UNION OIL COMPANY, Appellant TEXACO EXPLORATION AND PRODUCTION INC., FOUR STAR OIL & GAS COMPANY, and DUGAN PRODUCTION CORPORATION, Appellants CROSS TIMBERS OIL COMPANY and AMOCO PRODUCTION COMPANY, Appellants CONOCO, INC., Appellant v. DIRECTOR, FARMINGTON INDIAN MINERALS OFFICE, Appellee	Order Docketing, Dismissing, and Referring Appeals to the Navajo Regional Director, Bureau of Indian Affairs Docket Nos. IBIA 00-71-A IBIA 00-72-A IBIA 00-73-A IBIA 00-74-A July 27, 2000

These four appeals are from separate, but similar, decisions issued by the Director, Farmington Indian Minerals Office (FIMO Director; FIMO), on March 24, 2000. All four decisions concern oil and gas leases of Navajo allotted land. 1/ Each is titled "AMENDED ORDER TO PAY" and holds that the subject lease expired by its own terms for lack of production in paying quantities. Each decision also "orders [the lessee] to pay gross proceeds minus royalties for [the lease] from the period of [dates varying from September 1, 1990,

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1/ The appeal docketed as IBIA 00-71-A was filed by Union Oil Company (Union) from a decision concerning Navajo allotted lease NOOC14203780. The appeal docketed as IBIA 00-72-A was filed by Texaco Exploration and Production, Inc., Four Star Oil & Gas Company, and Dugan Production Corporation from a decision concerning Navajo allotted lease 1420603295. The appeal docketed as IBIA 00-73-A was filed by Cross Timbers Oil Company and Amoco Production Company from a decision concerning Navajo allotted lease NOOC14203611. The appeal docketed as IBIA 00-74-A was filed by Conoco, Inc. from a decision concerning Navajo allotted lease NOOC14203022.

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to December 1, 1995] to the present." For the reasons discussed below, the Board dockets these appeals but dismisses them for lack of jurisdiction and refers them to the Navajo Regional Director, Bureau of Indian Affairs (Regional Director; BIA).

Each of the March 24, 2000, decisions states that it may be appealed "pursuant to 25 CFR § 212.58 under the procedures set forth [in BIA's appeal regulations] at 25 CFR part 2." However, none "identif[ies] the official to whom it may be appealed," as required by 25 C.F.R. § 2.7(c). In their notices of appeal to the Board, all Appellants recognized that there was a question concerning the proper appeal forum. The Appellants in Docket Nos. IBIA 00-72-A, IBIA 00-73-A, and IBIA 00-74-A (hereafter, Texaco et al.) stated that they had filed simultaneous appeals with the Minerals Management Service (MMS). 2/

When these appeals were filed, the Board had little information about FIMO (only what could be gleaned from a brief description on the Department of the Interior web site). 3/ It therefore issued an order requiring the FIMO Director to submit certain information about FIMO's establishment, authorities, and location within the Department's organizational structure. The Board's order also stated that, following receipt of this information, the parties would be given an opportunity to file briefs concerning the Board's jurisdiction over these appeals.

The Board's April 26, 2000, order stated in part:

> As to whether the Board has jurisdiction over these appeals, the threshold determination to be made is whether the [FIMO] Director is an official whose decisions may be appealed to the Board. The Board's jurisdiction is established in 43 C.F.R. § 4.1(b)(2):
>
> > The Board decides finally for the Department appeals to the head of the Department pertaining to:
> >
> > (i) Administrative actions of officials of the Bureau of Indian Affairs, issued under 25 CFR chapter I, except as limited in 25 CFR chapter I or Sec. 4.330 of this part, * * *

2/ Texaco et al. stated that the decisions they received had appeal instructions attached, directing that appeals be filed with MMS. However, they did not furnish the Board with copies of these additional instructions. As noted above, the decisions themselves state that appeals were to be filed under BIA's appeal regulations.

3/ That description indicates that FIMO combines functions of BIA, the Bureau of Land Management (BLM), and MMS and "has a single director to manage all three bureaus' employees." See http://www.doi.gov/ppp/lab-mb-farmington-indian-min-off.html. The Board could not determine from the description whether the Director was a BIA official, let alone a BIA official whose decisions were subject to review by the Board.

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(ii) * * * The Board also decides such other matters pertaining to Indians as are referred to it by the Secretary, the Director of the Office of Hearings and Appeals, or the Assistant Secretary - Indian Affairs for exercise of review authority of the Secretary.

