistent and free exchange of information that could assist state and federal officials as well as operators.

Appendix B, below, offers comments from conservation agency lawyers or from conservation agency practitioners about how states deal with federal and Indian lands and about federal-state cooperation in selected states. Copies of draft, existing, and lapsed MOUs are included in Appendix C, below. Because a particular BLM state office negotiates an MOU with the conservation agency of a particular state, they vary in detail and content.

**VII. State Spacing and Pooling of Indian Lands**

**A. Preemption and The Omnibus Leasing Act of 1938**

The Omnibus Leasing Act of 1938 governs the leasing of Indian lands for ***oil*** and gas development.[[74]](#footnote-75)74 The discussion in the previous section, regarding federal land, is fully applicable to Indian lands.[[75]](#footnote-76)75 Accordingly, state conservation regulations have no force and effect over Indian lands, absent federal consent.[[76]](#footnote-77)76 The path to securing Secretarial consent is through the appropriate superintendent or area director of the Bureau of Indian Affairs (BIA),[[77]](#footnote-78)77 although the BLM reviews all applications for communitization and makes a nonbinding recommendation to the BIA. For communitization of combinations of federal and Indian leases, both the BLM and BIA must give approval. The BIA has promulgated a general regulation that expressly negates [\*23] state regulation of Indian lands[[78]](#footnote-79)78 and specific regulations requiring Secretarial consent to communitization[[79]](#footnote-80)79 as well as to a state well-spacing program.[[80]](#footnote-81)80

The BLM, BIA, and MMS (Minerals Management Service) have a Tripartite Memorandum of Understanding.[[81]](#footnote-82)81 This MOU contains an attachment that summarizes the cooperative procedures of the three agencies regarding their related responsibilities for the administration of communitizations.[[82]](#footnote-83)82 Relevant portions of this MOU are reproduced in Appendix C, below. The BLM Montana State Office and BIA Rocky Mountain and Great Plains Regional Offices have an MOU concerning the Management of ***Oil*** and Gas Functions on Indian Lands in Montana, North Dakota, and South Dakota.[[83]](#footnote-84)83 This MOU is included in Appendix C, below. The BIA, BLM, and Southern Ute Tribe have a MOU addressing procedures for the review and evaluation of proposed spacing, pooling, and field rule matters that come before the Colorado ***Oil*** and Gas Conservation Commission. This MOU is also included in Appendix C. below.

**B. The Federal Trust Responsibility**

In addition to the matters discussed in Section VI, above, there are additional concerns with the communitization of Indian Lands. The Secretary of the Interior is a trustee of Indian tribes and allottees.[[84]](#footnote-85)84 Thus, the Secretary owes a fiduciary duty that cannot be delegated to a state agency.[[85]](#footnote-86)85 Although the Secretary may act in a manner that is consistent with state [\*24] conservation regulatory requirements, the Secretary's action is the governing and controlling event, not the state regulatory action. Moreover, because the Secretary must act as a fiduciary "in the best interest of the Indian mineral owner,"[[86]](#footnote-87)86 the Secretary may fail to consent to the state spacing or pooling of Indian or allotted lands in circumstances where the Secretary might routinely consent if federal lands were involved.[[87]](#footnote-88)87 In making this best-interest determination, the Secretary must consider "any relevant factor, including ... economic considerations, such as the 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."[[88]](#footnote-89)88 This definition of best interest requires the Secretary to consider more than conservation objectives even though the communitization regulation begins with the phrase, "[f]or the purpose of promoting conservation ...."[[89]](#footnote-90)89

Several cases address the fiduciary duty to act in the best interests of the tribe or allottee in the communitization context.[[90]](#footnote-91)90 Under the Administrative Procedures Practices Act,[[91]](#footnote-92)91 a court may set aside an order of an agency that is arbitrary, capricious, an abuse of discretion, or contrary to law. To be arbitrary and capricious, the order must fail to consider relevant factors or bear no rational relationship to the agency's findings of fact. Regarding communitzation, agency or approval or disapproval is contrary to law if the Secretary or his delegate fails to act as a trustee in the best interests of the Indian owner, whether a tribe or an allottee. Unfortunately, a study of the reported communitization cases offers little solace to those desirous of a predictable outcome, including both operators seeking approval of, as well as federal officials responsible for approving or rejecting, communitization proposals.[[92]](#footnote-93)92

[\*25] In *Kenai* ***Oil*** *and Gas Inc. v. Department of the Interior*,[[93]](#footnote-94)93 the court affirmed the BIA's refusal to approve a communitization request that would have pooled an unproductive Indian lease that was about to expire with a productive fee lease on the ground that issuing a new lease would be more economically beneficial to the Indian owner. In reaching this decision, the court observed that the Secretary's discretion is limited by the fiduciary duties owed to Indians, which requires the Secretary to "manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors and has a duty to maximize lease revenues."[[94]](#footnote-95)94 The court stated that "limiting the ... considerations solely to matters of conservation and production would be inconsistent with ...[the] trust responsibilities to the Indians ...."[[95]](#footnote-96)95 In other words, where Indian lands are involved, the Secretary must consider all relevant factors, not just conservation.

In concurring, Judge Barrett emphasized the fact that, in this case, the lessee waited until the last minute to seek approval, giving the federal officials only a weekend to consider the application. Moreover, federal officials did not consult with officials of either the United States Geological Survey, which at that time performed the BLM's duties regarding the approval of communitizations, or the Utah ***oil*** and gas conservation agency.[[96]](#footnote-97)96 Nevertheless, Judge Barrett expressed concern about the conservation objective of communitization:

I concur in the opinion based on the specific facts of this case. In doing so, I do not believe that in considering the broad discretion issue, we can permit the Superintendent, simply in light of his trust responsibilities to the Indians, to refuse approval of communitization agreements if he concludes that the Indian lands within the proposed unit will fare better economically "outside".

...

Pooling or communitization of leases is often necessary and advisable to properly explore, develop and operate leased premises in order to promote the conservation of ***oil*** and gas. ... Thus, if action is taken by a lessee in adequate time to afford hearings establishing expert justification of the conservation-development aspects of a specific communitization plan, the fact that the Superintendent foresees the likelihood of realizing a substantial bonus payment with possible enhanced reserved royalty coupled with a drilling commitment from another lessee operating company if he refuses to commit an Indian lease to the unit involved would, in my view, be contrary to the public interest.[[97]](#footnote-98)97

[\*26] In *Cotton Petroleum Corp. v. United States Department of the Interior*,[[98]](#footnote-99)98 the lessee sought approval to communitize Indian leases with one fee lease to form a 640-acre unit. At the time of the application, a unit well had been commenced, and one allotment Indian lease, the Rose lease, covering an 80-acre tract within the proposed unit, was due to expire later that same month. The communitization request was approved over the objection of the allottee for the Rose lease; however, this approval was reversed two years later regarding the Rose parcel after an administrative appeal by the allottee. In the interim and in response to *Kenai*, the Department had issued written guidelines for BIA officials to use in determining whether to approve a communitization. These guidelines, inter alia, stressed the need to consider the long-term economic effects of the communitization agreement.[[99]](#footnote-100)99 The primary ground for administrative reversal was that the Rose parcel could be reoffered for lease for a new bonus, although the reviewing official also found that this parcel probably could not be economically developed independent of the unit. The district court affirmed the refusal to communitize the Rose parcel, but the Court of Appeals reversed.

The Court of Appeals addressed a number of issues, but, regarding the communitization determination, held that the decision to reject communitization on the Rose parcel, while approving others, was arbitrary and capricious and ordered that the communitization of the Rose parcel be approved.[[100]](#footnote-101)100 The court reasoned that the Department had not acted in accord with its [\*27] own guidelines and had failed to consider all relevant factors affecting the Indian's best interests, in particular the possible long-term adverse economic impact that the refusal to communitize might have on the Indian owners.

Significant to this appeal, the Assistant Secretary *did not* discuss or analyze the various factors required under the guidelines set forth in his memorandum of April 23, 1982, issued to all BIA Superintendents and Area Directors. He *did not* (a) assess the long term economic effects of the communitization agreement in relation to whether it would be in the best interest of the (Rose) Indian lessor, nor was any attempt made to document this matter, (b) rely upon or give any reasons for not relying on the recommendation of the Minerals Management Service approving the communitization agreement based upon expert geologic and engineering opinions as serving the best interests of the Indian lessor, and (c) assess whether the lessee had complied with the terms of the Rose lease ... . Instead, the Assistant Secretary purported to dispose of the Rose appeal 'on the narrow question of whether approval of the communitization agreement was in appellants' best interest. . . . '[[101]](#footnote-102)101

Due to the Department's failure to follow its own guidelines, the case may have somewhat limited value as precedent in future communitization cases. The case boils down to a clear failure to consider all relevant factors. While the opinion emphasizes the importance of long-term economic effects, the case stops short of holding that long-term effects outweigh short-term effects. And one judge of the three-judge panel dissented, seeing no error in refusing to communitize the Rose parcel so that the lease would expire.[[102]](#footnote-103)102

In *Cheyenne-Arapahoe Tribes of Oklahoma v. United States*,[[103]](#footnote-104)103 the BIA approved two communitization agreements regarding two 640-acre spacing units over the objections of the Indian lessors. Six 160-acre Indian leases were communitized, and the primary terms of several of these leases were in their final month. At the time that approval was sought, there had been a deep gas discovery in the area and recently issued Indian leases had been sold for large bonuses and increased royalties. The tribe resisted approval and sought to renegotiate lease terms, seeking an additional bonus as well as a back-in working interest. In response, the operator threatened suit. The tribe appealed, and both the Department and the BIA affirmed the approval, although the BIA did rehear the matter and supplemented the record with further detail. This final BIA order was issued eight days after the expiration of the primary terms of several of the leases.

The tribe then filed suit in federal court to address the issue of whether approval of the communitization agreement extended the primary terms of the subject leases. The court found that the BIA had abused its discretion, and thus breached its trust responsibility, for failing to [\*28] consider the "economic conditions prevailing at the time."[[104]](#footnote-105)104 The district court ultimately found the leases upon which drilling had commenced were preserved, but that the other four leases had expired at the end of their primary terms as result of this breach of trust.

A three-judge panel of the Court of Appeals unanimously affirmed the district court, stating:

Acting in the capacity as a trustee, the Secretary and his delegate, the Superintendent of the BIA, must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues.[[105]](#footnote-106)105

The court found that the BIA Area Director had failed to consider "all relevant factors" by failing to consider "'any evidence of the market value and marketability of the new lease.'"[[106]](#footnote-107)106 The agency's refusal to consider marketability of new leases was based upon the fact that the lessee had the full primary term in which to develop and on the threat that litigation might have on the timing and value of new leases. The court answered that: "Relying on such a justification would, however, result in across-the-board approvals of communitization agreements. The threat of litigation may be intimidating, but careful analysis of relevant factors takes precedence over avoiding a lawsuit."[[107]](#footnote-108)107 The lessees had argued that conservation was the "quintessential component" was conservation,[[108]](#footnote-109)108 but the court responded that this argument "completely ignores the fiduciary relationship between the Secretary and the Tribe."[[109]](#footnote-110)109 The court further reasoned that "[a]bsent consideration of current market developments, the Area Director's conclusion that he could not protect the Tribe's economic interests if the communitization agreements were disapproved ... seems more consistent with a policy of blanket approval than with a policy of maximizing tribe revenues."[[110]](#footnote-111)110

The Tenth Circuit revisited communitization approvals en banc in *Woods Petroleum Corp. v. Department of the Interior*.[[111]](#footnote-112)111 This case involved a proposed communitization of a lease [\*29] comprising 117.5 net mineral acres of allotted Indian lands to Woods. The acreage was within a 640-acre drilling unit established by the Oklahoma Corporation Commission in 1981. A unit well was commenced on other lands within the unit prior to the expiration of the Woods lease. Woods sought approval of an executed communitization agreement, which was initially approved; however, on administrative appeal, the Secretary allowed the lease to expire, and then, as requested by the allottees, approved the sale of a new lease to the same acreage to Tomlinson for a $400,000 bonus. The Secretary then approved a communitization agreement covering the same unit retroactive to date of first production, thereby giving the Indian allottees back royalties on the unit well. Woods filed suit, challenging the Secretary's actions. On appeal, the district court affirmed, but the three-judge panel reversed and ordered the old lease reinstated and further ordered that the prior communitization agreement be approved.[[112]](#footnote-113)112 The three-judge panel was affirmed en banc, with two judges dissenting.[[113]](#footnote-114)113

The court criticized the agency for focusing on underlying leases and on the income to be derived from the issuance of new leases, rather than on the proposed communitization. As in *Cotton*, the court cited the BIA's own guidelines, identifying what the court described as "three critical factors."[[114]](#footnote-115)114

(1) whether the long term economic effects of the proposed agreement are in the Indian lessor's best interest; (2) whether the engineering and technical aspects of the agreement adequately protect the Indian lessors; and (3) whether the lessee has complied with the terms of the lease in all respects prior to its expiration date. ... The first two of these factors require the Secretary to focus on the communitization agreement, and the third factor simply asks if the lessee is in default under the existing lease.

...

As the Secretary's clearly articulated factors in the BIA guidelines make clear, the issue before the Secretary is whether the communitization agreement should be approved, and it is not whether the underlying leases, which previously had been approved by the Secretary, were a good deal or bad deal with the benefit of hindsight. When the Secretary first disapproved the communitization agreement for the sole purpose of causing the underlying leases to terminate, and then immediately thereafter approved an identical communitization agreement for the new leases, it is obvious that the Secretary was not really evaluating the communitization agreement at all. Rather, he was using his power in an arbitrary [\*30] way to disapprove the communitization agreement as a mere vehicle to cause the underlying leases to terminate.[[115]](#footnote-116)115

The court was especially critical of the fact that the Secretary had approved communitization of the very same unit once the new lease had been issued but then made the approval retroactive to date of first production. This "merely demonstrated the arbitrariness of his action in disapproving the [prior] communitization agreement."[[116]](#footnote-117)116

The court distinguished the instant case and *Cotton* from *Kenai* and *Cheyenne-Arapahoe* on several grounds.[[117]](#footnote-118)117 For purposes of this essay, one ground is particularly noteworthy. The court observed that, in *Kenai* and in *Cheyenne-Arapahoe*, the state conservation agency had not established spacing units for the area that included the Indian mineral interests at the time that approval of communitization was requested. In *Cotton* and in the instant case, when approval for communitzation was requested, the state conservation agency had established spacing units for the area that included the Indian mineral interests.[[118]](#footnote-119)118

The court summarized its own en banc opinion as follows:

Today, we make explicit that the Secretary acts arbitrarily and abuses his discretion ... when he (1) rejects a proposed communitization agreement for the sole purpose of causing the expiration of a valid Indian mineral lease and allowing the Indian lessors to enter into a new, more lucrative, lease, and then (2) approves essentially the identical communization agreement, with the new lessee of the Indian lands simply substituted for the old lessee, and permits the Indian lessors to collect royalties retroactively to the date of first production under the original unit plan.[[119]](#footnote-120)119

In terms of results, the Tenth Circuit renders four consecutive decisions in which it bounces back and forth about how the Secretary should fulfill his fiduciary obligation. In *Kenai*, the court upheld the Secretary's decision disapproving communitization so that an Indian lease would expire and so that a new lease could be sold. In *Cotton*, the Court rejected the Secretary's disapproval of communitization so that Indian lease would expire and so that Indian owners could assume the status of unleased co-tenants within the same proposed unit. In *Cheyenne-Arapaho*, the court overturned the Secretary's decision to approve communitization and thereby [\*31] preserve an Indian lease. In *Woods*, the court overturned the Secretary's decision disapproving of communitization so that an Indian lease would expire so that a new lease could be sold.

The *Woods* holding suggests that communitization should be approved when the only reason for rejection is to allow for expiration of an Indian lease so that the Indian owners can secure a new bonus and possibly more favorable lease terms. The *Cotton* holding suggests that communitization should be approved when the only reason for rejection is to allow for expiration of an Indian lease so that the Indian owners may assume the status of unleased co-tenants. Given *Cotton* and especially *Woods*, the *Kenai* and *Cheyenne-Arapaho* decisions have little value as precedent.

The facts of *Kenai* seem to marginalize the opinion. The lessee waited until the weekend before the Indian lease was due to expire to submit the communitization agreement for approval and the federal officials acted very precipitously. The facts imply that the lessee could have requested communitization much earlier. Moreover, apparently the state conservation agency had not yet determined the appropriate spacing for the area. The concurring judge in *Kenai* emphasized these facts while expressing concern that the conservation objective of communitization suggests that federal agencies should act in the best long-term interests of the Indian mineral owner.[[120]](#footnote-121)120 Finally, when *Kenai* was decided, the BIA had no written guidelines for assessing communitization requests.

*Cotton* was decided after the BIA issued guidelines emphasizing long-term economics. Although the *Cotton* court does not decide whether the guidelines comply with the government's fiduciary obligations to the Indian owners, the implication is that they do comply. The decision, however, is narrow in that the court simply decides that the agency failed to follow its owned guidelines to consider all relevant factors, thus acting arbitrarily and capriciously.

*Cheyenne Arapahoe* is a case where short-term economics reaches its zenith and is found to outweigh long-term interests. While not overruled by *Woods*, the case may have little significance in light of the en bane opinion in *Woods*. Appellate courts avoid overruling cases, so they try to distinguish or ignore them. The *Woods* court makes a rather lame attempt to distinguish *Cheyenne Arapahoe* by noting that only Indian lands were involved and that wells had already been drilled on some of the Indian leases,[[121]](#footnote-122)121 and then ignores it. The fact that only Indian lands were involved in *Cheyenne-Arapahoe* should not matter if sound conservation practice requires that the leases should be communitized. One distinction that may be of practical assistance to lessees of Indian tracts is that in *Cheyenne-Arapahoe*, as in *Kenai*, the area had not been spaced by the conservation agency.

So what incites do these cases offer? While lessees have until the last minute of the primary term to save their Indian leases, lessees are wise to seek communitization as soon as they are able. Although not essential, in cases where unit ownership is checker-boarded-that is part private and part Indian-lessees should secure an order from the state conservation agency [\*32] spacing the area prior to seeking communitization. And whenever feasible, approval of communitization should be secured before the unit well is drilled, especially if the well is to be drilled on an Indian tract. Conservation and long-term economics are important relevant factors in passing on a communitization application.

While short-term economics are also relevant, they probably will not or, at least, should not override other factors. Indeed, although unstated by the courts in these cases, approval of communitization agreements that are consistent with established well-spacing patterns would seem to be in the long-term and even short-term interest of Indian tribes and allottees as a whole. Approval of communitization based upon sound conservation practices should serve to encourage investment in Indian ***oil*** and gas leases. Routine rejection of communitization solely to collect a new lease bonus would serve to discourage ***oil*** and gas investment in Indian acreage.

The dilemma for the Secretary, as trustee, is similar to that of any trustee. Should the trustee invest for the long or the short term?[[122]](#footnote-123)122 In making this decision, trustees of all stripes should consider "all relevant factors." Not addressed by these cases is the question of what are "all" of the relevant factors. For example, should the Secretary consider the long- and short-term needs of the particular Indian owner? Consider the possibility that a particular allottee has need for immediate cash to pay for necessary medical procedures or for family educational expenses. Would these be relevant factors? Of course, owing to heirship, there are commonly multiple Indian owners of an allotted tract, and they are not likely to have the same short-term or long-term needs.

Given the Tenth Circuit's back-and-forth rulings in these four cases, one might expect additional cases to have come before the court. Yet, although *Woods* was decided in February of 1995, there have been no additional reported decisions regarding Secretarial approval of Indian communitization agreements. This suggests that the Secretary has figured out how to consider "all relevant factors" so that his discretion in deciding to approve or disapprove of communitization cannot be readily challenged by unhappy lessees or by unhappy Indian owners. Indeed, by its very nature, an all-relevant-factors test seems very flexible. Thus, if the Secretary can show due and actual consideration of all relevant factors, his decisions should be upheld. Making sure that the Secretary does so may be the most important task for lessees when seeking approval of communitization.

[\*33] Regulations provide guidance regarding the process by which the Secretary approves or rejects a communitization application.[[123]](#footnote-124)123 In addition to reaching a decision in the best interest of the Indian mineral owner, the Secretary must consult with the tribe regarding tribal leases prior to making a determination,[[124]](#footnote-125)124 but consent of the Indian mineral owner, whether tribal or allottee, is required only if the underlying lease so provides.[[125]](#footnote-126)125

Separate regulations govern the leasing of Osage Reservation lands.[[126]](#footnote-127)126 An Osage lease may be limited to ***oil***, limited to gas, or a may include both ***oil*** and gas. The Superintendent of the Osage Agency may impose drilling and production restrictions when "necessary or proper for the protection of the natural resources of the leased land and the interests of the Osage Tribe."[[127]](#footnote-128)127 In so doing, the Superintendent may consider Oklahoma laws regulating either drilling or production.[[128]](#footnote-129)128 However, the Osage Tribal Council and the Superintendent must consent to "unitize or merge ... ***oil*** or ***oil*** and gas leases into a unit or cooperative operating plan to promote the greatest ultimate recovery of ***oil*** and gas from a common source of supply or portion thereof ...."[[129]](#footnote-130)129 As a practical matter, the Osage Agency does not establish spacing units or communitize leases. All production is reported on a leasehold basis. Because the Osage Nation owns the mineral interest throughout the Osage Nation, drainage from one lease does not affect the Nation because it receives royalty on all production.[[130]](#footnote-131)130

[\*34] By special federal statute, the inherited "restricted lands of the Five Civilized Tribes [Five Nations] are ... subject to all ***oil*** and gas conservation laws of Oklahoma."[[131]](#footnote-132)131 Nevertheless, this statute also provides that "no order of the Corporation Commission affecting restricted Indian lands shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative." The Oklahoma Corporation Commission has acknowledged that the federal government must approve state regulatory orders involving these restricted lands of the Five Nations,[[132]](#footnote-133)132 but asserts that it has full regulatory authority over these lands to the extent that its authority has not been preempted.[[133]](#footnote-134)133 No federal regulations govern these inherited restricted lands and leases for those lands are governed by state law and subject to the approval of state district courts, who may issue a lease on behalf of unlocatable restricted Indian owners after the lease applicant has made a diligent effort to locate them. In practice, after a state district court has approved a lease of inherited restricted lands, the lessee or operator may obtain an order from the Oklahoma Corporation Commission spacing and pooling the lease; however, the order is not valid as to the inherited restricted lands until approved by the Regional Director of the Eastern Oklahoma Regional Office of the BIA. Accordingly, lessees or operators must submit spacing and pooling orders to the Regional Director for approval. Upon receipt of the order, the BIA forwards the order to the BLM for technical review and for an approval or disapproval recommendation. The BIA verifies ownership, verifies the lease of the Indian interests, considers historical production, if any, on the affected lands, and weighs other relevant factors in light of the best interests of the Indian lessors. The lessee is requested to file a copy of the BIA's decision in the county land records. The applicant or the Indian lessors may appeal an adverse decision. As is discussed in Appendix A, below, this dual state-federal process is not always well coordinated and can create problems when the Regional Director disagrees with the state's spacing order or the attempted pooling of Indian interests that could otherwise be leased.[[134]](#footnote-135)134

Separate federal regulations govern leases of Five Nations' restricted lands still owned by original allottees or that are still producing under a lease obtained when the lands were owned by an original allottee.[[135]](#footnote-136)135 These regulations allow the Secretary to restrict drilling and production when "necessary or proper for the protection of natural resources of the leased land and in the interest of the lessor."[[136]](#footnote-137)136 When exercising judgment in this regard, the Secretary may consider [\*35] state laws and regulations, as well as lawful agreements.[[137]](#footnote-138)137 No lands may be included in any cooperative or unit plan without prior Secretarial approval, and if any such plan "effects a change in lease terms, the consent of the lessor or lessors must be obtained before the plan is effective."[[138]](#footnote-139)138

Separate regulations govern the leasing of Wind River (Shoshone) Indian Reservation lands in Wyoming.[[139]](#footnote-140)139 Regarding unit operations, these regulations are similar to those covering the Five Nations.

Because of the Secretary's fiduciary duty to Indian owners, there are important differences between the communitization of Indian lands and federal lands.[[140]](#footnote-141)140 Angela Franklin will discuss these differences in her essay, *Communitization Agreements in the 21st Century*, Paper 3.

**C. Federal-State Cooperation**

The discussion in Section VI.C., above, is generally applicable regarding Indian lands. However, because of the federal government's trustee responsibilities to Indian owners, discussed in the prior subsection, immediately above, the federal government may be less deferential to state conservation law where Indian lands are involved.

In the future, there may be greater and more direct tension between Indian tribes and state conservation agencies. Some tribes may elect to establish their own conservation regulations for Indian lands. Under the Indian Mineral Development Act of 1982,[[141]](#footnote-142)141 tribes, with the approval of the Secretary, may negotiate a variety of mineral development agreements, including leases, production-sharing contracts, joint ventures, and mineral operating agreements. These [\*35] agreements are not subject to the limitations of the Omnibus Leasing Act. Thus, these agreements, coupled with tribal conservation regulations, could confer great contractual and regulatory discretion on a tribe that could lead to conflicts with state regulatory authorities, including conservation agencies. Moreover, under the Indian Tribal Energy Development and Self-Determination Act, embodied in Title V of the Energy Policy Act of 2005,[[142]](#footnote-143)142 a tribe can enter into a tribal energy resource agreement (TERA) with the Department of the Interior. A TERA allows a tribe to make its own decisions about energy development without having to obtain Secretarial approval. Potentially, these agreements could be inconsistent with a variety of state regulatory laws, including conservation and environmental regulations.[[143]](#footnote-144)143 A TERA, especially if coupled with tribal conservation regulations, could prove to be particularly troublesome respecting reservations that are checker-boarded with non-Indian lands.

**VIII. Conclusion**

Most special institutes of the Rocky Mountain Mineral Law Foundation have tended to focus on the "nuts and bolts" of ***oil***, gas, or mining law. In other words, their primary focus is on the practical more than on the theoretical. The most practical advice that can be given concerning my assigned topic is as follows: Most state conservation agencies tend to assume that their regulations apply to federal land and perhaps even to Indian land (or at least to non-Indian lessees), unless the federal government has expressly preempted state law. In contrast, the BLM and certainly the BIA tend to assume that state conservation regulations do not apply to federal or Indian lands without federal consent. The only way to resolve this divide is for interested or affected parties to litigate state conservation regulation in light of *Granit Rock*. But why litigate if navigation is possible? Indeed, though these are polar assumptions, the divide seems neither wide nor deep.

By taking a pragmatic and common-sense approach to this divide, an ***oil*** and gas operator can easily navigate between these poles without mishap-whether or not an MOU is in existence in a given state. First, keep both state and federal agencies informed about development plans. Second, do not wait until the last minute to seek the administrative assistance of the state conservation agency, the BLM, or the BIA. Third, whenever possible, avoid creating unusual situations that might cause the BLM or BIA to disapprove a proposed communitization. Specifically, whenever possible, use the model communitization agreements without adding unnecessary provisions that might raise a red flag when reviewed for approval. Fourth, when faced with an unusual situation, that cannot be avoided, request an informal conference with the BLM or BIA. Obviously, the operator should make its best case on the merits to both the state and federal agencies. If possible, make the best case without pressing preemption, because taking sides and making this latter argument could prove costly in terms of relationships with affected officials, as well as be costly in both time and money better spent on exploration and development.

[\*36] **Appendix A**

**Federal-State MOUs Covering Spacing & Communitization for Indian *Oil* & Gas Regulation: The Federal Perspective in Oklahoma**

Tracie A. Williamson, Attorney, and Alan R. Woodcock, Field Solicitor U.S. Dept. Of the Interior, Office of the Tulsa Field Solicitor

(The opinions expressed in this excerpt are the personal observations of the authors and do not represent the official position of the Department of the Interior.)

During the course of the last several years, the Bureau of Land Management, Oklahoma Field Office (BLM), and several Oklahoma offices of the Bureau of Indian Affairs (BIA), have pursued discussions on various ways to improve their management practices in overseeing ***oil*** and gas development for the restricted allotted lands of the Five Civilized Tribes and the trust allotted lands (primarily located in the western part of the state) to more efficiently prevent drainage, trespass and de-spacing of Indian lands, as well as to encourage leasing and development of Indian minerals. Specifically, the federal agencies have engaged the Oklahoma Corporation Commission (OCC) to create a better working relationship with the OCC to enable federal agencies to have meaningful participation in OCC regulatory actions affecting Indian lands and to enable the agencies to protect more effectively the interests of Indian mineral owners.

Ultimately, the federal agencies desire to execute a formal agreement with the OCC that recognizes the concurrent jurisdiction shared between the Department and the OCC and outlines agreed upon procedures to be utilized for the management and oversight of Indian ***oil*** and gas development within the State of Oklahoma. The execution of a formal agreement would be consistent with the Department's practices in other western ***oil*** and gas states where the BLM and BIA play a significant role in establishing spacing for federal and Indian lands. In some states, BLM officials participate in hearings affecting federal or Indian lands. In other states, companies are required to send requests or applications for spacing to the BLM, which are then referred to the state board.

