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REPORT ON AN INQUIRY INTO PAYMENTS MADE BY THE PROJECT ON GOVERNMENT OVERSIGHT TO TWO FEDERAL OFFICIALS

PREPARED BY

PAUL THOMPSON, DETAILEE FROM THE GENERAL ACCOUNTING OFFICE

TO THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

JULY 2000

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LETTER OF TRANSMITTAL

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC, July 20, 2000.

To: Frank H. Murkowski, Chairman

From: Paul Thompson, Detailee From the General Accounting Office

Re: Report On An Inquiry Into Payments Made By the Project On Government Oversight to Two Federal Officials in Connection with the Department Of Interior's Development of a New Oil Royalty Valuation Policy.

BACKGROUND

On November 19, 1999 you requested that the Comptroller General detail an attorney/investigator from the General Accounting Office to the Committee on Energy and Natural Resources to conduct a preliminary inquiry into payments made by the Project on Government Oversight (POGO) to two Federal officials in connection with the Department of the Interior's development of a new oil royalty valuation policy. Pursuant to your request, I was detailed to the Committee and initiated a preliminary inquiry into this matter to obtain information about the payments. The inquiry was conducted during the period from January 10, 2000, through June 2, 2000. Attached is my report discussing the information obtained during this inquiry. The inquiry included interviews with current and former officials of the Departments of the Interior and Energy, other individuals familiar with Federal oil royalty matters, ethics specialists and others. Thousands of pages of documents were reviewed, a substantial number of which were records of the Department of the Interior. Despite these efforts, the information on which this inquiry is based is subject to limitations.

POGO officials, including POGO directors, Mr. Robert Berman (an employee of the Department of the Interior) and Mr. Robert Speir (a former employee of the Department of Energy) declined to be interviewed, although Mr. Speir provided some information in two conversations during which he set forth his version of certain events but declined to answer questions generally. Statements attributed to Messrs. Henry Banta (former chairman of POGO's board of directors), Berman and Speir and Ms. Danielle Brian (POGO's executive director) in this report are contained in transcripts of deposition testimony they were compelled to provide in connection with a *qui tam* lawsuit filed by Ms. Brian and POGO concerning the oil royalties issues discussed in the report. Although

Mr. Berman answered certain questions in his deposition, he refused to answer questions about the payment issue pursuant to his right under the Fifth Amendment of the Constitution to be free from compelled self incrimination. Other statements attributed to these individuals were made at a hearing held by the House Resources Subcommittee on Energy and Natural Resources on May 18, 2000.

Information obtained directly through interviews and documents was produced subject to the selective judgment of those providing it. Compulsory process was not available, and document inspections were not conducted. Accordingly, the information on which this inquiry relied is limited by the selectivity and biases (known and unknown) of those who provided it.

SUMMARY

In November 1998, the Project On Government Oversight (POGO) paid a currently employed Federal official and a retired Federal official $383,600 each because of work they had done as Federal policy advisors and experts. POGO maintains that the payments were "public service awards" in recognition of the employees' "whistle-blowing" over a ten-year period (apparently 1986 through 1996) in connection with the government's oil royalty valuation policy.

POGO did not publicly acknowledge the payments until late in April 1999, after they had been reported by the press. In response to the reports, you and other members of the Committee on Energy and Natural Resources as well as the House Committee on Resources expressed concerns about the appearance of impropriety resulting from the payments. The chief concern is whether the payments represent an improper influence upon the Department of the Interior's development of its new oil royalty valuation policy, which has been implemented in regulations of the Department's Minerals Management Service (MMS) effective June 1, 2000. 65 Fed. Reg. 14022 (March 15, 2000). An additional concern is whether public knowledge of the payments might erode confidence in the Department's management of its royalty management program.

CONCLUSIONS

It appears that POGO paid the two Federal officials in connection with their activities to influence the Department toward taking actions and adopting policies that, among other things, (a) directly and indirectly assisted POGO in a project involving matters in which these two individuals were substantially involved as Federal employees and that led to POGO's filing of a lawsuit through which it and the two officials received substantial sums of money and stand to receive potentially millions of dollars more, and (b) benefitted the professional and business interests of POGO's chairman and a client of his law firm. The circumstances associated with the payments raise the possibility that the Department of the Interior's development of the policy underlying the new oil royalty regulations may have been improperly influenced by expectations or understandings of the officials that they could personally benefit from using their positions as Federal employees to assist POGO

and two of its principals. The officials were substantially involved in key stages of the Department's policy development process in ways that served the interests of the POGO's chairman and its executive director. Whether the payments and circumstances under which they were made could serve to erode confidence in the Department's administration of the royalty management program is a well grounded concern.

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The Project on Government Oversight (POGO) is a tax-exempt public interest group. According to its mission statement, POGO "investigates, exposes, and remedies abuses of power, mismanagement, and government subservience to special interests." To carry out this mission, POGO encourages federal employees and others to obtain information from the government surreptitiously and leak it to POGO and/or others. At least when POGO considers the information to be compatible with its interests, POGO may deem the cooperating federal employees to be "whistle-blowers." As the facts of this inquiry indicate, POGO has designated as whistle-blowers federal officials who have policy objectives or legal opinions on which their agencies do not immediately act or act upon but do not implement.

POGO provides guidance to its so-called whistle-blowers by, among other things, directing them to publications and entities that advise the individuals on whistle-blowing techniques. POGO also provides access to resources that furnish support and legal representation to persons seeking to file qui tam lawsuits under the False Claims Act.[1]

During most of the time period covered by this report, POGO's chairman was Henry Banta. He resigned from that position in February 1998 but continues to serve as a POGO director. Mr. Banta is a principal of the Lobel, Novins and Lamont law firm located in Washington, D.C.

POGO's executive director is Danielle Brian. She has served in this capacity throughout the period covered by this inquiry. Before and during the period she was individually responsible for all phases of POGO's operations and performed most of its work other than some internal administrative and housekeeping tasks. Al-

[1] Generally speaking, the False Claims Act (FCA) prohibits any person from filing false or fraudulent financial claims with the Government or falsely withholding payments owed to the Federal Government. The Act provides that private parties may bring civil actions for themselves and the United States Government, in the name of the Government, to recover amounts allegedly withheld from the Government in violation of the Act. Lawsuits brought by private persons are referred to as "*qui tam*" actions. Among other things the Act provides that the Department of Justice may intervene in *qui tam* actions, that such actions are to be sealed for sixty days (which period may be extended pursuant to a request from the Justice Department) and that once a person brings a *qui tam* action, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action. 31 U.S.C. §§ 3729, 3730

though Ms. Brian presented certain matters to POGO's board of directors, she appears generally to have controlled the institution. She appears to have had unfettered discretion in selecting the matters in which POGO was involved, deciding how POGO participated in them, and carrying out its day-to-day activities. The individuals who received the payments from POGO are Robert Berman and Robert Speir. During the time covered by this inquiry, Mr. Berman served in the Department of Interior's (DOI) Office of Policy Analysis (OPA) as a policy advisor to the Secretary. He continues to serve in this capacity. Mr. Berman is an economist with substantial knowledge of the Department's several royalty programs, including the federal oil royalty program.

Robert Speir was an expert and policy advisor in the Department of Energy whose specialties included oil valuation in California. He retired from DOE in October 1997. He was highly regarded within the Department for his expert knowledge of oil markets, particularly the California market, and his work concerning the effects of distribution channels upon the value of crude oil production. From May 1994 through May 1996, he participated as a member of an Interagency Task Force (ITF) coordinated by DOI to investigate the valuation of crude oil in California.

Messrs. Berman and Speir have had relationships with Mr. Banta since 1985/86. At that time, the Lobel firm was representing the State of California in connection with its effort to collect royalties from oil produced on lands within the State. California had sued several oil companies in 1975 to recover state royalty deficiencies allegedly caused by their anti-competitive conduct in the distribution of crude oil produced on State-owned properties (*Long Beach I*). Oil was valued by reference to sale prices at the wellhead (posted prices). According to the State, the practices caused oil prices to be less than true market value, thus resulting in royalty payments based upon artificially low oil values.

In 1986, the State instituted a second legal proceeding against integrated oil companies (producer/refiners) to recover unpaid royalties resulting from alleged undervaluations occurring during a later time period (*Long Beach II*). Some allegations in that case were similar to those in Long Beach I, but the thrust of the State's complaint was that the oil companies had engaged in sales transactions, exchanges and other practices through their producing and refining affiliates and related parties (non-arm's length transactions) that resulted on the payment of royalties based on less than true market values.

For royalty purposes, crude oil production had been valued by referring to posted prices offered by oil purchasers at or near the well head. Because the transactions allegedly caused posted prices to be less than the true market value of crude production, the State sought to collect royalties based upon an alternative valuation method. To re-value the production, the State relied upon spot prices paid for production at market centers within the State, apparently using adjusted spot-prices for Alaska North Slope (ANS) crude oil transported to relevant California market centers.

The *Long Beach* cases involved royalty valuations of oil produced on California-owned lands. Under federal law, states receive a percentage of federal royalties collected from oil produced on federal

lands within their borders and from certain adjacent offshore areas.[2] As part of its campaign to collect royalties, in1986 California sought to persuade MMS that it should apply theories similar to the ones the State argued in the *Long Beach* cases to collect additional royalties under the federal royalty program. The Lobel firm represented the State in connection with that effort. In this context, Mr. Banta began relationships with Mr. Berman and Mr. Speir.

The *Long Beach II* case is particularly pertinent to the circumstances at hand. By 1992, all but one of the defendants in that case had settled for a combined total of approximately $350 million. California and others considered the settlements to be indications that the Federal Government could obtain similarly large amounts of royalties from integrated oil companies that produced oil from Federal lands in the State.

Motivated by this prospect in 1993, the State and its representatives mobilized a campaign to influence the Department to adopt a valuation approach similar to the State's in *Long Beach II*. The general objective of the approach was to use adjusted spot prices to value crude production when those prices, which purportedly reflected true market value, exceeded posted prices established by integrated oil companies. As in 1986, the State sought to persuade the Department of Interior that integrated oil companies had artificially depressed the price of oil produced in California and that the Department should adopt a spot-price approach for valuing federal crude oil produced in there. As in 1986, the Lobel firm represented California in the matter. Also as in 1986, Mr. Banta enlisted the support of Messrs. Berman and Speir. He also introduced them to Ms. Brian.

Mr. Banta introduced the three individuals in December 1993. Earlier that year, both Mr. Berman and Mr. Speir had been involved in a DOI initiative concerning the California oil market. In August Mr. Berman had recommended that the Department conduct an inquiry into oil prices in California. The MMS promptly began the inquiry but limited the review to California's evidence in *Long Beach II*. MMS discussed the study with Mr. Speir, even though at the time he worked for the Department of Energy. Apparently by assuming the accuracy of the State's factual allegations and adopting its spot-price valuation theory (without regard to MMS's own regulations requiring an initial consideration of whether posted prices reflect fair market value) MMS officials reported that the range of unpaid royalties during the period covered by the study reached above $400 million. The finding was contained in an MMS report produced in or about November 1993 which promptly was leaked to the press.

When Mr. Banta introduced Ms. Brian to Messrs. Berman and Speir during the next month, she had no experience in or knowledge of oil royalty issues. Soon after the meeting, however, she, Mr. Berman and Mr. Speir entered into a relationship that initiated and contributed to POGO's initiation of a project involving Federal

[2] Under the Mineral Leasing Act, as amended, 50% of federal royalties accrued from oil produced on federal land is shared with the state where the oil was produced. Under the Outer Continental Shelf Lands Act, 27% of royalties from production within three miles of the Seward boundary of the State (or within three to six miles from the coastline) is shared with the state.

oil royalty issues, particularly as they related to California. Ms. Brian engaged POGO in an intensive public relations project to steer the Department of Interior toward adopting California's position on undervaluations in the State. Mr. Berman persistently raised and worked on similar issues within the Department. Mr. Speir was placed on the Interagency Task Force assembled by the Department to address federal royalty issues in California. Eventually, the parties' relationship resulted in POGO's payment of more than $383,000 to each individual from proceeds of a lawsuit brought by Ms. Brian and POGO involving matters in which Messrs. Berman and Speir were substantially involved as federal employees.

POGO paid Messrs. Berman and Speir in November 1998 pursuant to a pre-existing agreement. As of at least December 1996, Ms. Brian was completing a plan to file a *qui tam* lawsuit individually and as POGO against several major oil companies. Ms. Brian believed that the oil companies had engaged in various schemes in several states, including California, to depress the price of oil below true market prices. Accordingly, the amounts of royalties paid on the under-priced oil allegedly were less than the amounts that should have been paid on the true market prices. In connection with this plan, Ms. Brian, Mr. Berman and Mr. Speir entered into an agreement under which POGO and Ms. Brian would share equally with the two officials in any proceeds POGO and she recovered from the suit.

POGO and Ms. Brian filed their lawsuit in June 1997. By January 1998, Ms. Brian, Mr. Berman and Mr. Speir concluded that one of the defendants, Mobil Oil, was likely to settle the claims against it. At or about that time, the three parties discussed and decided to record their agreement in writing. On January 5th, they signed a document that states in full as follows:

> This is to put in writing the standing oral agreement between the Project On Government Oversight (POGO), Mr. Robert Speir and Mr. Robert Berman concerning our False Claims Act suit regarding the underpayment of royalties by oil companies to the federal government. Any and all proceeds to come to the Project On Government Oversight or Danielle Brian through this law suit will be shared equally (33⅓%) between POGO, Mr. Speir and Mr. Berman.