The BIA officials whose decisions may be appealed to the Board under 25 C.F.R. Part 2 are listed in 25 C.F.R. § 2.4(e). [4/]

* * * * * * *

Another jurisdictional question is suggested by the decisions themselves)) whether or to what extent the Board has jurisdiction over the subject matter of the decisions. Decisions holding that oil and gas leases have expired are commonly made by BIA Superintendents or Area Directors (now Regional Directors) under 25 C.F.R. Parts 211-213. When those decisions are made by Area/Regional Directors, the decisions are appealable to this Board. The Board has decided a number of appeals of this nature. Accordingly, it appears that the "lease expiration" parts of the decisions are within the Board's subject matter jurisdiction and thus would be reviewable by the Board if the Director is an official whose decisions may be appealed to the Board.

The Board is not familiar with orders, such as are included in the [March 24, 2000,] decisions, "to pay gross proceeds minus royalties." The decisions do not cite any regulatory authority for these orders. However, the decisions contain citations to various sections of the MMS regulations in 30 C.F.R., suggesting the possibility that the orders were issued under

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4/ 25 C.F.R. § 2.4 provides:

"The following officials may decide appeals:

"(a) An Area Director, if the subject of appeal is a decision by a person under the authority of that Area Director.

"(b) An Area Education Programs Administrator, Agency Superintendent for Education, President of a Post-Secondary School, or the Deputy to the Assistant Secretary--Indian Affairs/ Director (Indian Education Programs), if the appeal is from a decision by an Office of Indian Education Programs (OIEP) official under his/her jurisdiction.

"(c) The Assistant Secretary--Indian Affairs pursuant to the provisions of § 2.20 of this part.

"(d) A Deputy to the Assistant Secretary--Indian Affairs pursuant to the provisions of § 2.20(c) of this part.

"(e) The Interior Board of Indian Appeals, pursuant to the provisions of 43 CFR part 4, subpart D, if the appeal is from a decision made by an Area Director or a Deputy to the Assistant Secretary--Indian Affairs other than the Deputy to the Assistant Secretary--Indian Affairs/Director (Indian Education Programs)."

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> authority set out in the MMS regulations. The Board does not have authority to review decisions issued under 30 C.F.R. Appeal procedures for decisions issued under 30 C.F.R. are set out in 30 C.F.R. Part 290.

Board's April 26, 2000, Order at 2-3.

With respect to this second jurisdictional issue, the Board ordered the FIMO Director to "identify the regulations under which he issued the orders 'to pay gross proceeds minus royalties.'" Id. at 4.

In his response, the FIMO Director stated that he "exercis[es] the oil and gas leasing authority of the Navajo Area Director pursuant to a delegation from the Commissioner [of Indian Affairs]." On this basis, he argued that he "is an Area Director from whom the IBIA may hear an appeal [under] 25 C.F.R. 2.4(e)." FIMO Director's May 10, 2000, Response at 3. Attached to the response were documents concerning FIMO, i.e., a 1996 Memorandum of Agreement establishing the Four Corners Indian Trust Services Laboratory Pilot for the operation of FIMO 5/ and delegations of authority to the FIMO Director from BIA, BLM, and MMS.

As to the second jurisdictional issue, the FIMO Director stated: "[T]he Director has assessed damages in the amount of all gross proceeds minus royalties for the trespass of Appellants. This amount of damages is not articulated in regulations, but rather, is a reasonable assessment by the Director for trespass on allotted Indian lands and the removal of minerals." Id.

Following receipt of the FIMO Director's response, the Board ordered briefing on the Board's jurisdiction over these appeals. In light of the FIMO Director's statement concerning assessment of trespass damages, the Board ordered him "to advise the Board of (1) the statutory authority under which the orders to pay gross proceeds minus royalties were issued, (2) the Interior bureau or office * * * which normally issues such orders, and (3) the appeal route normally applicable to such orders." Board's May 15, 2000, Order.

5/ The Memorandum of Agreement states in part:

"[T]he Pilot will perform most: 1) leasing and lease administration functions; 2) lease inspection and enforcement functions; and 3) royalty management functions. The Department and bureaus will provide legal and technical support services as necessary, particularly BLM (drilling and reservoir management), MMS (revenue collection/disbursement, associated reports processing, and major payor audits), and all three bureaus (automated systems support).

* * * * * * *

"The Office Director will report to the Associate Director for Royalty Management, MMS for supervisory and administrative purposes only. * * * The Four Corners Pilot will be managed for policy, guidance, coordination, and overall appraisal purposes by the [Indian Minerals Steering Committee (IMSC)]."

1996 Memorandum of Agreement at 2-3.

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In his response to this order, the FIMO Director clarifies his earlier statement. He now cites 25 C.F.R. Parts 162, 211, and 212 as the regulatory authority for issuance of orders to pay gross proceeds minus royalties. He cites 25 U.S.C. §§ 2, 9, and 396a as the relevant statutory authority. 6/ Further, he states that it is BIA which would normally issue such orders and that the orders would normally be appealable under 25 C.F.R. Part 2. FIMO Director's June 1, 2000, Response at 2-4.