The Department believes that a formal agreement would help forge better business practices in carrying out its trust responsibilities to Indian mineral owners within the state and also enable industry to conduct more cost-effective business in Indian country. ***Oil*** and gas management in Oklahoma requires concurrent jurisdiction for a couple of unique reasons. First, land ownership patterns are widely intermixed between restricted or trust Indian owners and unrestricted or nontrust owners. Second, with respect to certain restricted inherited Five Civilized Tribes lands, federal law delegates the OCC authority to apply the conservation laws of the state to such lands, but clearly subjects that authority to federal oversight. This delegation of authority is unique to the inherited restricted lands of the Five Civilized Tribes lands in Oklahoma.

[\*38] Background: Regulatory Jurisdiction

1. Exclusive Federal Jurisdiction of Trust Allotted Lands of Western Tribes

Generally, throughout the United States, the Secretary has exclusive authority to manage and regulate ***oil*** and gas development for the Indian allotted lands for the benefit of Indian mineral owners. 25 U.S.C. § 396, *et seq*. and 25 C.F.R. Part 212, *et seq*. Such is the case with respect to the Oklahoma trust allotments, which are primarily located in the western part of the state. Federal law governs the terms of leases and the unitization or communitization of such leases for production. *Home-Stake Royalty Corp.*, IBLA 93-298; *Samedan v. Cotton Petroleum Corp.*, 466 F. Supp. 521 (W.D. Okla. 1978); *Kardokus v. Walsh*, 797 P.2d 322 (Okla. 1990); and *Shearn v. Ward*, 808 F. Supp. 1530 (W.D. Okla. 1992). The BIA not only grants leases for the trust allotments through competitive bid or through negotiated sale, which are subject to federal regulations and on a departmental lease form, but also regulates the development phase of the lease. 25 C.F.R. Part 213.31 provides: ". .. No lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior." In addition to approving communitization agreements, the Secretary, at his discretion, may also approve spacing orders of the OCC, thereby making them valid as to the Indian interest. 25 C.F.R. § 1.4.

The OCC has not been delegated authority to regulate ***oil*** and gas development on the trust allotted lands or to apply the conservation laws to such lands. Thus, exclusive regulatory authority exists within BLM and BIA for the trust allotments. However, in practice, due to the mixed ownership of non-Indian and Indian lands in trust allotments in Oklahoma, the OCC routinely establishes drilling and spacing units that either include or de-space Indian trust lands, regardless of whether the Indian lands have been leased by the Department. After obtaining an OCC spacing order, companies will obtain a duly approved Communitization Agreement or, in rare cases, have the Secretary approve the OCC spacing order. Companies must also obtain or file other duplicate permits such as notice of intent to drill and applications for permit to drill with both the BLM and the OCC.

These processes are duplicative and companies have advised the BLM that they believe development of Indian trust lands in Oklahoma is cost prohibitive because of dual permitting requirements imposed by the BLM and OCC. Consequently, when able, companies may obtain spacing orders from the OCC, wherein the Indian lands are de-spaced from a production unit. As discussed below, this is problematic because it can be done without the Secretary receiving notice of this action.

2. Concurrent Jurisdiction over Five Civilized Tribes Allotted Lands

Unlike the rest of Indian country, federal law has created an exception to exclusive federal jurisdiction for the inherited restricted lands of the Five Civilized Tribes. Section 11 of the Act of August 4, 1947, 61 Stat. 731, delegates limited authority to the OCC to apply the conservation laws of the state to the development of ***oil*** and gas on Five Civilized Tribes inherited restricted lands. In pertinent part it provides:

[\*38] All restricted lands of the Five Civilized Tribes are hereby made subject to all ***oil*** and gas conservation laws of Oklahoma: *Provided*, That no order of the Corporation Commission affecting restricted Indian lands shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.

Thus, Orders of the OCC are subject to the approval of the Secretary before they are legally binding on Indian mineral owners. However, in practice, the federal agencies are reviewing a very small percentage of drilling and spacing orders affecting restricted allotted lands of the Five Civilized Tribes and an even smaller percentage of pooling orders.[[144]](#footnote-145)144 To the Department's knowledge, the agencies rarely have an opportunity to review pending applications before an OCC hearing and rarely receive them for review and approval until after they are entered by the OCC. As discussed below, this is mostly due to the lack of notice afforded the Department under the rules of practice of the OCC and the ability to affect or change spacing for restricted Indian lands without clearly identifying whether an application affects restricted Indian lands.

Issues

1. Trust Responsibility

The Secretary of the Interior is trustee for all restricted and trust allotted lands and minerals throughout the state. In exercising supervision over these lands, the Secretary is charged with acting in the best interest of the Indian mineral owners when making discretionary decisions with respect to such lands. Such decisions include whether or not to approve, grant, modify, or cancel a lease for trust allotted lands; whether or not to approve a communitization agreement or to permit drilling under certain conditions; whether or not to object to the District Court's approval of a Five Civilized Tribe's lease; and whether or not to approve an OCC spacing or other order affecting the inherited Five Civilized Tribes lands. The Secretary must carefully weigh the costs and benefits of his decision and may not rubber stamp decisions made by a state entity. *Assiniboine and Sioux Tribes v. Bd. of* ***Oil*** *and Gas*, 792 F.2d 782 (9th Cir. 1986).[[145]](#footnote-146)145 Similarly, it has been held that the OCC cannot modify or impose lease terms on Indian mineral [\*40] owners, which may be contrary to the terms established by the Secretary. *See e.g. Armstrong v. Mapleleaf Apartments, Ltd.*, 508 F.2d 518 (10th Cir. 1975).

This is particularly important during an era of scrutiny of the Secretary's management of the trust or restricted assets and income derived therefrom. It is questionable whether the federal delegation of authority to manage ***oil*** and gas development of Indian lands has shifted a trust responsibility to the state. *See Walker v. United States*, 663 F. Supp. 258 (E.D. Okla. 1987) (discussing trust responsibilities associated with the state District Court's approval of conveyances of inherited Five Civilized Tribes lands). Despite the concurrent jurisdiction that may be shared with the OCC, the Secretary has not relinquished his trust responsibilities to the Indian landowners.

2. Ambiguity of Rights and Responsibilities

An ad hoc process where the OCC establishes spacing that affects Indian lands and which is subsequently disapproved by the Secretary creates ambiguity of rights and responsibilities. It can result in situations where companies' rights are potentially subject to two different spacing or pooling obligations for a tract of land. This is of particular concern for the inherited restricted lands of the Five Civilized Tribes lands where it apparently is not unusual for companies to de-space the Indian lands out of production units.

3. Dual Permitting and Processes

On the west side of the state for the trust allotments, companies are subject to dual permitting or dual filing requirements in some cases. For example, pursuant to Departmental leases, companies are required to obtain duly approved communitization agreements. This requirement is in addition to the OCC's requirement to obtain a spacing order if a tract contains or is pooled with non-Indian mineral interests. Additionally, companies are required to file and obtain an Application for Permit to Drill to develop an Indian lease. The OCC also requires companies to file a Notice of Intent to Drill for wells drilled on Indian lands. These requirements are duplicative in nature and result in greater costs for the development of Indian wells. As a result, as with the inherited restricted lands of the Five Civilized Tribes lands, it is believed that companies prefer to exclude the Indian tract from a production unit or to drill off the Indian leasehold.

Proposed Changes

1. Notice

One of the most basic, yet significant, changes the federal agencies have proposed is that the OCC establish a requirement that Applicants clearly identify when an application affects restricted or trust allotted lands and that notice of such applications be made to the appropriate BIA office at least 15 days prior to the hearing. Under current OCC rules of practice, Applicants are only required to provide notice to the individual mineral owners, but not to the Secretary of the Interior. Applicants are also not required to identify affected Indian lands. As indicated previously, it is believed that the Department receives notice of hearings for only a very small [\*41] percentage of Applications affecting Indian lands. Frequently, if notice is received, it is not received until a few days before the hearing, on the day of the hearing, or after. In some cases, notice is received from the Indian owner rather than from the company filing the Application. It is also common for the Department to only receive a copy of the Order after it is entered by the OCC.

2. Orders Recognize Secretarial Authority

The Department has proposed that language be included in spacing and pooling Orders that recognizes the Secretary's authority to approve or disapprove the order. Specifically, we have proposed that the Order clearly state that it is only effective as to the non-Indian lands until such time the Secretary approves the Order, thereby making it valid as to the Indian interests. We have also proposed that Orders affecting Indian lands be made contingent upon Secretarial approval. Such language would create incentive for the companies to submit the orders for review, as required by federal law.

3. Streamline Dual Permitting and Filing Requirements

The Department believes that a formal agreement could address some of the dual permitting and filing requirements that exist for the trust allotments on the west side of the state. It is possible that in some cases, a certain permit obtained from either the state or the BLM or a notice filed with one entity would be sufficient for the other agency and that the issuing agency could provide a copy to its counterpart. This might involve slight changes in the applicable permitting process and better cooperation between the BLM and BIA with the OCC. At a minimum, the BLM should receive notice of operations the OCC is permitting on lands that are pooled with Indian lands, before the permit is issued.

Conclusion

A formal agreement that addresses these issues would not only be beneficial to the Indian mineral owners, but would also benefit ***oil*** and gas companies. The changes proposed by the Department, in our opinion, are not cumbersome on industry or the OCC, but would require a substantial change in thinking and recognition of federal law and jurisdiction pertaining to Indian lands. The OCC has stated an unwillingness to make any changes in its practice to accommodate the Secretarial authority over Indian lands because it fears that it would result in unequal or preferential treatment for the Indian mineral owners in the state. To our knowledge, this has not been a problem for other states who have agreed to an entirely separate process for spacing and pooling of Indian-owned lands.

[\*43] **Appendix B**

**Commentary on Federal-State Cooperation**

(All comments are personal observations and are not official opinions of the commentator's agency or firm.)

**California**

Comments by Alan Hager, Assistant Attorney General, State of California

California, unlike many other states, has limited well-spacing laws. California spacing is normally one well per acre, with some exceptions. This high-density spacing is due to California's complex geology. Wells must be drilled close together to reach the various pockets of ***oil*** and gas found within California's highly complex and heavily faulted ***oil*** and gas reservoirs. Well-spacing patterns used in other parts of the country with large, uniform pools that extend over large areas do not exist in California.

California's spacing laws are found in sections 3600 through 3609 of the California Public Resources Code. Most the exceptions to or variations on the standard one-well-per-acre spacing deal primarily with urban areas where individual lots are small, where there is limited surface access, and where set-backs from property lines and streets are required for reasons of public safety. Some regulations are a bit antiquated. For example, the set-backs from streets go back to the time when derricks were used and were intended to prevent a derrick from falling into the street.

Section 3609 is California's basic exception to the one-well-per-acre spacing requirement. It permits the State ***Oil*** and Gas Supervisor, on a case-by-case basis, to impose a spacing pattern for new pools, those discovered after January 1, 1974. Spacing patterns based on this law would provide less density than the normal one-well-per-acre spacing and would be designed specifically for the pool on which it is to be imposed. Section 3609 spacing is in place for several new pools, primarily in the southern San Joaquin Valley and in the gas producing areas in the Sacramento Valley

California has a compulsory unitization law in sections 3630 through 3690 of the California Public Resources Code. The lands to which it applies are limited. Cal. Pub. Resources Code, sec. 3635.5. If the efficacy of an enabling statute is measured by the frequency of its use, then this statute is worthless, as it has never been used.

Because of California's limited spacing statutes that are a product of its complex geology, there is very little likelihood of a conflict between the state and the federal government over spacing patterns on federal lands. The only statute that might create a potential conflict is section 3609 where the state would impose a less dense spacing plan for a new pool. The imposition of a state spacing plan under section 3609 would follow a public hearing and would be based on a [\*44] technical evaluation of the characteristics of the pool and the engineering criteria for producing the pool to maximize ultimate economic recovery. In this situation, objections to a plan are more likely to come from private interests looking for a quick recovery of their investment than from the federal governments.

The California Department of Conservation's Division of ***Oil***, Gas and Geothermal Resources (DOGGR) and the California Office of the United States Bureau of Land Management (BLM) are currently developing a Memorandum of Understanding (MOU) to address cooperative regulation of ***oil*** and gas producing operations on BLM lands in California. A copy of the draft MOU is enclosed. See Appendix C, below. It is substantially complete. A few minor revisions are anticipated before both DOGGR and the BLM execute it. Section C.6. in the Downhole Well Permitting Operating Agreement, addresses well spacing. This section, which should remain unchanged in the final MOU, reads:

The state well spacing statutes, specified in PRC Sections 3600 through 3609, will be utilized. The spacing statutes generally accommodate line agreements. Any areas of disagreement or deviation from spacing statutes would require a separate agreement.

This section of the MOU recognizes that California's limited well-spacing statutes will address fully most all situations on BLM lands. It also recognizes, like section 3609, that exceptions are to be handled on a case-by-case basis and may not be able to be addressed until a new pool is discovered and sufficient technical data from that pool are available for making an informed technical decision on how best to space the wells in that new pool.

**Colorado**

Comments by Carol Harmon, Assistant Attorney General

In Colorado, ***oil*** and gas production occurs on federal, state, fee, and tribal lands. Approximately 35% of the land in Colorado is owned or managed by the federal government, and approximately 1.2% of the land is either tribal or allotted Indian lands in the southwest corner of the state.

The ***Oil*** and Gas Conservation Act, Col. Rev. Stat. §§ 34-60-101 *et seq*, as amended, (the Act) provides the framework for the jurisdiction of the Colorado ***Oil*** and Gas Conservation Commission (Commission) over ***oil*** and gas development in the state. The Act applies to a limited extent to "lands of the U.S. or lands which are subject to its supervision" (which presumably would include tribal lands). Colo. Rev. Stat. § 34-60-120(a). The Act applies only to the extent necessary to permit the Commission to protect correlative rights and to carry out the following sections of the Act:

Colo. Rev. Stat. § 34-60-106, which specifies the Commission's powers over permitting, drilling, producing, plugging, treating, and spacing of ***oil*** and gas wells;

[\*45] Colo. Rev. Stat. § 34-60-117(4), which requires non-discriminatory purchasing or ratable taking for transportation;

Colo. Rev. Stat. § 34-60-118, which gives the Commission authority to approve unit operations necessary to increase the ultimate recovery of ***oil*** or gas; and

Colo. Rev. Stat. § 34-60-122, which authorizes the Commission to levy a fee based on the market value of production in the state (except on the interest of the U.S., State of Colorado, or any allotted Indian or Indian tribe). Colo. Rev. Stat. § 34-60-120(a).

The Act does not apply to any lands committed to a federal unit or cooperative agreement, "except as provided in sections 34-60-106, 34-60-117(4), and 34-60-118, and except as to privately owned or state lands; except that section 34-60-122 shall apply to all lands and to all production from all lands within the state of Colorado." Colo. Rev. Stat. § 34-60-120(b). Under this provision, it would appear that the Commission's spacing orders (authorized by Colo. Rev. Stat. § 34-60-106(2)(c)) would apply to private and state lands within a federal unit.

Because of the overlapping jurisdiction between the Commission and the Colorado office of the Colorado BLM, the agencies have signed two Memoranda of Understanding (MOU) to clarify their respective authorities related to applications for pooling, spacing and other orders (field rules) and inspection activities. The MOU applicable to spacing applications was executed by the parties in 1991. *See*, MOU Between BLM and COGCC, adopted 8-22-91 (1991 MOU), www.***oil***-gas.state.co.us (Library then Inter-Agency Cooperation then MOU's/MOA's between the COGCC and Other Agencies). The definition of "COGCC action" in the 1991 MOU means actions taken by the COGCC to establish pooling, spacing, and other orders (field rules) to govern operation in specific fields. 1991 MOU at PE.1 In practice, the term has been more broadly interpreted to include matters requiring COGCC approval, decision, or order, including spacing applications.

Under the terms of the 1991 MOU, matters requiring Commission approval involving nonfederal minerals must be submitted initially, as an application for hearing, to the Commission even if federal or Indian minerals are partially involved. 1991 MOU at PF.3. This includes applications for spacing orders that involve federal or Indian minerals.

The Commission Staff provides the Colorado BLM with notices of all hearings that relate to or involve federal or Indian lands. 1991 MOU at PF.3. The Commission hears the applications subject to the following conditions: (1) the ability of the Colorado BLM to present expert testimony, and (2) the ability of the Colorado BLM to protest any requested application and specify conditions under which it will accept the relief requested. *Id.* The Commission can either issue its order incorporating the conditions of the protest or relinquish jurisdiction to the Colorado BLM insofar as the matter relates to federal or Indian lands. *Id.*

Failure of the Colorado BLM to object, concur, or appear at a hearing is construed as concurrence, except for Indian lands. 1991 MOU at PF.3. Failure of the Colorado BLM to concur regarding Indian lands postpones the hearing until concurrence is obtained. *Id.*

[\*46] In general, The Southern Ute Indian Tribe does not concur with the jurisdiction of the Commission over its lands, but it does concur with the limited authority of the Commission, with the concurrence of the BLM, over certain aspects of ***oil*** and gas activities on tribal and allotted Indian lands. 1991 MOU at PG.4.b. There are MOUs between the Colorado BLM and the Southern Ute Indian Tribe and the Bureau of Indian Affairs that set out procedures for tribal or allotted Indian participation through the Colorado BLM in any proposed Commission action affecting their lands. *Id.* Tribal or allotted Indian participation is required for any action of the Commission to be effective as to their respective lands. *Id.*

As a practical matter, the Commission staff and the Southern Ute Indian Tribe have a good working relationship and communicate directly and informally on issues affecting tribal lands. The Commission staff keeps the Colorado BLM informed of communications with the Tribe.

The Commission also signed an MOU in 1999 with the Colorado BLM to facilitate routine and non-routine inspections of ***oil*** and gas operations on lands within their respective jurisdictions. *See*, MOU Between COGCC and BLM on Inspection Sharing, adopted 7-12-99 (1999 MOU) at www.***oil***-gas.state.co.us (Library then Inter-Agency Cooperation then MOU's/MOA's between the COGCC and Other Agencies). Routine inspections include activities like producing wells, underground injection wells, and environmental and reclamation inspections. 1999 MOU at PVI. Non-routine inspections include activities like drilling, plugging, and clean-up of spills. 1999 MOU at PV. The agencies communicate and assist each other with inspections on lands within each other's jurisdiction if personnel and resources are available. 1999 MOU at PP V and VI.

The relationship between the Commission and the Colorado BLM is premised on a history of cooperation, communication, and trust between the parties. Most of the time, issues that arise are worked out on an informal basis, rather than resorting to the precise terms of the MOUs or the Act.

**Montana, North Dakota, and South Dakota**

Comments by John Lee, Crowley, Haughey, Hanson, Toole, and Dietrich, P.L.L.P., Billings

The Montana State Office of the BLM, located in Billings, Montana, manages the federal ***oil*** and gas interests in all Montana, North Dakota, and South Dakota. The Montana Board of ***Oil*** and Gas Conservation (MBOGC) and the BLM have a Memorandum of Understanding (MOU), which provides procedural guidelines that are followed in those instances where regulatory relief involve both fee and federal or Indian lands in Montana. See Appendix C, below. Neither North Dakota nor South Dakota presently have an MOU with the BLM.

The Montana-BLM MOU has proven to be extremely functional and user friendly among the BLM, MBOGC, and operators in developing ***oil*** and gas reserves in Montana. Cooperation is imperative due to the intermingling of fee, federal, and Indian lands in the producing regions of the State. In general, the Montana-BLM MOU acknowledges, in the interests of conservation, preventing waste, and protecting correlative rights, that the spacing and pooling of federal or [\*47] Indian lands will conform to the orders and rules of the MBOGC. Although there have been a few exceptional situations, the MOU has served this objective well.

For purposes of seeking feedback, operators should informally communicate their intentions to the appropriate BLM staff in advance of filing an application involving federal or Indian lands. A good rule of thumb is that if the regulatory relief being sought is of the "garden variety" nature, courtesy copies of the applications should be furnished to the BLM at the time of filing with the MBOGC. The BLM will also request submission of all technical data forming the basis for the relief sought. If requested by the operator, the BLM will keep this information confidential.

If the relief is complex in nature or involves a matter of first impression, an operator should carefully discuss the request with the BLM as soon as possible. If the BLM deems the request unacceptable and if additional discussion proves non-persuasive, the operator may then have time to explore other alternatives that will allow the project to move forward with BLM's blessing. Again, allowing the BLM ample time to review all relevant technical data and to discuss the ramifications of a proposed application will usually culminate in a good result-that is not having the BLM protest the application.

Occasionally there are no feasible or palatable alternatives to compromise, in which case the operator may simply "agree to disagree" with the BLM, take the matter to hearing and live with the result. This is the rare case, because both operators and the BLM prefer the certainty that a compromise provides.

Advance notice and discussion is especially important when dealing with Indian lands, because the federal government's fiduciary obligations require consultation with the affected Tribe, which takes additional time. If the request involves Indian lands, an application must be submitted both to the MBOGC and to the BLM. The BLM will assign a federal docket number to the application. Under the Montana-BLM MOU, the BLM will hear the matter in conjunction with the regular MBOGC hearings. The applicant is subject to cross-examination by BLM staff-normally only technical personnel, not BLM attorneys, and the BLM may or may not present evidence. Since the MBOGC does not have jurisdiction over Indian lands, the BLM will issue a federal order covering the Indian land. If the relief involves both fee and Indian lands, the MBOGC will enter its order respecting the lands, and the BLM will enter a corollary federal order. Where the requested relief involves both fee and federal lands, the normal procedure is for the BLM to concur in the MBOGC's decision and request that the order promulgated by the MBOGC include appropriate language requiring the lands to be communitized.

When proceedings before the North Dakota Industrial Commission's ***Oil*** and Gas Division ("NDIC") are likely to affect federal lands, BLM officials from the Dickinson District Office may attend the hearings and voice any concerns. As in Montana, the practice of most operators and their counsel is to be in communication with the BLM personnel in Dickinson prior to filing applications with the NDIC. There has been little development on Indian lands in North Dakota to date.

South Dakota practice is similar to North Dakota practice.

[\*48] **Nevada**

Comments by Alan Hager, Assistant Attorney General, State of California (based upon telephone conversation with John Menghini, BLM in Reno)

Nevada has default spacing of 1 well per 40 acres for ***oil*** and 1 well per 160 acres for gas. Upon completion of a well, the conservation commission may determine, upon petition from an operator, whether the spacing should be changed. Because there is no gas production in NV, there has never been a spacing problem with gas wells. Although there is some ***oil*** production, there has also not been a spacing problem with ***oil*** wells. Seldom, if ever, has an operator sought a waiver from the Nevada commission of the 40-acre spacing for ***oil*** wells.

Federal land comprises over 85% federal land. Regarding federal lands, there is no spacing requirement. If there are multiple mineral-interest owners, the lands are cooperatively developed and the unit participants determine well density. Apparently, the state has never tried to space federal acreage. This may partly because production has been marginal in most plays.

There is no MOU that addresses communitization, spacing, and pooling processes; however, the BLM and Nevada Commission on Mineral Resources, Division of Minerals have an MOU that largely deals with matters regarding inspections and compliance with the provisions of the Federal ***Oil*** and Gas Royalty Management Act. This MOU is not included in Appendix C, below.

**New Mexico**

Comments by David Brooks, Assistant General Counsel, ***Oil*** Conservation Division

New Mexico has no functioning MOU regarding federal or Indian lands. In practice, the ***Oil*** Conservation Division (OCD) applies its spacing regulation in the same manner as it does to other lands in New Mexico. Under Rule 14 (N. Mex. Admin. Code § 19.15.1.14), operators file certain forms (applications for permits to drill and sundry notices) with the BLM. BLM processes them, and the approved applications then come to OCD. OCD's position is that OCD approval is also required, and we will not issue an Authorization to Transport from a well unless we have approved the permit to drill. We are not sure BLM agrees with this position, but no one has challenged it.

With regard to injection wells, OCD has primacy under the federal Underground Injection Control (UIC) program except for Indian lands, and we administer our state law permitting system and the UIC program through the same permitting process. However, New Mexico takes the position that a non-Indian must obtain an OCD injection permit for a Class II well on Indian lands. Although the United States Environmental Protection Agency (EPA) has UIC authority on Indian lands, New Mexico applies its state permitting laws as well. While EPA may not agree with this position, no one has challenged it.

New Mexico had an MOU with the BLM regarding spacing issues on Indian lands. However, that agreement expired several years ago and has not been renewed. The agreement [\*49] was based on a misinterpretation of *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation, Montana v. Calvert Exploration Co.*, 223 F. Supp. 909 (Dist. Mt. 1963), *rev'd. on jurisdictional grounds sub nom., Yoder v. Assiniboine and Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964), in that the MOU assumed that the State had no power to impose spacing regulations on Indian lands. That is the reason it was not renewed. *Yoder* dealt only with the issue of whether the federal government could delegate its trust responsibilities, and the issue of State authority was not before the Ninth Circuit. OCD made some effort to reach a new MOU with BLM that would achieve the same practical results without acknowledging an absence of State jurisdiction, but, so far, no agreement has been reached. While the agreement was in effect, OCD issued some spacing orders that specifically did not apply to Indian lands in the same pool. This created some confusion, but no practical problems because OCD issued exceptions when necessary to conform the spacing to what BLM approved.

The prior MOU applied only to Indian lands and did not apply to federal lands. OCD issues compulsory pooling and spacing orders that include federal lands when an operator applies for such an order. Of course, these are not valid if BLM disapproves. In fact, BLM monitors our dockets and advises OCD if it disapproves of an applicant's request. BLM never advises OCD if it approves of a request, as there is no procedure for BLM to do so.

**Oklahoma (Re: Inherited Restricted Lands of the Five Nations)**

Comments by Keith Thomas, Attorney, Corporation Commission

In any given year, the Oklahoma Corporation Commission (OCC) addresses thousands of spacing and pooling issues. Oklahoma has extensive Indian mineral interests but a much smaller amount of non-Indian federal minerals.

In the past, operators have been reluctant to form spacing units that comprise Indian or federal minerals. Some operators have considered spacing units involving Indian or federal minerals but abandoned the venture, believing it to be problematical. The reluctance to pool or space Indian or federal minerals with other lands has recently lessened.

The BIA has issued guidelines for the pooling of inherited restricted lands of the Five Nations. Compliance with these guidelines increases the likelihood that the BIA will approve a communitization request. The applicant should supply the BIA with:

1. an affidavit of the landman stating the name of the individual(s) who were contacted in an effort to obtain the current address of the Indian owner(s);
2. proof of search of appropriate county records, such as deed recordings and probate records;
3. proof of search of telephone directories;
4. proof of death, including an obituary from a local or tribal newspaper, the BIA, or name of the source confirming death;
5. name of the Nation or tribal agency that was contacted for the information about the location of the Indian owner;
6. proof of publication in a tribal newspaper; and
7. [\*50] proof of nondelivery of correspondence to an Indian owner at the last know address of that individual.

All applicants seeking approval of a pooling order that involves inherited restricted lands must provide the BIA office in Muskogee, Oklahoma, with a copy of the application; any testimony by a landman regarding the market value of the lease bonus and rate of royalty; and any applicable proof of an attempt to locate Indian owners. Upon receipt of this information, the BIA forwards the application and related materials to the BLM office in Tulsa, Oklahoma, for its recommendation. Additionally, the BLM prepares an appraisal and evaluation of the market value of the restricted Indian interest.

The OCC forwards pooling orders to the BIA for approval pursuant to the Stigler Act, Section 11 of the Act of August 4, 1947, 61 Stat. 733. If the BIA approves the order, an Approval of the OCC Pooling Order and Election of the Secretary of the Interior is issued. This approval is sent to the applicant's attorney for filing in the county land records where the mineral interest is located.

The applicant must pay any lease bonus derived from the pooled interest to the BIA for deposit into the Individual Indian Monies account. The ***oil*** and gas operator is required to notify the BIA of all actions involving operations upon lands included in the order.

When an application is filed with the OCC related to spacing, including increased density and exception locations, or pooling, the applicant must list all interested parties that are to receive notice. There is an agreement between the OCC and the BLM that the OCC will notify the BLM of any spacing or pooling application involving federal or Indian minerals. If the BLM, the BIA, or an Indian owner is listed as a party to whom notice is to be given, the OCC supplies the BLM with copies of the application.

For all pooling or spacing applications affecting restricted Indian interests, it is important for the applicant to initiate and maintain communication with the BIA and BLM.

**Utah**

Comments from Steve Alder and Mike Johnson, Assistant Attorneys General

In Utah, ***oil*** and gas production occurs principally from areas where federal and Indian mineral ownership is significant. The State's Board of ***Oil***, Gas & Mining (the Board) exercises regulatory control over certain aspects of ***oil*** and gas development activities on federal and Indian lands. The Utah ***Oil*** and Gas Conservation Act, Utah Code Ann. § 40-6-1 *et seq.*, asserts state regulatory jurisdiction over all ***oil*** and gas production in the State as necessary to conserve ***oil*** and gas resources and to prevent waste.

In practice, this dual federal-state authority over ***oil*** and gas production activities on federal and Indian lands in Utah has been based on mutual accommodation of each sovereign's regulatory processes and on the established customs and practices of operators in the state. There is no formal memorandum of understanding (MOU) or other such agreement. Although a formal [\*51] MOU was proposed in the early 1990s, it was never adopted, and no MOU is in place at this time.