POGO maintains that by entering their agreement the parties merely expressed their mutual assent that Ms. Brian would pay each Mr. Berman and Mr. Speir a ''public service award'' should she and POGO recover any funds from the lawsuit. Under this scenario, the ''agreement'' never was intended to be an agreement and was, in effect, meaningless. POGO's explanation means that in December 1996, again in writing in January 1998, and on other occasions when any of the parties referred to their arrangement as an agreement or obligation of POGO to make the payments, they considered it to be merely a joint acknowledgment that Ms. Brian had promised to pay Messrs. Berman and Speir and that the two federal employees would recognize her performance of the promise by accepting the funds.

The agreement raises several concerns and questions. First, the agreement itself reasonably can be seen as a payment. Ms. Brian has admitted that by entering the agreement she gave Messrs. Berman and Speir something they previously did not have, *i.e.*, the expectation that they would receive their shares of any funds she and POGO might recover. Second, documents generated by the three parties and by POGO raise a substantial question as to the true nature and purpose of the agreement. Third, nothing in the information supports POGO's assertion that the payments were legitimate awards for "whistle-blowing" or any other ostensible public service. Rather, it appears that while serving as federal employees Mr. Berman and Mr. Speir acted as important allies of Mr. Banta and Ms. Brian in their campaign on behalf of Mr. Banta's client and toward POGO's royalties project leading to the receipt of a substantial amount of money through the *qui tam* action. In light of questions about POGO's portrayal of the circumstances, a thorough inquiry into other possible reasons for making the payments would be appropriate. Such an inquiry could help determine whether the Department of Interior was improperly influenced by the officials in connection with the development of its new royalty policy and whether the Department's administration of its oil royalties program has been hampered because of this matter.

SUBSTANTIAL QUESTIONS EXIST CONCERNING THE PURPOSE OF THE PAYMENTS

POGO has explained the payments as a unique form of a public service award given to two officials who worked in opposition to their agencies as whistle-blowers for ten years to expose the use of an improper oil royalty valuation method. The information indicates that POGO's explanation of the payments is implausible.

First, the payments are uncharacteristic of a public service award. They were made pursuant to an agreement by the parties entered at least two years before they were made. Second, the officials were not whistle-blowers. For most of the ten-year period covered by the awards, Mr. Berman did not even work on oil valuation or royalty issues. Mr. Speir never worked on royalties during the period. Although he concentrated in the distribution and marketing of crude oil and its effect on prices, his work was highly regarded and heavily relied upon by DOE. Moreover, neither individual's work was in opposition to their respective agencies. Third, additional circumstances support concerns about whether the payment agreement also was intended to cover the employees' activities after the ten year period. Fourth, POGO did not treat the payments as public service awards.

Mr. Banta, Mr. Berman, Mr. Speir and Ms. Brian worked to steer the Department of Interior toward adopting policies beneficial to Mr. Banta's client and to POGO. The Department adopted those policies. Shortly afterward, Ms. Brian and POGO decided to file a joint *qui tam* lawsuit involving those same policies to recover potentially large sums of money for themselves and for Mr. Berman and Mr. Speir pursuant to an agreement to do so. As federal officials, both Mr. Berman and Mr. Speir had been substantially involved in matters at issue in the lawsuit.

In light of these facts, the parties might face legal action regardless of POGO's explanation of the payments. The Department of Justice is investigating the matter. For purposes of this inquiry, POGO's assertions about the payments were examined because the explanation bears directly on whether the payments indicate potential improprieties in connection with the Department's policy making process.

Two compelling questions raised by POGO's explanation are: (a) If POGO merely paid the officials to reward them for their public service, why did Mr. Banta, Ms. Brian and the two officials take the extraordinary measure of negotiating and formalizing the award pursuant to an agreement; and (b) In view of POGO's admission that it paid the officials because of work each of them performed during a ten-year period in the public service, what work did they perform? These questions do not reflect the entire scope of the matter, however. POGO's explanation narrows the focus of the payments to a purported set of events occurring during a ten year period apparently ending with 1996. Nothing in the information warrants the conclusion that Mr. Banta's and Ms. Brian's purposes in obligating POGO were solely to pay the officials for work they performed during that period.

1. The parties' agreement on the payments and questionable testimony about the agreement cast doubt upon POGO'S assertion that the payments were gratuitous awards

There is no reasonable explanation of why the parties believed it was necessary that they all formally assent to the award by making an agreement. There is no indication of the reasons why any of the parties would enter into the agreement if he or she believed that the payments were nothing more than Ms. Brian's gratuitous expression of appreciation. Their testimony about the agreement contains inconsistencies that justify questions about why it was made. Moreover, the payments are not characteristic of an award in the sense portrayed by POGO.

POGO's answer to these points appears to be that the agreement was necessary to reflect what Ms. Brian considered a "moral commitment" to treat the two officials as parties to the *qui tam* lawsuit even though they had elected not to participate in it. According to POGO's assertions, the only function of the agreement appears to have been that each federal employee merely assented to Ms. Brian's sense of morality and fairness. Assuming for present purposes that the parties shared this view, it remains unclear why they would negotiate and formally record Ms. Brian's sense of commitment, call it an agreement, and act as if it were one.

The parties' use of the device of an agreement merely to reflect a gratuitous promise is perplexing. Each of them, particularly Mr. Banta, who is an accomplished and well-regarded lawyer, is educated and sophisticated enough to have been familiar with the general understanding and bedrock principle of law that an agreement manifests a bargain among the parties who make it. Yet Mr. Banta, Ms. Brian and Mr. Speir assert that there was no bargain here, but only Ms. Brian's naked promise to pay the officials. In effect, they maintain that the agreement was meaningless because its only purpose was to reflect what Ms. Brian could have done

without an agreement, which was either to honor or not honor her promise.

According to this proposition, the parties negotiated, formalized and recognized their relationship as an agreement even though doing so was a meaningless gesture. Although they used the term "agreement" to describe their relationship, they never intended the arrangement to be what they said it was. It is a normal assumption that sophisticated individuals typically do not intentionally create the appearance of an agreement where none exists. It is not unreasonable to consider that the parties may have entered an agreement because their arrangement involved more than merely a gratuitous promise by Ms. Brian that POGO would pay the two officials.

Several facts betray the parties' assertions that they never meant to have an agreement. For instance, Mr. Banta and Ms. Brian maintain that their use of the term "agreement" to describe the payment arrangement was a "mistake. Even considering the parties' levels of experience and sophistication, such a mistake, depending upon the circumstances, might be understandable had it occurred inadvertently. The facts show, however, that the parties used the term deliberately and on more than one occasion to characterize the nature of their relationship.

In a meeting of POGO's board of directors in December 1996, both Mr. Banta and Ms. Brian informed the board that they had reached agreements with Messrs. Berman and Speir to "compensate" them. In pertinent part, the minutes state as follows: "Ms. Brian mentioned that an agreement has been worked out that if there is some reward (from filing a *qui tam* lawsuit), whatever and whenever an amount would be won, that the individuals that have that have been doing this work for years would be compensated." The minutes also refer to Mr. Banta's description of "private agreements" POGO entered with others in connection with its consideration of the *qui tam* lawsuit. Mr. Banta and Ms. Brian have confirmed that the term "agreement" in the minutes refers to the payment arrangement among POGO, Mr. Berman and Mr. Speir. Both Mr. Banta and Ms. Brian have stated that they met with Messrs. Berman and Speir in Mr. Banta's office before the December 9 board meeting. The sharing arrangement was discussed at those meetings. It is reasonable to conclude that he and Ms. Brian were aware enough of the nature of the arrangement to have described it accurately to the board.

December 1996 was not the only time that Ms. Brian referred to the arrangement as an agreement. As shown in the above-quoted language, she and the two federal officials used the term in the January 1998 document to describe their pre-existing relationship. According to Mr. Banta, the terms of the January 1998 writing were "not any different" from the arrangement that existed in December 1996. The parties discussed the document before they signed it. Moreover, according to Ms. Brian, Mr. Banta saw the document before it was signed.

To accept the argument that the parties did not consider themselves to have entered into an agreement at least as of December 1996, one must conclude that in January 1998, when Ms. Brian, Mr. Berman and Mr. Speir signed a written confirmation of their

standing agreement, the following circumstances existed: (a) Ms. Brian once again mistakenly referred to the arrangement as an agreement following discussions about it with Messrs. Berman and Speir, (b) Mr. Banta once again failed to appreciate the meaning of the term "agreement," and (c) each Mr. Berman and Mr. Speir either signed a document that was inaccurate or did not understand the difference between Ms. Brian's personal commitment and an agreement. Nothing in the information warrants these conclusions. Rather, additional facts show that at least two of the parties, Ms. Brian and Mr. Berman, considered themselves engaged in a relationship that bound POGO to make the agreed upon payments.

In October 1998, after POGO had received its share of the proceeds from the Mobil settlement, Mr. Berman questioned Ms. Brian about receiving his payment. In a letter to Mr. Berman dated October 8, 1998, she stated as follows:

> This is to confirm our commitment to live up to our existing understanding that POGO will share in equal thirds with you and Bob Speir all past and future settlement amounts we receive through our filing of the False Claims Act case regarding the underpayment of oil royalties.
>
> We will distribute the shares already received, as well as the accrued interest, on or before November 2, 1998 and will distribute shares from any other settlements promptly upon receipt.
>
> You may reach me for any further discussion of this or any other matter through POGO's attorney Lon Packard at 801–485–6464.

The letter states unconditionally that Mr. Berman would receive his payment and refers Mr. Berman to POGO's attorney. It is reasonable to question why Ms. Brian would respond in this manner if the payment arrangement was nothing more than her gratuitous, non-binding promise to pay Mr. Berman for his service to the public. Indeed, the letter raises questions about assertions by POGO and Mr. Speir that no agreement existed because the parties never believed that POGO was obligated to make the payments.

According to Ms. Brian and Mr. Speir, the parties believed that even though Ms. Brian promised to pay the officials if funds became available her commitment was subject to several conditions that she could decide not to satisfy. It follows, therefore, that the parties never considered the commitment to be a legally enforceable agreement. This position is questionable. It appears that these so-called conditions did not exist at the time the parties made their agreement. Moreover, regardless of when the conditions first emerged, it appears that Ms. Brian unilaterally committed POGO to satisfy them.

Ms. Brian and Mr. Banta described the conditions relating to POGO as follows: (a) POGO's board of directors would approve of the payments; (b) an attorney's approval would be obtained; and (c) POGO would notify the Department of Justice (DOJ) about the payments. At first hand, it should be noted that neither the January 1998 written confirmation of the sharing agreement nor Ms. Brian's October 1998 letter to Mr. Berman refer to any condition that might preclude the payments. The October 8 letter is particu-

larly important because it demonstrates Ms. Brian's own view that nothing stood in the way of POGO's making the payments. She stated that POGO "will share in equal thirds with you and Bob Speir all past and future settlement amounts" . . . and "will distribute the shares already received, as well as the accrued interest, on or before November 2, 1998 and will distribute shares from any other settlements promptly upon receipt."

Accepting Ms. Brian's professed adherence to moral principles, there is no reason to conclude that she intended to deceive Mr. Berman in the letter. The substance of her commitment was identical to the terms laid out in the January 1998 confirmation which, in turn, was "not any different" from the agreement expressed at least as early as December 1996. This information alone raises questions about whether the parties believed as of December 1996 that any genuine "conditions" of payment were to be satisfied by POGO other than the obvious one of obtaining the payment funds through its *qui tam* lawsuit.

Additional information appears to answer these questions by showing that in fact no such conditions existed. From at least December 1996, when Ms. Brian and Mr. Banta informed the board of the sharing agreement, the board's approval of the arrangement had been clear. In deposition testimony, Ms. Brian recounted that board approval was a foregone conclusion because the board members had understood for some time that Ms. Brian intended to pay Messrs. Berman and Speir. The formality of approving the payments was merely a ministerial matter.

The "condition" of obtaining approval from an attorney was not a part of the agreement because, according to Ms. Brian, the action was not even considered until August 1998. Similarly, POGO's notification to the Department of Justice, was not part of the parties' arrangement.

In one of two depositions taken in connection with the POGO/Brian *qui tam* lawsuit, Ms. Brian testified that the sole purpose of notifying DOJ was to inform the Department that POGO would be paying the funds to two potential witnesses, not to seek the Department's approval of the payments. She testified that when the parties entered the agreement she had not given any thought as to whether either Mr. Berman or Mr. Speir might be a witness. It is unlikely that the "condition" of contacting DOJ would have existed at this time. On this point, Ms. Brian testified that she could not recall when it "struck her" to notify the Department. Specifically, she testified as follows:

> Q: Let's go forward, continuing with the October 27th (1998) time frame, and the notification to the Department of Justice. And just again, to put this in context, this notification is something that had been on your mind from at least January of 1998, correct?
>
> A: I don't know exactly when it struck me that it was important for Justice to know before any government employees had a financial interest in the litigation.
>
> Q: Do you recall testifying earlier that, as of the time of your January 5, 1998 agreement, which we had some dialogue about, whether this was simply a statement of your

intentions or not, that it would be a condition to you paying the money that the Justice Department be notified?

