Berman Ex. 13, Description of Office of Policy Analysis on DOI Website, 2004.

5. At the time the events of this case took place, PPA had no policy-making or regulatory authority with respect to oil royalties or any other substantive area within DOI's jurisdiction. PPA does not conduct investigations into allegations of fraud, waste, and abuse in the administration of the oil-royalty program or any other DOI programs. *Id; Berman Declaration.*

6. For oil that is extracted from land belonging to the United States or Indian nations, oil companies must pay a royalty based on the greater of the "value of production" or gross proceeds from the sale of oil, minus certain allowances. *30 C.F.R. §206.102*. The oil companies set the value – the so-called "posted price"– based on a number of variables, which include the quality and location of the oil.

7. The Minerals Management Service ("MMS") is the bureau within DOI responsible for collecting and managing the revenue from leases that permit oil and gas exploration on federal lands. This is accomplished through the Minerals Revenue Management office ("MRM"). The MRM collects, accounts for and distributes revenues associated with mineral production from leased federal and Indian lands. The MRM is the office within MMS that is responsible for the formulation and publication1 *Berman Ex. 14, DOI Website.*

B. <u>Robert A. Berman's Role In Disclosing Possible Fraud in Oil Pricing</u>

8. Mr. Berman's interest in oil pricing and its impact on the federal government's collection of oil royalties began in 1986, well before the Project on Government Oversight ("POGO") began to disclose publicly the fraudulent practices of certain\n oil producers in the early 1990's and approximately a decade before POGO filed the *qui tam* action that

resulted in its public service award to Mr. Berman in November 1998. *Berman Exhibits 1-3.*

9. After joining PPA in 1986, Mr. Berman began to analyze the pricing practices of the oil industry and the impact of these practices upon the royalties collected by the MMS. Mr. Berman chose this topic on his own as an application of economics market theory. He was not directed to perform his analyses by any official either in PPA or elsewhere at DOI. Mr. Berman received no direction, guidance, management, or supervision from any PPA or other DOI supervisor as to the analytical techniques and methods he employed in conducting his study. *Id.*

10. In 1986 and 1987, Mr. Berman authored several memoranda that he sent to his immediate supervisor, Theodore Heintz, and through Heintz to more senior officials at DOI memoranda regarding the oil companies' pricing policies. In these memoranda Berman explained his findings and his concerns about the oil companies' use of a so-called "posted price" as the basis for calculating the royalties owed. *Id*.

11. Berman pointed out that posted prices were not the result of arms-length transactions in a market setting; to the contrary, they were artificially low prices created by the oil companies solely for the purpose of artificially lowering the royalties they owed. In other words, Berman contended that the oil companies were intentionally cheating the government and the Native American tribes out of the royalties that they were due. *Id.*

12. Berman drew support for his contention from his comparison of posted prices, on which the companies calculated the royalties, with contemporaneous prices charged by these same companies for identical products in the "spot" and "futures" markets, where oil was sold in arm's-length transactions. *Id.*

13. In each instance that he examined, the posted price was substantially lower than the market price charged on the New York Mercantile Exchange ("NYMEX"), where oil was sold in arm's-length transactions. *Id.*

14. Berman also discovered that in many oil transactions conducted at the posted price, the buyer and seller were part of the same integrated oil company, providing additional opportunities for collusion over prices. *Id.*

15. Berman told his immediate supervisor, Theodore Heintz, that the data demonstrated that DOI was mistaken in its belief that the government was better-off collecting royalties based upon posted prices. *Berman Ex. 1, Memorandum from Robert Berman to Ted Heintz (September 9, 1986).*

16. In late October 1986, Mr. Berman prepared and distributed a second memorandum analyzing the use of posted prices. *Berman Ex. 2, "Crude Oil Royalty Valuation Monitoring System" (October 28, 1986)*. In his memorandum, Mr. Berman showed that the oil companies' practice of basing royalties on posted prices artificially undervalued the oil that the companies were taking from federal lands and unlawfully reduced the royalties owed by the oil companies to the federal government.

17. Mr. Berman also warned that "negotiated" prices between affiliated parties – that is, the integrated oil companies – were designed to maximize after-tax profits to the affiliated parties rather than maximize royalty payments to the government. He explained:

> Economic theory suggests that prices "negotiated" between affiliated parties are not a priori market prices. A market price results from a trade or transaction between willing, but not obligated, parties of opposing economic interests, and may not be unilaterally altered by either party. If parties are affiliated, the transfer price will be that which maximizes after-tax profits to the combined entity[.]

Id.

