

**U.S. Department of Labor**

Labor-Management Services Administration  
Washington, D.C. 20216



Reply to the Attention of:

OPINION 81-16A  
3(1), 3(2)

JAN 23 1981

Mr. J. Michael Wylie  
Moore & Peterson  
2400 One Dallas Centre  
Dallas, Texas 75201

Dear Mr. Wylie:

This is in response to your letter of August 4, 1980, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA) of the EIT Trust (the Trust). You ask whether the Trust, created by employees of Natural Resource Management Corporation (NRMC) and its subsidiaries for the purpose of acquiring a general partnership interest in NRM 81-1, Ltd., a Texas limited partnership, is an "employee pension benefit plan" within the meaning of section 3(2) of ERISA, or an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA.

The following is a summary of the representations in your letter. NRMC and its subsidiary NRM Petroleum Corporation (NRM) have organized and operated 26 drilling funds since 1973. NRMC proposes to organize NRM 81-1, Ltd. during calendar year 1981 to engage in the business of exploration, development, and operation of oil, gas and other mineral properties. NRMC will be one of the General Partners as will NRM Exploration Company, an affiliate of NRM. NRM 81-1, Ltd. will be registered with the Securities and Exchange Commission and appropriate state authorities, and will be sold to the public as a registered public drilling fund.

NRMC proposes to give certain of its employees and employees of its subsidiaries the opportunity to invest in a public drilling fund as a general partner in a limited partnership through the use of a trust. To accomplish this objective, the Trust will be created. The employees given the opportunity to invest in NRM 81-1, Ltd. through the Trust will be both the settlors and beneficiaries of the Trust.

The Trust will be a co-general partner with NRMC and NRM Exploration Company in the limited partnership. Income from the partnership distributed to the Trust as a general partner will be currently distributed to the participating employees as long as the oil, gas, and other mineral properties owned by the limited partnership generate income to the Trust. The trustees of the

Trust will be officers and directors of NRMC and NRM Exploration Company who are also participating in the Trust.

The Trust will be funded with an initial cash contribution of \$10,000 paid on a pro rata basis by each participating employee. Contemporaneously with or immediately following the creation of the Trust, NRMC and NRM Exploration Company as General Partners and the Trust as Investment General Partner will execute the NRM 81-1, Ltd. Agreement of Limited Partnership. NRMC will loan to the Trust the funds necessary to satisfy the Trust's allocable share of partnership costs. The loan is expected to be in the range of \$150,000 to \$250,000, depending on the amount of drilling undertaken by NRM 81-1, Ltd. It will be repaid in seven semi-annual installments beginning 48 months after the creation of the Trust. Income from the Trust, after payment of any loans and expenses, will be distributed currently to the participating employees.

The Limited Partnership Agreement will provide that the Trust shall have no authority to participate in the management of NRM 81-1, Ltd. Further, the Limited Partnership Agreement will provide that NRMC will indemnify the Trust for any liability incurred by it on account of the management activities of NRMC.

The interests of the beneficiaries in the Trust are subject to divestiture in whole or in part if they cease to be employed by NRMC or one of its subsidiaries (other than by retirement, death, or total and permanent disability) prior to completing 6 years of employment with NRMC or one of its subsidiaries in accordance with a schedule set forth in the agreement of the Trust. Upon divestiture of an interest in the Trust, the divested interest will be reallocated among the remaining employees participating in the Trust who are still employed by NRMC or whose interests in the Trust are not subject to divestiture. Only when and to the extent that the interests of the employees participating in the Trust are no longer subject to divestiture, may such employees freely transfer their interests

The Trust will terminate upon the liquidation of NRM 81-1, Ltd. or the sale or exchange of all the partnership interest owned by the Trust. At the present time it is anticipated that the Trust will not exist more than 10 years after its inception.

An "employee welfare benefit plan" is defined in section 3(1) of ERISA as:

... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Though the Trust may incidentally result in the payment of benefits after the death or disability of a participating employee the primary purpose of the Trust is to enable employees to participate in a public drilling fund. Accordingly, it is the Department's position that the Trust would not be established or maintained for the purpose of providing any of the benefits enumerated in ERISA section 3(1) and would not be an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

An "employee pension benefit plan" is defined in section 3(2)(A) of ERISA as:

... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -

- (i) provides retirement income to employees,
- (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

In your letter you suggest that the Trust would not provide retirement income to employees because participating employees would be current, not retired, employees and the Trust makes no reference to a retirement age, and that the Trust would not result in deferral of income to employees for periods extending to the termination of covered employment or beyond because income from the Trust is distributed currently after expenses are recouped. For these reasons, among others, you suggest that the Trust is not an employee pension benefit plan within the meaning of section 3(2)(A) of ERISA.