A: Sure, all right, okay.

Q: So at least as of this time?

A: Okay.

Q: Prior to that, did you consider it important that the Justice Department be notified about this arrangement?

A: I don't really know. I don't recall whether I had thought about it.

Whether the parties believed that POGO unconditionally was bound by its obligation under the agreement is a question of fact which, at the very least, remains unresolved. A conclusive answer to the question could help determine whether the payments represented more than Ms. Brian's merely gratuitous promise. Unfortunately, testimony about the payments they have provided in connection with the *qui tam* action and in a hearing conducted by the House Resources Committee Subcommittee on Energy and Mineral Resources (House Subcommittee) on May 18, 2000, is unreliable, thus adding to a reasonable skepticism about their statements regarding the conditions and concerns generally about the purpose of the agreement.

For example, Mr. Banta offered inconsistent testimony about his understanding of the agreement as of December 1996. Further, both his apparent understanding and Ms. Brian's understanding of the agreement as of that time differ fundamentally from Mr. Speir's account. Mr. Berman refused to testify in a court-sanctioned deposition about the agreement and related matters by asserting his Fifth Amendment right against compelled self incrimination. Finally, in the May 18 hearing conducted by the House Resources Subcommittee, Mr. Berman, Ms. Brian and Mr. Banta refused to answer questions the Committee determined to be pertinent.

Mr. Banta's inconsistent testimony about key occurrences concerning the agreement is a particularly stark illustration of why POGO's rendition of the events at issue should be considered cautiously. Among other things, while testifying about this matter under oath in two separate proceedings, he gave different sworn accounts of the arrangement between POGO, Mr. Berman and Mr. Speir as of at least December 1996.

Mr. Banta was present when, at that time, the sharing arrangement was discussed and the commitment terms were set. In a deposition taken in connection with the POGO/Brian *qui tam* action, he testified that the January 1998 written confirmation was "not any different" from the agreement reached in December 1996. In sworn testimony before the House Resources Subcommittee, however, Mr. Banta referred to the December 1996 arrangement as merely an "offer" by Ms. Brian and testified that he did not recall the arrangement at that time to share proceeds in equal thirds. After being confronted with the transcript from his deposition testimony, Mr. Banta stated at the hearing as follows: "Well, that was my testimony at the time. I'm not sure if that comports with my current recollection, but that was my testimony at the time."

The record of Mr. Banta's involvement in POGO's royalties effort itself raises questions about the true nature of his participation and the quality of his testimony. According to the minutes of a

POGO board meeting held on January 5, 1995, Mr. Banta was recused from POGO's royalties project at or about that time. However, he was involved in discussing and arranging the terms of the payment agreement with Messrs. Berman and Speir in December 1996.

When compared with POGO's December 1996 board minutes and testimony about the agreement from Ms. Brian and Mr. Banta, Mr. Speir's deposition testimony in the *qui tam* case also amply illustrates that the truth about the agreement remains unclear. For example, as discussed previously, in December 1996 both Mr. Banta and Ms. Brian stated to POGO's board that they had entered "agreements" that in fact were the payment arrangement with Messrs. Berman and Speir. In her second *qui tam* deposition, after having stated that the January 1998 agreement reflected the arrangement the parties made in December 1996, Ms. Brian also testified as follows:

> Q: Clearly you created an expectation, whether justified legally or not, you created an expectation in the mind (sic) of Mr. Berman and Mr. Speir that if you recovered, they would recover; correct?
> A: Yes.

In contrast, Mr. Speir swore in his deposition that until a matter of days before January 5, 1998, the payment arrangement was nothing more than a vague suggestion by Ms. Brian that he and Mr. Berman might receive funds from POGO in recognition of their work. When asked specifically whether the parties had entered an agreement in December 1996, Mr. Speir testified as follows:

> Q: Isn't it a fact that you had a private agreement with POGO on the subject of compensation from the lawsuit?
> A: No.
>
> * * * * *
>
> Q: The suggestion, as you phrase it, to pay you money from the proceeds of this litigation, was made when?
> A: Let me correct another piece of terminology. It was not ever put to me in terms of pay you money from the proceeds. It was that the suggestion was that if we have money available we will make we would like to make an award to you, we'd like to extend to you an award for your long-term government service, is the way, you know, that was the way it developed. . . .
>
> * * * * *
>
> Q: And toward the spring of 1997 did you come to an agreement with this Project on Government Oversight relating to the False Claims Act lawsuit?
> A: An agreement? You mean well, no. Simple answer to that is no. I came to no agreement.

Although POGO never has explained why an agreement was used merely to reflect the parties' assent that the two federal officials would receive a gratuitous award, Ms. Brian apparently has attempted to justify it. She has asserted that the agreement was used as a device to recognize that the officials could have been rela-

tors in the Brian/POGO *qui tam* case but for their fears of retaliation from their agencies. These assertions should be considered in light of the following facts. Mr. Banta did not consider the employees to be qualified as relators. Moreover, nothing in the information indicates any basis for either individual to have feared retaliation. Finally, Ms. Brian herself recognized that if either employee was known to have a financial interest in the lawsuit, he likely would have been recused from working on any matter related to it.

In deposition testimony involving the Brian/POGO *qui tam* action, Mr. Banta stated that neither Mr. Berman nor Mr. Speir was qualified to be a relator. Mr. Banta explained, however, that the officials were invited to be relators because their presence in the matter would help POGO achieve its stated purpose for bringing the action, which was to prompt the federal government to take action to collect unpaid royalties. According to Mr. Banta, their qualifications as relators were irrelevant to this purpose, but somehow their presence in the case was. His rationale is questionable.

Assuming that the actual reason for filing the Brian/POGO lawsuit was to prompt federal action, it is unclear how the presence of the federal employees as named relators would have enhanced the achievement of POGO's objective. Because, according to Mr. Banta's explanation, filing the lawsuit was merely a device POGO chose to draw federal attention, the identities of additional parties would seem to be superfluous. Ms. Brian herself testified to the effect that the identity of the parties was irrelevant to POGO's objective. In her July 1999 *qui tam* deposition testimony, she stated that she had not wanted to file her and POGO's lawsuit and would not have done so if someone else had brought a similar action.

Additional information casts doubt about Mr. Banta's explanation. For example, it appears that filing the suit in order to instigate federal action might not have been the sole purpose of the lawsuit. When Ms. Brian and POGO filed their *qui tam* claim, Ms. Brian already was aware that both DOI and the Department of Justice were investigating the matters at issue in their complaint. Also, as explained later, some information indicates that Ms. Brian may have been aware that a similar suit already had been brought over a year before she and POGO filed their claim. In any event, it appears that within approximately thirty days after the POGO/Brian suit was filed, POGO was notified that a similar suit under court seal (later identified by the Department of Justice as "virtually identical" to the POGO claims) had been brought in February 1996. POGO, however, continued to pursue its claim by, among other things, entering an agreement with the parties to the earlier lawsuit to share in the proceeds any party might obtain in their respective actions, even if POGO and Ms. Brian were to be dismissed by the Court as relators.

Retaliation

POGO's assertions about the officials' fears of retaliation also are questionable. Interviews of each of their supervisors and others within their respective departments and reviews of departmental materials provided no indication of why either employee reasonably would have feared retaliatory job actions. It is reasonable to consider that if either individual had joined the Brian/POGO lawsuit,

he would have been recused from working on matters related to the lawsuit. Sources who spoke with Mr. Speir stated that he acknowledged this point. This probability could be what Ms. Brian characterized as the prospect of retaliation. "Retaliation" of this kind could have had an impact upon the POGO royalties project and the Brian/POGO *qui tam* lawsuit.

Ms. Brian herself has acknowledged the lack of objectivity that can be expected from a person who, like Mr. Berman or Mr. Speir, had a direct financial interest in the outcome of her and POGO's action. As observed above, she testified to her knowledge that when the parties entered the payment agreement at least as of December 1996 it created in each employee the expectation that if POGO were to recover proceeds from the lawsuit he would receive a one-third share. She also has expressed her awareness that a person's having a financial interest in the outcome of the litigation was cause for concern over his or her objectivity with respect to the subject matter of the lawsuit.

Early in 1998, Ms. Brian announced that because oil companies had an interest in the outcome of her and POGO's lawsuit and similar claims brought by other parties, policymakers should "take a good hard look" at the companies' positions on DOI's proposed rule for federal oil royalty valuation, which addressed the subject of valuation raised in the lawsuit.[3] Given POGO's vigilance in preserving the integrity of government processes, it is reasonable to consider whether Ms. Brian's concern about bias reflects an awareness that Messrs. Berman and Speir likely would have been recused from their work on royalty matters because of their financial interests in POGO's lawsuit. Recusal would have been incompatible with their interests as federal officials as well as any interest either employee or Ms. Brian would have had in their assisting POGO's royalties project through actions taken as a federal employee.

As the rest of this discussion demonstrates, while acting as federal officials both Mr. Berman and Mr. Speir directly and indirectly assisted Ms. Brian with her project from 1993 through at least 1996 and were substantially involved in matters having outcomes favorable to Mr. Banta's client, the State of California. Moreover, the information does not compel the conclusion that their assistance ended in 1996.

2. To The Extent That POGO Made the Payments Because of Work Messrs. Berman and Speir Performed as Federal Officials, Nothing Indicates That Their Work Amounted To "Whistle-Blowing" Which, According to POGO, Justified the Payments as Public Service Awards

As stated in POGO's board minutes, at least one purpose of the sharing agreement and payments was to "compensate" the officials

[3] Testimony of Danielle Brian, Executive Director, before the Department of Interior Minerals Management Service's Public Hearing Regarding the Proposed Oil Valuation Rule, February 1998. In her statement Ms. Brian offered the following observation:

> As you know, last week the U.S. Department of Justice concluded that there is sufficient concern about this industry's past practices regarding the payment of federal royalties that they have intervened in a fraud case on the subject. (POGO's FCA lawsuit) I submit that this ongoing investigation should cause policymakers to take a good hard look at any criticisms of the Proposed Final Rule emanating from industry. . . .

for their work as federal employees. Ms. Brian has stated that POGO paid Messrs. Berman and Speir because of work they performed as federal "whistle-blowers" apparently from 1986 through 1996 and because the officials believed that they could not recover funds on their own efforts as relators in a *qui tam* suit. The information shows that during the ten year period highlighted by Ms. Brian neither individual worked on matters relating to the re-valuation of federal royalty oil except to a limited extent in 1986-1987 and from 1993 onward. The information also does not support POGO's contention that the work for which the officials were rewarded somehow was a form of "whistle-blowing" that POGO apparently considers to have satisfied a standard of public service.

At the same time Mr. Berman and Mr. Speir began their relationships with Mr. Banta in 1985-1986, they became involved in projects relating to the spot price valuation issue raised in the *Long Beach II* litigation and which the California had pursued with DOI. At that time, each official engaged in a limited project concerning the use of market center prices or spot prices as alternatives to posted prices for valuing crude oil. Neither individual appears to have pursued the valuation matter again until 1993, after all but one of the defendants in *Long Beach II* had paid substantial settlement amounts and DOI had committed to obtaining at least a similar result with respect to federal oil royalties. At that time, each employee became actively involved in the matter of royalty oil valuation in California.

It should be noted that while testifying under oath about the payments within approximately eight months after they were made, and even though they were unprecedented as a form of public service award given by POGO, Ms. Brian was largely unfamiliar with the work either individual purportedly had performed as a "whistle-blower" during the ten-year period. She was unable to provide any details other than to refer to: (a) an internal DOI memorandum discussing the use of spot prices to value crude oil that Mr. Berman wrote in 1986; and (b) an article co-authored by Mr. Speir and published by DOE referring to ANS crude prices in California to illustrate that a new pipeline could affect the value of oil produced in the State. However, she was able to articulate what she considers to be the "touchstone" for her deeming the officials as whistle-blowers throughout the ten-year period. In her July 1999 deposition, she testified as follows:

> No, the touchstone, when most of their agency is opposing something, and they are relatively low-level guys, and they have no authority to do anything, and they continuously tried to get their agencies to do something. They are whistle-blowers.

Ms. Brian's standard qualitatively differs from the type of conduct protected by the Whistle-Blower Protection Act of 1989 and similar laws. As expressed in those provisions, whistle-blowing by a federal employee is the disclosure of information the employee reasonably believes to evidence either "(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety." This appears to be the prevailing un-

derstanding of what constitutes whistleblowing activity.[4] As the following discussion will show, neither Mr. Berman nor Mr. Speir took any action that satisfied this standard. Moreover, it does not appear that either official's royalty-related work qualified as whistle-blowing even under Ms. Brian's standard.

1986 through 1992

It appears that during this period Messrs. Berman and Speir became active with respect to the spot-price valuation of federal royalty oil at the same time they became familiar with an effort by Mr. Banta and the Lobel firm to influence the federal government to adopt such a methodology at least with respect to oil produced in California. In the 1986-1987 time period, each official took some action to call attention to the use of spot-pricing or a similar alternative to posted prices.