Jurisdictional briefs were filed by Union and by Texaco et al. Neither brief addresses the first jurisdictional issue identified by the Board))whether the FIMO Director is an official whose decisions are subject to review by the Board.

Both briefs focus on the substance of the FIMO Director's decision and the nature of decisions normally made by BIA and BLM. Union suggests, and Texaco et al. specifically allege, that the FIMO Director's March 24, 2000, decisions are, at least in part, decisions which should have been made by BLM under its authority to make "paying quantity" determinations. All Appellants discuss the delegations of authority from BLM to FIMO and contend that BLM specifically declined to delegate to FIMO authority to make "paying quantity" determinations for leases of Navajo allotted lands. 7/

Union also argues that BLM, rather than FIMO or BIA, is the bureau with authority to calculate damages for minerals trespass.

These arguments actually go to the authority of the FIMO Director to issue the March 24, 2000, decisions, rather than the jurisdiction of this Board to review those decisions. The Board cannot address the question of the Director's authority (and would not do so at this point in any event) unless it first determines that it has jurisdiction to review the Director's decisions.

The Board therefore returns to the threshold issue))whether the FIMO Director is an official whose decisions may be appealed to the Board. As discussed above, the FIMO Director argues that his decisions are appealable to the Board because he exercises the oil and gas leasing authority of the Navajo Regional Director and thus is equivalent to a Regional Director in this regard.

6/ Given that the lands at issue in this appeal are allotted lands, it appears likely that the FIMO Director intended to cite 25 U.S.C. § 396 rather than 25 U.S.C. § 396a.

7/ For this contention, they cite an Oct. 6, 1998, memorandum from the New Mexico State Director, BLM, to the FIMO Director which states at page 3:

"As to Navajo Allotted lands, [paying quantity] determinations consist of recommendations to [BIA] and require an evaluation by reservoir management experts such as petroleum engineers and geologists. * * * The delegation of authority to issue determinations that leases in their extended terms are either capable or incapable of production in paying quantities will not be delegated to FIMO."

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Upon review of the BIA delegations of authority to the FIMO Director, the Board finds that it cannot agree.

The BIA delegations appear in two documents furnished to the Board by the FIMO Director. One is a September 26, 1997, memorandum from the Deputy Commissioner of Indian Affairs to the FIMO Director, which states:

> Under authority of 10 BIAM [BIA Manual], Bulletin No. 9702, general delegation of authorities have been delegated from the Deputy Commissioner of Indian Affairs to all Area Directors. However, this memorandum rescinds the Navajo Area Director's authority to approve allotted mineral leases and re-delegates the authority to approve/disapprove allotted mineral leases processed pursuant to [25 C.F.R.] Part 212, to the [FIMO] Director.

Deputy Commissioner's Sept. 27, 1997, Memorandum at 1.

It is this delegation of authority which the FIMO Director cited in his May 10, 2000, response as support for his statement that he "exercis[es] the oil and gas leasing authority of the Navajo Area Director."

The FIMO Director appears to have construed the delegation broadly, i.e., as extending beyond the act of lease approval/disapproval to encompass decisions, such as those he issued on March 24, 2000, which are functions of lease administration, rather than lease approval. The Deputy Commissioner's memorandum makes clear, however, that it concerned the actual approval/disapproval step. For instance, in describing the need for the delegation, the memorandum states:

> Presently, allotted mineral leases are prepared by the FIMO and submitted to the Area Director, Navajo Area Office, for final review and approval/disapproval. However, it has been determined that this process is cumbersome. The [IMSC which] oversees the pilot project [has] determined that a more streamline[d] review and approval/disapproval process is needed. It is the opinion of the IMSC that a re-delegation of authority will facilitate more timely processing of the allotted mineral leases.

Id.

The second BIA delegation document is an April 10, 1997, redelegation of authority from the Navajo Area Director to the FIMO Director. Navajo Area Office Addendum No. 2 to 10 BIAM 3.3E. The cover memorandum for this redelegation states that it was to "remain in force and effect until April 9, 1999, or the date the two-year pilot is ended, whichever is

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sooner." For purposes of this decision, the Board presumes that the redelegation has been extended beyond April 9, 1999. 8/

In sec. 1.4 of this delegation document, the Area Director redelegated to the FIMO Director "authority to administer allotted oil and gas leases and permits as set forth in 25 CFR [Part] 212 being more particularly described in the 'Redelegation of Authorities to the Director, Farmington Indian Minerals Office' attached hereto as Exhibit 'A.'" Attached to the redelegation is a chart titled "Bureau of Indian Affairs Authorities Redelegated by the Area Director, Navajo Area Office to Director, Farmington Indian Mineral Office." The authorities shown as redelegated to the FIMO Director cover a wide variety of lease administration functions. Among other things, the chart states that the FIMO Director "[e]valuates cessation of lease production and gives notice of expiration of lease on its own terms." Redelegation Chart at 1.

