

II. Comments Received on Proposed Rule

The proposed rule provided for a 30-day public comment period, which ended March 2, 1990. Four commenters (three industry and one Indian representative) submitted comments during the comment period which are addressed in this section.

Comment: The Indian representative objected to the proposed requirement that BIA approval be obtained before lessees and payors could recoup more than 50 percent of the monthly reported revenues on an individual allotted lease. This objection was based on the commenter's opinion that BIA is ill-equipped to make an independent determination of the propriety of any claimed overpayment. Because there is an obvious adverse impact on allottees subject to recoupment, this commenter recommended that the final rule require prior consultation and concurrence of the affected allottee regarding requests from lessees and payors to recoup more than 50 percent of reported revenues in an individual month.

Response: MMS agrees with the commenter's recommendation with respect to affected Indian allottees. However, in many situations, it may be impractical to obtain concurrence for more than a 50 percent recoupment from all affected Indians in a timely manner. Therefore, the final regulation was changed and no longer provides for such an exception to the 50 percent recoupment limitation on allotted leases.

Comment: One industry commenter agreed with the proposed recoupment procedure and in general with the proposed limitation. However, the commenter expressed concern regarding the need for expeditious handling of requests for recoupments in excess of the limitation. The commenter emphasized that it was important that the request for any recoupment above the limitation be processed timely, unless interest could be recovered by the lessee on the overpayment.

Response: Since the final regulation no longer provides for recoupments in excess of the limitations, expeditious handling of such requests is a moot point. In regard to interest on overpayments, MMS does not have legal authority to pay interest on overpayments made by lessees and payors.

Comment: Another industry commenter agreed that MMS regulations should establish the recoupment policy. However, this commenter questioned the necessity for the requirement that written permission be obtained from a

tribe before overpayments made on one lease could be recouped from a different tribal lease. In this commenter's opinion, a lessee or payor should be able to take a credit and recoup any overpayment against any and all of its producing leases with that tribe without requiring that tribe's approval, because the tribe's revenue is generally not limited to a single lease.

Response: Royalty payments on production from mineral leases are a major source of income to many tribes. When a lessee or payor can recoup an overpayment against payments due on all producing tribal leases without permission, the tribe cannot plan the distribution of royalty revenues with reasonable accuracy.

In order that the tribe may plan for decreases in royalty revenues, MMS has determined that a payor must obtain written permission from the tribe to recoup overpayments made on one tribal lease from a different tribal lease. Paragraphs 218.53(b) and 218.203(b) of the final rule require that the payor provide MMS with a copy of the tribe's written permission in accordance with instructions provided in the "Oil and Gas Payor Handbook" and the "AFS Payor Handbook—Solid Minerals".

Comment: A different industry commenter who was in general support of the proposed rule stated that a strict application of the policy may, in some cases, be inequitable. For example, if a lessee or payor is required to make a payment to an Indian allottee on a Bill for Collection that is under appeal and the lessee or payor prevails on the appeal, the lessee/payor may not be able to recoup if the company is no longer the payor on the lease or the level of production on the lease has declined to a point where recoupment is not an adequate remedy. In this commenter's opinion, it would not be good policy in these situations to allow an allottee to keep the payment and prevent the lessee from otherwise obtaining a refund. The commenter recommended that the final rule allow lessees to obtain a cash refund when recoupment is an inadequate remedy.

Response: MMS recognizes the merit of this commenter's concerns. However, this situation can be avoided if the payor, in accordance with 30 CFR 243.2, elects to post a surety pending a decision on the appeal rather than submitting payment. If the appellant prevails on its appeal, the surety would be returned and recoupment or refund of a payment would not be necessary. If the payor elects to submit payment and is not able to recoup the payment, MMS does not have legal authority to refund the payment from general funds, but can

seek a special congressional appropriation for the amount of any refund due to the payor.

Comment: One industry commenter state that any rulemaking that would deny or delay recovery of any overpayment, other than under a strict statute of limitations imposed equitably on both the Indian(s) and lessee, would be a violation of Executive Order 12630, "Government Actions and Interference with Constitutionally Protected Property Rights."

Response: A continuing payor with sufficient recoupable balances would not be denied recoupment of any overpayment under the proposed or final rule. MMS has determined that the procedures set forth in the proposed or final rule do not violate E.O. 12630.

III. Summary of Final Rule

This final rulemaking codifies MMS' longstanding policy with respect to recoupment of overpayments made by lessees and other royalty payors on Indian mineral leases by the addition of new sections at 30 CFR 218.53 (previously reserved) and 30 CFR 218.203. Overpayments subject to recoupment under the adopted rule include all payments made in excess of the required payment for royalty, rental, bonus, or other amounts owed as specified by statute, regulation, order, or terms of an Indian mineral lease.

The final rule permits lessees and payors to recoup overpayments as credits against reported revenues due to Indian tribes or allottees in the current month on the same lease. Specifically, the final rule allows recoupment of overpayments not to exceed 50 percent of reported revenues in that month on an allotted lease or 100 percent of the reported revenues in that month on a tribal lease. A payor may recoup an overpayment made on one tribal lease from a different tribal lease only if written permission is authorized by tribal statute or resolution.

The final rule also provides that MMS may issue an order to a payor prohibiting recoupment of any amount for a reasonable period of time as MMS may need to review the nature and amount of any overpayment. Situations may arise in which a payor believes it has made an overpayment and is entitled to recoup the overpaid amount. However, the payor in fact may not have overpaid, and should not be allowed to recoup since recoupments reduce the Indian lessor's expected revenues. The authority in paragraph (d) of both § 218.53 and § 218.203 allows MMS to prevent the payor from taking the recoupment until the fact that the payor has overpaid and the amount of the