Mr. Berman joined OPA's predecessor office in 1986 as an economist. He became involved in the California oil valuation matter in 1986, when the State, assisted by the Lobel firm, sought to persuade DOI that it should adopt a crude oil valuation methodology similar to the one the State advocated in the *Long Beach II* case. During this period, MMS was in the process of proposing changes to its oil royalty regulations. Mr. Berman, along with members of MMS and other DOI officials, worked with the State to consider its contentions that, at least with respect to non-arm's length transactions (the vast majority of crude oil sales transactions in California) posted prices did not reflect what the State believed the true value of oil should have been.

In a meeting with the federal officials attended by a member of the Lobel firm and other representatives, the State introduced a methodology for valuing royalty oil that utilized "a simple refinery net back approach." The methodology used open-market prices as the starting point for valuing crude oil and then netted back certain costs such as transportation expenses, at least in situations where the adjusted open market prices were higher than posted prices. Following the meeting, the California State Controller's Office sent an August 1986 written request to MMS that it further consider the State's spot price approach to valuing crude oil produced there. With the letter the Controller submitted a memorandum critical of MMS' inclination not to adopt the new methodology.

During this same period, Mr. Berman conducted his own inquiry into valuing federal royalty crude oil by using a market-center approach rather than posted prices. He compared the prices of West Texas Intermediate crude (WTI) futures traded on NYME X with refiner posted prices for WTI for the period June 1985 through Au-

[4] 5 U.S.C. 2302(b)(8). Accordingly, the United States Office of Special Counsel (OSQ, which is an independent federal investigative and prosecutorial agency whose primary mission includes safeguarding federal employees, former employees and employment applicants from reprisal for whistleblowing, defines whistleblowing as the disclosure of information such an individual believes to show "a violation of law, rule or regulation, gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety." OSC Web Page, www.osc.gov/discl1.htm. See, *e.g.*, *Black's Law Dictionary* 1596 (6th ed. 1990) (any change in a later addition?), where a "whistle-blower" is defined as "an employee who refuses to engage in and/or reports illegal or wrongful activities of his employer or fellow employees." See also, Glazer & Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* 4 (Basic Books, 1089). Referring to whistleblowers as ethical resistors, the authors define them as "employees who publicly disclose unethical or illegal practices in the workplace."

gust 1986. Recognizing the need for further consideration of the issue, Mr. Berman concluded nonetheless that valuation based on posted prices was not *per se* the best method for valuing royalty oil in all cases, particularly those involving non-arm's length sales contracts. In October 1986, he wrote a follow-up memorandum expanding upon his earlier analysis and suggesting that the Secretary develop a program to monitor and analyze oil valuations based on posted prices and open-market prices.

The DOI official then responsible for OPA, the Deputy Assistant Secretary for Policy, Budget and Administration, forwarded Mr. Berman's memoranda to the MMS Director. In his transmittal memorandum, the Deputy Assistant Secretary recommended further consideration of Mr. Berman's points and stated that OPA would continue working in the area. Indicating that Mr. Berman's approach might not be ready for near term implementation, the Deputy Assistant Secretary pointed out that "in the long term, . . . more market-based approaches (such as that discussed by Mr. Berman) may be more desirable."

MMS accepted the Deputy Assistant Secretary's recommendation. In a reply, the MMS Associate Director recognized the academic value of Mr. Berman's work but offered several observations as why it could not be implemented. Among other things, the Associate Director concluded that "for purposes of royalty valuation, the use of futures and/or spot prices would be either contrary to existing law, lease terms, and regulations, or too impractical and nonspecific to administer." Among other things, he referred to provisions of the Mineral Leasing Act and the Outer Continental Shelf Lands Act that require the collection of royalties based on the value of production, *i.e.* the place at or near the location at which the oil is extracted.[5]

According to Mr. Berman's testimony in a deposition taken in connection with the *qui tam* lawsuit, he stopped working on the valuation issue at this point. The Department, however, did not. It continued to pursue the issue of underpricing in California, which effort included an extensive study of aspects of the California oil market underlying claims that crude oil produced in the State had been undervalued. The study recognized conditions of the market that served as grounds for concern about the prices of oil produced in certain regions. It addressed eight aspects of the California oil market that influenced the price of California crude. Two of these were: (a) the lack of common carrier status of intrastate pipelines allowed producers who owned the pipelines to maintain low posted prices; and (b) issues raised in the *Long Beach* cases, *i.e.*, that integrated oil producer/refiners engaged in collusive practices to maintain low posted prices.

The report expressed the view that the largest influence on California crude prices was the lack of common carrier status of the producer-owned pipelines. The Department's Solicitor, however, had issued a written opinion stating that under the Mineral Leasing Act the Secretary had no authority to regulate "the common carriage of oil or gas through pipelines on rights-of-way" granted

[5] See, *e.g.*, *Independent Petroleum Association of America v. Armstrong*, Civ. No. 98–00531 (RCL) (March 28, 2000) ("The longstanding interpretation of 'value of production,' one recognized by the courts, is that it refers to the value of oil or gas at the wells.")

pursuant to the Mineral Leasing Act. The author of the report declined to discuss the issue of collusive conduct because it was the subject of the *Long Beach II* litigation.

The report illustrates that in 1988 the Department continued to address the issue of crude oil valuation in California even though Mr. Berman had stopped doing so. Mr. Berman's 1986 documents were not inconsistent with the Department's administration of the oil royalty program. It appears instead that his work was consistent with an initiative the Department itself had undertaken. The Department did not take regulatory action to implement his position. However, the information does not indicate that the Department opposed it. Mr. Berman appears not to have been a "whistleblower" on the matter of oil valuation at the time. Rather, he did his job as a policy advisor, and his observations were taken seriously by the Department.

Following his paper in 1986, Mr. Berman did nothing within DOI concerning allegations of royalty under-payments in California until 1993. Statements by one present and two former DOI officials familiar with Mr. Berman corroborate the indications that he was not a whistle-blower during that period. A former senior ranking Department official, a former highly placed MMS official, and a current official, each of whom was familiar with Mr. Berman's work, stated that until 1993 they believed that Mr. Berman was a an "apologist" for the oil companies with respect to the valuation issue.

One of the former officials, who worked with Mr. Berman until the early 1990s, stated that Mr. Berman took no action concerning federal oil valuations in California in even after all but one of the defendants had settled the *Long Beach II* claims in 1991. Beginning in 1993, about the time Mr. Berman began his relationship with POGO, he used those settlements as examples of why DOI should adopt a federal policy similar to the one reflected in the State's case in the *Long Beach II* litigation.

In 1986, Mr. Speir was with the DOE Energy Information Administration (EIA), where he had been since 1979 and served until 1991. His responsibilities included the supervision of a branch responsible for obtaining, analyzing and publishing crude oil price information. His particular expertise involved crude oil distribution systems. He was regarded within the Department as one of its experts on crude oil valuation and had particular knowledge with respect to the effect of transportation networks and distribution channels on oil prices.

With respect to his work on royalties generally while at DOE, Mr. Speir provided that following statement in deposition testimony concerning the POGO/Brian *qui tam* action:

> Q: Okay, mid 1994. Prior to the appointment to the task force in mid 1994, did you have any responsibilities relating to issues involving crude oil royalties?
>
> A: No, I did not. The energy Department really didn't have formal responsibility for royalty matters. In fact, the only place the Energy Department interacted on royalty issues was to develop occasionally initiatives that were to the end of reducing royalties to stimulate production. I was not involved in any of those.

Based on his other statements and assertions by Ms. Brian, it appears that the activity from 1986 through 1992 for which POGO awarded him related to the valuation and pricing of crude oil rather than the computation of royalties themselves. Nothing indicates tht his work was "whistle-blowing," however.

While he served in EIA, Mr. Speir's responsibilities included researching and analyzing aspects of the California petroleum market. Among other things, his duties involved collecting and analyzing crude oil prices in California (including the price of ANS crude), the costs of transporting petroleum products within and from California, comparing the California prices with Texas prices, and refining costs in California.

Similar to Mr. Berman, Mr. Speir appears to have become involved specifically in the valuation of California-produced royalty oil in 1985 or 1986 when Mr. Banta approached him while representing the State in connection with DOI's proposals on royalty oil valuation. During that time, Mr. Speir co-authored an article entitled *California Crude Oil Price Levels.* The article discussed some of the factors the authors thought might have contributed to observed differences in California's crude oil prices and refining profitability compared to the rest of the country. Among other things, the article contained a comparison of California posted prices with adjusted prices for ANS crude, which DOI now uses in the new regulations to value crude oil produced in California. DOE, through the EIA, published the article in its periodical entitled the "Petroleum Marketing Monthly" (PMM). In response to the article, Chevron Oil submitted a critique that questioned some of the authors' findings and conclusions. Mr. Speir drafted a response to the critique.

When asked about specific actions he took between 1986 and 1993 that were covered by the award payment, Mr. Speir referred to the PMM. article and his comments in response to the Chevron criticisms. Ms. Brian shared this view, citing the article both as Mr. Speir's early support for spot pricing and as an instance in which he served as a whistle-blower because his view purportedly was rejected.

These perspectives are interesting for several reasons. First, the article did not advocate the use of spot prices. The authors concluded the article with the question whether the anticipated completion of the All American Pipeline would have an affect on California prices. Second, the article was published by DOE, rather than having been opposed by the Department. Third, as Mr. Speir himself has observed, the only opposition to his article within DOE involved nothing more than a philosophical difference between himself and another economist apparently involving their philosophies as economists.

The information does not contain any other specific instance of Mr. Speir's purported whistle-blowing. When asked about additional occasions, he referred to his participation in a program DOE began in the 1990–1991 time frame to increase domestic oil and gas production. Mr. Speir stated that approximately during this period he developed or began to work on several initiatives concerning the distribution and transportation of crude oil. His work in-

cluded matters involving the status of oil pipelines in California as common carriers, which was at issue in the *Long Beach* cases.

In this regard, he stated that while serving as a DOE expert he attempted to change the "grand mechanism" by which California crude prices were controlled. He believed, as others did, that the lack of federal common carrier status for intra-state oil pipelines in California owned by integrated oil companies depressed the price of crude oil in the State. Assuming that some of Mr. Speir's efforts in this regard were not readily adopted by the Department, it is difficult to fathom how he might consider them to have been whistle-blowing. The question of federal common carrier status for intra-state oil pipelines is a legal one committed to the Department of Interior. Mr. Speir's opinion notwithstanding, the Department of Energy had no authority to act upon it.[6]

1993 Through 1996

During this period, DOI began its initiative to replace the posted price valuation methodology with an approach that relied upon market center or exchange prices rather than the prices used by producers and buyers to value production that was the subject of specific transactions. Among other things, the Department, through MMS, conducted studies of federal royalty oil values in California, formed and coordinated an Interagency Task Force to investigate the California oil market and make recommendations about the use of open market pricing as an alternative to posted prices, retroactively imposed a spot-price methodology to recover from integrated refiner/producers in California allegedly unpaid royalties that resulted from the higher valuations based on the new approach, and began the process for amending its regulations to provide for the use of market center prices.

The outcomes of the Department's initiative primarily were to benefit California in the manner championed by Mr. Banta and POGO, and to set the stage for development and promulgation of the new valuation rules. Although DOI did not act as promptly on some matters as Mr. Berman, Mr. Speir, and Ms. Brian desired and did not wholly adopt all of their advice on all matters they considered important to the oil royalty issue, nothing in the information supports POGO's portrayal of each employee's work as a lone heroic struggle against an agency opposed to their public-minded views. To the contrary, both individuals were "in the thick" of the Department's policy change and, it appears, were instrumental players in the process.

During this period, Messrs. Berman and Speir also helped develop and contributed to POGO's royalty project, which resulted in the POGO/Brian *qui tam* lawsuit from which the two officials were paid. As the following discussion of their activities makes clear, their work beginning in 1993 could be accurately described as assistance to POGO and its related interests

Mr. Berman's work may have benefitted POGO and its causes in at least two ways. First, he appears to have been the individual

[6] In a letter dated March 29, 1994, to Interior Secretary Babbitt, DOE requested that the Secretary "take actions to require that all California pipelines that are subject to Mineral Leasing Act provisions immediately publish tariffs, shipping conditions, and other information relevant to their operation as common carriers."

primarily responsible for the Department's initial involvement in California and to have been influential in advising the Department about collecting royalties in the State and on related matters. His activities in this area contributed to the recovery of proceeds for Mr. Banta's client which, together with other DOI actions, created a regulatory climate supportive of *qui tam* actions to recover allegedly unpaid royalties in other localities based on similar principles and valuation theories. One indication of his influence is that his recommended valuation methodology, *i.e.*, the use of NYMEX oil futures prices, was contained in early proposals of the new rule. Purportedly he has claimed that he wrote the preamble to the first set of proposed rules.

Second, in the course of his activities Mr. Berman obtained information from both DOI and non-DOI sources concerning the valuation of crude oil produced in California and possibly elsewhere. He reviewed non-public working documents from MMS concerning the California valuation issue and appears to have had general access to MMS information. He may have shared knowledge and expertise he gained from this information with Ms. Brian. She has stated that Mr. Berman gave her guidance that was essential to her understanding of certain oil company transactions she and POGO challenged in their lawsuit. Although the extent, if any, to which he provided documents to her is unclear, such activity would have been consistent with their relationship and mutual interests. Mr. Berman also conducted an independent investigation of crude oil valuations in other oil-producing states and while doing so obtained expert information and analysis on matters material to the POGO/Brian lawsuit from at least one expert who had filed a similar *qui tam* action under seal over a year before the POGO/Brian lawsuit was brought.