The state's ***oil*** and gas rules, Utah Administrative Code R649-2-1 *et seq.*, accommodate this federal-state cooperation by first explicitly stating that "[t]hese general rules apply to all lands in the state including lands of the United States and lands subject to the jurisdiction of the United States to the extent lawfully subject to the state's power." *Id.* at R649-2-2. However, the rule then provides that: "

the Board may suspend the application of the general rules or orders or any part thereof, with regard to any unit agreement approved by a duly authorized officer of the appropriate federal agency, so long as the conservation of ***oil*** and gas and the prevention of waste is accomplished thereby, but such suspension shall not relieve any operator from making such reports as are otherwise required by the general rules or orders or as may reasonably be requested . . . in order to keep the board and the division fully informed as to operations under such unit agreements.

*Id.* at R649-2-3. These two provisions codify the state's policy and practice with regard to its well location rules and spacing orders when federal lands are unitized.

In other cases where the federal lands are not part of a federal unit, the operators are expected to comply with the state location rules and spacing orders. The Utah well location rules provide that, in the absence of an order establishing a spacing pattern for a pool or approving an exception location, each well is required to be within a 400-foot square drilling window at the center of a 40 acre quarter-quarter section. *See* Utah Admin. Rules R649-3-2. This de-facto 40- acre well density is considered applicable to all private, state, federal, and Indian lands in the state that are not in a federal unit. This well location requirement and the various provisions applicable to exception locations and horizontal wells are enforced by the statewide approval of applications for permission to drill (APDs) that must be processed and approved by the State Division of ***Oil***, Gas and Mining (the "Division").

To drill on a different density, and to establish drilling units for other purposes, an operator may petition the Board for the "establishment of a drilling unit for any pool". Such drilling units require a public hearing, are to be based on geologic and production information, and are to "not be smaller than the maximum area that can be efficiently and economically drained by one well". Utah Code Ann. §40-6-6. Operators on federal and Indian lands routinely apply to the state Board for spacing orders pursuant to this statute, and for approval of 'exception locations' when consent cannot be obtained from all owners. The Board generally seeks the 'comments' of the BLM before entering such orders, but neither BLM 'consent' nor 'comment' is required. Instances of objections from the BLM are rare.

When an operator is seeking federal approval of a communitization agreement for federal and Indian lands, the BLM takes almost the same approach. It requires operators to "adhere to the well spacing and well location requirements established by the appropriate state regulatory bodies, while reserving the right to impose different requirements in those instances where [\*52] adherence to a state's requirement is considered not to be in the public interest, or in the interest of the Indian lessors." BLM Manual 3160-9.06(D)(1988).

**Wyoming**

Comments by Eric K. Nelson, Senior Assistant Attorney General

The State of Wyoming and the Bureau of Land Management (BLM) entered into a Memorandum of Understanding regarding ***oil*** and gas operations on public, state and privately owned lands. This MOU is not applied to tribally administered lands within Wyoming. Authority for ***oil*** and gas regulation on the Wind River Reservation resides with the EPA and the BLM.

The Wyoming-BLM MOU was signed in 1992 and incorporates five appendices addressing Underground Injection Control, Segregated Surface and Mineral Ownership, Units and Communitization Agreements, Well Spacing and Geophysical Operations.

The Wyoming ***Oil*** and Gas Conservation Commission (WOGCC) provides all applications submitted under the UIC program to the EPA for review. In theory, EPA's comments regarding the federal government's position on the application are to be received prior to the hearing. Unless protested, examiners hear these applications. Typically, neither the BLM nor the EPA appear at the hearings, and neither agency has disputed the decision of the WOGCC under the UIC program.

In 2005, Wyoming enacted a law granting surface owners of split estate lands additional rights. Wyoming has taken the stance that its statute applies with equal force to federal split- estate lands. With the exception of a letter issued by Kathleen Clarke during the rulemaking process implementing the Wyoming act, the BLM has not challenged the validity of the Wyoming law. In practice, this law has not been a roadblock to ***oil*** and gas development of federally owned severed minerals.

Generally speaking, there is good communication between the WOGCC staff and the BLM Resource Management Team (RMT) located in Casper, Wyoming. Under the MOU, notices of all spacing applications affecting federal units, communitized areas, and other federal lands are submitted to the RMT. The WOGCC will accept federal sundry forms for federal wells, as long as the information contained is substantially the same as required by state forms. Typically, members of the RMT attend WOGCC hearings but do not formally participate or enter appearances. Rarely does the BLM file a formal protest. Instead, most issues are handled through informal discussions between the RMT, WOGCC staff, and applicants.

The BLM maintains primary responsibility for field inspections and regulatory enforcement regarding federal lands, while the WOGCC handles state and fee inspections and enforcement. In cases where violations are noted by WOGCC staff on federal lands, the appropriate BLM field office is notified. The level of communication with, and enforcement by, the BLM varies by field office, with some offices following the state's lead, while others make independent determinations. Staffing shortages and high employee turnover has made establishing continuity with the various BLM field offices extremely difficult.

[\*53] **Appendix C**

**MOUs and Draft MOUs**

[\*55] **California Draft MOU**

[\*57] MEMORANDUM OF UNDERSTANDING

BETWEEN THE

CALIFORNIA STATE OFFICE

U.S. BUREAU OF LAND MANAGEMENT

AND

CALIFORNIA DEPARTMENT OF CONSERVATION

DIVISION OF ***OIL***, GAS, AND GEOTHERMAL RESOURCES

Draft revision April 6, 2006

**I. PURPOSE**

This Memorandum of Understanding (MOU) is made and entered into by and between the U.S. Bureau of Land Management in California, hereinafter called the "BLM" and the California Department of Conservation, Division of ***Oil***, Gas, and Geothermal Resources, hereinafter called the "Division." The purpose of this MOU is to delineate procedures for regulating oilfield operations where both the BLM and the Division have jurisdictional authority, hereinafter called "BLM Administered Land," to streamline operations and minimize duplication. Unless otherwise noted, this MOU applies to oilfield operations on all federally-owned land administered by BLM in California, whether that land is owned in total by the federal government or is a "split-estate" (when the federal government owns either the minerals or the surface, but not both). Wells within a federal unit operation but located on land with private surface and minerals ownership are not considered to be on "BLM Administered Land", unless the unit agreement stipulates BLM regulation of the land, and then only to the extent stipulated by the unit agreement. However, production verification for both private and federal wells in federal units will be performed by BLM.

The BLM and the Division recognize that it is in the best interest of the respective agencies and the public to exchange information and combine resources where possible. Further, this MOU acknowledges the value of the ***Oil*** and Gas Work Group, hereinafter called the "Group," as a means of accomplishing this exchange. The Group will continue to meet regularly and may form subcommittees to address specific issues. The Group will conduct the ***Oil*** and Gas Conference as a forum for communication between government agencies, industry, and the public at large. Furthermore, the Group may make recommendations to the BLM and the Division, either collectively or individually.

This MOU is not intended to limit such partnerships or make them exclusive. Also, this MOU is not intended to supersede any compliance requirements with other federal or state laws and regulations.

[\*58] **II. AUTHORITIES**

This cooperative agreement is entered into with full recognition of the following regulatory mandates/authorities:

1. The BLM has mandated responsibilities for regulation of all oilfield operations on BLM Administered Land, under Title 43 of the Code of Federal Regulations (CFR), Group 3100 ***Oil*** and Gas Leasing, Title 40, Subpart 1500 of the CFR, the National Environmental Policy Act (NEPA), the Endangered Species Act, and other applicable laws. Under Federal Regulations, the BLM as the minerals and/or surface owner, is considered to wholly regulate oilfield operations (downhole and surface) on all BLM Administered Lands.
2. The Division has the statutory responsibility under Division 3 of the Public Resources Code (PRC) to regulate all oilfield operations in the State of California. The Division is considered by California statute to wholly regulate downhole operations and be responsible for appropriate surface regulations. The Division has been delegated authority, under provisions of Section 1425 of the Federal Safe Drinking Water Act, to administer the Underground Injection Control (UIC) program for Class II injection wells in the state of California. Also, the Division has discretionary permitting authority under the California Environmental Quality Act (CEQA). The Division serves as lead agency for drilling activities within unincorporated areas of ***Kern*** County. It serves as a responsible agency for drilling activities in incorporated areas of ***Kern*** County where the local agency issues a discretionary permit.
3. Both the BLM and the Division are mandated to protect hydrocarbon reservoirs, groundwater, and health and safety; however, Division statutes effectively place liability for downhole well operations with the operator, while BLM, as the landowner, maintains considerable liability for both downhole and surface conditions. The BLM is responsible for enforcing a wide range of surface land-use issues, including fresh water protection from surface discharges and endangered species habitat.

**III. OPERATING AGREEMENTS**

To implement this MOU in the most effective manner, Operating Agreements will be utilized to outline specific procedural and technical working relationships between the BLM and the Division. The following Operating Agreements have been developed, attached to, and made a part of this MOU.

1. Downhole Well Permitting
2. Surface Operations
3. Idle/Orphan Well Program
4. Bonding
5. Underground Injection Control (UIC)
6. Exchange of Resources/Information

[\*59] Other Operating Agreements may be developed at the recommendation of BLM, the Division, or the Group. Operating Agreements may be added, modified or deleted with the consent of the BLM and the Division and with input from the Group. Unless otherwise noted, whenever an Operating Agreement states that applications, permits, or records will be furnished to the other party, that information will be furnished within thirty (30) days of being available.

**IV. CONCLUSION**

This MOU replaces and nullifies the MOU adopted in December 1995, presently in effect between the BLM and the Division. This MOU may be modified in the future, by mutual consent and agreement of the BLM and the Division, as conditions warrant. This MOU does not limit the BLM and the Division from reaching other agreements, within the limit of their statutory responsibilities and authorities, either with each other or with other parties or agencies. Nothing in this MOU may supersede or exceed the statutory or regulatory authority, or responsibility of either agency.

This MOU will be effective upon signature of the designated parties. This MOU can be terminated by either party by providing written notice at least 45 days in advance.

Mike Pool

State Director

Bureau of Land Management

Director

Department of Conservation

Ron Huntsinger

Bakersfield Field Office Manager

Bureau of Land Management

Hal Bopp

State ***Oil*** and Gas Supervisor

Division of ***Oil***, Gas, and Geothermal Resources

DATE:

[\*60] **DOWNHOLE WELL PERMITTING OPERATING AGREEMENT**

To provide an effective, streamlined, coordinated application and permitting/approval process, and to reduce or eliminate duplicative administration of regulations and requirements, the BLM and the Division hereby agree to adhere to the procedures set forth in this Operating Agreement for Downhole Well Permitting. The procedures in this Operating Agreement shall be carried out in a cooperative manner, to fulfill the objectives of the BLM and the Division and reduce the regulatory burden on industry.

The BLM is mandated to post all Applications for Permit to Drill (APDs) for a 30-day public review period, while the Division is obligated to respond to Notices of Intention to Drill New Wells within 10 working days. Otherwise, BLM and Division Permits to Conduct Well Operations are substantially equivalent in the specifications required to drill, rework, and plug and abandon wells. The BLM will utilize Division requirements that are clearly more stringent. Applicable Division requirements that are more stringent are outlined in Section C of this Operating Agreement.

Downhole well permitting on BLM Administered Land will be conducted as follows. (Note: Permitting of UIC wells is outlined in the UIC Operating Agreement attached to the MOU.)

A) BLM-owned Fee Land and Split-estate BLM-owned Minerals (Note: includes cases where the BLM owns less than 100% of the mineral estate, and also where a well is drilled directionally through both BLM and private minerals.)

BLM Responsibility

1. The BLM authorizes all applications/operations for APDs, Sundries, and Abandonments, as mandated in Title 43, Subpart 3160, of the CFR.
2. Applications and permits for downhole well operations, except for UIC wells, shall be obtained from the BLM. All approvals for variances and all inspections will be conducted by the BLM.
3. The BLM will forward a copy of all APDs to the Division within 24 hours of receipt, by the most expedient means possible, for the purpose of assigning API Numbers, verifying proper well designations, posting in the Division issued Summary of Notices Received, and assuring State bond coverage.
4. The BLM will review Sundries (notices to perform downhole work on an existing well) and determine State bond coverage requirements. The Division will be notified if the operator needs to provide state bond coverage.
5. [\*61] The BLM will develop surface and downhole conditions of approval (COAs) for each application and will forward a copy of the approval to the Division for its records.

Division Responsibility

1. The Division will accept copies of BLM notices and permits/approvals for its records. No separate approval from the Division will be required for production operations.
2. Operators will continue to furnish production and injection reports, well summaries, histories including results of BLM inspections, logs, and other records required by the PRC to the Division.
3. The Division will keep BLM advised of state bonding requirements so BLM may make accurate financial assurance determinations.

B) Split-estate Privately-owned Minerals

***Oil*** and gas development activities on split-estate with BLM-owned surface and privately-owned minerals are uncommon. As of March 2002, this situation has occurred only in the Alpaugh/Trico Gas area. When ***oil*** and gas development activities occur in such a situation, the following will apply:

BLM Responsibility

1. The BLM Natural Resource Team will authorize applications to conduct surface disturbing activities and will provide COAs to comply with requirements for surface disturbance on BLM-owned surface.
2. The BLM will accept copies of Division notices and permits/approvals for its records. No separate approval from the BLM for downhole operations will be required.
3. The BLM will provide the Division with BLM surface ownership information for areas where drilling activities are likely.

Division Responsibility

1. The Division permits proposals to drill, redrill and to perform work in existing wells that constitute a permanent mechanical change under PRC 3203, or to plug and abandon wells (PRC 3229).
2. [\*62] Applications will be submitted to and permits for downhole well operations will be received from the Division. All approvals for variances and all inspections will be conducted by the Division. The Division will develop the COAs for each application, on the Division Permit to Conduct Well Operations form, for each application. If the application or permit involves surface disturbance, the Division will inform operators that BLM approval is required prior to beginning operations.
3. The Division will forward a copy of the notice and approval to the BLM for its records.

C) More Stringent Division Requirements

Where applicable, the BLM will specify the following more stringent Division downhole requirements. These specifications are in addition to existing BLM specifications. The BLM will consult with the Division if there are any questions about more stringent requirements.

1. For plugging and abandonment, the base of fresh water (BFW) will be protected with a cement plug. Base of fresh water is designated as 3,000 parts per million (ppm) total dissolved solids (TDS), although there are some variances for local conditions. The BFW will be protected with a minimum 200-foot plug across the fresh-saltwater interface in open hole, a 100-foot plug across the interface inside cemented pipe, or a 100-foot plug inside pipe, with sufficient cement placed outside pipe if uncemented. For new or existing wells, the base of fresh water must be protected with cement behind pipe lifted to at least 100 feet above the interface.
2. In open hole, a cement plug shall be placed to extend from the total depth of the well, or from at least 100 feet below the bottom of each ***oil*** or gas zone or injection zone, to at least 100 feet above the top of each ***oil*** or gas zone or injection zone. In cased hole, all perforations shall be plugged with cement, and the plug shall extend at least 100 feet above the top of a landed liner, the uppermost perforations, the casing cementing point, the water shut-off holes, an ***oil*** or gas zone or injection zone, whichever is highest. For massive sand intervals, or any depleted productive interval more than 100 feet thick, a variance may be allowed that the cement shall extend from at least 100 feet below the top of the zone to at least 100 feet above.
3. A bridge plug may not be used over the top ***oil*** or gas interval, but may be used above the lowermost zone in a multiple-zone completion, if that zone is isolated from the upper zones by cement behind casing. In some cases, multiple bridge plugs may be used in alternating zones, where multiple zones exist, so long as a cement plug is placed across the uppermost zone.
4. Cement plugs shall extend at least 100 feet above casing stubs or junk. Prior [\*63] to placing a 100-foot plug above junk where the base of fresh water, or ***oil*** or gas zones were not plugged properly, cement will be downsqueezed past the junk to the extent possible.
5. All portions of the hole not plugged with cement will be filled with inert mud fluid having a minimum gel-shear strength (10 minute rheometer measurement) of 20 lbs./100 sq. ft. and capable of balancing formation pressures. (This generally requires 9.6 lb/gal mud.)
6. The state well spacing statutes, specified in PRC Sections 3600 through 3609, will be utilized. The spacing statutes generally accommodate line agreements. Any areas of disagreement or deviation from spacing statutes would require a separate agreement.

D) Alternate Plugging and Abandonment Requirements

The use of hydrated sodium bentonite as a solid plugging material may be allowed in lieu of cement by either BLM or the Division, within operational guidelines developed by the Division. These guidelines presently allow the use of bentonite for plugging wells located in the San Joaquin Valley that are shallower than 4,000 feet with a zone pressure differential that is less than 500 psi from an upper zone. The permitting of well abandonments using the alternative bentonite plugging technique is discretionary on the part of BLM and the Division, and may be permitted on a case-by-case basis in the best judgment of either agency.

**SURFACE OPERATIONS OPERATING AGREEMENT**

Generally, the BLM has more extensive requirements for surface operations. The BLM enforces protection of endangered species habitat, cultural resources and other resource values, and assesses the cumulative impact of development on all BLM Administered Land. The BLM also conducts field production accounting audits on all leases with federal minerals. Otherwise, both the BLM and Division enforce substantially equivalent requirements for the operation of surface facilities. Therefore, inspection and surveillance of surface operations on BLM Administered Land will be conducted as follows:

A) Environmental Lease Inspections

BLM Responsibility

1. The inspection and enforcement of compliance for the surface condition of ***oil*** and gas leases, including pipelines and aboveground tanks, will be the responsibility of [\*64] the BLM, with the exception of UIC facilities. The BLM will inspect the leases, issue citations, and enforce remediation actions, as applicable, in accordance with existing federal regulations.
2. The BLM will set the conditions for the reclamation of the disturbed surface.
3. The operation and proper closure of surface impoundments will be the responsibility of the operator, under the oversight of the BLM, and in accordance with guidelines provided by BLM to federal operators (dated 4-8-94). The guidelines were developed by a subcommittee of the Work Group and were adopted by the full Work Group.

Division Responsibility

1. The Division will be responsible for the inspection and enforcement of compliance for the surface condition of UIC facilities, including UIC injection wells, injection pipelines, and injection pumps. The Division will be responsible for determining remediation requirements for leaking and otherwise deficient UIC facilities.
2. **On split-estate leases with a privately-owned surface**, the Division will enforce provisions of the PRC, only if necessary for the protection of the private surface owner and the environment, and in consultation with the BLM.
3. **On split-estate leases with privately-owned minerals**, the Division will enforce provisions of the PRC, in consultation with the BLM, if necessary, for the protection of subsurface reservoirs and protection of groundwater.

B) Well Abandonment and Surface Restorations

BLM Responsibility

1. The BLM will receive, evaluate, set the COAs and approve any request/application relating to abandoned well surface restoration, including UIC wells, in accordance with all existing federal regulations.
2. Upon completion of restoration activities and notification by the operator, the BLM will inspect the restored surface to ensure that work done is consistent with the COAs. If the COAs are met, the BLM approves the final abandonment notice (FAN).
3. **For split-estate leases with a privately-owned surface**, exceptions to standard surface restoration requirements may be made with the written consent of the surface landowner, and in consultation with the Division, including the conversion of abandoned ***oil*** wells to water wells.
4. [\*65] The BLM will not forward a copy of the FAN approval to the Division for its records. This document is no longer required by the Division.

Division Responsibility

1. The Division will not issue a separate report of final abandonment approval unless necessary for state-required bond release or other administrative reasons. In any case, the Division's final abandonment approval will indicate only that all required records have been received, all Division requirements have been met, and that final approval will be the responsibility of the BLM.
2. **For split-estate leases with BLM-owned surface**, the Division will issue a Final Letter of Abandonment Approval upon completion of downhole plugging and abandonment operations. The letter will state that downhole plugging and abandonment procedures have been completed in accordance with Division regulations and that surface restoration is the responsibility of the operator, in accordance with BLM requirements.
3. **For split-estate leases with privately-owned surface**, the Division will enforce provisions of the PRC only if necessary for the protection of the surface landowner and the environment, and in consultation with the BLM.
4. If the Division issues a Final Letter of Abandonment Approval, a copy will be forwarded to the BLM for its records.

C) Pipeline Management Program

BLM Responsibility

1. The BLM will exercise jurisdiction for pipelines/flow-lines and pipeline repair requirements, including jurisdiction for pipeline leaks resulting in spills, within its authority on BLM Land.
2. The BLM will receive, upon request, from the Division copies of all records related to the Division's pipeline management program for pipelines located on BLM Land.

Division Responsibility

1. The Division will be responsible for regulating pipelines pursuant to California Code of Regulations (CCR) Section 1774 (e) through 1774 (I), which includes environmentally sensitive pipelines, as defined in CCR Section 1760 (d). Under this program, operators must prepare pipeline management plans that include mapping, maintenance programs, and testing for certain pipelines.
2. [\*66] The Division will inspect and may witness mechanical integrity testing of all pipelines included in the pipeline management plans.
3. The Division will furnish BLM, upon request, copies of all records, including pipeline management plans, maps, and testing results for applicable pipelines located on BLM Land.

D) Well Access, Well Reabandonment, and the California Environmental Quality Act (CEQA) Program

In its role as a CEQA Responsible Agency, the Division comments on various proposed surface developments throughout the state. These comments include recommendations to provide access for future exploration and development, requirements to maintain access to existing wells, and locating previously plugged and abandoned wells. Using the discretionary authority of the lead agency, the Division may require testing and replugging previously abandoned wells to current standards. BLM wells may be involved in this review if they are located on a split estate where private surface is being developed.

**On split-estate leases with a privately-owned surface:**

BLM Responsibility

1. The BLM will consult with the Division regarding retaining access to existing wells and maintaining access for future oilfield development.
2. The BLM will consult with the Division, if necessary, for reabandonment specifications and will issue reabandonment specifications if downhole work will have an impact on BLM-owned minerals.

Division Responsibility

1. The Division will act in its capacity as **a** CEQA responsible agency, and in consultation with BLM, recommend requirements for retaining access to existing wells and maintaining access for future oilfield development when private surface development is proposed and conducted.
2. The Division will act in its capacity as a CEQA responsible agency, and in consultation with BLM, specify reabandonment work for wells not plugged and abandoned in accordance with current standards when private surface development is proposed. This reabandonment work will be accomplished by the surface developer. If [\*67] the reabandonment involves substantial downhole work, BLM will be contacted to issue reabandonment specifications.

**IDLE/ORPHAN WELL PROGRAM OPERATING AGREEMENT**

A) Idle Well Program

The BLM conducts an idle-well program under Title 43 CFR 3160, WO-IM-No. 92-149 and CA-94-40 and has adopted a formal idle-well policy that was developed in full partnership with the ***Oil*** & Gas Work Group. The Division conducts an idle-well program under the authority of PRC Sections 3106, 3202, 3206, 3206.5, 3237, and 3250 and has adopted a formal idle-well policy. The BLM and Division idle-well policies have similar goals and require testing of idle wells to ensure mechanical integrity, protection of groundwater, and protection of reservoir integrity. The BLM and Division require plans from operators to place long-term idle wells back on operational status or to plug and abandon such wells.

The idle-well program on BLM Administered Land will be conducted as follows:

BLM Responsibility

1. The BLM will administer its formal idle/orphan well program and policy.
2. **On split-estate leases with privately-owned minerals**, the BLM will have input, as to the status of idle wells, on its property.
3. The BLM will furnish the Division with mechanical integrity test results.
4. The BLM will participate in the Division's Idle Well Reduction Program as agreed to by the Agencies.

Division Responsibility

1. The Division will continue to maintain records of idle wells on BLM Administered Land for the purpose of enforcing the PRC.
2. **On split-estate leases with privately-owned minerals**, the Division will administer its idle-well program. The Division will share its idle-well program data with the BLM.
3. Operators may meet the long-term idle well elimination requirements of PRC Section 3206(a)(4) by elimination of wells on BLM Administered Land.
4. [\*68] The Division will include the BLM in all Idle Well Reduction activities where these activities involve federal wells.

B) Orphan Well Program

The BLM and the Division define an orphan well as a well for which the operator is deceased, defunct, bankrupt, or otherwise inaccessible, and there is no or insufficient bond coverage for plugging and abandonment operations. Both the BLM and Division conduct programs to minimize the number of orphan wells, by finding responsible parties or operators willing to acquire such wells and return them to production, attempting to assure adequate financial responsibility when well ownership/operatorship is transferred or, ultimately, to contract for plugging and abandonment to abate a public nuisance. The Division, at its discretion, may utilize PRC Section 3258 funding to plug and abandon orphan wells on BLM Administered Land. The BLM may utilize federal bond funds and/or federally budgeted orphan well funds to participate in plugging and abandonment operations with the Division on a case-by-case basis. The vehicle for transferring these funds to the Division is an Assistance Agreement.

These programs are developed in cooperation with industry through subcommittees of the Group, the Conservation Committee of California ***Oil*** and Gas Producers, and other ad hoc committees. The BLM and the Division will continue to work together, and with these subcommittees, to make the best use of funds and other resources available for remediating idle-deserted, hazardous, and orphaned wells.

**BONDING OPERATING AGREEMENT**

The BLM and the Division acknowledge that bonding statutes are an obvious example of duplicative requirements. Under current provisions of the PRC, the Division is mandated to require bond coverage on all wells, including those on BLM Administered Land. The BLM and the Division will work together to eliminate duplication, while recognizing the need to maintain bonds consistent with existing statutes. Hence, the following:

BLM Responsibility

A) The BLM will continue to maintain bond coverage consistent with the level of liability for all operations on BLM Administered Land (surface and minerals) as mandated under CFR Title 43, Subpart 3104. Under this regulation, the BLM requires bond coverage for operating individual leases.

[\*69] Division Responsibility

A) The Division will continue to require a performance bond, in conformance with PRC Sections 3202 (e) and 3204 through 3206, during idle well acquisitions and for either drilling a new well or making mechanical changes to an existing well on BLM Administered Land.

**UNDERGROUND INJECTION CONTROL (UIC) OPERATING AGREEMENT**

The U.S. Environmental Protection Agency (EPA), under provisions of Section 1425 of the Safe Drinking Water Act, has delegated authority (primacy) to the Division to administer the UIC program for Class II injection wells in California, including those on BLM Administered Land. The Division does not approve notices to drill injection wells, or convert existing wells to injection, without an approved UIC project or injectivity test.

CFR Title 43, Subpart 3162.5, in conjunction with Federal Onshore Order No. 7, mandates that the BLM approve underground injection and the disposal of produced water on BLM Administered Land. The BLM assigns to the Division injection approval authority, except for surface use conditions of approval, on BLM Administered Land. The UIC program and disposal of produced water will be conducted as follows:

BLM Responsibility

A) Prior to project approval:

1. The BLM will receive, from the Division, a copy of the project application along with the draft conditions of approval. No action will be required on the part of BLM, although comments may be provided to the Division if the BLM desires.

B) Drilling an injection well outside an approved UIC project:

1. A well cannot be approved for injection unless it is within the scope of an approved UIC project, and injection is not allowed until the project, or injectivity test is approved. On BLM-owned minerals, the operator could file an APD with the BLM and subsequently file a notice to convert to injection with the Division.

C) Drilling an injection well inside an approved UIC project:

1. The BLM will receive a copy of the Notice of Intention from the Division.
2. The BLM will receive from the operator

a Sundry Notice**an Application for Permit to Drill (APD)** for any UIC injection well application on **all** BLM-owned

fee land, **whether BLM owns the surface or not**, to evaluate and set surface use Conditions of [\*70] Approval.

D) Abandonment of injection wells:

1. The BLM will receive from the operator a Sundry Notice for any UIC injection well application to plug and abandon a well on all BLM-owned fee land, to evaluate and set surface use Conditions of Approval.
2. The BLM will be responsible for surface restoration after the downhole plugging and abandonment work is accomplished.

E) Surface facilities:

1. The BLM will receive from the operator a Sundry Notice for the installation or modification of any UIC surface facilities, including UIC injection pipelines, injection fluid storage tanks, and injection pumps, on all BLM-owned fee-land, to evaluate and set surface use Conditions of Approval.

F) Cyclic steam wells:

1. Wells used to inject steam on a cyclic basis, in conjunction with cyclic production, will receive permits and be administered by BLM as production wells, with consideration for specific injection issues subject to input from the Division.

G) Conversion of UIC wells to production, or other non-UIC use:

1. On BLM-owned minerals, notices to convert existing UIC wells to production wells, or other non-UIC use, will be filed on a Sundry Notice with the BLM. A copy of the notice and permit will be furnished to the Division.

H) Gas and Air (In Situ Combustion) injection wells/projects:

1. Wells used for gas and air (in situ combustion) injection, including gas-storage wells, are considered to be UIC wells and will be drilled, operated, permitted, and regulated under the provisions of this Operating Agreement.

I) Rights of Ways:

1. All rights of ways for pipelines associated with disposal of off-lease water will require BLM approval.

[\*71] J) Filing Well Records

1. The BLM will receive from the operator well histories, including results of Division inspections, and logs.

Division Responsibility

1. Under UIC Primacy, the Division will receive for approval all UIC injection projects (steamflood, waterflood, water disposal, etc.). Subsequently, the Division will prepare a draft approval letter, in accordance with program requirements, and furnish a copy of the project application to the BLM. The final project approval by the Division will address BLM comments and concerns. **The Division will ensure that a stipulation is included in their Permit to Conduct Well Operations (for drilling and abandonment of all UIC wells) notifying the operator that it must receive an approval from the BLM for surface disturbance prior to move in**.
2. The Division will be responsible for the inspection and enforcement of compliance for the surface condition of UIC facilities, including UIC injection wells, injection pipelines, injection fluid storage tanks, and injection pumps. The remediation of leaking and otherwise deficient UIC facilities will be the responsibility of the operator, in conformance with Division specifications.
3. Applications for aquifer exemptions will be filed with the Division and processed in accordance with EPA regulations. A copy of applications located on, or which would include BLM Administered Land, will be forwarded to the BLM for review and comment as described under BLM responsibilities in this section.
4. Notices to conduct downhole well operations for drilling new UIC injection wells within an existing UIC project, reworking existing UIC injection wells, converting existing non-UIC producing wells to UIC injection wells, or abandoning UIC injection wells will be filed with the Division for approval. A copy of the notice and the Division's Permit to Conduct Well Operations will be furnished to the BLM.
5. Any files of cyclic steam project letters, and any related correspondence will be kept by the Division. Copies of cyclic steam project letters will be furnished to the BLM. The Division will be responsible, in consultation with the BLM, for any issues related to cyclic steam projects or wells that are specifically related to the steam injection phase.