We agree with your argument that by its express terms the Trust does not provide retirement income or result in a deferral of income to the termination of covered employment or beyond. The Trust does not, by its express terms, provide retirement income because the terms of the Trust do not make payments of income to participating employees contingent, directly or indirectly, upon retirement. Similarly, the Trust does not, by its express terms, result in a deferral of income to the termination of covered employment or beyond. Accordingly, it is the view of the Department that the Trust is not an employee benefit plan by its express terms.

The definition of the term "employee pension benefit plan" in section 3(2)(A) of ERISA, however, includes plans which provide retirement income, or result in a deferral of income to the termination of covered employment or beyond, as a result of surrounding circumstances, in addition to those whose express terms provide for these results. Since the question whether the Trust is a pension plan as a result of surrounding circumstances is inherently factual in nature, the Department will not render an opinion on that question. See section 5 of ERISA Procedure 76-1 (41 FR 36281, August 27, 1976).

In this connection, however, we note that since the public drilling fund has an estimated existence of 10 years, income payments from the Trust may extend to periods after a participating employee has retired or terminated employment with NRMC or its subsidiaries. Further, the class of employees who will be permitted to participate in the Trust is not specified either in the Trust instrument or in other submissions you have made. Thus, the extent to which payments from the Trust will extend beyond employees' retirements cannot be determined. Depending on the likelihood that participating employees will retire or terminate employment with NRMC or its subsidiaries before expiration of the 10 year period, it is possible that the Trust might be designed for the purpose of paying retirement income to some or all of the participating employees and therefore might be a pension plan within the meaning of section 3(2)(A) of ERISA.<sup>1</sup>

In your letter you also suggest that the Trust is not an employee pension benefit plan within the meaning of section 3(2)(A) of ERISA for the following reasons: (1) the Trust is not a plan, fund, or program within the meaning of section 3(2)(A) because, according to your letter, the exclusive instrument creating an interest in property is the Trust and the Trust would be created by the participating employees; and (2) the Trust would not be established or maintained by an employer because NRMC will not make contributions to it and will not be involved in its administration.

We do not agree with your suggestion that the Trust would not be a plan, fund, or program. It is contemplated that the Trust would contain a thing of value, specifically, a general partnership interest in a limited partnership. The Trust is expected to operate on the basis of specified terms and conditions of participation, including rules relating to divestiture. For these reasons we believe that the Trust has the characteristics of a plan, fund, or program.

Under the circumstances described in your submissions, moreover, we think that the Trust is a plan established or maintained by an employer. Although as a matter of form, the employee participants are the settlors of the Trust, your letter indicates that the Trust is to be formed in order to enable NRMC to allow certain of its employees and employees of its subsidiaries the opportunity to invest in a public drilling fund as a general partner in a limited partnership. Thus, it appears that regardless of the form in which the Trust may be structured, NRMC is the party providing the impetus for the creation of the Trust. Further, the terms and conditions for

---

<sup>1</sup> In support of your argument that the Trust is not a pension plan, you cite Murphy V. Inexco Oil Co., 611 F. 2d 570 (5W Cir. 1980), where the court held that a program similar in some respects to the Trust, involving the award of oil and gas royalties by an employer to employees as a bonus, was not a pension plan subject to title I of ERISA. We note that the court's opinion in Murphy does not indicate that any facts were before the court in that case that might raise the possibility that the program at issue was designed for the purpose of providing retirement income to employees as a result of surrounding circumstances.

participation in the Trust appear to be deliberately fashioned to enable NRMC to encourage continuing employment by employees participating in the Trust, by providing for divestiture of all or part of an employee's interest in the Trust if he leaves employment with NRMC or one of its subsidiaries before completing 6 years of employment.

In addition, while your submission stresses that NRMC will not be involved with the Trust in the capacity of contributor, you indicate that NRMC will enable employees to participate in a general partnership interest in NRM 81-1, Ltd. by lending to the Trust funds necessary to satisfy the Trust's allocable share of partnership costs and expenses. The loan agreement furnished with your submissions relating to the proposed loan by NRMC to the Trust to cover the Trust's share of partnership costs and expenses provides for an interest rate of 9 percent. To the extent that this rate would be less than the rate at which participating employees could obtain loans from unrelated commercial lenders in the same amounts and subject to the same contingencies as their allocable shares of the loan by NRMC to the Trust, the NRMC loan, in our view, would be equivalent to a direct contribution to the Trust.

Thus, it appears that the Trust would be created at the instance of NRMC and with NRMC's active involvement and financial support. Under these circumstances, we cannot conclude that the Trust would not be established or maintained by NRMC.

This letter constitutes an advisory opinion as defined in ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of such procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff  
Administrator of Pension and Welfare Benefit Programs