Mr. Speir's work appears to have benefitted POGO and its causes in similar ways. DOI was aware of his position on valuation in California when it assembled the Interagency Task Force. His position was, in general, that spot prices should be used to value federal royalty oil in the State without regard for the approach prescribed by the rules then in effect, which was to audit transactions and refer initially to posted prices to value the oil involved, with the potential for using other benchmarks, including net-back and spot price methodologies, under circumstances where posted prices did not reflect fair market value. As a member of the task force, he strongly advocated his position, which DOI adopted to a significant extent even though its own task force members opposed Mr. Speir's recommendation to do so. In response to his recommendation, joined by a colleague of his who he had invited onto the task force, the Department issued payment orders based on a retroactive application of his recommended valuation methodology seeking to recover initially more than $385 million in allegedly unpaid royalties from integrated oil companies in California covering the period from 1980 through 1986.

While serving as a member of the task force, Mr. Speir obtained confidential access to court-sealed records of major oil companies produced in the *Long Beach II* litigation. Based on his recommendation and influence, the task force entered into a sole source contract with an expert who served as a consultant to Cali-

fornia in that case and who had a long-time relationship with the Lobel firm. Both Mr. Speir and the expert, Peter Ashton, assisted POGO with its royalties project while the task force was underway. Moreover, the POGO/Brian *qui tam* lawsuit appears to involve matters on which Mr. Speir provided advice and assistance.

The Officials' Activities During the Period

During 1993 Mr. Berman began an intensive effort to mobilize DOI toward recovering allegedly unpaid royalties from producers of federal royalty oil in California. He channeled his efforts generally through Mr. Brooks Yeager, who served as the Director of the Office of Policy Analysis and later as the Deputy Assistant Secretary with responsibility over policy matters. The information indicates that in response to Mr. Berman's advice and advocacy, Mr. Yeager frequently brought Mr. Berman's views to the attention of senior Department officials. Mr. Yeager addressed issues about crude oil valuation in California with senior Department officials as well as, occasionally, members of the Lobel law firm and Ms. Brian. The information does not indicate that Mr. Yeager knew about the payment arrangement between POGO and Mr. Berman or that Mr. Berman and Mr. Speir had a cooperative relationship with Ms. Brian.

Beginning in March 1993, Mr. Berman began to acquire information relating to intrastate crude oil transportation, alleged crude oil undervaluation schemes by integrated oil producers in California, and alleged royalty under payments. Based on information he had obtained from attorneys for the State in *Long Beach II*, he advised that the Department should obtain information produced by oil company defendants in the case which had placed under seal by the court. In August, Mr Berman submitted a memorandum to Mr. Yeager recommending that DOI investigate the California oil market to determine whether federal royalties had been underpaid. Like the State of California, Mr. Berman expressed the view that the lack of common carrier status resulted in lower posted prices for crude oil. Like the State of California he, expressed the view that oil companies in the State may have been artificially lowering posted prices through several types of transactions. Also like the State of California, Mr. Berman suggested that the Department consider the use of open market or ''spot prices,'' such as ANS crude, to value federal royalty oil.

In the memorandum, Mr. Berman also made the following suggestion:

> I suggest that the Department proceed immediately to ascertain the amount of additional royalties due, including interest and criminal penalties, if any, and initiate collection procedures. This will involve intervening in the ongoing litigation to protect Department interests and ensure access to evidence under court protective order. MMS has indicated an interest in pursuing the royalty issues.

This recommendation is significant. It indicates that by August 1993 Mr. Berman had accepted as fact that substantial undervaluations in California had occurred. In effect, he was advising the Department that it should adopt the State's position with respect to

oil valuation, thus advocating the position taken by Mr. Banta and his firm on behalf of their client. Considering that several experts did not agree with California's allegations and valuation methodology, it could fairly be questioned whether Mr. Berman was acting in the Department's best interests by urging it to pursue the cause of the Lobel firm's client apparently without regard for alternative views. It would also be fair to ask why Mr. Berman at that time dedicated himself to California's causes after his six years of silence on the issue.

Soon after Mr. Berman submitted his memorandum to Mr. Yeager, MMS was given a copy and initiated a project "to estimate the potential royalties due the Federal Government" on federal royalty oil produced in California. DOI thus undertook a program to "reevaluate whether to pursue possible under-payments due to crude oil valuation in California."

The first step in this initiative was a project generally referred to as the "1993 scoping study," the purpose of which was to examine information the State of California had compiled and created in connection with the *Long Beach II* case. The settlements in that case were seen by DOI as indications that the State's evidence, which included a spot price valuation methodology, was compelling enough to produce additional revenues from the oil companies at least through settlements, if not through the favorable outcome of a trial.

Notes taken by MMS officials indicate that MMS worked closely with Mr. Berman and Mr. Speir in developing issues to be considered in the study. The notes show that Mr. Berman was part of MMS's effort to obtain information about ANS crude valuations and that he discussed crude oil sales transactions in California which allegedly depressed the posted prices of crude beneath its true economic value. Mr. Berman also expressed his views opposing a concern that DOI's Solicitor had about the potential effect the 6-year statute of limitations governing royalty collections might have to limit DOI's collection of royalties after a certain period of time. In addition, he called the MMS's attention to concerns expressed by the State that DOI's settlements of royalty payment orders had been too low, and he recommended that MMS establish contact with individuals key to the State of California's valuation theories.

Mr. Berman advised MMS that a proposed report should include, among other things, the common carrier pipeline issue, valuation issues, comparisons of prices for California-produced crude with ANS crude, and ranges of undervaluation for different time periods. Each of these matters had been raised by the State in the *Long Beach II* litigation. The notes indicate that Mr. Berman informed MMS that Mr. Yeager was "on board" with the approach of the scoping study.

In connection with this study, Mr. Speir advised MMS with respect to the use of ANS crude to value oil produced in California and how to obtain information about California crude oil valuations. He recommended that MMS confer with Mr. Ashton, the consultant with whom the State of California and the Lobel firm had relationships.

To carry out the study, officials from MMS reviewed evidence assembled by the State in the *Long Beach II* lawsuit. Among other

things, the State's evidence included the use of a spot price methodology to value oil the State believed had been deliberately undervalued by affiliated oil producers and purchasers in the State. Using only the State's evidence, including its spot-price valuation methodology, and despite not having substantiated the information they examined, the MMS officials reported in an internal memorandum that for the period from 1960 to 1992 they ''had evidence that the major California oil producers may have undervalued California oil production by keeping posted prices low and thus underpaying the royalties based on them.''

In a report on this study, the MMS officials gave high and low estimates of potential undervaluations for both federal onshore and federal offshore crude oil during separate time segments reflecting market conditions. MMS estimated the amounts of unpaid Federal royalties for both onshore and offshore oil during the entire 1960 to 1992 time period to be as follows:

Offshore—Low: $130,719,954; High: $272,172,868
Onshore—Low: $68,674,243; High: $149,828,766

MMS attached charts showing estimates for various time segments that corresponded to changes and events in the California oil market during the thirty-two year period under review. The report noted that based on the information the ''most significant potential undervaluation'' occurred between 1980 and 1985.

In interviews during this inquiry, DOI officials stated that because this study was merely the initial stage of DOI's inquiry into purported crude oil under-valuations in California, the report was treated only as an internal working document not for publication. The officials also believed, without specifically recalling, that Mr. Berman was provided with the report because the study was initiated at the request of his office and he had discussed the matter with MMS officials. According to present and former DOI officials and other information, while the report was circulating within DOI it was leaked to the press.

Following this report, Mr. Berman sent additional memoranda to Mr. Yeager. In an undated memorandum after the report was written, he stated that MMS ''concluded'' that there was ''substantial evidence'' of undervaluation in California and that it resulted from transactions by the major integrated oil companies (''badger exchanges'') and the companies' failures to operate their pipelines as common carriers. In another memorandum dated December 3, 1993, Mr. Berman advised Mr. Yeager that the Department should take affirmative action with respect to the California valuation issues. He made the following observation: ''In considering each of the following decisions, you should know that I have been informed that *Inside Energy/Federal Lands* is in possession of the MMS analysis showing the $2.6+ billion undervaluation and $420+ million in additional royalties due'' in California. Some DOI officials expressed the belief that Mr. Berman had a role in providing the analysis to the press.

With the memorandum Mr. Berman attached two policy analyses of valuation-related issues uniquely concerning California entitled ''Oil Pipeline Rights-of-Way And Royalty Valuation of Oil In California,'' and ''California Common Carrier and Crude Valuation.'' In

these documents, he recommended that his office put together a DOI task force to look into conditions of the California market and activities of oil producers that the State believed to have resulted in unpaid royalties. He suggested that the Department consider the *Long Beach II* litigation as a model for determining underpricing by integrated oil producers.

Finally, Mr. Berman suggested in the memorandum that the Department file an amicus brief in a pending appeal by the State of California of a state court's decision in one of the *Long Beach* cases on the common carrier status of California oil pipelines. Stating that "an affirmative decision is important if the Department is to pursue" royalty matters, Mr. Berman wrote:

> Consideration is being given to a proposal that, if additional royalties are pursued, they should only be pursued for the post 1986 time period (footnote citing and rejecting DOI Solicitor's Office statute of limitation concerns). The post '86 underpayments are small relative to the pre- 86 underpayments. Moreover, the difficulty of demonstrating the undervaluation is significantly larger and the argument is far less convincing if the pre '86 behavior is ignored. . . .

As in his August 1993 memorandum, Mr. Berman again was advising the Department that underpayments in California were a fact, even though his advice appears to have been based upon nothing more than the State's allegations in *Long Beach II* and the fact that all but one of the defendants had settled. Relying upon the State's evidence and MMS' apparent adoption of it in the 1993 scoping study, Mr. Berman concluded that the mother lode of alleged under payments was to be extracted from transactions and activities by integrated producers occurring before 1986. This raised a problem. The DOI Solicitor's Office (SOL) had expressed strong reservations about the risks of testing DOI's ability under the statute of limitations to obtain royalties accruing in years prior to 1986.

The Solicitor was concerned about split decisions in federal courts of appeal on whether the statute generally precluded recoveries of royalties accruing more than six years before a royalty audit or collection effort. According to the Solicitor, some of the decisions interpreted the statute restrictively so that the Department's effort to collect back-royalties in those jurisdictions was limited. Because of this uncertainty, SOL believed that litigation over a DOI attempt to collect royalties accruing before 1986 would be likely and that the Department would risk another unfavorable application of the statute. Mr. Berman, although not a lawyer, disagreed with this position, which the Solicitor had given in the best interests of the Department and the royalty management program. In response to the memorandum, Mr. Yeager requested a briefing on the issues, including a "thorough discussion of the actual mechanisms used to reach the undervaluations."

By December 1993, Mr. Berman had sought to influence DOI toward "federalizing" the State's theories in the *Long Beach* cases by adopting them as Federal policy. He urged that the Department adopt California's position with respect to the common carrier sta-

tus of intrastate pipelines crossing federal lands, adopt California's spot price methodology, and seek recoveries of royalties for the same periods covered by the *Long Beach* cases. He initiated the 1993 scoping study and then touted it as the reason that DOI immediately should begin to recover royalty under-payments in California. At the same time, Mr. Speir had become a resource for MMS and was seen as an authority on the California market and its valuation of crude oil.

Perhaps coincidentally, Mr. Banta introduced Messrs. Berman and Speir to Ms. Brian in December 1993. From that point onward, each of the three parties took actions to move the Department toward recovering federal royalties for the period covered by the 1993 study by adopting a spot price valuation methodology. Although Ms. Brian had no experience in or knowledge of oil royalty issues, she, as POGO, became deeply involved in the matter. POGO adopted Mr. Berman's characterization of the 1993 scoping study as DOI's determination of the amounts of undervaluations and underpaid royalties in California. Ms. Brian later alleged that the Department refused to act immediately in response to the scoping study because of its desire to protect "big oil." Also at that time, Mr. Speir became involved in guiding the Department toward the use of ANS crude prices to value California oil.

Although indications at the time were that DOI would pursue the California royalties matter consistent with the objectives of Mr. Banta, Ms. Brian, Mr. Berman and Mr. Speir, a development within MMS soon raised concerns about the Department's future efforts in area. Early in 1994 MMS conducted a second analysis of the California crude market (1994 Scoping Study). This study evaluated posted prices and royalty values in California by examining whether any evidence showed that postings in California were below market value between 1986 and 1992. The study was limited to that period in recognition of the Solicitor's position that the risk of pursuing royalties accruing before 1986 could result in a judicially imposed limitation upon the Department's ability to collect royalties.

According to a former MMS official, this second study was a follow-up to the 1993 study. Its purpose was to consider whether differences between posted and spot prices in California revealed manipulations causing posted price undervaluations below market price or instead reflected aspects of the California market that justified the differences between posted and spot prices, thus indicating that under market conditions during the period reliance upon posted prices had been appropriate.