[\*72] **EXCHANGE OF RESOURCES/INFORMATION OPERATING AGREEMENT**

A) Well Records and Technical Information

Within reasonable guidelines, and to the extent practical, the BLM and the Division will exchange and make available well records and other technical information, subject to confidentiality limitations. Publications, maps, and copies will be exchanged at no cost. This exchange will include access to technical training.

The BLM and the Division agree to work cooperatively and share information, regarding the development of well record automation, so that information can be shared and accessed electronically.

B) Tank Inventory

The BLM maintains an inventory of all tanks on BLM Administered Land. The Division is responsible for maintaining an inventory of aboveground tanks containing hydrocarbons with a capacity greater than 250 barrels. The BLM provides to the Division tank inventory information at the request of the Division.

C) Operator Transfers

Both the BLM and the Division are required to process operator transfers, resulting from sales, acquisitions, or other means, and enforce their respective requirements, including bond coverage. The BLM and the Division will notify each other of operator transfers / **lease conveyances** on BLM Administered Land. **Either agency may request that the transfer approval be delayed pending resolution of issues of concern**.

**D)**Field Rules

The Division will advise the BLM, and consider BLM comments, when it develops field rules for ***oil*** and gas fields that include BLM Administered Land. The BLM will consider incorporating Division field rule provisions in its COAs.

E) Personnel

The BLM and the Division may exchange personnel (petroleum engineers, petroleum engineering technicians, geologists, surface compliance specialists, and other field staff) for periods not to exceed ninety (90) days at any given time. BLM staff may be detailed to work in the Division office, while an equivalent number of Division staff may be detailed to work in the BLM office. Both the BLM and the Division agree that only employees of similar classification will be exchanged at any time. This process will help [\*73] familiarize the BLM and the Division with each other's functions and **operational** processes.

**PERMITTING /INSPECTION MATRIX**

| **PERMITS, INSPECTIONS** |  | **BLM MNRLS/** | **BLM Srfc./** | **Private Srfc/** |
| --- | --- | --- | --- | --- |
| **VARIANCE APPROVALS** | **BLM** | **PRIVATE** | **PRIVATE** | **Private Mnrls in** |
| **FOR:** | **FEE** | **SURFACE** | **MINERALS** | **BLM Unit** |
| PRODUCTION VERIFICATION | **BLM** | **BLM** | **N/A** | **BLM** |
| DOWNHOLE OPERATIONS (Non-UIC) |  |  |  |  |
| Drills, Reworks, & Abd. Permits, | **BLM** | **BLM** | **DOG** | **DOG** |
| Variance Approval & Inspections |  |  |  |  |
| Directional BLM + Private Compl. | **BLM** | **BLM** | **N/A** | **N/A** |
| ENVIRONMENTAL LEASE INSP. | **BLM** | **BLM** | **BLM** | **DOG** |
| (see UIC exception below) |  |  |  |  |
| ABD WELLSITE RESTORATION | **BLM** | **BLM** | **BLM** | **DOG** |
| UIC: |  |  |  |  |
| 1. Project Approval | **DOG** | **DOG** | **DOG** | **DOG** |
| 2. Drill, Rework w/in project | **DOG** | **DOG** | **DOG** | **DOG** |
| 3. Drill, Rework outside of project | **BLM** | **BLM** | **DOG** | **DOG** |
| 4. Abandonment (downhole) | **DOG** | **DOG** | **DOG** | **DOG** |
| 5. Cyclic Well | **BLM** | **BLM** | **DOG** | **DOG** |
| 6. Convert UIC to Prod. (OG) | **BLM** | **BLM** | **DOG** | **DOG** |
| 7. Convert Prod, to UIC | **DOG** | **DOG** | **DOG** | **DOG** |
| 8. Gas Injection Well | **DOG** | **DOG** | **DOG** | **DOG** |
| 9. Observation Well | **BLM** | **BLM** | **DOG** | **DOG** |
| 10. Facilities Inspection | **DOG** | **DOG** | **DOG** | **DOG** |
| 11. Surface Conditions of Approval | **BLM** | **Not Req'd BLM** | **BLM** | **N/A** |

[\*75] **Colorado MOUs and Appendices**

[\*77] **Memorandum of Understanding**

**Between The Colorado Bureau of Land Management**

**And The Colorado *Oil* and Gas Conservation Commission**

A. Introduction

For many years there has been a spirit of cooperation, communication, and trust between the Colorado ***Oil*** and Gas Conservation Commission (COGCC) and the Colorado Bureau of Land Management (BLM) in the management of lands in the state of Colorado and the development of our nation's ***oil*** and gas resources. Each agency's mission and staffing levels have grown during these years to the point where we believe it is important to formalize our excellent working relationship, as well as define each agency's role and responsibilities in our overlapping jurisdictions.

B. Purpose

Most of our operations occur on adjacent lands or on the same lands, and it is important that both agencies provide ***oil*** and gas lessee/operators with consistent policy and procedures (including statewide ***oil*** and gas orders) on federal/Indian lands as well as nonfederal lands.

C. Objectives

This memorandum of understanding (MOU) between the Colorado BLM and the COGCC is intended to (1) avoid duplication of effort by the responsible ***oil*** and gas permitting agencies and (2) clearly define jurisdictional authority.

D. Authorities

The authorities for this agreement are the Mineral Leasing Act of 1920; the Interior Department Secretarial Order No. 3087, as amended; Title 34, Article 60, of the Colorado Revised Statutes; and 25 CFR Part 211. These agreements shall not supersede existing law, rule, or regulation of either party, nor require commitments of manpower or funds beyond legal authority or appropriation.

E. Definitions

1. COGCC actions shall mean those actions taken by the COGCC to establish pooling, spacing, and other orders (field rules) to govern operations in specific fields.
2. Colorado BLM actions shall mean actions taken by the Colorado BLM in accordance with federal regulations (i.e., Application for Permit to Drill approvals, plugging orders, etc.).
3. [\*78] For purposes of this agreement, the term "Indian lands" shall mean those lands located within the exterior boundaries of the Southern Ute Indian reservation, including allotted Indian lands, in which the legal, beneficial, or restricted ownership of the underlying ***oil***, gas, or coal bed methane or of the right to explore for and develop the ***oil***, gas, or coal bed methane belongs to or is leased from the Southern Ute Indian Tribe or allottee. This includes allotted Indian lands. The Colorado BLM will act in the same manner for actions involving Ute Mountain Ute land as for Southern Ute land.
4. Protest shall mean any objection to a proposed determination. A protest by the Colorado BLM to the COGCC shall be furnished in writing so as to be received by the COGCC at least three working days prior to the hearing or any appearance at the hearing. On Indian lands, the Colorado BLM will notify the COGCC in writing of protest or concurrence so as to be received by the COGCC at least three working days prior to the hearing or any appearance at the hearing. However, should the Colorado BLM fail to protest, and at a later date wish to protest, the Colorado BLM has the right to request that specific orders be reviewed.

F. Responsibilities

The Colorado BLM and the COGCC agree as follows:

1. Designated Official

Each party shall appoint a designated official to receive notices hereunder and to facilitate communication and coordination in implementing this agreement.

1. Coordination Meetings

Semiannual coordination meetings will be held to discuss orders, policies, and procedures. This MOU will be reviewed and updated, if necessary, at the first coordination meeting of every year. Prior to the meeting, each agency's respective staffs will identify issues that will be discussed/resolved at the meeting. An agenda will be prepared and distributed prior to the meeting. Other agency staff and/or interested parties may be included in these meetings, as agreed upon by the agencies. Any decisions and agreements reached as a result of these discussions will be addenda to this agreement, as appropriate.

1. Procedural Format

[\*79] It is agreed that all matters which would require COGCC approval (whether administrative or COGCC decision) involving nonfederal minerals shall initially be submitted to the COGCC even if federal/Indian minerals are partially involved. All matters which would require COGCC approval (whether administrative or COGCC decision) where federal/Indian minerals are entirely involved shall be initially submitted to the COGCC. Both types of matters shall be heard and decided by the COGCC, subject to the conditions set forth below.

The COGCC shall furnish the Deputy State Director, Mineral Resources, in the Colorado BLM with notices of all requests for hearings which in any manner relate to or involve federal/Indian lands. As an additional courtesy, the COGCC will send notices of all requests for hearings to the Colorado BLM District Offices. The Colorado BLM shall be entitled to present expert testimony with respect to such determinations and hearings, and shall be informed in writing of any dispositions. If the Colorado BLM should desire to protest any requested determination, it shall do so by written protest delivered to the COGCC within three working days prior to the hearing or appearance at the hearing. Any such protest shall specify the Colorado BLM objections and the conditions, if any, under which the Colorado BLM will accept the relief requested. The COGCC shall either issue its order incorporating the conditions of the protest or shall relinquish jurisdiction to the Colorado BLM over the matter insofar as it relates to federal/Indian lands. Failure to object to any determination, and failure to appear and protest (either by witness or in writing) at any hearing, shall be construed as concurrence by the Colorado BLM, with the exception of Indian lands. On Indian lands, the Colorado BLM will notify the COGCC of concurrence within three working days prior to the hearing or appearance at the hearing. Failure to concur shall cause the hearing for that issue to be postponed until the following month or until concurrence is obtained.

Consistent with the terms of this agreement, all existing decisions of the COGCC involving federal and Indian minerals will remain in effect, subject to the right of the Colorado BLM to request that any specific orders be reviewed, rescinded, or modified.

G. Special Provisions

1. Confidentiality

[\*80] Each agency will abide by the proprietary and confidential data requirements of its own laws and regulations, in accordance with 43 Code of Federal Regulations 3162.8 and Rule 306 of the Colorado Rules and Regulations, Rules of Practice and Procedure (as amended), and ***Oil*** and Gas Conservation Act.

1. Access to Records

Each agency will provide for public access in accordance with its own rules.

1. Information Sharing

Each agency will provide the other with courtesy copies of all regulation changes and Instruction Memoranda that deal with common or pertinent issues.

1. Jurisdiction of the CQGCC
2. Federal lands - In the event any matter is submitted to the COGCC for decision or other order, and the Colorado BLM does not object to the COGCC order as provided in Section F, the COGCC shall exercise its jurisdiction over all private parties holding interests in federal ***oil*** and gas leases jointly with any nonfederal interests, other than Indian interests.
3. Indian lands - The Southern Ute Indian Tribe does not concur with the exercise of jurisdiction by the COGCC over Indian lands. The Tribe does, however, concur with the exercise of limited authority by the COGCC, but only with the concurrence of the BLM over certain aspects of ***oil*** and gas activities on tribal lands. Specifically, the Tribe and the BLM have entered into a separate MOU which secures to the Tribe the independent right to participate and concur through the BLM in any proposed COGCC action affecting tribal lands prior to said action becoming effective. The BIA and the BLM have entered into a separate interagency agreement which sets out procedures for allotted Indian participation through BLM in any proposed COGCC action affecting allotted Indian lands prior to said action becoming effective.

Should the COGCC render a decision or order after the parties have followed the approved procedures contained in this agreement, said COGCC decision shall be deemed by the parties hereto to be a decision of the BLM. Any [\*81] interested party shall have the same opportunity to appeal or challenge such decision as if said decision had been rendered exclusively by the BLM, Colorado State Director, through the State Director Review process outlined in 43 CFR 3165.3.

H. Affect on Prior Agreements

This agreement will supersede the previous agreement signed September 4, 1986, and incorporate the previous amendment signed September 22, 1989.

I. Administration

This agreement shall become effective upon the date of execution by the last signatory party.

This agreement may be amended by mutual consent of the parties.

Termination of this agreement may be effected by either party upon 60 days written notice to the other party. Termination of this agreement may be effected at any time by mutual written consent of the parties.

This agreement shall terminate when no longer authorized by the U.S. Department of the Interior, by federal or state law, or if determined to be unenforceable by any court having jurisdiction over the parties.

Signed by:

Dennis R Bicknell

Director Colorado ***Oil*** and Gas Conservation Commission

August 22, 1991

Bob Moore

State Director

Bureau of Land Management, Colorado State Office

August 22, 1991

**[\*83] *OIL* AND GAS OPERATION**

**INSPECTION SHARING**

**MEMORANDUM OF UNDERSTANDING**

**Between the**

**COLORADO *OIL* AND GAS CONSERVATION COMMISSION**

**and the**

**COLORADO BUREAU OF LAND MANAGEMENT**

**I. PURPOSE**

The Colorado ***Oil*** and Gas Conservation Commission (COGCC) and the Colorado Bureau of Land Management (BLM) have entered into this Inspection Sharing Memorandum of Understanding (MOU) to provide for more efficient and effective ***oil*** and gas operation inspection coverage on lands under the jurisdiction of both without requiring increased personnel resources.

This MOU provides for the voluntary sharing of ***oil*** and gas operations inspections by the agencies to increase inspection coverage resources.

Upon execution this MOU will replace and supersede the Inspection Sharing Cooperative Agreement between the COGCC and the BLM dated April 28, 1995.

**II. OBJECTIVES**

Provide more efficient and effective coverage of critical non-routine inspections by allowing both the BLM and the COGCC to perform these inspections for the other agency at the other agency's request, regardless of jurisdiction.

To implement more efficient and effective routine inspection coverage by allowing local BLM and COGCC staff to negotiate plans for sharing routine inspection work between agencies.

To facilitate non-routine drilling, plugging and spill inspections that require immediate attention and are often critical for the protection of public health, safety, welfare and the environment.

To share inspection resources to maximize the productivity of strategically positioned BLM and COGCC inspection staff in various ***oil*** and gas producing areas in Colorado.

To ensure that requests for inspection assistance by one agency for another will [\*84] in no way obligate either party to provide inspection assistance. Inspections performed pursuant to such requests will be done only when the agencies are available and willing to provide the requested inspection assistance.

**III. BACKGROUND**

On April 28, 1995 the COGCC and the BLM signed an Inspection Sharing Cooperative Agreement (COOP) designed to exchange critical, non- routine inspections (inspections of drilling and plugging operations and spill inspections) and routine inspections (inspections on producing wells and Underground Injection Control (UIC) wells, environmental inspections, and reclamation inspections The COOP was implemented during fiscal years 1995, 1996 and 1997.

Each agency participated in the COOP on a formal time equivalent basis. The COGCC and the BLM agree that the administrative burden of tracking times and working out equitable exchanges diminished the effectiveness of the COOP. The COGCC and the BLM recognize the need for a more simplified approach.

**IV. AUTHORITIES**

The BLM has authority to enter into this agreement pursuant to § 307(b) of the Federal Land Policy and Management Act (FLPMA) of 1976.

The COGCC has authority to enter into this agreement pursuant § 29-1-203 (1) and § 34-60-106 (15) of the Colorado Revised Statutes.

Authority to enter onto private and state land to inspect under this agreement is covered by Colorado BLM policy, enclosed as Exhibit A. COGCC inspectors are allowed to enter BLM land to perform inspections to the extent necessary to perform the terms of this agreement.

**V. FOR NON-ROUTINE INSPECTIONS, BLM and COGCC MUTUALLY AGREE**:

If critical non-routine inspections (i.e., drilling, plugging and spill) occur on land under the jurisdiction of the BLM ("BLM lands"), and BLM inspection resources are not available, the local BLM office may request the local COGCC contact to make arrangements for the inspection.

If critical non-routine inspections occur on non-federal COGCC jurisdictional land [\*85] ("COGCC lands"), and COGCC inspection resources are not available, the local COGCC office may request the local BLM contact to make arrangements for the inspection.

Any request of an agency to perform an inspection does not obligate an agency to conduct the inspection. Inspections will be performed when the contacted agency is available and willing to undertake the work.

Inspections will be performed and documented to the standards and guidelines of the requesting office. Training on the standards and guidelines will be initiated and coordinated by the requesting agency local inspection offices prior to the performance of the requested inspection. Training may include BLM Certification classes, joint inspections, or other inspection related classes or meetings.

Inspection and reporting will be primarily informational. If an agency identifies an undesirable event or an alleged violation of either agency's rules, regulations, orders, notices to lessees, or conditions of approval, the inspecting agency will notify the agency with primary jurisdiction within 24 hours for action and follow-up.

Inspection documentation will be provided to the requesting office in a timely manner.

**VI. FOR ROUTINE INSPECTIONS, BLM AND COGCC MUTUALLY AGREE**:

When BLM field offices or COGCC area representatives identify a need for a routine inspection (i.e., producing and UIC well inspections, environmental inspections, and reclamation inspections) that is the responsibility of the other agency, the local BLM and COGCC office will consult and have the inspections completed. The primary contact for each agency will notify each other to initiate such agreement.

**VII. FOR ALL INSPECTIONS (ROUTINE AND NON-ROUTINE) PERFORMED UNDER THIS AGREEMENT BLM AND COGCC MUTUALLY AGREE**:

The BLM and the COGCC will meet at least annually on or before October 1, of each year to:

1. Evaluate the success of this agreement and continue to explore other opportunities.
2. Discuss the status of work done by both parties.
3. Identify work for the next year.
4. Identify training needs.
5. [\*86] Identify issues of concern and agree on actions to be taken.
6. Amend any part of this MOU, as needed.

To initiate and coordinate training by the local inspection offices. Training may include BLM Certification classes, joint inspections, or other inspection related classes or meetings.

To share current guidance and policy related to the performance of the requested inspections.

To obtain prior approval by the other agency before subcontracting any requested inspections.

To accept liability for wrongful disclosure of proprietary data and to be subject to the same provisions of law with respect to the disclosure of such information related to this MOU as would apply to any officer or employee of the United States or the State of Colorado.

To direct inspectors not to inspect the operations of those companies in which they or members of their immediate family have a direct financial interest.

To direct inspectors not to use information acquired as a result of participation in this agreement for private gain for him/herself or another person by indirect or direct action on his/her part or by counsel, recommendation or suggestion to another person.

To abide by the terms of Federal Executive Order 11246 and State of Colorado Equal Employment Opportunity requirements for nondiscrimination and will not discriminate against any person because of race, color, religion, sex, age, disability or national origin while this agreement is in effect. The agencies will ensure that applicants are employed without regard to their race, color, religion, sex, age, disability or national origin.

**IIX. INSPECTION CONTACTS**

Contact for inspection work is made between the appropriate local BLM offices and COGCC area representatives listed. General implementation is by the primary contacts listed.

BLM Inspection Contacts:

Terry Galloway (l&E Coordinator - San Juan Resource Area Office)

Ernie Gillingham (Natural Resource Specialist - Canon City District Office)

Will Lambert (Engineer - Grand Junction Resource Area Office)

Mike Lystad (I&EE Coordinator - White River Resource Area Office)

[\*87] Jim Wood (Petroleum Engineering Technician - Little Snake Resource Area Office)

Pat Gallagher (State l&E Coordinator - Primary Contact)

COGCC Inspection Contacts:

Jamie Adkins (Northwest Area Engineer)

Jay Krabacher (Northwest Area Inspector)

Ed Binkley (Northeast Area Inspector)

Linda Pavelka (Weld County Inspector)

Larry Robbins (South Area Engineer)

Dave Shelton (North Area Engineer)

Bob VanSickle (Southeast Area Inspector)

Mark Weems (Southwest Area Inspector)

Ed Dimatteo (Engineering Supervisor - Primary Contact)

**IX. TERM OF THIS AGREEMENT**

This agreement shall be effective from the date of execution and shall remain in full force and effect for five years unless sooner terminated by 90-day written notice from either party to the other party. This agreement may be modified, extended or amended upon written request of either party and written concurrence of the other party.

**IIX. APPROVAL**

Ann Morgan

Ann Morgan

State Director, BLM-Colorado

June 23, 1999

Date

Allan Heinle

Allan Heinle

Chairman, Colorado ***Oil*** and Gas Conservation Commission

July 12, 1999

Date

Richard Griebling

Richard Griebling

Director, Colorado ***Oil*** and Gas Conservation Commission

June 30, 1999

Date

[\*89] **Appendix To Memorandum of Understanding Between The Colorado Bureau of Land Management And The Colorado *Oil* and Gas Conservation Commission**

A. Background

Since 1991, the Colorado ***Oil*** and Gas Conservation Commission (COGCC) and the Colorado Bureau of Land Management (BLM) have had a Memorandum of Understanding (MOU) which provides the framework for each agency's roles and responsibilities in our overlapping jurisdictions.

B. Purpose

Technological advances have allowed BLM and COGCC to secure, store, and distribute data more efficiently and effectively. The internet has increased the capability of the COGCC and BLM to make ***oil*** and gas data available to the public. The original MOU did not cover the sharing of public land ***oil*** and gas data and data administered by the COGCC. This appendix will address these issues.

C. Authorities

The authorities for this agreement are the Mineral Leasing Act of 1920; The Federal Land Policy Management Act of 1976 and Title 34, Article 60, of the Colorado Revised Statutes. These agreements shall not supersede existing law, rule, or regulation of either party, nor require commitments of manpower or funds beyond legal authority or appropriation.

D. Procedures

The BLM and COGCC agree that they may share or exchange data gathered in the process of conducting their regulatory responsibilities. This data may include, but is not limited to ***oil*** and gas leases, well logs, well files, reports, studies, analyses, production, inspection, audit, surface use, and unit and communitization agreements and ***oil*** and gas leasing stipulations. The sharing of data shall be conducted in a consensual manner that does not require unreasonable monetary or manpower expense and/or a requirement to occur in a time frame that reduces the ability of an agency to perform its routine functions. This agreement does not prescribe or limit the method that the exchange of information may occur. Additionally, the agency that created the data shall be considered the owner of the data and data distribution to third parties shall be the sole right of the data owner.

[\*90] E. Confidentiality

Each agency will abide by the proprietary and confidential data requirements of its own laws and regulations, in accordance with 43 Code of Federal Regulations 3100.4 and Rule 308C of the Colorado Rules and Regulations, Rules of Practice and Procedure (as amended), and ***Oil*** and Gas Conservation Act.

F. Administration

This agreement shall become effective upon the date of execution by the last signatory party.

This agreement may be amended by mutual consent of the parties.

Termination of this agreement may be effected by either party upon 60 days written notice to the other party. Termination of this agreement may be effected at any time by mutual written consent of the parties.

This agreement shall terminate when no longer authorized by the U.S. Department of the Interior, by federal or state law, or if determined to be unenforceable by any court having jurisdiction over the parties.

Signed by:

Brian Macke, Director

Colorado ***Oil*** and Gas Conservation Commission

3/14/05

Date

Ron Wenker, State Director

Bureau of Land Management

Colorado State Office

3/2/03

Date

[\*91] Exhibit A

UNITED STATES DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Colorado State Office

2850 Youngfield Office

Lakewood, Colorado 80215-7093

June 29, 1999

In Reply Refer To:

CO-934

3160

EMS Transmission 06/29/99

Instruction Memorandum No. CO-99-028

Expires: 09/30/00

To: All Field Office Managers

From: State Director, Colorado

Subject: Inspection of Private and State Lands - Memorandum of Understanding (MOU) Between the Colorado ***Oil*** and Gas Conservation Commission (COGCC) and Bureau of Land Management (BLM)

BLM employees are authorized to enter onto private and state land and use federal owned equipment to perform inspections on private and state land to fulfill an Inspection MOU between the COGCC and the BLM. The effective and termination dates of this policy will be coincident with that of the MOU. The MOU will follow under separate cover.

If you have any questions, please contact Pat Gallagher at extension 3756.

Signed by

Stuart Cox

Acting State Director

Authenticated by

Don Snow

EMS Operator

[\*93] **Montana MOU**

[\*95] Memorandum of Understanding between U.S. Department of the Interior Bureau of Land Management, Montana State Office and The State of Montana, Board of ***Oil*** and Gas Conservation concerning ***Oil*** and Gas Well Spacing/Well Location Jurisdiction

I. Purpose

The State of Montana, Board of ***Oil*** and Gas Conservation (Board) has jurisdiction for well spacing/well location on State and fee lands. The Bureau of Land Management (BLM) has jurisdiction over federal and Indian lands. This agreement between the BLM and the Board is intended to (1) promote cooperation between BLM and the State of Montana; (2) provide consistency in establishing spacing units and well location requirements in areas involving diverse mineral ownerships; (3) protect correlative rights; (4) eliminate unnecessary duplication of effort; and (5) define duties and responsibilities.

This agreement shall not supersede existing laws, rules,, or regulations of either party, nor require commitment of manpower or funds beyond legal authorities or appropriations.

II. Authority

Montana Code Annotated 82-11-112; the Mineral Leasing Act of 1920; the Acquired Land Leasing Act of 1947; the Indian Minerals Development Act of 1982; the Allotted Indian Land Leasing Act of 1909; the Unallotted Indian Leasing Act of 1938; and Interior Department Secretarial Order No. 3087. Regulations pertaining to well spacing programs exists at 43 Code of Federal Regulations 3162.3-1.

[\*96] III. Procedures

THE BLM AND THE BOARD AGREE AS FOLLOWS:

A. Point of Contact

Each party shall appoint a specific person or persons who shall be the point of contact to facilitate communication and coordination in implementing this agreement.

B. Procedures and Jurisdictions

(1) Federal Land

Subject to BLM approval, the Board shall issue well spacing/well location orders affecting federal lands. Upon receipt of a well spacing/well location docket request involving federal lands, the Board shall notify BLM of the hearing and hold the hearing. The BLM shall be entitled to present expert testimony with respect to such spacing determinations, and shall be informed in writing of any disposition. If the BLM should desire to protest any requested determination, it shall do so by written protest delivered to the Board prior to the hearing or by appearance at the hearing. Any such protest shall specify the BLM objections and the conditions, if any, under which the BLM will approve the relief requested. The Board's determination/order is approved if the BLM does not object. If the BLM objects, the final decision as relating to federal lands shall be made by BLM.

Orders issued by the Board which affect spacing units containing both federal and non-federal lands shall contain the following statement:

"A federal communitization agreement for spacing units which contain both federal and nonfederal lands shall be submitted to the Authorized Officer of the Bureau of Land Management prior to or upon completion of a producible well."

[\*97] (2) Indian Land

The BLM will adopt, as standard practice for trust lands, the state-wide spacing rules and set-back requirements as defined in the Board's General Rules and Regulations, Section 36.22.702. Applications for field spacing or exception location requests on trust lands will be submitted to the BLM. The BLM shall forward copies of said applications to the Board for inclusion into the Board's notice of hearing. The Board's notice of hearing shall serve to notify the general public of applications concerning trust lands. The BLM shall ensure that any affected tribes and the Bureau of Indian Affairs (BIA) Area Office receive timely notice and copies of applications for field spacing or exception location requests on trust lands.

The Board shall conduct hearings involving trust lands, and will receive evidence and hear testimony relating to trust land applications. The Board will not issue orders granting exception locations or establishing spacing on trust lands. Pleadings, papers, documents, or testimony from any hearing before the Board shall be made a part of the administrative record upon which trust land decisions will be made by BLM.

After completion of the administrative record, which will be the basis for approval or disapproval of a field spacing or exception location application involving trust lands, the BLM will issue a decision. The BLM will notify the BIA and affected tribes of any applications involving trust Lands. Upon request, an affected tribe or individual Indian will be granted an opportunity for a pre-decision meeting to review the administrative record, submit additional information, and express their views. An applicant may also request such a meeting. If requested, the BLM shall notify the affected tribe, if any, and the BIA Area Office of the time and place of the meeting.

The BLM shall notify the applicant, the Board, the BIA, and the affected tribe of the Bureau's decision.

[\*98] (3) Confidentiality

Each agency will abide by the confidentiality requirements of its own laws and regulations.

(4) Access to Records

Each agency will provide for public access to records in accordance with its own laws and regulations.

IV. Expiration

This Memorandum of Understanding will continue in effect indefinitely unless formally canceled by either party.

V. Review

Each of the parties to this Memorandum of Understanding will review it annually to determine its currency, adequacy, and continuing need.

VI. Amendment

Each of the parties to this Memorandum of Understanding may propose changes to it at any time. Any such change shall be proposed in writing in the form of an amendment, and shall not become effective until agreed to and signed by both of the parties.

VII. Cancellation

Either of the parties to this Memorandum of Understanding may unilaterally terminate it by providing 60 days written notice to the other party.

[\*99] **New Mexico Former MOU (no longer effective)**

[\*101] **Amended Memorandum of Understanding between the Colorado and New Mexico Bureau of Land Management and the New Mexico *Oil* Conservation Division regarding WELL SPACING ON INDIAN LANDS**

A. Purpose and Objectives

The federal courts and the Interior Board of Land Appeals have held that the Bureau of Land Management (BLM) has jurisdiction and must make independent decisions in setting ***oil*** and gas well spacing on lands which are held in trust by the United States for Tribes, individual members of a Tribe, or Pueblos. In these matters, the BLM will make the final decision governing operations on Indian lands within the exterior boundaries of New Mexico. The New Mexico ***Oil*** Conservation Division (NMOCD) of the State of New Mexico Energy, Minerals and Natural Resources Department is also granted regulatory authority over certain lands within New Mexico. ***Oil*** and gas operations occur on adjacent Indian and non-Indian lands and it is important that both agencies provide Indian landowners, lessees, and operators with clear policy and procedures consistent with their respective regulatory responsibilities. We believe it is important to formalize our working relationship, as well as define each agency's role and responsibilities.

This Memorandum of Understanding (MOU) will establish a procedure where the BLM utilizes the existing ***oil*** and gas hearing processes of the NMOCD for the purposes of notification, public hearing, and receiving recommendations from all appropriate parties for matters related to spacing of Indian lands. An interested Tribe or Pueblo may appear at a hearing conducted by NMOCD relating to its land, but nothing in this MOU shall be construed to require the Tribe or Pueblo to appear at the hearing in order to present the Tribe's or Pueblo's views on the matter. NMOCD has declined reimbursement for the services provided above.

The objectives of the MOU are to 1) avoid duplication of effort by the responsible agencies, 2) clearly define jurisdictional authority, 3) provide the lessees and operators with a familiar and effective method of obtaining necessary orders in a timely manner, and 4) carry out the trust obligations of the BLM to Indian landowners.

B. Authorities

The authorities for this MOU are the Mineral Leasing Act of 1920; the Indian Mineral Development Act of 1982; the Allotted Indian Land Leasing Act of 1909, the Unallotted Indian Land Leasing Act of 1938; the Interior Department Secretarial Order No. 3087, as amended; the New Mexico Revised Statutes, including the New Mexico ***Oil*** and Gas Act; and parts 25 CFR [\*102] 211, 212 and 225, and 43 CFR 3160. This MOU shall not require commitments of manpower or funds beyond the legal authority or appropriation of either party.

C. Definitions

1. For purposes of this MOU, the term "Indian lands" shall mean any mineral estate or mineral resources of an Indian Tribe or Pueblo or an Indian allottee, which are held in Trust by the United States or which are subject to Federal restrictions against alienation.

2. The "administrative record" will include all pleadings, papers, documents or testimony, any input from the Tribe or allottee, and BLM's own technical reviews, presented or submitted at a hearing before the NMOCD.

3. "Mixed jurisdictional lands" shall mean those lands, under a single application, including Indian and non-Indian lands, where both the NMOCD and the New Mexico or Colorado BLM would have jurisdiction over their respective areas.

4. "***Oil*** and gas spacing matters" shall mean the setting of ***oil*** and gas well spacing, approval of exception locations for wells, approval of non-standard spacing units and compulsory pooling.

5. "BLM" shall mean the Colorado or New Mexico Bureau of Land Management.

D. Responsibilities

The Colorado BLM, New Mexico BLM and the NMOCD agree as follows:

1. Designated Official

Each party shall appoint a designated official to receive notices hereunder and to facilitate communication and coordination in implementing this agreement.

CO BLM contact: Area Manager

San Juan Resource Area

15 Burnett Court

Durango, Colorado 81301

(970)247-4082

For all Ute Mountain Ute Indian Tribal lands located in New Mexico, excluding the Horseshoe Gallup and La Plata Mancos Units.

[\*103] NM BLM Contact: Deputy State Director

Resource Planning, Use and Protection

New Mexico State Office

P.O. Box 27115

Santa Fe, New Mexico 87502-0115

(505)438-7450

For all Navajo and Jicarilla Apache Tribal lands located in New Mexico; the Horseshoe Gallup and La Plata Mancos Units; all Navajo allottee land; or any Pueblo lands within the boundaries of the State of New Mexico.

NMOCD contact: Director

New Mexico ***Oil*** Conservation Division

2040 South Pacheco

Santa Fe, New Mexico 87505

(505) 827-7132

2. Coordination Meetings

Coordination meetings will be held as needed to discuss orders, policies, and procedures. This MOU will be reviewed and updated, if necessary, at each coordination meeting. Prior to the meeting, each agency's respective staffs will identify issues that will be discussed/resolved at the meeting. An agenda will be prepared and distributed prior to the meeting. Other agency staff and/or interested parties may be included in these meetings as agreed upon by the agencies. Any decisions and agreements reached as a result of these discussions will be addenda to this MOU, as appropriate.

3. Procedural Format

a. BLM Adoption of Certain NMOCD Rules and Regulations

Because of its familiarity to the ***oil*** and gas industry, the existing NMOCD hearing process will be utilized as a convenience to the industry and to avoid duplication of effort. The BLM will adopt, as standard practice for Indian lands, the state-wide well spacing and set-back requirements set forth in the NMOCD's Rules and Regulations, as amended.

b. Notification

[\*104] In the interest of customer service, it is agreed that all matters that require a hearing involving Indian lands shall initially be submitted to the NMOCD. Operators shall be strongly encouraged to provide information on a proposed hearing to the BLM, tribes and allottees prior to the hearing. This information should include as much supporting information evidence as possible and will allow the BLM to have a meaningful consultation with the Tribe or allottee prior to the hearing. At a minimum, this information should include the hearing notice and supporting technical evidence. Operators shall be also encouraged to meet and discuss the matter directly with the Tribe or allottees. Submission of this information will reduce the time it takes for BLM to issue its final order. The NMOCD shall furnish the designated officials referred to in D.l. with notices of all requests for hearings. If the BLM does not concur with a proposed application, it will notify the NMOCD in writing at least three working days prior to the hearing or by appearance at the hearing. Failure to notify NMOCD in advance of a hearing or failure to appear at a hearing shall not relieve BLM from its obligation and authority to make an independent evaluation and order on the application.

c. Hearing Process

The NMOCD shall conduct hearings involving Indian lands, and will receive evidence and hear testimony relating to the applications. The NMOCD will continue its customary role of presiding over the hearing and asking questions of the witnesses. The BLM may attend the hearing and actively participate in the hearing process by asking questions of the witnesses, when applicable, as well as initiating motions. Pleadings, papers, documents, or testimony from any hearing before the NMOCD shall constitute the administrative record upon which BLM will base its orders. The Tribe or allottee will be granted an opportunity to participate as a party at the hearing, submit evidence and information for consideration, and express its views. Input from the Tribe or allottee as well as BLM's own technical work presented or submitted to the NMOCD will become a part of the administrative record. The complete administrative record of the hearing before the OCD will be the basis for approval or disapproval of an application involving Indian lands.

d. Orders

The NMOCD will not issue final binding orders relating to matters on Indian lands. The NMOCD will issue a draft order, within 45 days of the hearing, for the purpose of consideration by the BLM in making its decision. The BLM will review the draft order and make an independent evaluation of the evidence presented at the hearing and all other information in the administrative record. The BLM will issue an order within 30 days after issuance of the NMOCD draft order. However, this may be delayed up to an additional 60 days if Tribal or [\*105] allottee consultations do not occur prior to the hearing. The BLM will notify the applicant, the NMOCD, and the Tribe whose Indian land is at issue of the BLM's orders and decisions. BLM's Orders will be consecutively numbered by state.

i. Consensus

Should the BLM concur with the draft NMOCD decision, it will issue a concurrence letter and enclose a separate signature page to be attached to the NMOCD Order.

ii. Non-consensus

Should the BLM not concur with the draft NMOCD decision, it will notify the NMOCD of its concerns and BLM and NMOCD will try to reach consensus. If the two agencies cannot reach consensus on a decision, BLM will take the NMOCD decision under advisement and issue its own Order with respect to Indian lands. In addition to the decision, the BLM Order will set forth: (1) the differences between the BLM and NMOCD orders, (2) the reasoning behind those differences, and (3) why the decision is consistent with the BLM's trust responsibilities.

e. Administrative Approvals

Any application involving ***oil*** and gas spacing matters which is subject to administrative approval by NMOCD will follow the Order issuance process outlined above in D.3.d.

f. Pre-existing Orders

Consistent with the terms of this MOU, all existing decisions of the NMOCD involving Indian lands (excluding those orders dealt with by BLM in Ute Mountain Ute Order No. 1 and Ute Mountain Ute Order No. 2), will be relied on by the BLM and will remain in effect. This is subject to the right of the Colorado or New Mexico BLM to request that any specific orders be reviewed, rescinded or modified, or unless modified or superseded by a later BLM order, and subject to the right of an Indian landowner to challenge such decisions.

4. Appeals

Any interested party shall have the same opportunity to appeal or challenge the BLM Order to the Colorado or New Mexico State Director, as appropriate, through the State Director Review (SDR) process outlined in 43 CFR 3165.3. [\*106] Any party adversely affected by the SDR decision may then appeal to the Interior Board of Land Appeals (BLA) as provided in 43 CFR 3165.4.

a. Solely Indian Lands

Matters where only Indian lands are involved will be reviewed in accordance with BLM's established SDR procedures. The NMOCD would not conduct a hearing de novo in recognition of BLM's jurisdiction.

b. Mixed Jurisdictional Lands

Any adversely affected party may request a review:

1. Where BLM will use the NMOCD hearing de novo process as the forum for the SDR review. This option may be preferred where the adversely affected party wants a review of both the NMOCD and BLM Orders, if differing orders have been issued; or
2. Where review will be in accordance with established SDR procedures. This SDR will only address Indian lands.

E. Special Provisions

1. Records

Each agency will provide public access in accordance with its own rules. For its purposes, BLM will keep a copy of the administrative record.

2. Information Sharing

Each agency will provide the other with courtesy copies of all rule and regulation changes and Instruction Memoranda that deal with common or pertinent issues.

F. Administration

This MOU shall become effective upon the date of execution by the last signatory party.

This MOU may be amended by mutual consent of all parties.

[\*107] This MOU will expire 5 years from the date of execution by the last signatory party.

Withdrawal from this MOU may be effected by any party upon 180 days written notice to the other parties. Withdrawal by either the Colorado or New Mexico BLM will not terminate the agreement with respect to the remaining parties. Termination of this MOU may be effected at any time by mutual written consent of the parties.

State of New Mexico

New Mexico Energy Minerals and

Natural Resources Department

By

Department Secretary

Title

7-2-99

Date

United States Department of Interior

Bureau of Land Management

Colorado State Office

By

Title

6-17-99

Date

United States Department of Interior

Bureau of Land Management

New Mexico State Office

By

STATE DIRECTOR

Title

5/5/99

Date

[\*109] **Wyoming MOU**

[\*111] BLM MOU NO.: WY920-94-09-79

MEMORANDUM OF UNDERSTANDING

Concerning:

The day-to-day ***oil*** and gas operations and use of public, state, and privately owned lands for ***oil*** and gas production and drilling operations.

I. BACKGROUND

The last Memorandum of Understanding (MOU) between the Wyoming Bureau of Land Management (hereinafter referred to as either the Bureau or BLM) and the State of Wyoming ***Oil*** and Gas Conservation Commission, (hereinafter referred to as either the WOGCC or Commission) BLM No. WY 23, was signed and activated on April 13, 1977. This was approximately five years before the merger between the Minerals Management Service and the Bureau of Land Management; a time before the Bureau had any jurisdiction regarding ***oil*** and gas operations on Federal minerals (***oil*** and gas). Although cooperation between the Commission and Bureau has remained constant and positive, a revised MOU needs to be exercised. Several subjects, including issues where differences exist, are discussed in each appendix of this MOU.

II. PURPOSE

This MOU entered into between the Commission, and the United States Government by and through the State Director, BLM (Wyoming), United States Department of Interior, establishes a general framework under which more specific activities, responsibility sharing, and operational agreements may be developed to outlines specific actions, as agreed to, between the two agencies.

III. AUTHORITY

This MOU is made and entered into by and between the BLM and the WOGCC in accordance with the Federal Land Policy and Management Act (43 U.S.C. 1701-1782) P.L. 98-450 (98 STAT 2718).

IV. PROCEDURES

The BLM and the WOGCC agree to:

1. Develop or acquire and share information of common need.
2. Plan and implement ***oil*** and gas development in coordination with surface management issues.
3. [\*112] Maintain a good faith effort to keep one another informed and advised, as far in advance as possible, of proposed plans or actions which might affect the other. All decisions should consider applicable state or local regulatory requirements.
4. Work in harmony to achieve the objectives of their policies and regulations. To the extent possible, all actions throughout this MOU will utilize existing systems and procedures.
5. That the Reservoir Management Team (RMT) Casper District Office, BLM, will be the WOGCC's local point of contact for routine disbursement of correspondence related to this MOU. All correspondence (dockets, notice and decisions) will be sent to the RMT for proper distribution. It will be the BLM State Office responsibility for oversight and policy decisions regarding the Federal ***Oil*** and Gas Program.
6. To incorporate the following Appendices 1-5, attached here:

APPENDIX TITLE

1 UNDERGROUND INJECTION CONTROL

2 SEGREGATED SURFACE AND MINERAL OWNERSHIP

3 UNITS AND COMMUNITIZATION AGREEMENTS

4 WELL SPACING

5 GEOPHYSICAL OPERATIONS

V. ADMINISTRATION

1. Nothing in this MOU will be construed as affecting the authorities' of the participants or as binding beyond their respective authorities or to require any of the participants to obligate or expend funds in excess of available appropriations.
2. Each participant may propose changes to this MOU in the form of amendments which will become effective upon the mutual consent and signature by the parties.
3. This MOU shall become effective upon signature by all participants and shall be in effect until either party requests a modification.
4. This MOU will be reviewed by the participants at least every five years to determine adequacy, effectiveness and further need. Any party may withdraw from or cancel the MOU by giving 30 days written notice to the other party.
5. The agencies shall hold an annual coordination meeting for discussion and actions on issues pertaining to this memorandum.

[\*113] VI. APPROVALS

FOR THE STATE OF WYOMING ***OIL*** AND GAS CONSERVATION COMMISSION

By:

***Oil*** and Gas Supervisor

Date

FOR THE UNITED STATES DEPARTMENT OF THE INTERIOR - BLM

By:

Wyoming State Director

Date

[\*114] UNDERGROUND INJECTION CONTROL

Purpose

1. The BLM and the WOGDD agree it is in the best interest of both agencies, industry, and the public to operate the Underground Injection Control (UIC) Program in a streamlined manner that is not duplicative. The Federal Safe Drinking Water Act (SDWA) specifies the regulation of Class II underground injection wells should not impede ***oil*** and gas operations unless necessary to prevent endangerment to underground sources of drinking water.
2. The purposes of this section is to outline procedures for processing and approving applications relating to Class II UIC activities. This portion of the MOU does not cover everyday activities on federal leases which are unrelated to the UIC program, such as Sundry Notices. Nothing in this section prohibits either the BLM or the Commission from exercising jurisdiction over issues specifically mandated by statute, rule or regulation.

Responsibilities

1. The EPA, under the provisions of Section 1425 of the SDWA, has delegated authority to the Commission to administer the UIC program for Class II injection wells on federal, state, and private lands. Indian lands are excluded and are directly under EPA jurisdiction and direction.
2. The BLM recognizes the authority granted to the Commission, via the EPA, to administer the UIC program and to issue permits for Class II injection wells either located on or proposed for federal minerals.
3. The BLM has authority and responsibility over the development of the mineral estate and surface management authority on public lands.
4. The BLM has a mandated administrative and technical interest in all injection projects and wells on federal minerals and has the responsibility to participate in the authorization of theses projects and wells.

Procedures

To provide an effective, streamlined, and coordinated program satisfying the directives of the BLM and those requirements of the Class II UIC program, the BLM and the WOGCC hereby agree to adhere to the procedures set forth in this section. Verbal notifications should be confirmed in writing.

A. Project Approval

1. Notice of applications to the WOGCC for proposed Class II projects and aquifer exemptions on federal lands by WOGCC rule will be provided to the RMT.
2. During the review of project applications, the WOGCC and the BLM shall consult with each other as deemed necessary by either party. If the BLM wishes to comment prior to the issuance of a permit by the Commission, it shall make an appearance at the Commission hearing to provide testimony, or shall provide a written response within fifteen (15) days of receiving notice of an application.

B. Subsequent Well Operations

1. The BLM shall accept UIC program orders issued by the Commission as approval of an aquifer exemption. The BLM shall authorize injection well workovers or plugging, or conversion of wells on federal leases, by approval of a Sundry Notice. If the proposed work meets the minimum standards mandated by the EPA, the Commission will accept the federal Sundry Notice as approved by BLM.

2. [\*115] If an existing federal well located in a previously approved project area is proposed to be converted to an injection well, the Commission rules require the application to provide a copy of the proposal to BLM for review. The BLM will provide the Commission with any objection or appropriate comment it wishes to make within the fifteen day comment period provided by rules of the WOGCC.

3. The Interior Board of Land Appeals (IBLA) made a decision (IBLA 87-97, Phillips Petroleum Co., decided 11/17/88) that a surface owner owns the void space below the surface. Void was determined to mean void of producible leasable minerals. On split estate, federal minerals/private surface, if a surface owner wants to acquire ownership of a federal or gas well in a depleted reservoir or use a known hydrocarbon bearing information for disposal, BLM must make a determination whether the formation to be used for injection or disposal contains economically producible hydrocarbons or other economically producible leasable minerals (voidance determination).

In the event that BLM determines there are no economically producible minerals, BLM will notify WOGCC of the conclusion. WOGCC will determine proper bonding requirements for the new (surface) owner. BLM will not release the ***oil*** and gas operator bond(s) until WOGCC notifies RMT, that the bond(s) and other paper work requirements have been satisfied.

4. The BLM and the Commission shall share responsibility to witness plugging and abandonment operations on federal injection wells and to perform routine inspections on federal leases having UIC operations. BLM further agrees to accept those mechanical integrity tests witnessed by the Commission under the auspices of the UIC program. Duplicate testing will not be required by BLM. Surface impoundments used for the disposal or temporary retention of Resource Conservation [\*116] and Recovery Act exempt wastes from ***oil*** and gas exploration and production operations on leases having Class II wells shall be the regulatory responsibility of the agency holding the leaseholder bond.

C. Enforcement

The Commission will notify the BLM State Office, Cheyenne of any pollution problems noticed during Class II well inspections on federally administered lands and minerals. The BLM will notify the Commission of any suspected violations of Commission requirements noted during BLM inspection activities. If a determination if made by the Commission or BLM that an injection operation is violating the terms of the authorized permit or is causing unacceptable impacts to water quality, the Commission shall take any necessary action to assure that compliance is achieved. Neither agency is precluded from taking independent enforcement action, but each agency shall notify the other, either before or immediately after taking any action associated with the UIC program.

MOU No. WY920-94-09-79

WOGCC (Int.)

Date:

BLM (Int.)

Date:

[\*117] APPENDIX 2

SEGREGATED SURFANCE MINERAL OWNERSHIP

I. Federal Surface and State or Private Minerals

A. The BLM agrees to:

1. Visit the Commission off at selected times and review Applications for Permit to Drill (APD) submitted to the Commission to determine surface ownership. When federal surface is involved, a copy of the Commission APD will be forwarded from the RMT to the appropriate BLM office. The ownership review procedure will be an interim practice until the Commission can modify their rules to require operator submittal of surface ownership information on the drilling application.
2. Notify the Operator that a right-of-way grant should be obtained for access roads and well sites on federal surface/state or private minerals.
3. Notify the Commission within ten working days after receipt of the APD by the appropriate BLM office of any critical environmental problems regarding surface operations (i.e. big game crucial winter range, known cultural resources, presence of threatened and endangered species, etc.). Prior to notifying the Commission, critical environmental problems will be confirmed and justified through on-site inspections by the BLM to verify potential problems. The existence of big game crucial winter range will not be used as the sole reason for denying access to a location.
4. Forward to the Commission, within thirty days from BLM's receipt of the Commission APD, a copy of the terms and conditions of any right-of-way grant issued for drilling and related activity on federal surface/state or private minerals and access to state minerals.
5. Refrain from approving waste management practices less protective of the environment than those adopted by the Commission by rule or guidance.

B. The Commission agrees to:

1. Supply the BLM with a copy of an APD for proposed drilling activity on federal surface/state or private minerals at the time the application is received (see A.l. above).
2. Advise the operator of the necessity of obtaining a right-of-way grant for the access road and the drilling site from the BLM when federal surface/state or private minerals are involved.
3. [\*118] Send RMT a copy of the approved Notice of Intent to Abandon when an application to plus a well on federal surface with state or private minerals has been submitted.

II. For all Land Ownership Patterns

A. The BLM and WOGCC mutually agree to:

1. Immediately notify one another when environmental/waste problems are discovered at ***oil*** and gas sites on split estates. This includes reclamation inspections of abandoned well sites and associated access roads.
2. Be responsible for surface reclamation compliance as the jurisdictional agency holding the bond.
3. Retain the operator and/or lessee's bond until surface reclamation requirements have been completed to the satisfaction of the surface owner and/or as outlined in the reclamation agreement.
4. Forward to the proper agency, WOGCC or RMT, a copy of any notification document releasing the operator from bond/reclamation obligations for operations conducted on split estate lands.

MOU No. WY920-94-09-79

WOGCC (Int.)

Date:

BLM (Int.

Date:

[\*119] APPENDIX 3

UNIT AND COMMUNITIZATION AGREEMENTS

I. Permits for State and Private Wells within Federal Agreements

The BLM will accept for the record Commission Sundry Notice and APD forms for state and private wells in federal units or CA.

II. Site Inspections in Unit or Communitization Agreements

1. In unit or communitization agreements the BLM will limit their inspections of drilling and/or production operations of non-federal ***oil*** and gas leases to site security, production accountability, and rights-of-way matters involving federal interests.

B. In unit or communitization agreements the WOGCC will limit their inspections of drilling and/or production operations to private and state ***oil*** and gas leases and to class II injection/disposal wells regulated under the UIC Program in accordance with Appendix 1 of this document.

MOU No. WY920-94-09-79

WOGCC (Int.)

Date:

BLM (Int.)

Date:

[\*120] APPENDIX 4

WELL SPACING

The BLM will offer input for state spacing hearings, regarding Federal minerals, and will accept WOGCC spacing decisions with no formal ratification measures. The provision for acceptance of this procedure is, if a proposed well location is not in compliance with either Commission Rule 302 or a special spacing order, the APD will not be approved until the BLM verifies an exception has been granted by the Commission. The Commission will provide copies of approved location exceptions to the RMT.

WOGCC (Int.)

BLM (Int.)

MOU No. WY920-94-09-79

Date:

Date:

[\*121] APPENDIX 5

GEOPHYSICAL OPERATIONS

The BLM and Commission will work jointly on seismic exploration activities in the following areas:

I. Notice of Intent (NOI)

1. The BLM will require a WOGCC seismic number to included with all seismic NOI submitted. This will create more clear communication between BLM and the Commission. BLM will incorporate the WOGCC number into the number of assigned to their case file. BLM will forward a copy of the approved NOI along with terms and conditions to the WOGCC.
2. The BLM has five working days to sign a completed NOI. The BLM will notify the WOGCC of any delays in processing completed applications.
3. Standard conditions of approval may be added to every shot hole prospect calling for a random sampling of holes, these holes will be opened at completion of the prospect by the driller to verify proper plugging. A representative of the WOGCC and/or BLM will select the holes to re- enter. The number of holes will be a percentage of the total number of shot points (1 or 2 per mile). The operator will be required to notify the WOGCC and BLM at the end of operations.

II. Notice of Completion (NOC)

1. The BLM is mandated by regulation to inspect seismic lines within thirty (30) days of receipt of a NOC. Inclement weather is the only exception to this regulation. If the random re-entering of shot holes shows compliance with WOGCC Rule 406, and there is no surface damage, the NOC will be accepted for bond release. Inspections by one agency will be accepted by the other. For the purpose of inspecting seismic lines, inclement weather begins when the surface freezes preventing access to the shot hole. Normally, this time period extends from November through April (6 months).
2. The BLM will not inspect lines located entirely on private surface. On the other hand, BLM and WOGCC will coordinate inspections to eliminate duplication of effort. Either agency will inspect lines crossing mixed ownership when preservation of time and effort will be realized. Such inspections will be on the ground to insure compliance.
3. [\*122] In the event one agency forfeits or makes call upon a bond, it shall coordinate with the other to ensure reclamation of the entire project to the extent that as the bond funds permit such reclamation. Initially the agencies will meet on semi-annual basis to review procedures and work out any conflicts which may arise.

WOGCC (Int.)

BLM (Int.)

MOU No. WY920-94-09-79

Date:

Date:

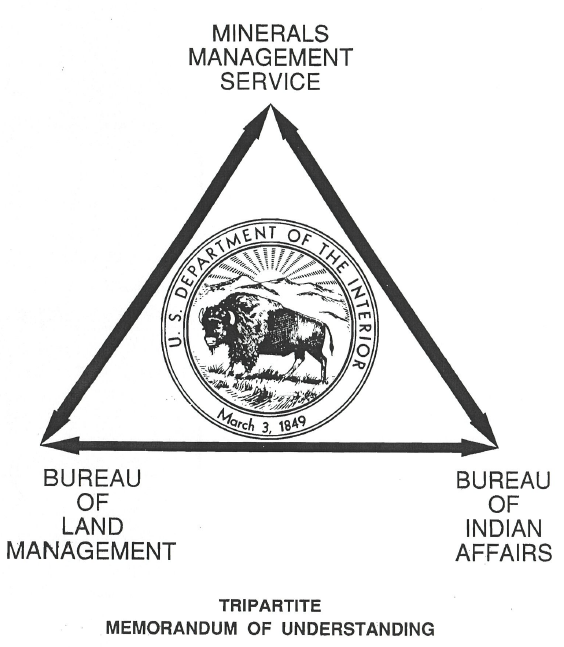
[\*123] **Excerpts from Tripartite Memorandum of Understanding**

**Minerals Management Service**

**Bureau of Land Management**

**Bureau of Indian Affairs**

[\*125]



[\*126] BLM MOU WO600-9111

MEMORANDUM OF UNDERSTANDING BETWEEN THE BUREAU OF INDIAN AFFAIRS, THE BUREAU OF LAND MANAGEMENT, AND THE MINERALS MANAGEMENT SERVICE REGARDING WORKING RELATIONSHIPS AFFECTING MINERAL LEASE ACTIVITIES

This Memorandum of Understanding (MOU) is a revision of the December 19, 1988, MOU enacted between the Bureau of Land Management (BLM), Minerals Management Service (MMS), and the Bureau of Indian Affairs (BIA). Side MOU's by and between various BLM, MMS, and/or BIA offices may exist to accommodate special operating circumstances as long as the terms and conditions of the side MOU are not in conflict with the terms and conditions of this MOU. All timeframes specified in this MOU are calendar days unless otherwise specified. All timeframes are subject to extension if the involved agencies determine that circumstances warrant such an extension. Such extensions shall be confirmed in writing.

This MOU describes the working relationships between BIA, BLM, and MMS in carrying out the Department of the Interior's responsibilities for Federal onshore and Indian lease management and accounting. The purpose of the MOU is to achieve common standards and methods for creating an efficient and effective working relationship between the Bureaus and for achieving the common goal of improved minerals accountability on Federal and Indian leases.

I. DIVISION OF RESPONSIBILITY

The total lease management activities for Federal onshore and Indian leases involve BIA, BLM, and MMS. Attachment A, Information Sharing and Responsibilities - Indian Minerals, represents the agreed-to division of responsibilities for Indian lands. Attachment B, Information Sharing and Responsibilities - Federal Onshore Minerals, represents agreed-to division of responsibilities for Federal onshore lands. Attachment C, Onshore Production Data - Procedures for Data Management, describes procedures proposed to manage onshore Federal and Indian ***oil*** and gas production data. Attachment D, Treatment of Proprietary/Confidential Data, describes general operating procedures for handling nonpublic information which may be proprietary or confidential. Attachment E, BLM/BIA/MMS Responsibility and Procedure for Indian Mineral Development Act Agreements (IMDA), describes specific administrative IMDA responsibilities for the BLM, BIA, MMS, and tribes.

[\*127] II. INFORMATION EXCHANGE

A substantial part of the data necessary to maintain the MMS automated accounting systems must be supplied by BIA and BLM field offices. Similarly, part of the data essential to BIA's lease management activities must be supplied by MMS and BLM, and data necessary to BLM's lease management activities must by supplied by BIA and MMS.

Attachments A through E provide details of the agreed-to information exchange necessary for effective and efficient work accomplishment.

III. REVIEW OF REGULATIONS AND OTHER POLICY DOCUMENTS

The BIA, BLM, and MMS issue regulations and other policy documents that affect lease management activities. Those issuances that may have an impact on the missions of another Bureau should be reviewed in draft form by the affected Bureau(s). To the extent that such proposed issuances of one Bureau affect the operations of another, the other Bureau(s) will review and concur in such proposed issuances. When a recommendation is not followed, the usual Department conflict resolution process shall be followed.

Commencing with the date of execution of this agreement, the reviewing or concurring Bureau(s) will provide comments timely, but not later than 15 working days from the date of receipt. If comments are not provided within 15 working days, it will be assumed that the reviewing Bureau(s) has no comment. Where such documents will be published as proposed in the Federal Register, the review shall be performed prior to publication.

Bureau contacts for requests for review are: MMS - Royalty Management Program, Deputy Associate Director for Valuation and Audit, Rules and Procedures; BLM - Division of Legislation and Regulatory Management; BIA - Director, Office of Trust and Economic Development.

IV. IMPLEMENTATION

This MOU contains provisions that may require additional procedures, periodic review, and/or interpretation for specific cases. Each Bureau shall designate four senior staff members with responsibility for lease management activities who will constitute a Joint Steering Committee to oversee the implementation of this MOU. The Chairmanship of the Joint Steering Committee will rotate between the Bureaus on an annual basis.

The MOU and its attachments are considered working documents. Proposed substantive changes to the attachments will be presented to and approved by the Joint Steering Committee. Technical changes may be incorporated through memoranda issued by the Chairperson. The Joint Steering Committee will review the MOU attachments at least once each year or on an as-needed basis at the request of one or more Bureaus.

[\*128] The Joint Steering Committee is empowered to establish subcommittees, as necessary, to develop detailed analyses to aid the Joint Steering Committee in carrying out its duties. The Joint Steering Committee will meet, at a minimum, four times annually.

This MOU, which is a first revision of the December 19, 1988, MOU enacted between the BLM, MMS, and BIA, shall become effective upon the date of signature of the BLM and MMS Directors and the Director, Office of Trust and Economic Development, BIA. This edition MOU replaces the December 19, 1988, Tripartite MOU and supersedes the MOU's enacted between BLM and MMS on February 9, 1987, and between MMS and BIA on August 19, 1985.

Director, Office of Trust and Economic Development

Bureau of Indian Affairs

8/28/91

Date

Director, Bureau of Land Management

9/6/91

Date

Director, Minerals Management Service

AUG 15 1991

Date

[\*129] ATTACHMENT A INFORMATION SHARING AND RESPONSIBILITIES - INDIAN MINERALS BUREAU OF INDIAN AFFAIRS/BUREAU OF LAND MANAGEMENT/MINERALS MANAGEMENT SERVICE

| **DUTY** | **DUTY** | **APPLICABILITY** | | | **RESPONSIBILITY** | | | **REMARKS** |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  |  | **FLUIDS** | **SOLIDS** | **BOTH** | **BIA** | **BLM** | **MMS** |  |
| D. Unitization | C. Communitization |  |  |  |  |  |  |  |
|  |  |  |  |  |  |  |  |  |
| 1. Designation as logical | 1. Establishment of State field | X |  |  |  | S |  | The authorized officer (BLM) participates in hearings to |
| area | rules or pooling |  |  |  |  |  |  | establish such orders. |
|  |  |  |  |  |  |  |  |  |
| 2. Approval of form of | 2. Approval of agreement | X |  |  |  |  |  | The BLM provides recommendations. As agreed t o between |
| agreement |  |  |  |  | F |  |  | BIA and BLM jurisdictional offices, a communitization |
|  |  |  |  |  |  |  |  | agreement number will be assigned using CR numbers. The |
|  |  |  |  |  |  |  |  | BIA shall provide BLM and MMS (FAD) with copies of |
| 3. Final approval/expansio |  |  |  |  |  |  |  | approved agreements and affected Indian leases within |
| exploratory agreement |  |  |  |  |  |  |  | 10 days after receipt of a request from MMS or within |
|  |  |  |  |  |  |  |  | 10 days after a first production notice is issued for the |
|  |  |  |  |  |  |  |  | agreement. The BIA will include a paragraph in their |
|  |  |  |  |  |  |  |  | approval letter instructing the operator to notify appropriate |
|  |  |  |  |  |  |  |  | payors of MMS royalty reporting responsibilities. The BLM |
|  |  |  |  |  |  |  |  | will submit reference data to MMS (PAD) in the next |
|  |  |  |  |  |  |  |  | monthly AIRS update. |
|  |  |  |  |  |  |  |  |  |
| 4. Approval of secondary/ | 3. Determination of first/last | X |  |  |  | S |  | Within 10 days of notification, BLM will advise BIA and |
| agreement | production |  |  |  |  |  |  | MMS (FAD) when production is established and BIA when |
|  |  |  |  |  |  |  |  | production ceases within a communitized area. The BLM |
|  |  |  |  |  |  |  |  | will submit reference data to MMS (PAD) on next monthly |
|  |  |  |  |  |  |  |  | AIRS update. |
|  |  |  |  |  |  |  |  |  |
|  | 4. Termination of agreement | X |  |  | F |  |  | The BIA will provide MMS (FAD) and BLM with copies of |
| 5. Notification of secondary |  |  |  |  |  |  |  | action document within 10 days. The BLM will submit |
| agreement phase change |  |  |  |  |  |  |  | reference data to MMS (PAD) on the next monthly AIRS |
|  |  |  |  |  |  |  |  |  |
|  |  |  |  |  |  |  |  | update. |
|  |  |  |  |  |  |  |  |  |
|  | 5. Approval of successor | X |  |  | F |  |  | The BIA will notify BLM within 5 days of approval and |
| 6. Approval of successor | operator |  |  |  |  |  |  | provide action documents. The BLM will submit reference |
| operator/suboperator |  |  |  |  |  |  |  | data to MMS (PAD) on the next monthly AiRS update. |

[\*131] **MOU Concerning the Management of *Oil* and Gas Functions on Indian Lands in Montana, North and South Dakota**

**BLM Montana State Office**

**BIA Rocky Mountain and Great Plains Regional Offices**

[\*133] BLM-MOU-MT920-0121

MEMORANDUM OF UNDERSTANDING

among:

U. S. Department of the Interior - Bureau of Land Management;

Montana State Office; and

U. S. Department of the Interior - Bureau of Indian Affairs;

Rocky Mountain and Great Plains Regional Offices

concerning:

The Management of ***Oil*** and Gas

Functions on Indian Lands in Montana, North and South Dakota

I. Purpose. This Memorandum of Understanding (MOU) provides for continued coordinated management of ***oil*** and gas commodities on Indian lands in Montana, North Dakota and South Dakota, which are managed by the Rocky Mountain and Great Plains Regional Offices of the Bureau of Indian Affairs (BIA), and for which the Bureau of Land Management (BLM) also has trust responsibilities.

II. Objectives. Provide detailed procedural guidance for the implementation of the ***oil*** and gas operating regulations (43 CFR 3160 and 25 CFR 211, 212 and 225) and associated Onshore ***Oil*** and Gas Orders, on Indian lands.

III. Authorities.

1. Act of March 3, 1909 (35 Stat. 783) - Allotted Lands.
2. Act of May 11, 1938 (52 Stat. 347) - Tribal Lands.
3. Act of August 9,1955 (69 Stat. 540) - Restricted Allotted/Tribal Lands.
4. 43 CFR 3160 - Onshore ***Oil*** and Gas Operations.
5. 25 CFR 211,212 and 225.
6. Indian Mineral Development Act (IMDA) of December 22,1982.
7. Federal ***Oil*** and Gas Royalty Management Act of 1982.
8. Notice to Lessees (NTL) 3A, and 4A.
9. Onshore ***Oil*** and Gas Order Nos. 1, 2, 3, 4, 5, 6, and 7.
10. 25 CFR Part 2, Indian Appeals from Administrative Action.
11. Applicable laws, regulations, orders, and notices enacted after the effective date of this MOU.

[\*134] IV. Procedures. These procedures provide for the mutual cooperation between BLM and BIA concerning ***oil*** and gas leasing and operations. The designation of BLM in this MOU shall refer to the Montana State Office and its field offices. The designation of BIA in this MOU shall refer to the Rocky Mountain and Great Plains Regional Offices and their agency offices. For purposes of this MOU, the term "leases" shall refer to any agreement or Tribal operation for which the Department of the Interior (DOI) has trust responsibilities.

A. Prelease Responsibilities. Prior to leasing of Indian lands, each Federal agency has certain responsibilities to ensure that the lessors (Indian Tribes or allottees) receive market value for their lease and to assure compliance with applicable laws, regulations, policy and procedures of each agency.

1. BIA will:

1. Work with individual Indian Tribes and allottees in scheduling lease sales throughout the fiscal year.
2. Delineate individual lease parcels.
3. Request BLM assistance in parceling, if required, no less than 30 days prior to the target date for advertisement of the sale.
4. Provide BLM with a copy of the final sale notice at least 45 calendar days prior to the date of the sale.
5. Upon request, provide BLM with available appraisal data, and with appropriate geologic, engineering, and economic reference material, if available.
6. Upon request, provide BLM with available data concerning locations and operators of geophysical exploration ("seismic") lines conducted across Tribal and/or allotted Indian lands.
7. Upon request, provide updated BIA mineral ownership and lease status maps.
8. Accomplish needed National Environmental Policy Act of 1969 (NEPA) analysis and documentation.
9. [\*135] BLM will:
10. Upon request, assist in parceling for a proposed lease sale.
11. Appraise lease tracts and provide the BIA and/or Tribe with its conclusions concerning market value, no less than 2 working days prior to the sale. Evaluations will be based upon available comparable sales data, and/or geologic and engineering estimates of the potential for recoverable product.

Upon request, attend lease sales and aid in evaluating submitted bids.

1. Upon request, conduct postsale analyses, recommending acceptance or rejection of individual high bids.
2. Upon request, assist the BIA to determine mineral potential and reasonable foreseeable development for its NEPA analysis.
3. Postlease Responsibilities. Prior to on-ground lease operations, the lessee or operator must file a Notice of Staking (NOS) or an Application for Permit to Drill (APD). Subsequent operations require submission of a Sundry Notice (SN). The required reviews and approvals will be carried out in accordance with Onshore ***Oil*** and Gas Order No. 1 - Approval of Operations on Federal and Indian lands, other appropriate orders and notices, and the regulations in 43 CFR 3160.
4. Applications For Permit To Drill (APD), Notice of Staking (NOS), and Sundry Notices (SN).
5. BLM will:
6. Forward a copy of all APDs and NOSs for Indian wells, including the development plans and other appropriate information; also, all SNs which relate to surface disturbance, to the appropriate BIA office within 1 day's receipt of each such application.
7. Contact the appropriate BIA office and the operator to establish the need for a time and place to meet, and conduct a joint field inspection of the drill sites and access routes or other surface disturbance for all wells within 15 working days of receipt of he APD, NOS, or SN.
8. [\*136] Review BIA-prepared NEPA analysis, including, mitigations for environmental protection of other resources including endangered species, cultural resources, and reclamation. Make recommendations for additions or changes to BIA within 7 working days of receipt from BIA.
9. Furnish, within 5 working days of approval, copies of all approved drilling permits and SN to the appropriate BIA office.
10. BIA will:
11. Furnish BLM with NEPA analysis, surface protection and rehabilitation requirements within 15 working days after the joint field inspection (or completed office review, if no inspection is needed).
12. Provide BLM with a written declaration, as part of BIA's surface protection and rehabilitation recommendations, if a water well is desired, in case the well encounters a usable fresh water zone and is later abandoned. If appropriate, BLM will attempt to secure the well for use as a water supply well. The BLM and BIA will follow the procedures of BLM Manual 3160-3 - Water Well Conversions, in these cases.
13. Prepare needed NEPA analysis and documentation using BLM standards.
14. Well Abandonment/Reclamation.
15. BLM will:
16. Send BIA a copy of all Notices of Intent to Abandon (NIA), Subsequent Reports of Abandonment (SRA), and Final Abandonment Notices (FAN) and reports within 5 working days of receipt, and request reclamation stipulations needed in addition to those in the conditions of approval for the APD.
17. Approve the FAN only after surface rehabilitation requirements have been completed to the satisfaction of the BIA, and after written notice has been provided by BIA.
18. Provide a list of abandoned locations that require surface inspection to BIA on March 1 of every year; and upon request, technical expertise needed to complete reclamation.
19. [\*137] Check that proper well abandonment and reclamation has occurred, and notify the BIA within 15 days of needed action or recommend lease cancellation and bond release in writing.
20. BIA will:
21. Provide BLM with a compliance inspection schedule for abandoned wells within 30 days upon receipt of the list provided by the BLM under section 2(a)(3).
22. Work directly with the operator in the rehabilitation of the disturbed areas
23. Notify BLM of any failure on the part of the operator to undertake surface rehabilitation measures required by the approved APD.
24. Initiate action to have the lessee's/operator's surety company perform the required rehabilitation if all efforts fail to secure the lessee's/operator's compliance with the pertinent provisions of the approved APD.
25. Notify BLM prior to lease cancellation and/or bond releases on all leases that have had drilling or production activity, and furnish a written report to BLM recommending approval of final abandonment. Approve cancellation and/or bond release after written notice from BLM or 15 days after notifying BLM, whichever occurs sooner.
26. Well Takeover. The BLM will not approve well abandonments of producing wells on Indian lands without the consent of the involved Tribal and/or BIA office giving the Tribe or allottee the opportunity to take over operations of the well. If Tribal or allottee takeover occurs, the well may or may not remain under the BLM's jurisdiction. In cases where the operator relinquishes the portion of the affected lease, BLM inspections will be made on request by BIA or the Tribe only, and will be restricted to environmental and safety matters only. If problems are detected they will be documented by the BLM, and a memorandum sent to the BIA Superintendent and, if appropriate, the Tribe recommending appropriate action. The BLM will provide further assistance in determination of plugging and abandonment costs, recoverable reserves, operation and maintenance costs, and, generally, an economic analysis of takeover feasibility. In cases where the Tribe or allottees operate the well under contract to the operator, the BLM retains jurisdiction and/or trust responsibility. If the Tribe and/or BIA indicates, in writing or by a lack of response within the given timeframe, that the Indian Tribe or allottee does not wish to take over the well(s), the BLM will approve the NIA. The well takeover is not applicable to drilling wells which are being plugged and abandoned.
27. [\*138] Tribal Lands:

BLM will:

1. Forward the NIA via certified mail to both the involved Tribal and BIA offices for takeover review.
2. If the Tribe indicates a desire to take over well operation, BLM will send the operator a letter advising of the Tribal takeover request, and that any negotiations on such takeover will be conducted directly with the involved Tribe and BIA.
3. Allotted Lands:

BLM will:

1. Forward the NIA via certified mail to the appropriate BIA office for takeover review.
2. If the BIA indicates the allottee desires to take over the well operation, send the operator a letter advising of the allottee takeover request that any negotiations on such takeover will be directly with the involved allottee and BIA.
3. Tribal/Allotted Lands:

BLM will:

1. Approve the NIA upon receipt of notice that Tribal or allottee takeover is not desired or within 15 working days of BIA and Tribal receipt of the NIA, whichever occurs first.

BIA will:

1. Within 15 working days of receipt of the NIA, notify the BLM whether the Tribe or allottee desires to take over operations on the well, or that takeover of operations will not occur. The BIA will make necessary contacts to obtain Tribal or allottee waivers or approvals.
2. [\*139] Negotiate with the operator to ensure that takeover is in the best interest of the Tribe and/or allottee.
3. Drainage. The BLM will review all leased and unleased lands for potential drainage. If drainage is occurring, BLM will take appropriate actions to protect Indian lands from drainage.
4. BLM will:
5. Review all leased and unleased lands to determine if drainage may be occurring.
6. If unleased, notify BIA, and recommend leasing if drainage is occurring.
7. If leased, notify lessee of responsibilities to protect the lease, and send a courtesy copy to BIA and/or Tribes.
8. Issue a decision letter to the lessee, with a courtesy copy to BIA and/or Tribes.
9. Notify Minerals Management Service (MMS) of decision for billing via memorandum, as appropriate, with a courtesy copy to the BIA and/or Tribes.
10. Respond to potential cases identified by the BIA, and establish a drainage case, as necessary.
11. BIA will:
12. Provide lease documents and assignments to the BLM within 10 working days upon lease issuance or approval of the assignment.
13. Notify the BLM of potential drainage cases.
14. Supply BLM with a copy of ownership maps related to ***oil*** and gas mineral estates, upon request.
15. Indian Diligence. The BLM will review all producing Indian leases to determine if they are being diligently developed. These procedures are outlined in BLM Manual - 3160-16 - Indian Diligent Development.
16. [\*140] BLM will:
17. Annually review all producing Indian leases to determine if they are being diligently developed, and the BLM Montana State office will provide a report summarizing the diligence reviews to the BIA.
18. Notify lessee if the lease is not being diligently developed, and request their plans for lease development or justification as to why lease development is not presently warranted.
19. Recommend that BIA take appropriate actions as outlined in the Indian Diligent Development Manual, if the lessee elects not to proceed with reasonable lease development.
20. BIA will:
21. Provide lease documents and assignments to the BLM within 10 days upon lease issuance or approval of the assignment.
22. Identify to the BLM any leases which may require a diligence review.
23. Unitization. The BLM will review and make recommendations to the BIA for exploratory and secondary unit agreements.
24. BLM will:
25. Set the time and date for the unit meetings and invite the BIA and/or Tribes to attend.
26. Review and make recommendations to the BIA of the proposed unit area, and determine whether the application is complete pursuant to the regulations under 43 CFR 3180 and existing BLM unit requirements.
27. Review the final unit agreement and make recommendations to BIA.
28. Make recommendations to BIA to lease unleased lands within units.
29. Make recommendations to the BIA for approval of the Change of Operator.
30. Notify MMS of the final approved unit agreement.
31. Assign a unit agreement number.
32. [\*141] BIA will:
33. Review recommendations from the BLM and send approval letter, designating the unit area as logical, to the unit operator with a copy to the BLM.
34. Attempt to lease any unleased Indian lands within unit area.
35. Forward a copy of the final unit agreement within 5 working day's receipt to the BLM for review.
36. Review the recommendations from the BLM for approval of the final unit agreement form and review Exhibit "B" of the unit agreement to ensure that proper legal descriptions, lease numbers, expiration dates, royalty rates, lessors and lessees of record match those on the lease document. Request that the unit operator make necessary changes.
37. Forward BLM and MMS an approved copy of the final unit agreement with the approved Certification-Determination page, after recording with the Office of Titles and Records.
38. Upon approval of the Change of Unit Operator, send BLM a copy of the documents.
39. ***Oil*** and Gas Hearings.
40. ***Oil*** and Gas Hearings (Montana). The BLM will hear testimony and review evidence in order to grant exceptions and establish field rules for Indian lands in Montana. The BLM's hearings will be scheduled in conjunction with the hearings of the Montana Board of ***Oil*** and Gas Conservation (MBOGC),
41. BLM will:
42. Receive applications from mineral owners/ lessees/operators requesting exception location requests or field rules (spacing) for Indian lands. Forward copies of these applications to the MBOGC (for inclusion in the hearing notice), BIA, and affected Tribes within 5 working days of receipt.
43. [\*142] Conduct a technical evaluation and develop evidence of impact to Indian owned minerals.
44. Schedule any requested meetings with BIA and Tribal officials concerning a hearing application.
45. Have a geologist and petroleum engineer present at all hearings to ask questions, hear testimony, and gather evidence.
46. Render decisions based on the administrative record and the BLM's own technical evaluation of effects to Indian-owned minerals concerning each applicant's request.
47. Notify the applicant, BIA, MBOGC, and affected Tribes of the BLM's decision within 5 working days after the hearing.

BIA will:

1. Notify the BLM, by letter or memorandum, of any concerns affecting an application on Indian lands within 5 working days after receipt of the application.
2. Consult as necessary with the BLM, applicant, lessees, operators, Tribes, or allottees concerning an application affecting Indian lands prior to hearing.
3. Provide the BLM with a current Indian mineral ownership and lease status map describing the area affected by an application. This map should be received by the BLM at least 5 working days prior to the hearing.
4. ***Oil*** and Gas Hearings (North and South Dakota). The BLM will provide testimony or present evidence to the North Dakota Industrial Commission (NDIC) or the South Dakota Board of Minerals and Environment (SDBME) concerning hearings affecting Indian lands in North and South Dakota.

BLM will:

1. Review hearing notices to determine if Indian lands may be affected by an application. Forward copies of notices affecting Indian lands to the BIA and affected Tribes within 3 working days of receipt.
2. [\*143] Schedule any requested meetings with BIA and/or Tribal officials concerning hearing applications for all trust lands.
3. Conduct a technical evaluation and develop evidence of impact to Indian-owned minerals.
4. Attend all hearings affecting Indian lands to present the BLM's position and provide any evidence.
5. Should the North Dakota Industrial Commission or the South Dakota Board of Minerals and Environment render a decision adversely affecting Indian lands, notify the Commission or Board that the BLM will, after consultation with the BIA and/or Tribes, withdraw said Indian lands from any orders issued as a result of their decision.
6. Provide BIA and affected Tribes with a copy of all decisions of the North Dakota Industrial Commission or South Dakota Board of Minerals and Environment which concern Indian lands within 5 working days after receipt of a decision from the Commission or Board.
7. BIA will:
8. Notify the BLM, by letter or memorandum, of any concerns affecting an application on Indian lands within 5 working days after receipt of the hearing notice.
9. Consult as necessary with the BLM, lessees, operators, Tribes, or allottees concerning all applications affecting Indian lands.
10. Provide the BLM with a current Indian mineral ownership and lease status map depicting the area affected by an application. This map should be received by the BLM at least 5 working days prior to the hearing.
11. Commitment of Unleased Trust Lands to Spacing Units in Montana, The BLM approves ***oil*** and gas spacing orders and exception well requests for Indian Tribal and Allotted (Trust) lands in Montana. This section is intended to (1) authorize the BLM to notify the ***oil*** and gas industry that unleased Trust lands shall be committed to BLM-approved spacing units with standard provisions for royalty distribution and (2) ensure that accounts are established to receive royalty payments for Trust mineral owners.
12. [\*144] BLM and BIA agree as follows:
13. Notice to Lessees and Operators, The BLM shall notify operators of the procedures to commit unleased Trust lands to BLM-approved spacing units as outlined under (2). The BLM may use the notice procedures of the MBOGC to notify operators.
14. Procedures and Jurisdictions. Unleased Trust lands committed to spacing units in Montana shall be subject to each of the following:
15. All proposed spacing units containing Trust lands will be reviewed and processed in accordance with the procedures outlined under Part 7.a.
16. BIA acknowledges that the unleased Trust lands located within a BLM-approved spacing unit will receive revenues based on the distribution described under Part 8.a.(2)(c)a.
17. The BLM will notify each operator of a spacing unit containing unleased Trust lands to:
18. Establish an interest bearing account and deposit royalty payments equal to one-sixth of the proportionate share of production from the spacing unit;
19. Use the remaining five-sixths of the royalty share to pay for the unleased land's proportionate share of drilling and operating costs.
20. Should the Trust lands be leased, drilling and operating costs would be a matter of negotiation between the lessee and the spacing unit operator.
21. The unleased lands within an approved spacing unit shall be considered to be voluntarily committed by the BIA and, therefore, not subject to a joining penalty.
22. The BIA shall, at its discretion, distribute the funds in the interest-bearing account to the mineral owners of the unleased Trust lands as it deems appropriate
23. Communitization. The BLM will review and make recommendations to the BIA for communitization agreements (CA).
24. [\*145] BLM will
25. After receipt of a proposed CA from the BIA or operator, review and make recommendation to the BIA regarding the technical validity of the proposal and review Exhibit "B" of the CA to ensure proper legal descriptions, lease numbers, expiration dates, royalty rates, lessors and lessees of record are an accurate account of the lease document.
26. Assign a case recordation number to the CA for entry into BLM's automated system, the Legacy Rehost 2000 (LR 2000).
27. BIA will:
28. Forward a copy of the proposed CA agreement application within 5 working day's receipt to the BLM for review.
29. Review recommendations from the BLM regarding the CA and contact the operator to make all appropriate changes.
30. Forward the CA to appropriate official for approval and forward BLM an approved copy of the final CA with the approved Certification-Determination page, after recording with Office of Titles and Records.
31. Assign a CA number.
32. Distribute approved copies to lessees/operators
33. Mineral Agreements. The Indian Mineral Development Act (IMDA) of 1982 authorizes any Indian or Tribe owning an interest in mineral resources to enter into mineral agreements with private parties or corporations. Pursuant to the IMDA, all information concerning mineral agreements is considered proprietary.
34. BIA will:
35. Forward all mineral agreements proposed by an operator to the BLM Montana State Office, within 10 working days of receipt.
36. Forward two copies of all mineral agreements to the appropriate BLM district office within 5 working days of approval.
37. [\*146] BLM will:
38. Review and forward recommendations on mineral agreements to BIA within 30 working days of receipt providing any analysis, technical data, or other justification used.
39. Reporting of Undesirable Events. Operators of leases are required to report all spills, discharges, or other undesirable events in accordance with the requirements of the Notice to Lessees (NTL) 3A.
40. BLM will:
41. Notify BIA of accidents or spills involving lease operations and seek BIA expertise in rehabilitation and cleanup operations.
42. Notify other agencies of incidents and contact the operator for required cleanup work.
43. Make a determination as to whether the spill or accident resulted in avoidably or unavoidably lost ***oil*** and gas for royalty purposes and notify BIA and/or Tribes.
44. Inspect all spills brought to BLM's attention and furnish BIA with a report on actions taken.
45. BIA will:
46. Notify the BLM of any major spills or undesirable events involving lease operations immediately upon discovery. Contact the operators directly only in cases involving an emergency such as endangering health, safety, or significant resources.
47. Followup to assure compliance by lessee/operator and provide written report to BLM within 10 working days.
48. Gas Flaring/Venting. Gas produced from an Indian ***oil*** and gas lease may not be flared or vented without prior approval of the BLM.
49. BLM will:
50. Request that the operator make application with the BLM pursuant to the requirements under NTL 4A.
51. [\*147] Within 3 working days of receipt and prior to the approval of the NTL 4A application, BLM will send the BIA and/or Tribes a copy of the application for their review and comment.
52. Conduct a NEP A analysis prior to approval
53. BIA will:
54. Review and comment on the NTL 4A application received from the BLM and respond within 5 working days of receipt of the application.
55. Suspension of Production Requirements for Indian leases in Extended Term by Production or Uneconomic/Marginal Wells Policy. When a producing allotted or Tribal Indian lease ceases to produce in paying quantities, the lease terminates by the lease terms unless a suspension of production has been approved. A suspension of production requires approval of the BIA after the consent of the mineral owners has been obtained. The BLM will forward to the BIA the suspension application along with economic and production data and the BLM's recommendations for approval or disapproval. The BIA will inform the BLM of its decision to approve or disapprove and the lessee will be so notified by the BLM. Suspension of production requirements (or shutting-in a lease) on Indian lands is a form of renegotiation of lease terms; therefore, approval documents amend the lease.
56. BLM will:
57. Review the request for suspension of production as submitted by the lessee/operator.
58. Notify the lessee/operator that the lease must continue to produce until suspension approval is granted by the BIA, or the lease will terminate by its own terms.
59. Forward BLM's recommendation to the BIA for review and approval within 7 working days of receipt of the application.
60. Notify the lessee of the BIA's decision for approval/disapproval
61. BIA will:
62. Review the application for a suspension of production within 15 working days of receipt from the BLM.
63. Obtain consent/nonconsent from the mineral owner and approve or disapprove the suspension application and inform the BLM of the decision.
64. [\*148] Pisposal/Injection of Produced Waters. Water produced in association with Indian ***oil*** and gas leases must be disposed of according to the requirements of Onshore ***Oil*** and Gas Order No.7 (Order No.7), and laws and regulations of the Environmental Protection Agency (EPA), states, and the Tribes. A permit must be received from EPA, the primacy state or Tribe for approval of an injection well.
65. BLM will:
66. Require that the operator make application with the BLM pursuant to the requirements under Order No.7. Within 3 working days of receipt and prior to the approval of the Order No.7 application, BLM will send the BIA and/or Tribes a copy of the application for their review and comment.
67. Conduct a NEPA analysis for subsurface disposal.
68. BIA will:
69. Review and comment on the Order No.7 application received from the BLM and respond within 15 working days of receipt of the application.
70. Conduct a NEPA analysis for surface disposal prior to approval.
71. Business-Use Permits.
72. BLM will:
73. Review and make recommendations to the BIA on salt water disposal "business-use-permit" applications to ensure that the Indian mineral estate is being protected.
74. BIA will:
75. Send copies of all salt water disposal "business-use-permit" type applications to the BLM for BLM recommendations prior to BIA approval.
76. [\*149] Inspection and Enforcement.
77. BLM will:
78. Upon request, notify the BIA at least 24 hours prior to conducting inspections on producing Indian leases to allow BIA participation.
79. Send an informational copy of all inspections conducted on Indian leases to BIA.
80. BIA will:
81. Establish a contact person to handle inspection and enforcement related issues.
82. Notify the BLM in writing of any problems or concerns of an inspection conducted by the BLM within 30 days of the inspection.
83. Contact the BLM Law Enforcement regarding any suspected theft or fraud related to mineral operations conducted on Indian lands.

V. General Provisions.

1. Term of Agreement. The term of this MOU is 10 years, at the end of which period it will expire, unless cancelled or renewed before then.
2. Periodic Review. The participants will review this MOU at least every 5 years to determine its adequacy, effectiveness, and continuing need.
3. Amendments. Any participant may propose changes to this MOU during its term. Any change will be in the form of an amendment and will not take effect until all participants have reviewed and signed the amendment. All amendments should be reviewed by participants within 30 days of receipt of the amendment.
4. Renewal. Before this MOU is due to expire, if all the participants agree that there is a continuing need, it may be renewed for another term. Such renewal will be in the form of a new MOU and will contain any agreed-to changes.
5. Cancellation. This MOU may be cancelled at any time during its term by mutual written agreement among the participants, or by any participant giving the other participants at least 30 days written notice.
6. Effects on Other MOUs. This MOU supersedes BLM MOU MT920 9013 and Supplements 1 and 2 between the parties to this agreement If there are issues not covered in this MOU which require clarification, the existing nationwide MOU between the BIA/BLM/MMS, dated June, 1997, effective December 12, 1997, Attachment A- Information Sharing and Responsibilities - Indian Minerals, shall be used.
7. Execution of MOU. This MOU may be executed in one or more counterparts, each of which shall constitute an original, and all of which taken together shall constitute one and the same instrument.