Given the specific wording of this provision, the broad scope of the Area Director's redelegation to the FIMO Director, and the narrow scope of the Deputy Commissioner's delegation to the FIMO Director, the Board concludes that the FIMO Director's authority to evaluate cessation of lease production 9/ and give notice of the expiration of a lease on its own terms was delegated to him by the Area Director, not the Deputy Commissioner. Thus, with respect to these particular functions, the acts of the FIMO Director are clearly not equivalent to the acts of an Area/Regional Director. 10/

Even more tellingly, the chart indicates that decisions of the FIMO Director are appealable to the Area Director. At page 2, the chart states: "Appeals of FIMO Director decisions. Must be in writing & filed with FIMO Director. Package is forwarded to the Area Director

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8/ The FIMO Director does not comment on the status of the Area Director's redelegation but presumably would not have furnished it to the Board unless he believed it to be still in effect.

The Deputy Commissioner's delegation is evidently still in effect. It states that it "will expire upon termination of the pilot project or rescinded." Deputy Commissioner's Sept. 27, 1997, Memorandum at 1.

9/ The Board reaches no conclusion as to whether the FIMO Director was exercising the BIA authority to evaluate cessation of lease production or purporting to exercise the BLM authority to make paying quantity determinations. The Board concludes only that, to the extent the authority asserted by the FIMO Director relates to a BIA function, his authority came to him from the Area Director.

This issue may be argued before the Regional Director upon referral of these appeals to her.

10/ See, e.g., Area Director's Redelegation at subsec. 1.3.B: "Effect of Redelegation. The Area Director or an official who redelegates authority is not divested of the power to exercise that authority; nor does the redelegation relieve that official of the responsibility for actions taken pursuant to the delegation."

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who [is the] next higher line official." The official listed under "Approval Level" for this authority is the Area Director.

Thus, it seems clear that, when decisions of the FIMO Director are made under authority delegated by the Area Director, the Regional Director is now the official to whom appeals are to be taken, in accordance with 25 C.F.R. § 2.4(a). 11/ Because the decisions are appealable to the Regional Director, the Board lacks jurisdiction over them. 43 C.F.R. § 4.331(a). 12/

After reviewing the filings in this matter, the Board finds it most likely that the March 24, 2000, decisions either were issued under authority delegated by BIA, as the FIMO Director argues, or were not authorized at all, as Appellants argue. That is, the FIMO Director does not seem to have been exercising authority delegated to him by BLM or MMS. Thus it appears to the Board that there is no question of dual jurisdiction over these particular appeals. 13/ However, given the status of FIMO as an entity which combines the functions of three bureaus, it is perhaps inevitable that the FIMO Director will sometimes issue decisions which implement the authorities of more than one bureau. The three bureaus have distinctly separate appeal procedures, and there is at present no administrative appeal forum (except the Secretary of the Interior) with jurisdiction to review the decisions of all three bureaus.

Presumably, if FIMO is made permanent, provision will be made for an appeal forum. In the meantime, FIMO or the IMSC may wish to request the Secretary to designate a temporary appeal forum in order to avoid the problem of dual and/or conflicting appeal procedures. Should the Secretary decide to designate this Board as a temporary forum, a blanket referral to the Board could be made under 43 C.F.R. § 4.1(b)(2)(ii), either directly or through the Director, Office of Hearings and Appeals, pending establishment or designation of a permanent forum. 14/

11/ If it turns out that the Area Director's delegation of authority to the FIMO Director has expired, the result would appear to be that the authorities originally delegated by the Area Director (and not subject to the Deputy Commissioner's Sept. 26, 1997, memorandum) would now reside with the Regional Director.

12/ 43 C.F.R. § 4.331 provides:

"Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except--

"(a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official."

13/ Of course, MMS must decide for itself whether it has jurisdiction over the appeals filed with it by Texaco et al.

14/ An example of such a blanket referral to the Board is the Mar. 7, 1994, referral by the Assistant Secretary - Indian Affairs of authority to review certain probate decisions made by

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Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, these appeals are docketed, dismissed for lack of jurisdiction, and referred to the Navajo Regional Director.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge

fn. 14 (continued)
BIA Superintendents. That referral was intended to close a gap in existing regulations and remained in effect until regulations were promulgated.

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