18. Mr. Berman showed that “futures” prices, set under market conditions, rather than the artificially created “posted price,” set collusively by related elements within an integrated oil company, would more accurately and fairly measure the real value of the extracted oil and increase the government’s royalty stream.

19. In February 1987, Jerry D. Hill, Associate Director for Royalty Management within the MMS, issued a memorandum in which he flatly rejected Mr. Berman’s analysis and the data that supported it. Hill defended the use of posted prices as market-driven, sensitive to market changes, and adjusted as market conditions require. *Berman Ex. 3, Memorandum from Jerry D. Hill to MMS Director (February 12, 1987).*

20. When Mr. Berman tried to obtain review of Hill’s decision from the Office of the Assistant Secretary for Lands and Minerals, the DOI’s Solicitor stopped him.

21. Following MMS’s rejection of his suggestion in 1987, Mr. Berman ceased his analysis of the oil companies’ underpayment of royalties. He believed that MMS was not interested in pursuing the powerful oil companies to obtain the money those companies owed to the government.

C. **Berman Switches Focus of Attention to Common-Carrier Practices**

22. In approximately late 1987, Berman began to study the related issue of market structure and DOI's responsibilities for enforcing the common carrier responsibilities on oil pipelines crossing Federal lands in California.

23. At the same time that Berman was pursuing his new area of inquiry, several groups outside DOI were examining the oil companies' royalty practices, including the use of posted prices and pipeline access in California. These studies confirmed Mr. Berman’s analysis that the oil companies’ practices in California with respect to posted prices and

inhibiting access to oil transport pipelines across federal lands were designed to keep the price of oil, and, therefore royalties, artificially low.

24. The most notable non-DOI study was one prepared for the ongoing antitrust litigation between the State of California and the City of Long Beach against the major oil companies (commonly known as the "Long Beach I" and "Long Beach II" litigation). These studies, conducted by industry experts such as the Department of Energy, the General Accounting Office, and the Internal Revenue Service, confirmed Mr. Berman's longstanding contention that, at least in California, posted prices undervalued the market price of oil. They also demonstrated that the large integrated oil companies denied pipeline access to the small independent oil companies in order to force below-market sales. In both instances, the oil companies cheated federal and state governments and Native Americans of royalty payments. Mr. Berman reviewed the Long Beach litigation studies. He followed with his own study analyzing the failure of oil pipelines, run by large integrated oil companies on federal lands. Mr. Berman drafted another memorandum setting out both his own findings and the evidence from the Long Beach litigation. He argued that the violations of the MLA by the integrated oil companies "led to a significant under-pricing of crude oil in California." *Berman Ex. 4, "Oil Pipeline Rights-of-Way and Royalty Valuation of Oil in California" ("Rights-of-Way Report") at 1 (1993); Berman Ex. 5, "California Common Carrier and Crude Valuation" ("Common Carrier Report") at 3 (1993).*[2]

[2] "Other practices" was a reference to Mr. Berman's 1986 analysis demonstrating an undervaluing of royalties resulting from the "inconsistency" between posted prices and true market prices. *Berman Rights-of-Way Report at 3; Common Carrier Report at 6.*

25. As he had done several years earlier (*see* ¶18), Mr. Hill of the MMS again defended the oil companies' practices and rejected the accumulating evidence and analyses laid out by Mr. Berman and the Long Beach litigation.

26. Despite Mr. Hill's view, MMS assigned a professional staff member to review Mr. Berman's paper, the portions of the Long Beach record cited by Mr. Berman, and the historical record of MMS royalty collections

27. As a result of its own analysis, MMS staff rejected Mr. Hill's position and concluded that it was likely that the oil companies had underpaid royalties by approximately $420 million. In August 1993, Mr. Berman and MMS senior management were informed of the MMS staff conclusions.

28. Despite its study showing unpaid royalties, MMS, entered into "global settlements" negotiations with several major oil companies that ultimately settled all claims and issues. These settlements deviated from MMS' usual practice of settling only specific areas of oil production. In addition, MMS settled the "common carrier-depressed price issue" against the express wishes of the State of California. *Id.*

29. In late 1993, Mr. Berman argued to Brooks Yeager, Director of PPA and Deputy Assistant Secretary for Policy, Budget, and Administration, that DOI should file an *amicus* brief in the appeal of the Long Beach litigation to establish a clear DOI position on the common carrier issue and to "support any claim for additional royalties due." *Berman Ex. 6, Memorandum to Brooks Yeager from Robert Berman (December 3, 1993).*

D. <u>Berman Works to have DOI Collect Overdue Royalties</u>

30. In March 1994, Mr. Berman learned from contacts involved in the Long Beach cases that MMS was taking steps to forge a global settlement with Chevron; as in the Exxon settlement, this would make impossible any judicial effort to collect royalties in connection with the underpayments in California. Mr. Berman immediately reported this information to Theodore Heintz and to Mr. Yeager. He also suggested that Yeager advise the DOI Solicitor.

31. On March 30, 1994, Mr. Berman sent an email to Mr. Yeager in which Berman reiterated his advice and information as described in ¶ 29; Berman also protested MMS' report, issued without review by PPA, that reduced from $420 million to zero the amount of money that the large oil companies owed they evaded royalty requirements from 1986-1992. *Berman Ex. 7, E-Mail Correspondence to Brooks Yeager, March 30, 1994.*

32. On May 6, 1994, Mr. Berman again wrote Mr. Yeager that MMS was preparing to issue another report, again without review by PPA and the Solicitor's Office. This report both reiterated MMS's position that the oil companies had not underpaid royalties and evaluated whether to pursue collections of additional California royalties. *Berman Ex. 8, E-Mail Correspondence to Brooks Yeager, May 6, 1994.*

33. Mr. Berman warned Mr. Yeager that MMS's attempts to circumvent internal review, "particularly on contentious issues where a likelihood of disagreement exists, would set a bad precedent as well as deprive the Secretary of necessary protection." *Id.*

34. Mr. Berman also warned that internal review of the MMS document was critical because "there may be an argument that the Department (not knowingly) accepted less than gross proceeds as value, which would be contrary to DOI's longstanding position that value

could never be less than the gross proceeds obtained by the oil companies from the sale of oil." *Id.*

E. <u>Berman Directed by Superiors to Stop Criticism of Royalty Collections</u>

35. In response to Berman's repeated efforts to protect the United States' economic interests, Mr. Yeager directed that Mr. Berman cease his arguing against MMS's position.

36. In accordance with Yeager's directive, Mr. Berman had no further public involvement with the royalty-collection issue, other than to respond to a 1996 congressional request for testimony about the oil companies' conduct, described in ¶¶ 26-29.

37. After DOI negotiated a global settlement with Chevron, Mr. Berman contacted the Department of Justice (DOJ) to raise his concerns about MMS's settlement practice and Yeager's lack of responsiveness.

38. Despite promises to Mr. Berman to contact DOI's solicitor and "look into" the matter, the DOJ lawyer never reported the results of her efforts to Mr. Berman and refused to take his calls.

39. Mr. Berman also reported his global settlement concerns to the Office of Inspector General (OIG) at DOI. Berman requested that the Inspector General investigate the MMS royalty settlement activities.

40. The OIG investigated MMS beginning in 1995 . The OIG investigation proved that Mr. Berman's concerns about MMS's conduct were well-founded. The OIG discovered that just before MMS entered in negotiations with the oil companies, MMS took wrote-off more than $350 million in uncollected royalties and negotiated away several hundred million dollars more.

41. At MMS's request, the OIG did not formally release to Congress the report describing MMS's conduct. As a result, Congress did not see the report until it issued a subpoena --

more than a year after the OIG had completed its investigation – pursuant to a congressional investigation into the oil-royalty issue. The production of the OIG's final draft report to Congress was the first time that anyone outside DOI had seen the report.

F. <u>Other Federal Departments and POGO Enter the Royalty Dispute</u>

42. In 1992, Robert Speir of the Department of Energy conducted a study of the oil-royalty issue. He reached the same conclusions as Mr. Berman.

43. In 1993, Bernard Kritzer, an official in the Commerce Department also recognized that the oil companies had been undervaluing the oil they sold to related companies in order to reduce the royalties they had to pay.

44. In December 1993, Danielle Brian, executive director for the Project on Government Oversight ("POGO"), first heard that royalty underpayment on oil and gas leases might be an issue for the non-profit government watchdog organization to examine. *POGO Ex. 6 at 23*. The suggestion came from Henry Banta, a partner at the law firm of Lobel, Novins & Lamont and POGO' s chairman of the Board of Directors. *Id.*

45. POGO, led by Ms. Brian, began investigating the oil industry's underpayment of royalties in December 1993.

46. POGO released its first report on the oil royalties issue, entitled "Department of Interior Looks the Other Way: The Government's Slick Deal for the Oil Industry" in April, 1995. *POGO Ex. 15; POGO Ex. 6 at 72*. The report revealed wrong-doing by seven major oil companies on federal land in California. POGO also began publicly asserting that the Interior Department was ignoring this fraud.

47. In March 1996, POGO issued its second report on this issue, titled, "With a Wink and a Nod: How the Oil Industry and the Department of Interior are Cheating the American Public and California School Children." *POGO Ex. 16*. This report expanded the