U.S. Department of Labor

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

Reply to the Attention of:

OPINION 81-74A
Sec. 3(2)

SEP 29 1981

Mr. J. Gerald Martin
Fulbright & Jaworski
Bank of the Southwest Building
Houston, Texas 77002

Dear Mr. Martin:

This is in reply to your letter of May 29, 1981, regarding the applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the Anadarko Annual Override Pool Bonus Plan (the Plan). Specifically, your inquiry concerns whether the Plan is an employee benefit plan within the meaning of ERISA section 3(3), as further defined by ERISA sections 3(1) and 3(2), and thus is covered by ERISA title I.

You represent that the Plan has been established by Anadarko Production Company (the Company) (1) to attract and retain top quality management, professional, and other key personnel associated with the Company's oil and gas exploration operations, and (2) to provide an incentive for such persons who are selected to participate in the Plan to maximize their efforts on the job in order to maintain and increase the Company's reserves of oil and gas.

On the basis of your submissions, it appears that the Plan operates as follows. For any given fiscal year of the Company, the president of the Company may designate certain oil and gas producing properties ("wells") as forming an "overriding royalty pool" and may select a group of employees to receive annual bonuses based on revenues to be realized by the Company from the wells in the pool. The wells that may be designated as forming an overriding royalty pool for a particular fiscal year are wells which are "completed as producers" or "suspended pending completion as producers" during that year. Although your submissions do not explain these terms, it appears that "completion as a producer" refers to the point in time when a well begins to produce oil or gas. Employees eligible to be selected to participate in an overriding royalty pool are salaried employees who are managerial, professional, or other key employees in the Company's operations or explorations division and who, in the opinion of the president of the Company, are in a position to contribute materially to the continued financial success of the Company.

Although wells are apparently designated as forming an overriding royalty pool, and employees are designated to receive bonuses based on revenues generated by the wells in the pool, at or

about the time when the wells begin producing oil and gas, bonuses are not paid to employees unless and until the Company recovers the total investment it has expended in developing the wells in the pool. Your letter indicates that it may take 2 or 3 years after an overriding royalty pool is created for the Company to recover its investment and that it is possible that in some instances the Company may never recover its investment and no bonuses will be distributed. If bonus payments begin, they will be computed and distributed as long as the wells remain economically productive.

The total amount of bonus payments distributed with respect to an overriding royalty pool for a particular fiscal year is referred to as the "distributable amount." The distributable amount for a particular fiscal year is the sum of a percentage of any proceeds realized on the sale of wells in the pool during the fiscal year and the same percentage of the "net revenue after payout" realized during the fiscal year from the wells in the pool. The "net revenue after payout" is defined to mean, generally, revenue realized by the Company from the wells in the pool after the Company recovers its total investment in the wells. The percentage applied to the sale proceeds and net revenue after payout in determining the distributable amount varies from year to year with the ratio of the amount of reserves added to the Company's inventory during the year to the reserves sold during the year, according to a table set forth in the plan document.

A participant's right to receive bonus payments from a given overriding royalty pool is not forfeitable in the event of his death, retirement for age, or disability. However, such participant's right to such bonus payments is forfeitable in the event the participant's employment with the Company terminates for any reason other than death, retirement for age, or disability.

While the Plan provides for determining the distributable amount, and, therefore, the bonuses to be paid to participating employees, on the basis of the revenues realized by the Company from the wells in an overriding royalty pool, bonuses are payable to employees solely from the general assets of the Company, and are not secured in any way by any specific assets. The Plan specially provides that it creates no right, title, or interest of any kind in any participating employee in the oil and gas producing properties designated as part of a given overriding royalty pool, or in the production therefrom, that amounts due any participant under the Plan are general liabilities of the Company, and that a participant stands in the position of an unsecured general creditor with respect to amounts due under the Plan.

The term "employee benefit plan" is defined in section 3(3) of ERISA as, "… an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." The term "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)." Based on the representations set forth in your request for an advisory opinion, it does not appear that the purpose of the Plan is to provide any of the benefits enumerated in section 3(1) of ERISA. Accordingly, it is our view that the Plan is not a welfare plan within the meaning of section 3(1) of ERISA.

The term "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, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond …."

Regulations issued by the Department of Labor clarify the definition of employee pension benefit plan. As you note in your submission, 29 C.F.R. §2510.3-2(c) of the regulations provides as follows:

> For the purposes of Title I of the Act and [29 C.F.R. c. XXV], the terms "employee pension benefit plan" and "pension plan" shall not include payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees.

Because the Plan does not condition distribution of the bonus payments upon termination of employment or retirement, the Plan is not by its express terms an employee pension benefit plan within the meaning of section 3(2)(A) of ERISA, but, rather, appears to be a bonus program described in regulation section 2510.3-2(c).

Under section 3(2)(A) of ERISA, a plan may be an employee pension benefit plan as a result of surrounding circumstances. While we have no reason to believe, based on the representations in your submission, that the Plan would be a pension plan as a result of surrounding circumstances, plan fiduciaries should be aware of the possibility that, if as a result of surrounding circumstances, payments are systematically deferred until the termination of employment or until retirement age, the Plan might be deemed to be a pension plan.

This letter constitutes an advisory opinion under 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. It is not the Department's practice to delete mere identifying information from its advisory opinions or from the background files from which the opinions result. The Department's view of information which is "proprietary" and subject to deletion in

accordance with section 12.03 of Procedure 76-1 is narrowly construed and does not include information which merely identifies the inquirer.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs