Honorable Carolyn B. Maloney  
House of Representatives  
1504 Longworth House Office Building  
Washington, D.C. 20515-3214

Dear Ms. Maloney:

Secretary Babbitt has asked that I respond to your letter of January 23, 1997, regarding the concerns you have expressed about settlement agreements that the Department of the Interior (DOI) has entered into with oil and gas producers to resolve outstanding disputes over royalties owed under Federal and Indian oil and gas leases. Your letter expresses particular concern about settlement agreements entered into with Exxon and Chevron in 1993 and 1994, respectively. These two agreements were settlements which resolved a range of outstanding royalty payment issues with those producers for certain time periods.

Your letter questions whether the DOI has complied with "standards for agency compromise of claims established by Congress." You state that my letter to you of November 1, 1996, "raises some serious questions about MMS' [the Minerals Management Service's] compliance with applicable statutes and regulations." Your letter then contains a discussion of what you believe are the applicable statutes, regulations, and standards. Among other things, you emphasize your belief that only the Department of Justice may settle certain matters. You also imply that if the amount of a royalty claim is uncertain, it should be referred to the General Accounting Office (GAO). You further state that certain Indian claims were settled "without participation of the affected tribes."

Four days after your letter, on January 27, 1997, your office issued a press release expanding on these statements, maintaining that MMS held "secret meetings with large oil companies resolving huge royalty disputes without proper authorization." It further implies that affected States and Indian tribes had no role in the settlement negotiations.

The statements and legal analysis in your letter, and the positions taken in your office's press release, are based on a misapprehension of both the applicable law and the facts regarding these settlements. In large measure, your misunderstanding relates to the fact that most of the issues being settled by MMS are not "claims" of the government. The fact that an auditor makes an initial determination that royalty is owed and issues an order to pay does not bind the auditor's superiors within the Department, and does not itself constitute a "claim." I hope to be able to resolve these misunderstandings here. MMS has acted well within its authority in entering into settlement agreements with oil and gas producers on Federal and Indian leases.
First, I wish to clarify that the Department of Justice was a party to the 1994 Chevron settlement agreement and participated in settlement discussions. Not only did the Department of Justice sign that agreement, but approval for the Justice Department’s signature came from the Associate Attorney General of the United States. That settlement resolved a wide range of disputed royalty issues, including several that were pending in litigation in court. Every settlement involving any court litigation always, of necessity, has included the Justice Department.

Moreover, contrary to the implications of your office’s press release, representatives of the State of California were part of the settlement negotiations from the beginning. They not only concurred in the settlement, they and their counsel participated in drafting the California crude oil qualification provision contained in the Chevron settlement agreement. Although the State’s approval is not required for the MMS to enter into a settlement with Federal lessees, MMS always has cooperated closely with the States affected by a royalty settlement. Had the California representatives believed that the overall settlement figure did not adequately take the crude oil valuation issue into account, they would not have concurred in the agreement.

In a similar vein, the statements in your letter regarding the participation of Indian tribes are not accurate. Disputed issues involving tribal leases were a very small part of the settlement. While tribal representatives did not participate in the negotiating sessions directly, no issue involving tribal leases was compromised. All disputed tribal royalty issues were paid in full. The tribes were afforded an opportunity even after the settlements were concluded to review the amounts they were paid. No tribe had any objection to the amount it received. In addition, MMS decided to include tribes on any settlement team whose negotiations might affect their interest.

With two exceptions, the same observations are also true of the Exxon negotiations. First, Montana represented the affected States. (However, recognizing the significance of the California crude oil issue, a member of the MMS settlement team contacted a representative of the California State Controller’s Office, Mr. Bob Fees, who advised that California had no objection to a settlement that included California crude oil as part of the compromise.) Second, the Justice Department was not a signatory to the agreement because it was not legally required to be. The reasons for this will be apparent from the analysis of the legal assertions contained in your January 23 letter which now follows.

Your statements that MMS has violated the Federal Claims Correction Act (as amended by the Debt Collection Act of 1982 (DCA)) and the General Accounting Office/Department of Justice (GAO/DOJ) standards and has acted without proper authority in entering into its royalty settlements are incorrect for at least two reasons. The first reason concerns what constitutes a "claim" to which the DCA and the GAO/DOJ standards apply. The second concerns the relationship of the DCA and the GAO/DOJ standards to other laws.

We must first quote the pertinent provisions. The DCA, at 31 U.S.C. § 3711(a)(2) provides that the head of an executive agency

may compromise a claim of the Government of not more than $100,000 (excluding interest) or such higher amount as the Attorney General may from time to time prescribe . . . (emphasis added).
Section 3711(e)(2) then prescribes that the head of an executive agency acts under "standards that the Attorney General and the Comptroller General may prescribe jointly" (i.e., the GAO/DOJ standards). Those standards are found at 4 C.F.R. parts 101-105.

The DCA and the GAO/DOJ standards expressly apply to claims. In the GAO/DOJ standards, at 4 C.F.R. § 101.2, a "claim" is defined as "an amount of money or property which has been determined by an appropriate agency official to be owed to the United States from any person . . . " (emphasis added). That "appropriate agency official" necessarily is the official who acts finally for the Department of the Interior, i.e., the official whose decision is the final determination of the Department.

The fact that an auditor or enforcement official makes an initial determination that royalty is owed and issues an order to pay, does not and cannot bind the auditor's superiors within the Department. The MMS Director has the authority to affirm, modify, or overturn orders to pay issued by the subordinate officials. Moreover, the order is suspended while administrative appeals are pending. 30 C.F.R. § 243.3; 43 C.F.R. § 4.21. Thus, while an appeal is pending, the Department could not take action to collect the amount the auditor asserted was underpaid. When an order is still in the administrative appeals process, a final determination of what the DOI believes the lessee owes has not yet been made. That determination is made (1) when a final decision for the Department is issued (either by the Interior Board of Land Appeals (IBLA) or an Assistant Secretary), or (2) when a lower-level decision (either the MMS Director's decision or the underlying order itself) is not appealed and thus becomes final. Only then does a disputed unpaid royalty become a "claim" under the DCA, to which the requirements of the DCA and the joint GAO/DOJ standards could apply.

Thus, the matters resolved in the settlements that were not yet in judicial litigation were not "claims" subject to the DCA and the GAO/DOJ standards. It is for this reason that the Justice Department was not a signatory to the Exxon settlement. None of the matters resolved in that settlement was before the courts. It follows that DOI did not violate the GAO/DOJ standards in not obtaining the Justice Department's signature. Nor, for the same reason, could DOI have violated the standards by not referring a claim to the GAO.

Second, Title 4 C.F.R. section 101.4 provides:

Nothing in this chapter is intended to preclude agency disposition of any claim under statutes and implementing regulations other than Subchapter II of Chapter 37 of Title 31 of the United States Code [the DCA] and these standards, providing for the collection, compromise, termination of collection action, or waiver in whole or in part of such a claim . . .

In the case of oil and gas royalties, there is a statute and implementing regulations other than the DCA that provide for the collection, compromise, or waiver of claims. Section 101(c)(1) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1711(c)(1), provides in pertinent part:

The Secretary shall audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and take appropriate actions to make additional collections or refunds as warranted. (Emphasis added.)
The statute then provides for a variety of audit and collection tools, many of which go beyond the authorities in the DCA. For example, FOGRMA provides for a higher rate of interest on underpayments than the DCA (§ 111(b), 30 U.S.C. § 1721(b)), authority to impose severe civil penalties (together with an accompanying appeal and adjudication process) (§ 109, 30 U.S.C. § 1719), provisions for judicial enforcement (§ 112, 30 U.S.C. § 1722), etc.

Regulations implementing FOGRMA and the several mineral leasing laws provide for administrative appeals to the MMS Director, 30 C.F.R. part 290, and then to the IBLA, 30 C.F.R. § 290.7 and 43 C.F.R. part 4. As noted above, the MMS Director and the IBLA may affirm, modify, or overturn orders to pay royalty issued by subordinate agency audit officials.

The authority to collect and the authority to adjudicate disputes at administrative levels within the agency necessarily implies the authority to compromise and settle matters in dispute before the agency. If superior agency officials did not possess such authority, they could not consider appeals from auditors’ initial orders or modify or overturn those orders when the facts or the law require it. The Director’s and the IBLA’s authority in this respect has never been questioned.

Indeed, section 4 of the recently-enacted Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, Pub. L. No. 104-185, 110 Stat. 1700, in adding a new section 115 to FOGRMA, confirmed the agency’s existing settlement authority. The new section 115(l), 30 U.S.C. § 1725(l), provides:

To expedite collections relating to disputed obligations due within the seven-year period beginning on the date the obligation becomes due, the parties shall hold not less than one settlement consultation and the Secretary and the State concerned may take such action as is appropriate to compromise and settle a disputed obligation, including waiving or reducing interest and allowing offsetting of obligations among leases. (Emphasis added.)

This authority was not a new reform or a grant of new authority, and is nowhere referred to in the legislative history as such. The House Report gave an extensive list of specific “reforms” made in the Fairness Act. Settlement authority was not among the new reforms identified. See, H.R. Rep. No. 104-667, 104th Cong. 2d Sess. 14-15. Moreover, Congress had been informed repeatedly of MMS settlements of royalty disputes. This demonstrates that the quoted provision reflected existing practice rather than adding new authority the agency did not previously possess.

It is our firm belief that the MMS has authority to settle or compromise disputed matters that are before the agency and that are not in judicial litigation. That authority exists independent of the DCA and the GAO/DOJ standards, and is not subject to Justice Department approval.

In short, the MMS has acted well within its authority in entering into settlement agreements with oil and gas producers on Federal and Indian leases. While one may disagree with the terms of any particular settlement, that is different from accusing the agency of acting without authority. MMS has acted with full legal authority.

I wish to emphasize that the Justice Department has been aware of MMS’ royalty settlement procedures for more than a decade. Furthermore, MMS has not been engaged in conspiratorial “secret meetings” with oil companies. Settlement meetings with a company’s several representatives, accountants, and lawyers, with MMS’ representatives, accountants, and lawyers and representatives
of States and/or Indian tribes, were precisely what would be expected when any two contending parties meet to see if a mutually satisfactory resolution to their disputes can be reached in lieu of litigating each and every issue to the bitter end. Moreover, MMS has kept affected States and Indian tribes well informed of settlement proceedings, and in many instances States or tribes have participated directly in negotiating sessions.

Your January 23 letter also states that my letter of November 1 "suggests that MMS has been pursuing the settlements under (the) Alternative Dispute Resolution Act," 5 U.S.C. §§ 571 et seq. My letter stated that it would discuss why "MMS resolves many disputes through Alternative Dispute Resolution." The reference to "Alternative Dispute Resolution" is simply another way of saying "settlement." My letter did not refer to the Alternative Dispute Resolution Act (ADRA) itself. Nevertheless, your letter raises some questions regarding the ADRA that merit brief discussion.

The ADRA was enacted to provide "an explicit statutory authorization allowing federal agencies to use ADR techniques to resolve a dispute regarding the agency's administrative programs ...." S. Rep. No. 101-543, 101st Cong., 2d Sess. 8 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 3931, 3939. It did not operate as a limitation or restriction on other authority to settle disputes which an agency already possessed. MMS was engaged in royalty settlements under the authorities discussed previously years before the ADRA was ever enacted.