APPROVED:

Regional Director, Rocky Mountain Region

Bureau of Indian Affairs

9/27/01

Date

Regional Director, Great Plains Region

Bureau of Indian Affairs

14 Sept 01

Date

Montana State Director

Bureau of Land Management

9/28/01

Date

(This MOU supersedes BLM MOU MT920 9013 and Supplements and 2).

[\*151] Memorandum of Understanding

between

U.S. Department of the Interior

Bureau of Land Management, Montana State Office

and

The State of Montana, Board of ***Oil*** and Gas Conservation

concerning

***Oil*** and Gas Well Spacing/Well Location Jurisdiction

I Purpose

The State of Montana, Board of ***Oil*** and Gas Conservation (Board) has jurisdiction for well spacing/well location on State and fee lands. The Bureau of Land Management (BLM) has jurisdiction over federal and Indian lands. This agreement between the BLM and the Board is intended to (1) promote cooperation between BLM and the State of Montana; (2) provide consistency in establishing spacing units and well location requirements in areas involving diverse mineral ownerships; (3) protect correlative rights; (4) eliminate unnecessary duplication of effort; and (5) define duties and responsibilities.

This agreement shall not supersede existing laws, rules, or regulations of either party, nor require commitment of manpower or funds beyond legal authorities or appropriations.

II Authority

Montana Code Annotated 82-11-112; the Mineral Leasing Act of 1920; the Acquired Land Leasing Act of 1947; the Indian Minerals Development Act of 1982; the Allotted Indian Land Leasing Act of 1909; the Unallotted Indian Leasing Act of 1938; and Interior Department Secretarial Order No. 3087. Regulations pertaining to well spacing programs exists at 43 Code of Federal Regulations 3162.3-1.

[\*152] III Procedures

THE BLM AND THE BOARD AGREE AS FOLLOWS:

A. Point of Contact

Each party shall appoint a specific person or persons who shall be the point of contact to facilitate communication and coordination in implementing this agreement.

B. Procedures and Jurisdictions

(1) Federal Land

Subject to BLM approval, the Board shall issue well spacing/well location orders affecting federal lands. Upon receipt of a well spacing/well location docket request involving federal lands, the Board shall notify BLM of the hearing and hold the hearing. The BLM shall be entitled to present expert testimony with respect to such spacing determinations, and shall be informed in writing of any disposition. If the BLM should desire to protest any requested determination, it shall do so by written protest delivered to the Board prior to the hearing or by appearance at the hearing. Any such protest shall specify the BLM objections and the conditions, if any, under which the BLM will approve the relief requested. The Board's determination/order is approved if the BLM does not object. If the BLM objects, the final decision as relating to federal lands shall be made by BLM.

Orders issued by the Board which affect spacing units containing both federal and non-federal lands shall contain the following statement:

"A federal communitization agreement for spacing units which contain both federal and nonfederal lands shall be submitted to the Authorized Officer of the Bureau of Land Management prior to or upon completion of a producible well."

[\*153] (2) Indian Land

The BLM will adopt, as standard practice for trust lands, the state-wide spacing rules and set-back requirements as defined in the Board's General Rules and Regulations, Section 36.22.702. Applications for field spacing or exception location requests on trust lands will be submitted to the BLM. The BLM shall forward copies of said applications to the Board for inclusion into the Board's notice of hearing. The Board's notice of hearing shall serve to notify the general public of applications concerning trust lands. The BLM shall ensure that any affected tribes and the Bureau of Indian Affairs (BIA) Area Office receive timely notice and copies of applications for field spacing or exception location requests on trust lands.

The Board shall conduct hearings involving trust lands, and will receive evidence and hear testimony relating to trust land applications. The Board will not issue orders granting exception locations or establishing spacing on trust lands. Pleadings, papers, documents, or testimony from any hearing before the Board shall be made a part of the administrative record upon which trust land decisions will be made by BLM.

After completion of the administrative record, which will be the basis for approval or disapproval of a field spacing or exception location application Involving trust lands, the BLM will issue a decision. The BLM will notify the BIA and affected tribes of any applications involving trust lands. Upon request, an affected tribe or individual Indian will be granted an opportunity for a pre-decision meeting to review the administrative record, submit additional information, and express their views. An applicant may also request such a meeting. If requested, the BLM shall notify the affected tribe, if any, and the BIA Area Office of the time and place of the meeting.

The BLM shall notify the applicant, the Board, the BIA, and the affected tribe of the Bureau's decision.

[\*154] (3) Confidentiality

Each agency will abide by the confidentiality requirements of its own laws and regulations.

(4) Access to Records

Each agency will provide for public access to records in accordance with its own laws and regulations.

IV Expiration

This Memorandum of Understanding will continue in effect indefinitely unless formally canceled by either party.

V Review

Each of the parties to this Memorandum of Understanding will review it annually to determine its currency, adequacy, and continuing need.

VI Amendment

Each of the parties to this Memorandum of Understanding may propose changes to it at any time. Any such change shall be proposed in writing in the form of an amendment, and shall not become effective until agreed to and signed by both of the parties.

VII Cancellation

Either of the parties to this Memorandum of Understanding may unilaterally terminate it by providing 60 days written notice to the other party.

[\*155] VIII Affect on Existing Agreements

This Memorandum of Understanding specifically supersedes the Cooperative Agreement between the parties hereto, signed by the BLM State Director on November 3, 1987, and the Board Chairman on November 19, 1987.

APPROVED

sociate

State Director, Montana State Office

Bureau of Land Management

U.S. Department of the Interior

Chairman

Montana Board of ***Oil*** and Gas

Conservation

Date signed 10/7/92

Date signed 10/8/92

[\*157] **MOU**

**Southern Ute Indian Tribe**

**Bureau of Land Management**

**and**

**Interagency Agreement**

**Bureau of Indian Affairs**

**Bureau of Land Management**

[\*159] **MEMORANDUM OF UNDERSTANDING**

**(Southern Ute Indian Tribe and Bureau of Land Management)**

**AND**

**INTERAGENCY AGREEMENT**

**(Bureau of Indian Affairs and Bureau of Land Management)**

**I. Purpose**

This agreement between the Southern Ute Indian Tribe (Tribe), the Bureau of Indian Affairs (BIA) and the Bureau of Land Management (BLM) is intended to: (1) provide clear and consistent procedures and policy for the review and evaluation of proposed spacing, pooling, and field rule requests that come before the Colorado ***Oil*** and Gas Conservation Commission (COGCC); (2) avoid duplication of effort by the participants of this memorandum of understanding (MOU); and (3) define trust responsibility in matters of ***oil*** and gas spacing and pooling.

The parties recognize that the Tribe is the beneficial owner of lands held by the United States Government in trust for the Tribe and that the Tribe is entitled to monitor and participate in the spacing, pooling, and field rule requests.

For the purposes of this agreement, the term "Indian lands" shall mean those lands located within the exterior boundaries of the Southern Ute Indian reservation, including allotted Indian lands, in which the legal, beneficial, or restricted ownership of the underlying ***oil***, gas, or coal bed methane or of the right to explore for and develop the ***oil***, gas, or coal bed methane belongs to or is leased from the Southern Ute Indian Tribe or allottee.

The BIA and BLM are agencies of the federal government charged with overseeing certain ***oil*** and gas related activities on tribal and allotted lands in a manner consistent with the highest fiduciary and trust standards.

**II. Authority**

Authority for this MOU includes, but is not limited to, the following: Indian Mineral Leasing Act of 1938; the Indian Self Determination Act of 1968; the Indian Mineral Development Act of 1982; the Constitution of the Southern Ute Indian Tribe; the Mineral Leasing Act of 1920 as amended; the 1909 Mineral Leasing Act for allotted lands; and the Interior Department Secretarial Order No. 3087, as amended. This agreement shall not supersede existing law, rule, or regulation of either party; nor require commitments of manpower or funds beyond legal authority or appropriation. This agreement is not intended to abrogate or improperly delegate any of the Secretary of the Interior's fiduciary responsibilities towards Indian tribes within the State of Colorado.

**III. Procedures**

The Tribe, BIA, and BLM agree as follows:

**[\*160] A. Point of Contact**

Each party shall appoint a specific person or persons who shall be the point of contact to facilitate communication and coordination in implementing the agreement.

**B. Coordination Meetings**

Coordination meetings will be held in conjunction with the established quarterly Tribe, BIA, and BLM coordination meetings. This agreement will be reviewed and updated from time to time as required in conjunction with coordination meetings, subject to lawful acceptance by the parties. In any event, however, this Agreement shall be reviewed at the first coordination meeting at the beginning of the calendar year.

**C. Procedural Format**

In accordance with the terms of the Cooperative Agreement between the COGCC and the BLM, all spacing and pooling requests involving federal and Indian minerals shall initially be submitted to the COGCC.

**1. *Oil* and Gas Hearings**

The BLM will provide testimony or present evidence to the COGCC concerning hearings and other matters affecting Indian Lands.

**a. BLM Will**:

1. Administratively review hearing notices and notices of other matters to determine if Indian lands may be affected by an application. Forward copies of notices affecting Indian lands to the BIA and the Tribe within 3 working days of receipt.
2. Schedule any requested meetings with BIA and/or the Tribe concerning hearing applications or other matters for all trust lands.
3. Conduct a technical review and develop evidence of impact on Indian owned and allotted Indian lands. Nonconcurrence will be handled in accordance with COGCC/BLM MOU.
4. Attend all hearings affecting Indian and allotted Indian lands to present the BLM's position and provide any evidence.
5. Provide BIA and the Tribe with a copy of all decisions of the COGCC which concerns Indian lands within 5 working days after receipt of a decision from the Commission.

**b. BIA Will:**

1. Notify the BLM, by letter or memorandum, of any concerns affecting an application on Indian or allotted Indian lands within 5 working days after receipt of the hearing notice or notice of other matters.
2. Consult as necessary with the BLM, lessees, operators, Tribe, or allottees concerning all applications affecting Indian lands.
3. Notify BLM of concurrence within 5 working days of receipt, but not later than 3 days prior to hearing for allotted Indian lands. If concurrence is not received prior to the hearing, the BLM will be forced to object to any discussions relating to the application of concern.

**c. Tribe Will**:

1. Provide the BLM with a current Indian mineral ownership and lease status map depicting the area affected by an application as well as all known and proposed well locations. This map should be received by the BLM at least 5 working days prior to the hearing.
2. Notify BIA/BLM of concurrence within 5 working days of receipt, but not later than 3 days prior to hearing. If concurrence is not received prior to the hearing, the BLM will be forced to object to any decisions relating to the application of concern. With respect to Tribal allotted lands, Tribal concurrence will not be considered necessary for action by BIA/BLM, however Tribal comment will be accepted and considered.

**3. Existing COGCC Decisions**

Consistent with the terms of this agreement, all existing decisions of the COGCC involving federal and Indian minerals will remain in effect, subject to the right of the Colorado BLM to request that any specific orders be reviewed, recinded, or modified. All parties, Indian owners, or their representatives may request that specific orders be reviewed.

**[\*162] D. Special Provisions**

**1. Confidentially**

Each agency will abide by the confidentially requirements of its own laws and regulations with respect to determinations concerning and handling of proprietary data and any other statutes, regulations, or directives concerning restricted access to records or information in any form. With respect to any information supplied by the Tribe or generated by agencies in regard to a particular issue, the Tribe may request in writing that such matters be treated as confidential, and so long as not inconsistent with law, said request shall be honored.

**2. Access to Records**

Each agency will provide public access in accordance with its own rules.

**3. Information Sharing**

Each agency will provide the others with courtesy copies of all regulations changes and Instruction Memoranda that deal with common or pertinent issues.

**4. Jurisdiction of COGCC**

It is the Tribe's position that the COGCC lacks the jurisdiction to issue an order or decision affecting Indian lands within the boundaries of the Southern Ute Indian Reservation. Pursuant to an MOU between the BLM and the COGCC, BLM has contracted with the state to conduct hearings and review matters affecting Indian lands, and to make decisions affecting Indian lands. Without the concurrence of the parties hereto to decisions rendered by the COGCC affecting Indian lands, the parties agree that the COGCC by itself lacks the jurisdiction to render such decisions. This Agreement is intended to provide an acceptable procedure for obtaining the concurrence of the parties needed to make any COGCC decision binding.

Should the COGCC render a decision or order after the parties have followed the approved procedures contained in this Agreement, said COGCC decision shall be deemed by the parties hereto to be a decision of the BLM. Any interested party shall have the same opportunity to appeal or challenge such decision as if said decision had been rendered exclusively by the BLM, Colorado State Director.

**E. Effect on Prior Agreements**

[\*163] There are no prior agreements among the Tribe, BLM, and BIA that this MOU would affect.

**F. Administration**

This agreement shall become effective upon the date of execution by the last signatory party to this agreement.

This agreement may be amended by mutual consent of the parties at the same organizational level as sign this agreement.

Termination of this agreement may be effected by any party upon 60 days written notice to the other parties. Termination of this agreement may be effected at any time by written notification of the other parties.

This agreement shall terminate when no longer authorized by the U.S. Department of the Interior, by federal or state law, or if determined to be unenforceable by any court having jurisdiction over the parties.

IN WITNESS WHEREOF, the parties have executed this agreement on the date indicated for each respective party,

Date: 8/22/91

**BUREAU OF INDIAN AFFAIRS**

by: /s/ Ralph R. Pensoneau

Superintendent, Southern Ute Agency

Date: 8/22/91

**BUREAU OF LAND MANAGEMENT**

by: /s/ Bob Moore

State Director, Colorado

Date: 8/22/91

**SOUTHERN UTE INDIAN TRIBE**

by: /s/ Leonard Burch

Chairman, Southern Ute Tribal Council

The Foundation for Natural Resources and Energy Law Annual and Special Institutes (formerly Rocky Mountain Mineral Law Foundation Annual and Special Institutes)

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**End of Document**

1. 1Portions of this essay are adapted from parts of three prior co-authored works: Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture-An* ***Oil*** *and Gas Perspective* , 35 ENVTL. L. 899 (2005); Owen L. Anderson & Ernest E. Smith, *Exploratory Unitization Under the 2004 Model* ***Oil*** *and Gas Conservation Act* , 24 J. LAND RESOURCES & ENVTL. L. 277 (2004); and Owen L. Anderson & Ernest E. Smith, *The Use of Law to Promote Domestic Exploration & Production* , 50 INST. ON ***OIL*** & GAS L. AND TAX'N 2-1 (1999).

   For prior discussion of this topic, see T. Calder Ezzell, Jr. and Gregory J. Nibert, *Comrnunitization of Federal Lands: An Overview, Onshore Pooling and Unitization* , Book 1, Paper 12 (Rocky Mt. Min. L. Foundation 1997).

   For detailed discussion of spacing, pooling, and communitzation, readers are referred to the seminal treatise On pooling and unitization, BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION §§ 5.01 - 5.03 (spacing and density); §§ 10.01 - 13.08 (compulsory pooling); §§ 16.01 - 16.06 and 24.03 - 24.04 (federal lands) (Matthew Bender & Co., Inc. 2005) (hereafter Kramer & Martin).

   For earlier, but in light of more recent case law, somewhat outdated discussions of the effect of state spacing and pooling on federal and Indian lands, see Edward B. Berger & William J. Mounce, *Applicability of State Conservation Law to Indian and Public Lands* , 16 ROCKY MT. MIN. L. INST. 347 (1971) and Richard K. Books, ***Oil*** *and Gas: Effect of Oklahoma Conservation Laws on Federal and Indian Lands* , 29 OKLA. L. REV. 994 (1976). [↑](#footnote-ref-2)
2. 2*Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 562 (Tex. 1948). [↑](#footnote-ref-3)
3. 3For a recent discussion of both the historical and modern applications of the rule of capture regarding ***oil*** and gas development, see Bruce M. Kramer and Owen L. Anderson, *The Rule of Capture-An* ***Oil*** *and Gas Perspective*, 35 ENVTL. L. 899 (2005) (part of a symposium on the rule of capture). [↑](#footnote-ref-4)
4. 4*See generally* ROBERT E. HARDWICKE, ANTITRUST LAWS, ET AL. V. UNIT OPERATION OF ***OIL*** OR GAS POOLS (rev. ed. 1961). Hardwicke summarized the wasteful development as follows:

   Production in excess of requirements, unnecessary storage, untimely drilling of wells, the drilling of many unnecessary wells, wasteful and disorderly production practices, instability of markets, feasts and famine with respect to reserves, and particularly the unsound and burdensome drill-and-produce-as-you-please method to protect property lines against drainage.

   *Id.* at 391, n.l. [↑](#footnote-ref-5)
5. 5A leader in the federal-preemption movement was Harold L. Ickes, Secretary of the Interior under President Franklin Roosevelt. *See generally*, Daniel Yergin, The Prize 244-259 (Simon & Schuster 1990). [↑](#footnote-ref-6)
6. 6*See* Hardwicke, *supra* note 4, at 391. In 1945, Oklahoma enacted the first compulsory unitization act. For the current version, see OKLA. STAT. tit. 52, §§ 287.1-287.15. [↑](#footnote-ref-7)
7. 7*See* Yergin, *supra* note 5, at 259. The IOCC has been renamed the Interstate ***Oil*** and Gas Compact Commission and is located in Oklahoma City. [↑](#footnote-ref-8)
8. 8OPEC is the acronym for Organization of Petroleum Exporting Countries, formed at the Baghdad Conference in 1960 in response to an announced lowering of ***oil*** prices by major ***oil*** and gas companies. Current members are Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and Venezuela. [↑](#footnote-ref-9)
9. 9*See, e.g.*, Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948). [↑](#footnote-ref-10)
10. 10*See, e.g.*, Ohio ***Oil*** Co. v. Indiana, 177 U.S. 190 (1900). [↑](#footnote-ref-11)
11. 11*See, e.g.*, Ohio ***Oil*** Co. v. Indiana, 177 U.S. 190 (1900) and Pattie v. ***Oil*** and Gas Conservation Comm'n, 402 P.2d 596 (Mont. 1965). [↑](#footnote-ref-12)
12. 12*See, e.g.*, N.D. Cent. Code § 38-08-01. [↑](#footnote-ref-13)
13. 13*See, e.g.*, Pattie v. ***Oil*** and Gas Conservation Comm'n, 402 P.2d 596 (Mont. 1965). [↑](#footnote-ref-14)
14. 14Spacing regulation has withstood constitutional challenges. *See, e.g.*, Carter ***Oil*** Co. v. State, 249 P.2d 787 (Okla. 1951). [↑](#footnote-ref-15)
15. 15*See, e.g.*, Larsen v. ***Oil*** and Gas Conservation Comm'n, 569 P.2d 87 (Wyo. 1977) (holding that conservation agency had no statutory authority to consider economic waste). [↑](#footnote-ref-16)
16. 16*See, e.g.*, Trust Co. of Chicago v. Samedan ***Oil*** Corp., 192 F.2d 282, 284 (10th Cir. 1951). [↑](#footnote-ref-17)
17. 17Technically, a proration unit is the acreage assigned to a well for purposes of allocating production. While this acreage is often identical to the acreage comprising a drilling or spacing unit, this may not be true in every case in every state or in every reservoir. [↑](#footnote-ref-18)
18. 18*See generally* R. B. Giles, *The Technological Underpinnings of Conservation Law*, Paper 2, 2-13, ***OIL*** AND GAS CONSERVATION LAW AND PRACTICE (Rocky Mt. Min. L. Found. 1985). [↑](#footnote-ref-19)
19. 19*See, e.g.*, Chevron ***Oil*** Co. v. ***Oil*** and Gas Conservation Comm'n, 435 P.2d 781 (Mont. 1967); Pattie v. ***Oil*** and Gas Conservation Comm'n, 402 P.2d 596 (Mont. 1965); Application of Gulf ***Oil*** Corp., 313 P.2d 1101 (Okla. 1957); and Exxon Corp. v. Railroad Comm'n, 571 S.W.2d 497 (Tex. 1978). [↑](#footnote-ref-20)
20. 20Unitized development of reservoirs is a better alternative to well-by-well and drilling-unit-by-drilling-unit development, but early unitization of reservoirs is difficult to achieve. For discussion, see Owen L. Anderson & Ernest E. Smith, *Exploratory Unitization Under the 2004 Model* ***Oil*** *and Gas Conservation Act*, 24 J. LAND RESOURCES & ENVTL. L. 277 (2004); and Owen L. Anderson & Ernest E. Smith, *The Use of Law to Promote Domestic Exploration & Production*, 50 INST. ON ***OIL*** & GAS L. AND TAX'N 2-1 (1999). [↑](#footnote-ref-21)
21. 21*Cf.*, Pickens v. Railroad Comm'n, 387 S.W.2d 35, 21 O&GR 644 (Tex. 1965) (unit production was allocated partly on an acreage basis and partly on a reservoir-characteristic basis). In some states, typically in older fields, correlative rights may be further compromised, because wells may be subject to only spacing (distance) regulations. Under this approach, wells must meet minimum distance requirements, and a well may be assigned acreage to form a "proration" unit. As in the case of drilling units, the owners of tracts and interests within the boundaries of the proration unit share in the well; however, unlike drilling units, proration units may not be of uniform size or shape. In these circumstances, the three basic assumptions discussed above have even less veracity because, although drainage is presumed to be radial, the assigned acreage is not uniform for all wells. In Kansas, which has no compulsory pooling statute, it is even possible to have noncontiguous acreage assigned to a well. For an illustration of the Kansas approach see Mobil ***Oil*** Corp. v. State Corp. Comm'n, 608 P.2d 1325, 66 O&GR 19 (Kan. 1980). [↑](#footnote-ref-22)
22. 22*See, e.g.*, Denver Producing and Ref. Co. v. State, 184 P.2d 961, 964 (Okla. 1947) (limiting production from wells with high gas-to-***oil*** ratios to prevent underground waste) and Big Piney ***Oil*** & Gas Co. v. Wyoming ***Oil*** and Gas Conservation Comm'n, 715 P.2d 557 (Wyo. 1986) (curtailing production from wells that were depleting the gas cap). [↑](#footnote-ref-23)
23. 23*See, e.g.*, Denver Producing and Ref. Co. v. State, 184 P.2d 961, 964 (Okla. 1947) ("In striking a balance between conservation of natural resources and protection of correlative rights, the latter is secondary and must yield to the reasonable exercise of the former.") and Texaco, Inc. v. Railroad Comm'n, 583 S.W.2d 307, 310 (Tex. 1979) ("Between protecting correlative rights and protecting the public interest of preserving our state's natural resources, the prevention of waste has been held to be the dominant purpose."). [↑](#footnote-ref-24)
24. 24For background discussion, see Continental Resources, Inc. v. Farrar ***Oil*** Co., 559 N.W.2d 841 (N.D. 1977) and Browning v. Luecke, 38 S.W.3d 625 (Tex. App.-Austin 2000, pet. den.). *See generally* Taylor Reid and John W. Morrison, *Doing the Lateral Labamba: Negotiating the Technical and Legal Challenges of Horizontal Drilling*, 43 Rocky Mt. Min. L. Inst. 16-1 (1997) and Robert D. Buettner, *The Compleat Angler: A Survey of Horizontal Drilling Regulation in the Producing States*, 48 ***Oil*** & GAS Inst. 8-1 (Matthew Bender 1997). [↑](#footnote-ref-25)
25. 25Conservation agencies maintain continuing jurisdiction to revise prior orders as necessary to prevent waste or protect correlative rights based on new information or changed conditions. *See, e.g.*, Parkin v. State Corp. Comm'n, 677 P.2d 991 (Kan. 1984); Amoco Prod. Co. v. North Dakota Indus. Comm'n, 307 N.W.2d 339 (N.D. 1981); Mustang Prod. Co. v. Corp. Comm'n, 771 P.2d 201 (Okla. 1989); French v. Champlin Exploration, 534 P.2d 1302 (Okla. 1975); Landowners, ***Oil***, Gas & Royalty Owners v. Corp. Comm'n, 420 P.2d 542 (Okla. 1966); Application of Peppers Ref. Co., 272 P.2d 414 (Okla. 1954); and Wood ***Oil*** Co. v. Corp. Comm'n, 239 P.2d 1021 (Okla. 1950). [↑](#footnote-ref-26)
26. 26For background on these problems, see Hystad v. Indus. Comm'n, 389 N.W.2d 590 (N.D. 1986); Hystad v. Mid-Con Exploration Co. Exeter, 489 N.W.2d 571 (N.D. 1992); Union Texas Petroleum v. Corp. Comm'n., 651 P.2d 652 (Okla. 1982); El Paso Natural Gas Co. v. Corp. Comm'n, 640 P.2d 1336 (Okla. 1981); Kuykendall v. Corp. Comm'n, 634 P.2d 711 (Okla. 1981); Landowners, ***Oil***, Gas & Royalty Owners v. Corp. Comm'n, 420 P.2d 542 (Okla. 1966); Union Pacific Resources Co. v. Texaco, Inc., 882 P.2d 912 (Wyo. 1994). [↑](#footnote-ref-27)
27. 27*See, e.g.*, Exxon Corp. v. Railroad Comm'n, 571 S.W.2d 497 (Tex. 1978). [↑](#footnote-ref-28)
28. 28Initially, pooling regulation was a creature of local governments. The constitutionality of local compulsory pooling ordinances was upheld in Marrs v. City of Oxford, 24 F.2d 541 (D. Kan. 1928, *aff'd* 32 F.2d 134 (8th Cir. 1929). [↑](#footnote-ref-29)
29. 29*See, e.g.*, Carson v. Railroad Comm'n, 669 S.W.3d 315 (Tex. 1984). [↑](#footnote-ref-30)
30. 30*See, e.g.*, Application of Kohlman, 263 N.W.2d 674 (S.D. 1978); Bennion v. ANR Prod. Co., 819 P.2d 343 (Utah 1991); and Matter of SAM ***Oil*** Co., 817 P.2d 299 (Utah 1991). Historically, in North Dakota, parties were carried without a risk penalty, which left little incentive to participate in drilling a well so long as the carried party was confident that other working interest owners would elect to drill. North Dakota's current compulsory pooling statute expressly authorizes a risk penalty. N.D. Cent. Code § 38-08-08. [↑](#footnote-ref-31)
31. 31*See, e.g.*, Youngblood v. Seewald, 299 F.2d 680 (10th Cir. 1961) (construing Oklahoma law). [↑](#footnote-ref-32)
32. 32In Oklahoma, royalty owners are paid by the operator and royalty is calculated on a "weighted-average" approach as though each royalty owner was a lessor of each working interest owner as to their interest in the drilling unit. Shell ***Oil*** Co. v. Corp. Comm'n, 389 P.2d 951 (Okla. 1963) (commonly called the *Blanchard* case) and OKLA. STAT. tit. 52, §§ 570.1 - 570.15 (Production Revenue Standards Act). In contrast, in Texas, royalty is payable on a tract or interest basis-meaning that each lessee pays royalty to its own lessors for production marketed by that lessee. Puckett v. First City Nat'l Bank of Midland, 702 S.W.2d 232 (Tex. App.-Eastland 1985, writ ref'd n.r.e.). [↑](#footnote-ref-33)
33. 33*See, e.g.*, Ward v. Corp. Comm'n, 501 P.2d 503, 508 (Okla. 1972). [↑](#footnote-ref-34)
34. 34*See, e.g.*, Farmers Irrigation District v. Schumacher, 187 Neb. 825, 194 N.W.2d 788, 46 O.&G.R. 600 (1972); Texaco, Inc. v. North Dakota Indus. Comm'n, 448 N.W.2d 621 (N.D. 1989); Cowling v. Board of ***Oil***, Gas & Mining, 830 P.2d 220 (Utah 1991). For discussion, see generally Owen L. Anderson, *Compulsory Pooling in North Dakota: Should Production Income and Expenses Be Divided From Date of Pooling, Spacing or 'First Runs*'?, 58 N.D.L. REV. 537 (1982), reprinted, 20 PUB. LAND & RESOURCES L. DIG. 426 (1983). [↑](#footnote-ref-35)
35. 35U. S. Const. art. IV, § 3, cl. 2. [↑](#footnote-ref-36)
36. 36Kleppe v. New Mexico, 426 U.S. 529, 543 (1976) (barring states from regulating wild burros in a manner that is inconsistent with federal legislative policy). [↑](#footnote-ref-37)
37. 3741 Stat. 437 *et seq.* (1920) (governing so-called public domain lands). For laws governing the leasing of acquired lands of the United States for ***oil*** and gas development, see the Mineral Leasing Act for Acquired Lands, 61 Stat. 913 (1947), codified at 30 U.S.C. § 351 *et seq.* [↑](#footnote-ref-38)
38. 3830 U. S. C. § 187. [↑](#footnote-ref-39)
39. 39*Id.* at § 189. A similar provision is found in the Act governing the leasing of acquired lands. *Id.* at § 357. However, acquired lands are more susceptible to lawful state regulation because these lands were formerly owned by private parties or perhaps by a state or local government. [↑](#footnote-ref-40)
40. 40*See, e.g.*, Kirkpatrick ***Oil*** & Gas Co. v. United States, 675 F.2d 1122, 1124 (10th Cir. 1982), distinguishing Texas ***Oil*** & Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366, 368 (W.D. Okla. 1967). [↑](#footnote-ref-41)
41. 4130 U.S.C. § 226(m), formerly codified as § 226(j). This provision authorizing communitization was added to the MLA in 1946. 60 Stat. 952 (1946). [↑](#footnote-ref-42)
42. 42For example, field-wide unit agreements to enhance recovery or federal exploratory unit agreements are factually distinguishable from communitization, which ordinarily determines the acreage attributable to a single or first well drilled in a drilling unit. Moreover, the legal benefits and consequences are different. *Cf.*, 43 C.F.R. § 3105.1, Part 3180, and Part 3186 with § 3105.2. [↑](#footnote-ref-43)
43. 43***Oil*** and Gas Adjudication Handbook: ***Oil*** and Gas Leasing, BLM Manual Handbook 3100-1, Rel. 3-122 (Sept. 6, 1985), http://www.mt.blm.gov/oilgas/leasing/handbooks/3100/3100.html, defines "communitization agreement" as "an agreement which allows the bringing together of leases sufficient for the granting of well permit(s) under applicable State spacing requirements. Communitization involves one or more specific geologic formations." This definition is a bit deceptive because the BLM can require communitization in the absence of state spacing as well as communitization that is inconsistent with state spacing orders. A more accurate and complete definition is: "an agreement where all parties holding working interests in a spacing unit for a certain formation or formations, *usually set by* State ***Oil*** and Gas Commission order, combine those leases interests and consider operations conducted anywhere in the spacing unit as if they were on each lease." ***Oil*** and Gas Adjudication Handbook, Cooperative Conservation Provisions, BLM Manual Handbook 3105-1, Rel. 3-293 (Rev. 1994) (emphasis added), http://www.mt.blm.gov/oilgas/leasing/handbooks/3105/3105.html. [↑](#footnote-ref-44)
44. 4430 U.S.C. § 226(m). [↑](#footnote-ref-45)
45. 4543 C.F.R. § 3162.3-1. [↑](#footnote-ref-46)
46. 46For communitization regulations, see 43 C.F.R. § 3105.2. This regulation applies to both public domain, 43 C.F.R. § 3100.0-3(a), and to acquired lands, 43 C.F.R. § 3100.0-3(b). [↑](#footnote-ref-47)
47. 47The federal ***oil*** and gas lease form specifies that "Lessor reserves the right ... to require lessee to subscribe to a cooperative or unit plan, within 30 days of notice, if deemed necessary for proper development and operation of the area, field, or pool embracing these leased lands." United States Dep't of the Interior, Bureau of Land Management, Offer to Lease and Lease for ***Oil*** and Gas, Form 3100-11 (January 2006). [↑](#footnote-ref-48)
48. 48Ventura County v. Gulf ***Oil*** Corp., 601 F.2d 1080 (9th cir. 1979), *aff'd mem*, 445 U.S. 907 (1980) (construing the MLA and barring county from enforcing a zoning ordinance on federal land that would have prohibited the federal lessee from drilling without a special-use permit from the county government). See also, South Dakota Mining Assoc, v. Lawrence County, 155 F.3d 1005 (10th Cir. 1998) (construing the Mining Act and barring the county from enforcing a ban on surface mining). [↑](#footnote-ref-49)
49. 49*See, e.g.*, Kirby Exploration Co. of Texas, 149 IBLA 205 (1999), *aff'g in part, rev'g in part*, 143 IBLA 133 (1998) (finding that the Oklahoma "weighted average" approach to the payment of royalty on pooled acreage was inconsistent with the "gross proceeds" approach to the payment of royalty mandated by the MLA). [↑](#footnote-ref-50)
50. 50California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 ((1987) (upholding state regulation of hard- rock mining activities on federal land where the regulations imposed reasonable limits on, but did not prohibit, mining; however, four justices dissented on the preemption issue, arguing that federal law had preempted state law). [↑](#footnote-ref-51)
51. 51Not surprisingly, state cases have generally upheld state regulation of federal lands, but their importance lies principally in their willingness to allow state agencies to regulate federal lands. *See, e.g.,* Gulf ***Oil*** Corp. v. Wyoming ***Oil*** & Gas Conservation Comm'n, 693 P.2d 227 (Wyo. 1985) (upholding the conservation agency's authority to condition a permit to drill on federal land); v. Corp. Comm'n, 617 P.2d 177 (Okla. 1979) (upholding state regulation of well plugging on restricted lands of the Five Nations).