Similar to findings made in the 1993 study, the MMS officials who conducted the 1994 study found that in certain locations sales of crude brought premiums over the posted prices. Also similar to the 1993 study, the second study determined that spot prices in California exceeded postings. With respect to the adjusted prices of ANS crude as evidence of undervaluation, the study observed that spot prices for ANS crude delivered to California were higher than spot prices for comparable crude produced in California. The study concluded, however, that because of the unique characteristics and inherent volatility of the crude oil market in California during the

time period, discrepancies in valuation did not support the conclusion that lower-priced royalty oil had been undervalued.

In reaching this conclusion, MMS officials noted that they were unable to access court-sealed information pertinent to allegations of undervaluation occurring since 1986. Moreover, they did not consider settlements in the *Long Beach* cases to represent admissions of royalty under-payments because the settlements neither contained nor indicated that the oil companies admitted to wrongdoing. However, in addition to researching the California oil market, the officials conducting the study examined reports from experts, institutions and Federal agencies reflecting divergent positions on whether California crude oil had been undervalued. The information included the DOE-published article co-authored by Mr. Speir in 1987 and reports by experts working for the State of California.

Based on their analysis of available data, the MMS officials reported that they found "no convincing evidence" that from 1986 to 1992 posted prices were below market value or otherwise invalid for royalty purposes. This conclusion was not entirely inconsistent with Mr. Berman's position. In his December 1993 memorandum to Mr. Yeager, Mr. Berman observed that "the difficulty of demonstrating the undervaluation (in California) is significantly larger and the argument (for undervaluation) is less convincing if the pre '86 behavior is ignored."

Mr. Berman, along with the State of California and subsequently POGO, strongly opposed the 1994 scoping study findings. In an e-mail to Mr. Yeager dated March 30, 1994, Mr. Berman stated that the 1994 study lowered the estimate of under-payments in California from an estimated $140 million "to zero" for the period 1986–1992. He concluded his message with the following statement: "I am concerned that both the press and the Hill will have a field day with these 'revised' numbers." On April 11, 1994, Inside Energy/Federal Lands reported that the "a draft study" by MMS showed that "MMS now finds no royalty underpayments."

Ms. Brian later characterized the 1994 study as an attempt by DOI to cover up what she, Mr. Berman and others considered to be the definitive conclusions contained in the 1993 scoping study report. In a POGO report, Ms. Brian concluded that the study proved DOI's desire to continue "corporate welfare" for the oil companies and deprive the nation of billions in revenues to which it clearly was entitled.

In an e-mail memorandum to Mr. Yeager dated April 18, 1994, Mr. Berman suggested that the Secretary of DOI establish "a good working relationship" to make DOI's "objectives in California more achievable." He discussed the State's interests in obtaining its 50% share of federal royalties for onshore production as well as the State's interest in having pipelines crossing federal lands to be designated as common carriers. He expressed his concern that a "lack or responsiveness" by DOI and MMS on California-related common carrier and royalty issues "may be reaching a level that may impair the Secretary's relationships within the State, with the potential to negatively impact other initiatives."

Also in that e-mail, Mr. Berman expressed his familiarity with the California official instrumental in those issues, Robert Hight,

noting that Mr. Hight was the Executive Director of the California State Lands Commission and in that capacity he "had responsibility for the Long Beach litigations involving both the pipeline and royalty issues." Mr. Hight had a long standing relationship with the Lobel firm. Mr. Berman closed his memorandum with the following political observation: "Failure of MMS to pursue these matters could undercut California's efforts and chill relationships."

According to DOI records, also in or about April 1994 Mr. Berman requested that MMS provide him with "back-up" data on its review of alleged underpricing of California crude oil. The information indicates that the Director of MMS at the time, Tom Fry, was surprised and concerned that Mr. Berman was working on the topic because of an impression he and others had gotten from OPA that Mr. Berman was no longer assigned to crude oil royalty program issues. According to MMS officials, there was a general impression that with respect to California oil royalties Mr. Berman was not an objective source of information and interfered with MMS's work on the matter. Some former officials and others also stated that at the time a general suspicion had emerged that Mr. Berman may have been involved in leaking non-public MMS working documents to the press. They had requested that he be removed from the issue and were told that he had been.

Because of the concerns expressed by the State of California, Mr. Berman and others about the implications of the 1994 study, the Department formed the Interagency Task Force in summer 1994. The purpose of the task force was, as had been suggested by Mr. Berman, to obtain the oil company documents sealed by the court in *Long Beach II* as part of a study of California valuation and royalty issues. The team originally comprised five members: an attorney from DOI's Solicitor's office, two royalty experts from MMS, an attorney from DOJ and Mr. Speir. Mr Speir invited an employee from the Department of Commerce, Mr. Bernard Kritzer, to join the team. Mr. Kritzer is an economist in the Commerce Department's Bureau of Export Administration who specializes in exports of crude oil. At the time, he and Mr. Speir were familiar with and in agreement on each other's position proposing the use of market-center or spot prices to value oil in California. There is some information indicating that Mr. Kritzer may have had a relationship with one or more members of the Lobel firm.

The circumstances under which Mr. Speir became a member have not been clearly established. DOI was familiar with his position on the valuation of California oil before he was appointed to the team. Some of the information indicates that DOI, through the Assistant Secretary, Land and Minerals Management, Bob Armstrong, specifically asked DOE for Mr. Speir's participation because his position on California oil valuation was well known. According to other information, DOI requested that DOE provide a team member fitting a description that was uniquely tailored to Mr. Speir's experience, qualifications, and position on crude oil valuation in California.

The Task force also included "unofficial" participants, specifically an official from the State of California and Lee Helfrich, a member of the Lobel firm. On at least one occasion, Mr. Banta attended a Task Force meeting instead of Ms. Helfrich. Although POGO had

publicly attacked MMS for failing to serve the public and favoring large oil companies by not promptly adopting the positions advocated by Mr. Banta on behalf of his client, he did not inform any of the DOI Task Force members of his connection to Ms. Brian or POGO. Mr. Speir did not inform any of the members of his relationship with Ms. Brian or Mr. Banta in his capacity as POGO's chairman.

Although the ITF officially was instituted in May 1994, its goals and objectives were not established until sometime late in the summer. Among other things, during the summer MMS encountered difficulties in obtaining necessary resources, including support staff such as auditors, who were involved in audits and related matters, and in coordinating vacation schedules. By early September, however, resources had been assembled sufficiently for the team to have arrived at its preliminary goal, which was stated as follows: "Our purpose is to obtain any additional data that would enable MMS to determine conclusively whether the posted prices used by the major oil companies in California to value crude oil from Federal leases reflect market value." To gain access to the information, task force members, including Mr. Speir, signed confidentiality agreements with the oil companies under which they obligated themselves not to disclose the sealed information. Mr. Speir analyzed the data and reviewed it with another member of the task force. In the process, the members used a data base and other information developed by Mr. Ashton.

As a member of the task force, Mr. Speir forcefully advocated the general use of a spot-price valuation methodology to recover federal royalties in California. According to members of the task force, he believed that the approach should be used regardless of the Department's practices under the regulations in effect before 1988 and its interpretation of the regulations promulgated in 1988. Before the 1988 regulations the MMS Director had discretion over valuation methods. In practice, MMS generally relied upon posted prices, subject to alternatives if the conditions of sales transactions indicated that such prices did not reflect fair market value. Because posted prices reflected values determined by market conditions, they generally were regarded as indications of market price except in cases that MMS auditors considered not to be arm's length transactions. MMS essentially "codified" this approach in the 1988 regulations.

Mr. Speir's position raised a legal issue that persisted throughout the period of the task force and manifested itself in a split recommendation to the Department. Indeed, perhaps the truest indication of his influence on the Department's development of a market center valuation approach is that the Department accepted his and Mr. Kritzer's recommendation despite opposition by DOI's own task force members, who included an attorney intimately familiar with the applicable laws and Solicitor's legal opinions.

In December 1995, the task force advised DOI on several options for valuing crude oil in California. According to former task force members, Mr. Speir, along with Mr. Kritzer, persistently and ardently urged that DOI adopt the ANS-based valuation methodology and that it be applied retroactively even though doing so would be inconsistent with DOI's practices and interpretations of its royalty

rules. Because of the 1988 regulations, Mr. Speir accepted that his blanket valuation approach could not be used to collect royalties subject to those regulations, which required an audit-based, bench mark methodology that in the first instance relied upon posted prices. He and Mr. Kritzer insisted, however, that their blanket approach should be applied to production in California before 1988.

The other members of the task force opposed this on grounds that the pre-1988 regulations in effect were the same as the 1988 regulations; the Department's use of posted prices before 1988 was, in legal effect, an interpretation of the rules that legally could not be overturned retroactively. They believed that "both regulations rely on prices paid or offered in the same field or areas as the lessee's production, and they state that royalty is not to be less than the gross proceeds accruing to the lessee from the sale of its production." In addition, the use of Mr. Speir's spot price methodology for pre-1988 production risked challenges based upon the statute of limitations that the Solicitor had concluded were meritorious enough potentially to undermine the royalty collection program.

In the ITF report, Messrs. Speir and Kritzer recommended that the Department apply ANS spot prices to pre-1988 production in California. The remaining members opposed the recommendation pending further analysis and advice from the Solicitor on the legality of issuing payment orders using the spot price approach. This disagreement notwithstanding, the Department began implementing the Speir/Kritzer recommendation within weeks after the report was issued. At that time, MMS issued internal guidance to auditors that adopted the Speir/Kritzer recommendation. By the end of 1996, DOI had issued payment orders (billings) to integrated producer/refiners in California seeking to collect over $385 million in royalties based on ANS-adjusted prices for crude oil between 1980 and 1986.

In addition to the above activities, Messrs. Berman and Speir appear to have taken other actions favorable to POGO's interests. Mr. Berman successfully worked for discontinuing the Department's use of certain settlements, known as "global settlements", to ensure that future settlements would not release oil companies from future claims for unpaid royalties by the federal government or, by implication, other qualified parties such as *qui tam* relators.

In 1993 and 1994, MMS entered agreements with Exxon (October 1993) and Chevron (March 1994) to settle various matters, including litigation, concerning the companies' reporting, computation and payment of additional oil and gas royalties. Mr. Berman, POGO and the Lobel firm objected to provisions in the settlements that released the companies from royalty claims up to a certain date even if the claims were not part of the matter being settled.

The Chevron settlement released the company from claims to recover royalty under payments on production in California between January 1980 and September 1989 where the under payments were based on posted prices that were lower than the true price of oil. The release did not apply where the undervaluations had been established through collusion, fraud, or improper conduct violating the Minerals Leasing Act. The Exxon settlement contained provisions releasing the company from royalty-related claims through September 1989 except where transactions during the period in-

volved fraud, malfeasance, concealment or misrepresentation of material fact. The release included royalties on California production.

Both Mr. Berman and the Lobel firm opposed the use of such provisions in future settlements. It appears that beginning in March 1994 Mr. Berman met several times with Mr. Yeager and other DOI officials to express his concerns and objections to the release in the Chevron settlement. He complained that the settlement would preclude collections on significant portions of Chevron's production in California. In a September 1994 memorandum to Mr. Yeager, Mr. Berman opened with the following statement: "The problems associated with the Global Royalty Settlements that MMS has been conducting (Chevron and Exxon) have reached a level that Secretary (sic) may be exposed to significant criticism for relinquishing claims to substantial royalty revenues." Mr. Berman recommended that the Secretary place a moratorium on future settlements until settlement procedures and policies had been reviewed.

Shortly after Mr. Berman's memorandum, a member of the Lobel firm, Ms. Lee Helfrich, wrote a letter to the MMS Associate Director, Policy & Management Improvement. Nothing in the information indicates that Ms. Helfrich was aware of or involved in any of Mr. Berman's activities within the Department concerning the settlements. The purpose of the letter, however, was to emphasize her client's standing concern that language used in the Chevron settlement to limit the collection of royalties on California production was unacceptable. POGO subsequently issued a report in which it stated that the global settlements were evidence of DOI's favoritism toward the oil companies.

After considering the objections to the settlements, the Department stopped using the provisions Mr. Berman and Ms. Helfrich found objectionable. According to a DOI official familiar with the circumstances, Mr. Berman's involvement was instrumental in effecting the Department's change. It is unclear whether Mr. Speir was involved in the matter. DOI documents indicate that the matter was discussed among members of the ITF.

Another matter in which Messrs. Berman and Speir were involved was the question of unpaid royalties in states other than California. Both employees believed that crude oil sales and exchange transactions in the other states could justify the use of spot prices to re-value the production and recover higher royalties. Their work on the matter was of interest to POGO; it covered the issue in one of its reports. Moreover, the issue is the centerpiece of the Brian/POGO *qui tam* case.

The information indicates that Mr. Speir raised the issue at least as early as December 1995. In a December 14, 1995, memorandum accompanied by a supporting analysis, he stated as follows: "Consideration of other, lower-48 state royalty underpayment (sic) is justified by the divergence of market prices and prices posted by the major refiner/producers in recent years."

Mr. Berman also advanced this position. In a May 28, 1996, memorandum to the acting OPA director, Mr. Berman referred to the possibility that valuation questions might exist in states other than California. The memorandum was sent to Mr. Yeager, who in

turn distributed it to Assistant Secretary Armstrong, Cynthia Quarterman, then the Director of MMS, and John Leshy, the Solicitor. Over the memorandum, Mr. Yeager attached a note stating that the May 28 memorandum "indicates the possibility that there may exist oil valuation questions outside of California that may bear scrutiny in light of the findings of the interagency taskforce on the California issue."

Additional circumstances warrant particularly close scrutiny of Mr. Berman's involvement in the Department's royalties initiative and POGO's royalties project. In June 1996 both he and Mr. Speir testified at a hearing conducted by the Subcommittee on Government Management, Information, and Technology of the House Committee on Government Reform and Oversight. In his testimony Mr. Speir stated that he had initiated his own investigation to determine whether posted prices reflect market value outside of California. He stated that his initial investigation so far had indicated that posted prices were below market value outside of California.

It is unclear whether he shared his independent work with MMS or Department officials. Although nothing in the information demonstrates that Mr. Berman shared this work with POGO, it should be noted that the subject matter is at issue in the Brian/POGO *qui tam* action. It also should be noted that, while conducting his investigation, Mr. Berman obtained information material to the lawsuit under questionable circumstances.

In February 1996, an individual named Benji Johnson filed a lawsuit in the U.S. District Court in Lufkin, TX, to recover unpaid royalties allegedly due from oil companies who had undervalued royalty oil through transactions they conducted in several states. The suit was sealed. Mr. Johnson is a former oil company executive with substantial experience and expertise in crude oil sales, exchanges and valuation. He was well known among MMS and other Department officials and served as a consultant to DOI in connection with the recent rulemaking.

Beginning in April 1996 and ending in June 1997, Mr. Berman frequently contacted Mr. Johnson. Representing himself as a DOI investigator, Mr. Berman called Mr. Johnson frequently to discuss matters specifically involving the substance of his lawsuit. The information does not directly indicate that Mr. Berman shared this information with POGO. However, in September 1996 Ms. Brian also contacted Mr. Johnson.

According to Mr. Johnson, Ms Brian indicated that she was aware of his lawsuit and suggested that both he and POGO had interests in joining forces in a royalty-based *qui tam* lawsuit. He did not acknowledge the lawsuit. In June 1997, the Brian/POGO suit was filed in the same court and before the same judge presiding over Mr. Johnson's suit. According to representations by the Department of Justice, the claims made by the two parties were virtually identical.

Ms. Brian has stated that she did not know of Mr. Johnson's lawsuit until June 1997, when POGO's suit was filed. In this regard, it should be noted that Mr. Speir referred to the Mr. Johnson's lawsuit as having been the subject of "coffee table" conversation before the POGO claim was filed. Department of Interior officials also stated that from the time it was filed the suit was common knowl-

edge among those in the Department familiar with oil royalty issues. At the House Resources Subcommittee hearing on May 18, 2000, Mr. Banta and Ms. Brian were asked when they first became aware of Mr. Johnson's lawsuit. Both Mr. Banta and Ms. Brian refused to answer.

In her *qui tam* deposition testimony, Ms. Brian stated that she achieved an understanding of certain oil company sales and exchange transactions covered in the Brian/POGO *qui tam* complaint from Mr. Berman. Mr. Berman's inquiries to and discussions with Mr. Johnson covered elements of these same transactions.

It is possible that Mr. Berman also had access to internal DOI information relating to oil values in other states. While he was conducting his investigation, MMS was investigating oil valuation issues in other states and the Gulf of Mexico. Pursuant to its "National Crude Oil Strategy," in 1996 the agency audited crude oil production and sales transactions in oil producing regions in states other than California and in the Gulf of Mexico.[7] The National Strategy targeted about 125 companies, which, according to DOI, produced about 86% of the crude oil extracted from Federal lands. Unlike the Task Force, the nationwide program focused on more current periods, although its focus was not limited to only the most recent six-year period associated with the statute of limitations.

Information about this study was not obtained. The information gathered during the inquiry does not indicate specifically whether Mr. Berman was involved in or had access to the MMS investigation. The information shows, however, that Mr. Berman generally had access to information generated in and used by MMS even after it appeared to MMS and Mr. Berman's colleagues in OPA that he had not been assigned to oil valuation matters.

The Rulemaking

The above described activities show that Messrs. Berman and Speir were influential in the Department's development of its new royalty oil valuation policy, particularly with respect to matters of interest to California and issues pertinent to the potential for Ms. Brian and POGO to bring a royalty- based *qui tam* action. The information does not show the extent to which either employee may have been appreciably involved in formulating the content of the Department's new regulations. However, each official appears to have provided some input into the proposal. The information suggests that their philosophies and advice concerning the Department's adoption and application of spot-price valuation methods were influential.

Mr. Berman appears to have represented to two individuals that he drafted the preamble to the Department's first proposal. There the Department adopted the use of the NYMEX index price for non-arm's length sales in states other than California and Alaska. Mr. Berman long had been a proponent of using NYMEX oil futures prices to value crude oil production at least in connection with non arm's-length transactions. Some information suggests that the Department, while considering the proposal, initially was

[7] Subcommittee on Government Management, Information and Technology, House Committee on Government Reform, Testimony of Sylvia Baca, May 19, 1999.

not inclined to include the NYMEX measure in the new regulation. However, a memorandum by Mr. Berman justifying the standard was circulated among senior Department officials in December 1996 and his standard was adopted.

The final regulations do not contain Mr. Berman's position that NYMEX should be the principal index price for production outside of California. In general, the regulations allow for the use of spot-prices at market centers in the manner prescribed in the regulations. However, the final regulations do use ANS spot prices to value oil produced in California and Alaska, which is an approached advocated persistently by Mr. Speir. Moreover, it appears that while on the ITF he discussed with other members his opinion as to some ambiguities in the existing regulations that should be corrected in new ones. In the months before the first proposal was published, he sent a comment to an MMS member of the rule-making team suggesting that the regulations "do away with any recognition of affiliate transfers" and "define the lessee to be the parent corporation and all its consolidated and unconsolidated entities that it directly or indirectly controls." It appears that this advice was not adopted.

In light of Mr. Speir's influence with respect to the ITF recommendations, it is reasonable to assume that MMS was sensitive to his views. The Service asked DOE to comment on the proposals, and DOE designated Mr. Speir to provide them. For unexplained reasons, however, Mr. Speir's input was limited to providing comments on the proposal to DOE officials for DOE purposes. There is no indication that he sent comments to MMS or DOI, nor does the information indicate whether the DOE recipients of the comments forwarded them.

Aside from questions about their substantive input, the Department's rule making process does involve a somewhat peculiar circumstance involving Messrs. Berman and Speir. Both individuals had been involved in matters involving the issues to be addressed in the rules. Department officials relied upon the knowledge and advice of both advisors. Their participation in the rule making, directly or indirectly by way of review and advice, would seem to have been a reasonable if not prudent continuation of the policy making process. However, at or about the time they entered the payment agreement with POGO (December 1996), their involvement in the process terminated.

It appears that despite the confidence MMS placed in Mr. Speir, he did not honor MMS' request by submitting comments on the rule. Despite Mr. Berman's influential presence in the Department's formulation of the new valuation policy, which included the consideration of his position as late as December 1996, he was removed from oil royalty matters at or about the same time. He was replaced by a recent college graduate with no experience in the area. It appears that for a period after his removal, Mr. Berman served as resource in the Department's Office of Policy Analysis for reviewing comments on the rule. By mid-1997, he was no longer active in that role.

3. The information does not compel a conclusion that the payments were intended to cover only actions taken by Messrs. Berman and Speir through December 1996

Although most of the work for which Messrs. Berman and Speir were rewarded appears to have been accomplished by the time that the payment agreement terms were articulated in December 1996, questions remain as to what actions either employee may have taken after that date. As discussed earlier, each employee had a direct financial incentive to enhance POGO's chances of recovering proceeds in the *qui tam* lawsuit. Moreover, it appears that Ms. Brian was aware that the potential for remuneration created by the agreement would prejudice their work in favor of her's and POGO's claims. Finally, although Ms. Brian asserts that any contribution either employee made to POGO's royalties project occurred before December 1996, her contention is not reliable.

Ms. Brian and the two officials continued their communications after that time. Accepting her assertion at face value would mean accepting as reliable her subjective, qualitative assessment that information either individual may have provided or discussed after December 1996 was not a "contribution" to her work on the project, which included filing the *qui tam* lawsuit. In light of questionable statements she, Mr. Banta and another POGO representative have made about other aspects of this matter, placing such trust in her self-serving judgment without knowing her criteria would not warranted.

For example, in her July 1999 deposition, Ms. Brian testified that the Brian/POGO *qui tam* complaint was not based on information provided by Messrs. Berman or Speir. However, in a memorandum filed by POGO's attorney in Federal District Court, the attorney represented that POGO was qualified to remain in the suit because from early to middle 1994 through late 1995 the organization had non-public information about the practices and valuation theories at issue in the case sufficient to satisfy *qui tam* jurisdictional requirements. This time period coincides precisely with Ms. Brian's introduction to Messrs. Berman and Speir.

Ms. Brian has stated that before meeting the two officials in December 1993 she had no experience in or knowledge of any aspect of oil royalties. Following their introduction, each official helped her learn about the subject. Assuming that other sources of information were available to her during the period covered by the attorney's representation, one reasonably may question how Ms. Brian could have separated the assistance she received from Messrs. Berman and Speir during that period from information and assistance she may have obtained from others. In representing that neither official assisted POGO after December 1996 despite continued communications among the parties, Ms. Brian appears to have been making the same kind of categorical distinction, i.e., that any information from Messrs. Berman and Speir was not a contribution to the case. The question about her criteria and ability to make such a distinction remains.

The information also indicates that Ms. Brian may have been confused about the importance of the assistance either official gave her such that she is unable to appreciate the significance of their participation in POGO's royalties project at any stage, including

after 1996. In such a case, her assessment of their lack of contributions again would be questionable.

In POGO's reports about oil royalties, Ms. Brian referred to documents and information from Mr. Berman as positions taken by DOI's Office of Policy Analysis and described a person now identifiable as Mr. Berman as having been instrumental in causing the Department to re-assess royalty amounts. She described Mr. Speir as the Department of Energy's primary voice on royalty oil valuation. In her 1999 deposition testimony, however, Ms. Brian described both Mr. Berman and Mr. Speir as "low level guys" who "have no authority to do anything." In light of this apparent confusion, her assertion that neither official assisted POGO after the terms of the payment agreement were articulated is reasonably questionable.

4. POGO did not treat the agreement and payments as public service awards

POGO's treatment of the payment arrangement was not consistent with the making of such an award. Certain peculiar aspects of POGO's conduct themselves are reasonable grounds for questioning the purpose of the agreement and payments.

For example, it appears that POGO itself did not consider the payments to be "awards" until shortly before it made them. The minutes of a board meeting on October 27, 1998, approximately one week before the payments were made, indicate that POGO adopted the term somewhat as an afterthought, at the suggestion of its lawyers and accountants. In pertinent part, the minutes state as follows:

> The staff consulted with our accountants and a non-profit/tax attorney recommended by Mr. Hunter (POGO's then chairman) to make sure we were following proper procedure. The staff also consulted with a Constitutional attorney. The lawyers and our accountant agreed that we send a letter stating that it (the payments) was an award for public service and that we would send them the appropriate tax form at the end of the year.

Also, the board did not follow a nomination or other process by which it could determine Mr. Berman's and Mr. Speir's eligibility to receive the substantial shares of POGO's assets Ms. Brian committed to the two officials. POGO's December1996 board minutes show that Ms. Brian and Mr. Banta, not the board, selected Messrs. Berman and Speir for "compensation." Both Ms. Brian and Mr. Speir have stated that the minutes reflect their reports to the board that they, on behalf of POGO, had reached "private agreements" with the officials.

According to Ms. Brian, POGO's board approved of the payment arrangement in December 1996 and maintained its approval throughout the period under consideration. She has stated, however, that although it would have been logical for her to explain to the board in December 1996 why Messrs. Berman and Speir qualified for the arrangement, she could not recall discussing with the board any specific accomplishment either individual had performed. Even more peculiar, not a single member of the Board, including

those appearing before the House Resources Subcommittee on May 18, 2000, has explained why it accepted the use of agreements to make an award even though the agreements purportedly had no impact on POGO's discretion to make the payments once lawsuit funds were received. Although board members were given an opportunity to discuss this and other points during the inquiry, through counsel they refused to do so.

A review of POGO's traditional process for granting public service awards highlights the peculiarities of the payments to Messrs. Berman and Speir. Dating back to before POGO paid the two officials, POGO has been granting and publicizing that it grants a yearly public service award, the "Behind the Headlines Award," to persons who engage in the same types of activity POGO attributes to Messrs. Berman and Speir. Unlike the instant payments, under the Behind the Headlines award program POGO solicits nominations for recipients. Also unlike the instant payments, POGO's "Behind the Headlines Award" does not involve cash payments or an agreement binding POGO to take them from assets it acquires in the future.

Another peculiar aspect of POGO's treatment of the payments involves what appears to be its deliberate attempt to conceal them from public disclosure and Ms. Brian's unreliable explanations of the reasons for doing so. Specifically, POGO concealed the arrangement to make the payments and did not publicly disclose them even after they were made. POGO did not publicly acknowledge them until weeks after they were reported in the press.