Moreover, when section 8(b) of the ADRA amended 31 U.S.C. § 3711 to increase the limit on claims agency heads could settle from $20,000 to $100,000, it did not expand the DCA provision's coverage to matters which do not constitute "claims." Further, the ADRA, at 5 U.S.C. § 572(b)(4) (from which your letter also quotes), instructed that "[a]n agency shall consider not using a dispute resolution proceeding if .... the matter significantly affects persons or organizations who are not parties to the proceedings." (Emphasis added). Congress was concerned that agencies take "special care" to "weigh the effect of a dispute resolution on persons and organizations not party to the proceedings ...." S. Rep. No. 101-543, supra, 1990 U.S. Code Cong. & Admin. News at 3940. As explained above, MMS has done exactly that. Instead of violating the spirit of this provision, as your letter implies, MMS has consistently applied its philosophy.

Finally, your letter suggests that the observation in my letter of November 1 that "[i]n virtually all negotiations, MMS is not compromising a specific and uncontested amount due" means that royalty issues should be referred to the GAO. My prior observation was intended to convey two ideas. The first is that the royalty payors are almost always contesting MMS' assessment, usually on grounds of differing interpretations of law. The second is that in many cases -- those involving orders to the lessee to recompute its royalties on the basis set out in the order -- the exact amount due has not been computed because the "restructured accounting" has not been performed. Neither of these constitutes a reason to refer a royalty dispute to the GAO.

First, the fact that the exact amount due under MMS' view of an issue has not been computed does not mean either that the agency is acting without sufficient information in settlement or that the GAO could somehow compute the exact amounts due. When an audit of carefully sampled leases and

1 Indeed, as your letter quotes from the legislative history, Congress' focus in raising the limit was on ensuring that an agency did not "exceed the settlement authority delegated by the Attorney General to the U. S. Attorneys to settle claims for money damages against the United States," and not on claims which the United States had against other parties. S. Rep. No. 101-543, supra, 1990 U.S. Code Cong. & Admin. News at 3946 (emphasis added).
production months, conducted in accordance with governing GAO and agency audit instructions and Generally Accepted Auditing Standards, reveals a pattern of noncompliance that likely crosses a wide range of leases and production months, MMS will order the lessee to do a royalty recomputation or "restructured accounting" to correct the error. In setting issues which are the subject of restructured accounting orders, MMS, together with State auditors where appropriate, will estimate the amount it believes is due using available production and royalty payment data and the information derived from the sampled leases and production months -- in much the same way as the Internal Revenue Service computes estimates of income tax due. The agency is not simply taking a stab in the dark; it has a rather close estimate of the amount at issue. It is not possible to determine the exact amount in dispute in such a situation without reviewing each individual transaction for every lease for every production month potentially affected by the error. In fact, one of the disputed legal issues is whether MMS has the legal authority to require companies to perform restructured accountings, so at the settlement stage they generally have not been done. For settlement purposes, because of MMS' process of estimating the amounts at issue as described above, it is not necessary to get to exact dollars and cents, and it would not be an efficient use of agency resources or make economic sense to try to do so. Moreover, the GAO, even if a matter were referred to it, would not have any additional tools or information available to it that MMS does not have. There is nothing GAO could do that MMS could not and does not already do.

Second, the fact that the royalty payor is disputing the assessment means that there is often some litigation risk, to a greater or lesser degree, associated with the order and the agency's legal position. That risk must be accounted for in settlement negotiations to protect the interests of the United States and affected States or tribes. The GAO, however, has no experience whatsoever in litigation of these matters and lacks the expertise to evaluate litigation risk accurately.

I hope that this explanation has been helpful to you. We all share the common goal of collecting the proper royalties due to the United States. I trust that I have answered your concerns and have provided the response that you sought. If further information is needed, please do not hesitate to contact me.

Sincerely,

Bob Armstrong
Assistant Secretary, Land and Minerals Management