    Occasionally, state courts have jurisdiction over questions related to the effect of a communitization agreement on private lands included in a communitized area. *See, e.g.*, Kysar v. Amoco Prod. Co., 93 P.3d 1272 (N.M. 2004) (answering certified questions on access and use of private lands included in a communitized area) and Kysar v. Amoco Prod. Co., 379 F.3d 1150 (10th Cir. 2004) (after certification). Regarding federal leases, once they are committed to a communitization agreement, the entire communitized area, excluding uncommitted portions of federal leases, are treated as a single lease for purposes of surface use authorizations. *See*, http://www.blm.gov/nhp/efoia/mt/2006/im/Q6mtm038.pdf.

    State land departments may enter into or approve communitization agreements with the federal government where state lands are included in a communitized area. *See, e.g.*, Montana Board of Land Comm'rs, Minutes, page 2, April 19, 2004, http://dnrc.mt.gov/commissions/land board/2004/Apri104\_minutes.pdf. [↑](#footnote-ref-52)
52. 52*See, e.g.*, Kirkpatrick ***Oil*** & Gas Co. v. United States, 675 F.2d 1122, 1124 (10th Cir. 1982) (timely Secretarial consent to communitization is essential to bind the federal government to a state spacing and pooling order) and Texas ***Oil*** & Gas Corp. v. Phillips Petroleum Corp., 406 F.2d 1303 (10th Cir. 1969) (construing 30 U.S.C. §§ 187 and 189 as requiring federal approval of a state well-spacing and compulsory-pooling order through federal consent to a communitization agreement). State cases also emphasize the importance of federal consent to state regulations. *See, e.g.*, Ohmart v. Dennis, 196 N.W.2d 181 (Neb. 1972) (finding that federal consent to a communitization of federal land with fee land authorized the conservation agency to force pool the federal and fee land) and Kardokus v. Walsh, 797 P.2d 322 (Okla. 1990) (finding that timely consent to communitization was necessary to perpetuate a fee lease within a pooled unit where well had been drilled on an Indian lease). [↑](#footnote-ref-53)
53. 53*See, e.g.*, Homestake Royalty Corp, 130 IBLA 36 (1994) and San Juan Alliance, 129 IBLA 1 (1994). [↑](#footnote-ref-54)
54. 54*See, e.g.*, N.D. Cent. Code § 38-08-04 and Utah Code Ann. § 40-6-18.. [↑](#footnote-ref-55)
55. 55NEV. REV. STAT. § 522.140. [↑](#footnote-ref-56)
56. 56Colo. Rev. Stat. § 34-60-105. *See also*, Mont. Code Ann. § 82-11-103 and Wyo. Stat. § 30-5-118. [↑](#footnote-ref-57)
57. 57Wolff v. Belco-Dev. Corp., 736 P.2d 730 (Wyo. 1987) (concerning fee leases within a communitized area). Beware that this general statement ignores the issue of whether production within the unit will also hold those portions of leased tracts that are outside the communitized unit boundaries. Regarding federal leases, federal law governs, which is discussed below. Regarding fee leases, the answer depends upon whether the state spacing and pooling statutes segregate the unit and nonunit portions of leased tracts and may further depend on what the lease provides. These fee lease issues are beyond the scope of this essay. For detailed discussion see, Kramer & Martin, *supra* note 1, at Ch. 20. [↑](#footnote-ref-58)
58. 58*See, e.g.*, Kirkpatrick ***Oil*** & Gas Co. v. United States, 675 F.2d 1122 (10th Cir. 1982). [↑](#footnote-ref-59)
59. 59A failure to obtain timely approval may arise because the application for approval of a communitization agreement is filed without the signatures of all necessary parties. *See, e.g.*, Daniel T. Davis, 143 IBLA 317 (1998). [↑](#footnote-ref-60)
60. 60Samedan Petroleum Corp. v. Cotton Petroleum Corp, 466 F. Supp. 521 (W.D. Okla. 1978). [↑](#footnote-ref-61)
61. 61Kardokus v. Walsh, 797 P.2d 322 (Okla. 1990). [↑](#footnote-ref-62)
62. 62Shearn v. Ward Petroleum Corp., 808 F. Supp. 1530 (W.D. Okla. 1992). [↑](#footnote-ref-63)
63. 63Likewise, failing to timely communitize can result in an obligation to pay excess or compensatory royalty. *Cf.*, Benson-Montin-Greer Drilling Co., 123 IBLA 341 (1992); Bruce Anderson, 80 IBLA 286 (1984); and Kirkpatrick ***Oil*** and Gas Co., 15 IBLA 216 (1974). [↑](#footnote-ref-64)
64. 64*See supra* Section V, note 34 and accompanying text. *See generally, Compulsory Pooling in North Dakota: Should Production Income and Expenses Be Divided From Date of Pooling, Spacing or 'First Runs'?*, 58 N.D.L. Rev. 537 (1982), reprinted, 20 Pub. Land & Resources L. Dig. 426 (1983). [↑](#footnote-ref-65)
65. 6543 C.F.R. Subpart 3105. In addition, the BLM may enter into communitization agreements to prevent drainage from federal lands. 43 C.F.R. 3162.2. In deciding how best to protect federal land against drainage, the "BLM will consider applicable Federal, State, or Tribal rules, regulations, and spacing orders." *Id.* at § 3162.2-2 (a). Although beyond the scope of this essay, regulations relating to the payment of federal royalty on production from communitized leases may be found at 30 C.F.R. § 202.100(e) and (f) (***oil***), § 202.150(e) and (f) (gas), § 202.551 and .552 (Indian lands) (gas). Responding to a mandate in Section 352 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), a new regulation provides that federal acreages included in communitization agreements are not subject to the acreage limitations that limit the number of federal ***oil*** and gas lease acres that any one person or entity may hold. 43 C.F.R. § 3101.2-3. For geothermal communization regulations, see 43 C.F.R. Subpart 3217. [↑](#footnote-ref-66)
66. 6643 C.F.R. § 3105.2-3(b). [↑](#footnote-ref-67)
67. 67*Id.* [↑](#footnote-ref-68)
68. 68***Oil*** and Gas Adjudication Handbook, Cooperative Conservation Provisions, BLM Manual Handbook 3105-1, Rel. 3-293 (Rev. 1994), http://www.mt.blm.gOv/oilgas/leasing/handbooks/3105/3105.html. The most user-friendly manual, containing the basic information needed to secure communitization approval and including sample communitization agreements for federal, Indian, and combination federal and Indian lands, is the Operator's Handbook for Communization Agreement Submittals (undated) (hereafter Operator's Handbook) found on the Utah BLM website, http://www.blm.gov/utah/minerals/CA-IlANDBOOK.pdf. The downloadable version of this handbook is not dated and has no BLM publication number. A manual primarily designed to assist federal officials in administering communitization may also be of some assistance to applicants, particularly in dealing with unusual communitization situations. *See* Communitization Manual, BLM Manual 3160-9, Rel. 3-215 (July 7, 1988) (hereafter Manual 3160-9) http://www.mt.blm.gov/oilgas/resmgmt/communitization.html. From this website, you can download a Microsoft Word version of a model communitization agreement for federal lands as well as one for Indian lands. *See also*, http://www.blm.gov/utah/vernal/minerals/FEDCA.doc and http://www.blm.gov/utah/vernal/minerals/CASUCCESSOR.doc.

    Other manuals briefly discussing communitization include ***Oil*** and Gas Adjudication Handbook, Relinquishments, Terminations, and Cancellations, BLM Manual Handbook 3108-1, Rel. 3-301 (Rev. 1995), http://www.mt.blm.gOv/oilgas/leasing/handbooks/3108/handbook3108.pdf and ***Oil*** and Gas Handbook, Continuation, Extension, or Renewal of Leases, BLM Manual Handbook 3107-1, Rel. 3-291 (Rev. 1994), http://www.mt.blm.gOv/oilgas/leasing/handbooks/3107/3107-1.pdf and BLM Manual 3107 (undated), http://www.blm.gOv/nhp/efoia/wo/manual/3107.html. Notwithstanding the use of the term "adjudication" in two of these manuals, all manuals are used by BLM personnel in the administration of leases. [↑](#footnote-ref-69)
69. 69Burlington Resources ***Oil*** & Gas Co., 150 IBLA 178, 187 (1999) [↑](#footnote-ref-70)
70. 70Arizona Silica Sand Co., 148 IBLA 236, 243 (1999); and Howard B. Keck, Jr., 124 IBLA 44, 55 (1992). [↑](#footnote-ref-71)
71. 7130 U.S.C. § 226(m). [↑](#footnote-ref-72)
72. 72Depending upon ownership patterns in the unit, the direction may affect the allocation of production among owners, and drilling on the designated unit may serve to perpetuate federal leases that would have expired but for the direction of the unit. [↑](#footnote-ref-73)
73. 73Federal regulations expressly authorize these MOUs. 43 C.F.R. § 3160.2. [↑](#footnote-ref-74)
74. 7452 Stat. 347 (1938), largely codified at 25 U.S.C. §§ 396a - 396g. The leasing of allotted lands is authorized by 35 Stat. 783 (1909) as amended by 69 Stat. 540 (1955), codified at 25 U.S.C. § 396. The statutory authority for the Secretary to approve or reject communization agreements is derived from 25 U.S.C. § 396d. In addition, Indian Tribes, with approval of the Secretary of the Interior, may enter into various types of agreements for mineral exploration and development, including ***oil*** and gas. These agreements could include or contemplate the creation of various kinds of cooperative units. Indian Mineral Development Act of 1982 (IMDA), 96 Stat. 1938 (1982), codified at 25 U.S.C. § 2101 *et seq.* Agreements entered into under this Act are not subject to the provisions of the Omnibus Leasing Act of 1938. 25 U.S.C. § 2105. For IMDA regulations, see 25 C.F.R. Part 225. [↑](#footnote-ref-75)
75. 75Indian lands include lands owned by individual Indians or Alaska natives as well as tribal lands. 25 C.F.R. § 211.3 and § 212.3. [↑](#footnote-ref-76)
76. 76*See, e.g.*, Kenai ***Oil*** & Gas, Inc. v. Dep't of the Interior, 671 F.2d 383 (10th Cir. 1982); Samedan ***Oil*** Corp, v. Cotton Petroleum Corp., 466 F. Supp. 521 (W.D. Okla. 1978); and San Juan Citizens Alliance, 129 IBLA 1 (1994). [↑](#footnote-ref-77)
77. 7725 C.F.R. § 211.28(c) (tribal land) and § 212.28(c) (allotted land). [↑](#footnote-ref-78)
78. 78*Id.* at § 1.4(a). After consultation with affected Indians, the Secretary may elect to apply state or local regulation on a case-by-case basis or to a specific geographic area. *Id.* at § 1.4(b). [↑](#footnote-ref-79)
79. 79*Id.* at § 211.28(tribal lands) and § 212.28 (allotted lands). [↑](#footnote-ref-80)
80. 80*Id.* at § 211.28(h) (tribal lands) and § 212.28(h) (allotted lands). [↑](#footnote-ref-81)
81. 81Tripartite Memorandum of Understanding Between the Bureau of Indian Affairs, the Bureau of Land Management, and the Minerals Management Service Regarding Working Relationships Affecting Mineral Lease Activities, BLM MOU WO600-9111 (September 6, 1991) (not locatable on internet), replacing Tripartite MOU of December 19, 1988, and superseding the BLM-MMS MOU of February 9, 1987, and the MMS-BIS MOU of August 19, 1985. [↑](#footnote-ref-82)
82. 82*Id.* at Attachment A at A-6. The role of MMS is to monitor and administer royalty payments. [↑](#footnote-ref-83)
83. 83Memorandum of Understanding Concerning the Management of ***Oil*** and Gas Functions on Indian Lands in Montana, North and South Dakota, BLM-MOU-MT920-0121 (August 2001). [↑](#footnote-ref-84)
84. 84*See, e.g.*, Poafpybitty v. Skelly ***Oil*** Co., 390 U.S. 265, 368 (1968). *See generally* Lynn H. Slade, The Federal Trust Responsibility in a Self-Determination Era (May 20, 1999) http://www.modrall.com/articles/article 26.html; Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327 (1995) and Michael E. Webster, *Mineral Development of Indian Lands: Understanding the Process and Avoiding the Pitfalls*, 39 Rocky Mt. Min. L. Inst. § 2.01-.04 (1993). [↑](#footnote-ref-85)
85. 85*See, e.g.*, Assiniboine & Sioux Tribes v. Board of ***Oil*** and Gas, 792 F.2d 782 (9th Cir. 1986); Armstrong v. Mapleleaf Apartments, Inc., 508 F.2d 518 (10th Cir. 1975); and Home-Stake Royalty Corp., 130 IBLA 36 (1994), *on rehearing*, 136 IBLA 254 (1996). *See also*, Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation, Montana v. Calvert Exploration Co., 223 F. Supp. 909 (Dist. Mt. 1963), *rev'd. on jurisdictional grounds sub nom.*, Yoder v. Assiniboine and Sioux Tribes, 339 F.2d 360 (9th Cir. 1964). [↑](#footnote-ref-86)
86. 862 5 C.F.R. § 211.28(a) (tribal land) and § 212.28(a) (allotted land). [↑](#footnote-ref-87)
87. 87*See, e.g.*, Order and Judgment in Delgado et al. v. Dep't of the Interior, D.C. No. 95-CV-262 (W.D. Okla. July 10, 1998) (unreported), http://www.kscourts.org/CA10/cases/1998/07/97-6125.htm. [↑](#footnote-ref-88)
88. 88*Id.* at § 211.3 (tribal land) and § 212.3 (allotted land). [↑](#footnote-ref-89)
89. 89*Id.* at § 211.28(a) (tribal land) and § 212.28(a) (allotted land). [↑](#footnote-ref-90)
90. 90Cotton Petroleum Corp. v. United States Dept, of Interior, 870 F.2d 1515, 1516 (10th Cir. 1989); Cheyenne-Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583, 585 (10th Cir. 1992); Kenai ***Oil*** and Gas, Inc. v. Dep't of the Interior, 671 F.2d 383 (10th Cir. 1982); Woods Petroleum Corp. v. Dept, of Interior, 47 F.3d 1032, 1035 n.1 (10th Cir. 1995). [↑](#footnote-ref-91)
91. 915 U.S.C. § 706(2)(A). [↑](#footnote-ref-92)
92. 92*See generally* Randolph L. Marsh, *Secretarial Discretion in Communitization of Indian* ***Oil*** *and Gas Leases: The Tenth Circuit Speaks with a Forked Tongue*, 32 Tulsa L.J. 779 (1977). [↑](#footnote-ref-93)
93. 93Kenai ***Oil*** and Gas, Inc. v. Dep't of the Interior, 671 F.2d 383 (10th Cir. 1982). [↑](#footnote-ref-94)
94. 94*Id.* [↑](#footnote-ref-95)
95. 95*Id.* at 387. [↑](#footnote-ref-96)
96. 96*Id.* at 388-89. [↑](#footnote-ref-97)
97. 97*Id.* at 389. [↑](#footnote-ref-98)
98. 98Cotton Petroleum Corp. v. United States Department of the Interior, 870 F.2d 1515 (10th Cir. 1989). [↑](#footnote-ref-99)
99. 99The court quoted a portion of these guidelines:

    2. The Secretary has the discretion to approve or disapprove Communitization or Unit Agreements based on a determination of whether approval would be in the best interests of the Indian lessor. *Area Directors and Superintendents must prepare such a determination in writing, based on logical engineering and economic facts, whether the agreement is approved or disapproved*, and that document should be given to the applicant and the Indian lessor. In determining whether the agreement is or is not in the best interest of the Indian lessor, the following should be considered:

    1. The long term economic effects of the agreement must be in the best interest of the Indian lessor and we must be able to document these effects.
    2. The Minerals Management Service is required to recommend approval or disapproval based upon the engineering and technical aspects of the agreement to assure protection of the interests of the Indian lessor, and BIA officials should rely on that recommendation,
    3. *The lessee in question must have complied with the terms of the lease in all respects, including the commencement of drilling operations, or actual drilling, or actual production in paying quantities (depending on the terms of the lease), within the unit area prior to the expiration date of any Indian lease*.
    4. Central office must approve any format of a Communitization Agreement developed by an Agency or Area Office before implementation.
    5. Applications to form Communitization Agreements should include an affidavit certifying that all Indian mineral owners have been given notice of the pending action.

    \* \* \*

    1. The party applying for approval of a Communitization Agreement may be requested to provide copies of farm out or similar type agreements in cases where such agreements could have a bearing upon the ownership of the working interest in the unit.

    *Id.* at 1518 (emphasis supplied by court). [↑](#footnote-ref-100)
100. 100*Id.* at 1529. [↑](#footnote-ref-101)
101. 101*Id.* at 1525. [↑](#footnote-ref-102)
102. 102*Id.* at 1532. [↑](#footnote-ref-103)
103. 103Cheyenne-Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583, 585 (10th Cir. 1992). [↑](#footnote-ref-104)
104. 104*Id.* at 586. [↑](#footnote-ref-105)
105. 105*Id.* at 589. [↑](#footnote-ref-106)
106. 106*Id.* [↑](#footnote-ref-107)
107. 107*Id.* [↑](#footnote-ref-108)
108. 108*Id.* at 590. [↑](#footnote-ref-109)
109. 109*Id.* at 590-91. [↑](#footnote-ref-110)
110. 110*Id.* at 591. [↑](#footnote-ref-111)
111. 111Woods Petroleum Corp. v. Department of the Interior, 47 F3d 1032 (1995) (en banc), *cert, den.*, Spottedwolf v. Woods Petroleum Corp., 516 U.S. 808 (1995). [↑](#footnote-ref-112)
112. 112Woods Petroleum Corp. v. United States Department of the Interior, 18 F.3d 854 (10th Cir. 1994). [↑](#footnote-ref-113)
113. 113Woods, 47 F3d 1032 (1995) (en banc). [↑](#footnote-ref-114)
114. 114*Id.* at 1038. [↑](#footnote-ref-115)
115. 115*Id.* at 1038-39. [↑](#footnote-ref-116)
116. 116*Id.* at 1040. [↑](#footnote-ref-117)
117. 117In distinguishing the cases, the court actually misstated the facts in *Kenai*. In *Kenai*, the well was drilled on non-Indian land and the lessee sought to communitize nonproductive Indian land with the productive Indian acreage. Kenai, 671 F.2d at 384. Yet the court in *Woods* stated that the well in *Kenai* was located on Indian land. Woods, 47 F.3d at 1039. [↑](#footnote-ref-118)
118. 118*Id.* at 1040. [↑](#footnote-ref-119)
119. 119Id. at 1034. [↑](#footnote-ref-120)
120. 120Kenai, 671 F.2d at 388-89 (concurring opinion). [↑](#footnote-ref-121)
121. 121Woods, 47 F.3d at 1039. [↑](#footnote-ref-122)
122. 122Note that current Indian owners are entitled to all monies generated from an Indian lease. No monies, such as royalty, are held as corpus in a trust fund. Thus, one could argue that the Secretary fulfills this fiduciary duty simply by acting as a selfish lessor would likely act in similar circumstances. For example, suppose the lessor of a fee lease strikes the pooling clause. The effect would be that the lessor would have to approve of any attempt by the lessee to pool the leased premises voluntarily. Presumably, in an area undergoing ***oil*** and gas development, the lessor would disapprove a pooling proposal if he were confident that the lease would expire so that he could negotiate a new lease for an additional bonus and a higher royalty. Would it matter if, instead of striking the pooling clause, the lessor inserted a provision requiring his approval of voluntary pooling occurring in the last year of the lease primary term? Absent some duty of good faith-to not withhold approval unreasonably, the lessor could do as he pleased. [↑](#footnote-ref-123)
123. 12325 C.F.R. § 211.28 (tribal land) and 25 C.F.R. § 212.28(b) (allotted land). The ***oil*** and gas regulations for Indian lands are being revised to be more "user friendly;" however, no substantive change in the communitization regulations is expected. [↑](#footnote-ref-124)
124. 12425 C.F.R. § 211.28(b) (tribal land). In the counterpart regulation for allotted land, there is no consultative requirement. 25 C.F.R. § 212.28(b) (allotted land). When this essay went to press, the ***oil*** and gas regulations for Indian lands were being revised to be more "user friendly;" however, no substantive change in the communitization regulations is expected. [↑](#footnote-ref-125)
125. 125*Id.* at § 211.28(b) (tribal land) and § 212.28(b) (allotted land). Kenneth E Abbott, 20 IBIA 268 (1991) (where lease expressly required consent of Indian, this consent could not be overridden by federal officials). Ordinarily, Indian leases do not require Indian consent. Rather, they may provide that the parties "agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior...." *See, e.g.*, Cheyenne-Arapahoe Tribes v. United States, 966 F.2d 583, 585-586 (10th Cir. 1992) (setting forth this clause and finding that it does not require Indian consent to communitization). [↑](#footnote-ref-126)
126. 12625 C.F.R. at Part 226. [↑](#footnote-ref-127)
127. 127*Id.* at § 226.9(a). [↑](#footnote-ref-128)
128. 128*Id.* [↑](#footnote-ref-129)
129. 129*Id.* at § 226.15. [↑](#footnote-ref-130)
130. 130This information was provided by Alan R. Woodcock, Field Solicitor, and Tracie A. Williamson, Attorney, United States Department of the Interior, Office of the Tulsa Field Solicitor. [↑](#footnote-ref-131)
131. 13161 Stat. 731, § 11 (1947), commonly called the Stigler Act. [↑](#footnote-ref-132)
132. 132The Five Civilized Tribes, now commonly referred to as the Five Nations, consist of the Cherokee,, Choctaw, Chickasaw, Muscogee (Creek), and Seminole Nations. [↑](#footnote-ref-133)
133. 133For support of its position, Oklahoma relies on Currey v. Corp. Comm'n, 617 P.2d 177 (Okla. 1979), *cert den*. 452 U.S. 938, *reh. den*. 453 U.S. 927 (1981). [↑](#footnote-ref-134)
134. 134This information was provided by Alan R. Woodcock, Field Solicitor, and Tracie A. Williamson, Attorney, United States Department of the Interior, Office of the Tulsa Field Solicitor. For additional information regarding these inherited restricted lands, see Appendix A and Appendix B (Oklahoma), below. [↑](#footnote-ref-135)
135. 13525 C.F.R. at Part 213. [↑](#footnote-ref-136)
136. 136*Id.* at 213.31(a). [↑](#footnote-ref-137)
137. 137*Id.* at. § 213.31(a). [↑](#footnote-ref-138)
138. 138*Id.* at § 213.31(b). [↑](#footnote-ref-139)
139. 139*Id.* at Part 227. [↑](#footnote-ref-140)
140. 140For example, in contrast with non-Indian federal leases, the Indian regulations provide: "Any lease committed in part to any [communitization] ... shall be segregated into a separate lease or leases as to the lands committed and lands not committed to the agreement. Segregation shall be effective on the date the agreement is effective." 25 C.F.R. § 211.28(g) (tribal land) and § 212.28(g) (allotted land). Accordingly, an Indian communitization agreement that communitizes only a part of the Indian lease must contain the following provision:

     Any portion of an Indian leasehold interest not included within the communitized area is hereby segregated from that portion included within the communitized area, and is considered as a separate lease with the same parties subject to all of the terms of the original lease, excepting only the portion committed thereto.

     Communitization Manual, BLM Manual 3160-9, Rel. 3-215, .21A8 and Appendix 3, p. 2, § 6 (July 7, 1988), http://www.mt.blm.gov/oilgas/resmgmt/communitization.html. [↑](#footnote-ref-141)
141. 14196 Stat. 1938 (1982), codified at 25 U.S.C. § 2101 *et seq*. [↑](#footnote-ref-142)
142. 1422005 Energy Policy Act Title V § 2604, Pub. L. No. 109-58, § 501 *et se 11*9 119 Stat. 594,763 *et seq*. (2005). [↑](#footnote-ref-143)
143. 143For further discussion, see Andrea S. Miles, *Tribal Energy Resource Agreements: Tools For Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental and Trust Responsibilities*?, 30 Am. INDIAN L. REV. 461 (2006-2006). [↑](#footnote-ref-144)
144. 144As a matter of policy, the BIA and BLM have traditionally taken the position that the OCC has no authority to pool Indian interests. Section 1 of the 1947 Act clearly contemplates that restricted Indian owners of the Five Civilized Tribes allotments should be leased through the District Court where the lands are located. However, the BIA will approve pooling orders for individuals who cannot be located. Nevertheless, the federal agencies suspect that operators are force pooling unleased restricted Indian owners through the OCC and escrowing a 1/8 royalty, which may or may not ever be collected by the Indian mineral owner. [↑](#footnote-ref-145)
145. 145Specifically, the Secretary will consider the long term economic effects, technical aspects, whether the Indian mineral owners have received notice, whether they have cultural or religious preferences or needs that must be addressed, whether the lessee has and will comply with the terms and conditions of the lease, and whether the interests and correlative rights of the Indian lessors are protected. *Kenai* ***Oil*** *& Gas, Inc. v. Department of the Interior*, 671 F.2d 383 (10th Cir. 1982); *Cheyenne -Arapaho Tribes of Oklahoma*, 966 F.2d 583 (10th Cir. 1992); *See also, Cotton Petroleum Corp. v. Department of Interior*, 870 F.2d 1515 (10th Cir. 1989). [↑](#footnote-ref-146)