When the settlement funds clearly were forthcoming from Mobil in August 1998, Ms. Brian gave testimony in a deposition at that time which has indications of a deliberate cover-up of the fact that the funds would be shared with Messrs. Berman and Speir. She testified that it had not been POGO's practice to make cash payments to whistle-blowers even while knowing that disbursement of the funds for paying Messrs. Berman and Speir was imminent.

The Mobil settlement, which was the source of the payments, effectively had been completed before August 1998. As of at least August 6, 1998, Ms. Brian was aware of the settlement. In the deposition, taken on August 8, Ms. Brian testified as follows:

> Q: What sort of support do you provide to whistle blowers?
>
> A: Moral support.
>
> Q: But not financial. You?
>
> A: Never given whistle blowers money.
>
> Q: Okay. Even if you earn a substantial amount of money from the information you get from them?
>
> A: We've never given them, whistle blowers, money, no.

Following public discovery of the payments, Ms. Brian testified at a second deposition in July 1999. In pertinent part, her testimony is as follows:

> Q: You gave this testimony and you can look at the cover sheet if you want on August 6th (sic), 1998; correct?
>
> A: Right.

Q: And the next question there, What sort of support do you provide to whistle blowers? Your answer, moral support, correct?

(Colloquy)

A: Right.

Q: But not financial?

A: Right

Q: And you answered no?

A: No, my answer was, never given whistle-blowers any money, which I hadn't yet.

Q: You do not consider it misleading, to have testified, after you were aware of the Mobil settlement, and given the state of your level of agreement with Mr. Berman and Mr. Speir, as you testified here, you don't think that's misleading in any way?

A: It is not my fault if she (the questioner in the August 1998 deposition) didn't answer ask the question correctly.

Q: I didn't ask you whether she asked the question correctly. I asked you, is it your position, your testimony here today, that those answers to those questions, at that point in time, are not misleading?

A: No. That was the question.

Q: You had an agreement, at the time——

A: Yes.

Q: [continuing] to pay Mr. Berman and Mr. Speir one-third each of money you now knew you were going to recover from the Mobil settlement; correct?

A: Correct.

Q: And you don't consider that financial support to a whistle blower?

A: No, because we hadn't given it to them yet; we hadn't gone through our lawyers. It was a month before we actually did it. It was, what, four months before we actually gave them the money.

To summarize, Ms. Brian testified that she did not disclose the pending payments to Messrs. Berman and Speir because (a) the question in 1998 about paying whistle-blowers was not in the proper tense; and (b) as of August 1998 POGO "hadn't gone through the process of deciding and ratifying that decision, which we didn't make until November." Ms. Brian's stated concern about the certainty of making the payments is questionable because it is inconsistent with the facts and with her own testimony.

It appears that she was referring to the previously-described "condition" of board approval as cause for uncertainty about whether POGO would pay Messrs. Berman and Speir from the Mobil settlement proceeds. As previously discussed, she testified that there was never any question about the board's approval; it had assented to the arrangement since learning about it in December 1996. Ms. Brian herself stated that when she testified in August 1998 she had no reason to be concerned about making the payments. In her July 1999 testimony she stated as follows:

Q: So you are saying, Ms. Brian, all the way up to this point, October 27th (1998, 5 days before the payments

were made), it never occurred to you, nor had anyone anyone raised with you that there could possibly be anything problematic about giving these people this money?

A: That's correct.

Finally, what Ms. Brian referred to as "the process of deciding and ratifying the decision" to make the payments was merely a perfunctory exercise. She testified that "it was fully understood and had been discussed (within POGO), you know, two years earlier, and there wasn't any controversy about it".

It is reasonable to ask why Ms. Brian did not refer to the sharing agreement in her August 1998 testimony even if she actually believed that there was an uncertainty over whether POGO would make the payments. As she said in her public statement in May 1999 regarding the payments, POGO "had nothing to hide." The information indicates, however, that POGO had reasons for concealing the agreement and subsequent payments. Some of the reasons are more plausible than others.

As discussed previously, Ms. Brian was aware that disclosure of the arrangement could have led to concerns about any official action regarding oil royalties taken by Mr. Berman or Mr. Speir. Announcing the agreement at that point would have raised questions about the employees' objectivity in connection with DOI's royalties initiative. Announcing the payments when they were made in November 1998 would have raised similar questions.

According to Ms. Brian, POGO's reason for concealing the payments was a logistical one. Referring to the concerns about publishing the awards expressed at the POGO board meeting in October 1998, she has testified as follows:

Q: Let's go on to the next to the next sentence (of the October 27 minutes), you asked the board if the board thought it should you should put out a press release about this?

A: Mm-hmm.

Q: Why was that a question?

A: Because we had a real concern that if we publicized that these two whistle-blowers had received a lot of money, that we would start to attract people that wanted us to get involved in issues or give us information because they wanted to make money, and we didn't want to have anything to do with people whose motivation for being whistleblowers was to make money.

* * * * *

A: . . . I am fully supportive of people doing pursuing False Claims cases, but I am not as interested in getting whistle-blowers coming to me to work on a case since my focus has never been and is still not going to be to file lawsuits either.

Q: You have made much of the fact that you your organization exists, as you put it, in large measure to support whistle-blowers; correct?

A: Sure.

Q: And what you were doing here was an extraordinary, for your organization, act, that is paying these individuals

> from your share of the proceeds, because they were, as you viewed it, whistle-blowers?
>
> A: Right.
>
> Q: Is there not something terribly inconsistent about not publicizing that fact? Doesn't it encourage other whistle-blowers to know that they can be rewarded in a circumstance like this?
>
> A: Well, whistle blowers already know through the False Claims Act that they can be rewarded, and I wasn't interested in being a vehicle for someone who wanted to file a False Claims case.

It would not be unreasonable to question the sincerity and credibility of Ms. Brian's testimony. Her reason for not publicizing the payments suggests that POGO never could have publicized them as awards without incurring risks Ms. Brian considered unacceptable. Consequently, it is questionable whether she ever intended to publicize the payments. Had she intended never to publicize them, one prudently might consider whether she and the board actually considered the payments to be for "public" service.

Aside from this dubious aspect of Ms. Brian's explanation, it should be noted that POGO apparently could have publicized the awards without overloading its resources simply by referring opportunistic whistle-blowers to other entities that specialize in developing *qui tam* actions. As of spring of this year, the organization's web-site directed prospective whistle-blowers to several *qui tam* resources, including a business maintained by one of its directors, Dina Rasor, that specializes in developing *qui tam* lawsuits. Even in the unlikely event that opportunistic federal employees might flock to POGO with "whistle-blower" information because of the large amounts of the payments, POGO, with its large network of attorneys and consultants specializing in such matters, appears to have been equipped to handle the situation.

In addition to these circumstances, a separate set of developments raises concerns about POGO's reasons for not publicizing the payments. At the May 18, 2000 House Resources Subcommittee hearing, Ms. Brian offered a new reason for not publicly announcing the payments. She stated that POGO did not publicize them because the Assistant United States Attorney handling the *qui tam* litigation, Mr. Dodd, had advised POGO not to do so.

At the hearing, Mr. Dodd stated that he had made that suggestion to POGO's attorney in the lawsuit, Lon Packard, during a telephone conversation in which he also sternly advised that POGO should not make the payments to Messrs. Berman and Speir. Ms. Brian testified in her 1999 deposition and at the hearing that she had not been informed of Mr. Dodd's opposition to the payments before she made them. However, in the May 18 hearing she stated that she had been informed of his advice not to publicize them. It appears that when she first explained the reasons for not publicizing the payments she either concealed or forgot having complied with Mr. Dodd's advice. Moreover, her testimony about following Mr. Dodd's instructions implies that POGO's attorney told her about the advice not to publicize the awards but not about any advice against making the payments. The attorney has represented that Mr. Dodd never provided any advice against the payments. A

review of Mr. Dodd's testimony at the May 18 hearing shows that it reasonably can be considered persuasive, particularly in light of the fact that he was cross examined by a member of the Subcommittee who opposed the proceeding.

CONSIDERATIONS REGARDING THE IMPACT THE APPEARANCE OF IMPROPRIETY RAISED BY THESE CIRCUMSTANCES COULD HAVE UPON THE DEPARTMENT OF THE INTERIOR'S ADMINISTRATION OF THE OIL ROYALTY PROGRAM

The circumstances of the relationships among Ms. Brian, Mr. Banta, Mr. Berman and Mr. Speir raise reasonable concerns about the possibility that the Department's policy making process may have been improperly influenced by the advice given and actions taken by the two officials. Both officials were instrumental in guiding the Department toward decisions and policies favorable to Mr. Banta's client and to POGO, yet the interests they pursued and the actions they recommended were inseparable from the positions advocated by POGO in public reports and in its lawsuit and those advanced by the Lobel firm. Their duties of loyalty and objectivity as federal public servants may have been compromised by their relationship with POGO. It is not unreasonable to consider whether, as federal employees, they acted in POGO's interest while expecting to receive a benefit in return, such as a share of POGO's *qui tam* proceeds.

Ms. Brian has stated that during the period when Mr. Berman and Mr. Speir were most active on matters of interest to POGO, the organization was not considering a *qui tam* lawsuit. If this were the case, a concern that the two officials may have been motivated in their actions as federal employees before December 1996 by the prospect of sharing in the proceeds could be criticized as mere suspicion without substance. The information raises a question as to the reliability of Ms. Brian's assertion.

POGO's December 1996 board minutes recording Ms. Brian's and Mr. Speir's description of the payment agreement with Messrs. Berman and Speir state that POGO had been looking to file a *qui tam* action for years beforehand. Nothing in the information justifies overlooking the possibility that POGO considered the oil royalties matter as grounds for such a case during the development and execution of its royalties project and that the two federal employees shared in this view.

This observation is buttressed by Mr. Banta's statements before the House Resources Subcommittee in its hearing on May 18, 2000. There he stated that he recused himself from matters associated with the POGO/Brian *qui tam* lawsuit because "he was afraid that the *qui tam* litigation was actually going to go someplace, and that it would appear to have some conflicts with other with other client interests." The only record of his recusal exists in POGO's board minutes of January 1995. Mr. Banta stated that no other record of his recusal from the issue exists.

The minutes do not specify that the prospect of the Brian/POGO lawsuit was the "litigation" to which Mr. Banta referred, but the information indicates that this could have been the case. The inquiry did not identify any other royalty-related *qui tam* action in which POGO was involved. To the contrary, Ms. Brian stated that

the lawsuit from which POGO paid Messrs. Berman and Johnson was POGO's first *qui tam* lawsuit.

In view of these circumstances, the possibility exists that POGO was developing its case before January 1995. As POGO's attorney represented to the Court, it was during the 1994-1995 period that POGO and Ms. Brian acquired knowledge sufficient to qualify them *qui tam* relators. This also was the period during which, according to Ms. Brian, Messrs. Berman and Mr. Speir were most involved with her royalties project. And it was the period during which both officials were substantially and effectively involved in guiding the Department of Interior toward actions and policies beneficial to Mr. Banta's client and POGO's cause.

Nothing in the information indicates how the Department would have formulated its royalty policy had the two advisors not been involved. The information clearly shows, however, that they were instrumental in some key aspects of the Department's development of its new royalty program. The possibility exists that Messrs. Berman and Speir were motivated in their actions by the prospect of participating in or sharing in the proceeds of a POGO *qui tam* action.

Aside from concerns about the possibility that the Department's process may have been unduly influenced, this matter also raises reasonable concerns that the integrity of the royalty program may have been compromised by the appearance of impropriety generated by the payments. These concerns likely would be greater should Messrs. Berman and Speir be allowed to keep their payments.

While Messrs. Berman and Speir were helping POGO obtain information about royalty valuation and collections, they also were in positions through which they could and did obtain confidential information material to POGO's interests. While serving as a member of the Interagency Task Force, Mr. Speir signed confidentiality agreements with several oil companies to review crude oil sales contracts and other information they had produced under seal in the California royalty case. He had access to the information and used it to estimate amounts of unpaid federal royalties in California. POGO obtained similar estimates. Mr. Speir also had access to a substantial amount of information about oil valuation maintained by DOE's Energy Information Administration, where he worked until late 1989. Moreover, it appears that he had a network of individuals and resources inside and outside of government with whom he would discuss oil-related issues.

The payments he received involved the same subjects he covered in the course of these activities and relationships. Whether other employees will receive the levels of access and cooperation Mr. Speir received could depend upon how industry and others regard the prospects that cooperating with the employees could benefit them financially in a manner prejudicial to those providing cooperation and information.

The same concerns exist with respect to Mr. Berman. He used his position to acquire information from industry sources and others, including a party to a sealed lawsuit, purportedly for a public purpose. He used information he acquired and relationships he de-

veloped to steer the Department of Interior toward a policy favorable to the parties involved in paying him.

The information does not directly establish that either Mr. Berman or Mr. Speir shared there work products or related materials with POGO. However, both officials were (a) POGO's allies in its campaign against the oil companies, (b) described by Ms. Brian as individuals who should have been allowed to join her and POGO as parties in its *qui tam* lawsuit, and (c) paid substantial amounts from POGO's lawsuit proceeds. A reasonable concern exists that both officials may have used their positions and information they gathered to facilitate the Brian/POGO *qui tam* lawsuit. To the extent that this concern would inhibit the willingness of industry and others to share information, it could limit the Department's ability to administer the oil royalty program and similar programs in the future.

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