A P P E A R A N C E S:

FOR THE MINERALS MANAGEMENT SERVICE:

Judge Will Irwin
Ms. Sarah Inderbitzin
Mr. Platte Clark
Ms. Karen K. Johnson
Mr. Kenneth Vogel
Ms. Dixie Lee Pritchard
Mr. Pat Milano

THE PARTICIPANTS:

MR. Richard McPike
Mr. Brian E. McGee
Mr. Hugh Schaefer
Mr. Bob Teeter
Mr. Dow Campbell
Ms. Sandra Bartz
Ms. Sensimoir Williams
Ms. April Kanak
Mr. Jason E. Doughty
Mr. Brian C. Johnson
Ms. Cheryl Crawford
Mr. Wayne Pachall
Mr. George Butler
Ms. Patsy Bragg

DATE: February 16, 1999

TIME: 9:00 A.M.

PLACE: Houston, Texas.

MR. IRWIN: Good morning, ladies and gentlemen. My name is Will Irwin. I'm one of the members of the team that prepared the proposed rulemaking that appeared in the Federal Register on January 12 that we're here to discuss today. There was a notice of today's meeting in the January 21st Federal Register, pages 60, 62 and 63.

In a minute I will ask the other members of the team to introduce themselves, but for the moment, I'd like to outline how we plan to proceed today and establish a few ground rules.

The notice of the meeting stated that we are here today to discuss the proposed rule and to receive public comments. We have prepared an agenda of the Order that we plan to follow in discussing the proposed rules. If you don't have one, I have an extra, and there are others at the door. You will see that there will be an overview of the proposed rules at the beginning, and then there are times allocated for the discussion of each of the various subject matter parts. Depending on how much interest there is in these various parts,

the times that we've estimated may contract or expand. We do need to finish, at the latest, at 4:00 p.m., however.

Some people who are attending indicated in advance that they wished to make comments on some of the proposed rules. We have a list of those who said they wished to do so, and we will call on those people first in connection with each part to discuss. If nobody has signed up for a particular part, why, then, that part will be gone through.

We would like the discussion to be informal and open. Please do understand, and I need to emphasize this, that none of us on the team intends to or, indeed, can commit or bind the Department to any interpretation of any of these proposed rules. We're actually here to hear your concerns about the proposed rules and to clarify them to the extent we can so that you may prepare written comments for submission by the March 15, 1999 deadline, if you wish to. But none of our answers should be taken as gospel. We aren't the policymakers who will decide what the final rules will provide and, in any event, how they're implemented and

interpreted will depend on the circumstances of the situation when it arises.

In my own place, since I'm one of the judges on the Board of Land Appeals that may be called on to decide on how to supply the rules in various cases, you can understand that I do not and cannot speak for the Board of Land Appeals. Indeed, until there's a specific appeal, even my own opinions are necessarily tentative.

The meeting will be transcribed by Mr. Beard and will be made part of the rulemaking record.

In addition to participating today, I do urge you to submit your written comments on the proposed rules on or before March 15 to one of the addresses that is on page 1930 of the January 12 Federal Register notice.

My principal assignment today is to serve as moderator of the meeting, being responsible for facilitating the discussion and monitoring the time and trying to keep us on schedule.

Please help us and Mr. Beard by telling us your name when you speak and when

you ask a question so that we can remember who you are.

I will try to be flexible, but if I find it necessary to suggest that we bring a particular topic to a close or to curtail the discussion, I will let you know. I brought a gavel but I don't expect to have to use it. I trust that with everybody's cooperation we'll all have a chance to speak and we'll all benefit from the discussion.

Are there any questions or suggestions so far?

I would like now for the members of the team who are present today, and not all of us could be, to introduce themselves and say where they work, then I will ask Ken Vogel to give the overview presentation I mentioned, then I will ask each of the team members who's listed on the agenda to briefly introduce the topic for which he or she is listed, to call on those who registered their interest in making comments on that topic and handle any questions for discussion that you would like to have.

Ken, would you introduce yourself first? We will go down the table and we'll

come back to you for your presentation.

MR. VOGEL: I'm Kenneth Vogel. I'm the Chief of the Office of Enforcement in the Royalty Management Program in Lakewood, Colorado.

MS. JOHNSON: I'm Karen Johnson. I work in Compliance Verification Branch or division in Lakewood, Colorado.

MR. CLARK: My name is Platte Clark. Those of you that have been to the previous meetings may recognize that I'm a fresh face, new face. Hugh Hilliard, who was the Team Leader of this team, has been reassigned to the Assistant Secretary's office and I have replaced him as the Acting Chief of the Appeals Division in MMS, and also inherited his role as the Team Leader of this team. So my name is Platte Clark and I basically replaced Hugh Hilliard.

MS. INDERBITZIN: Good morning. I'm Sarah Inderbitzin. I work for the Office of Solicitor in Washington D. C.

MR. IRWIN: Ken.

MR. MILANO: I'm Patrick Milano --

MR. IRWIN: Oh, I'm sorry, Pat.

MR. MILANO: I'm with Rules and Publications in Lakewood, Colorado.

MR. VOGEL: The goals for this rule that we had was -- were really twofold, or perhaps even threefold. The first is that we were hoping to set out a process by which we could meet the time line that's mandated by the Federal Oil & Gas Royalty Simplification & Fairness Act which mandates that the Department decide all royalty appeals within 33 months of their commencement. We also hoped, by following the recommendations of the Royalty Policy Committee, to increase the perceived fairness of the process. We believe the process always was fair, but we understand there was some disagreement about that.

Let me go back to that slide for a second. And also we wanted to assure the opportunity to participate state and Indian real parties in interest, those states and tribes who own federal -- who either own federal lands or who receive revenues from federal lands. This assures them some rights to participate.

The principal thing that has changed

is that the process is now a one-stage process. The Minerals Management Service continues to participate in the process but it participants in the informal resolution process at the outset of the process rather than formally.

The other change in the Rule is that there -- because we had to change all the subparts to which we were -- to which the rules previously referred, give new rules for offshore appeals, which we could spend a little bit of time discussing to the extent people are interested in that.

We've changed the appeals regarding royalty-in-kind bills, bills to purchases of royalty-in-kind oil or gas.

We've changed the appeal process for civil penalties, and we've also, again following the mandate of the Royalty Simplification & Fairness Act, changed the requirements for sureties which are necessary for -- prior to beginning an appeal of an order to pay.

The other major change we've made in the rules is that we have a new process

regarding appeals for Indian orders. We've given owners of Indian lands the right to participate in a formal process. The first part of the process is we've said that Indian lessors will be able to ask MMS to issue orders. While they always had that right before, we've now formalized that and said that they have that right.

The second part of the process is that we've said that they will be able to appeal to the Interior Board of Land Appeals if MMS decides not to issue an order. And so the appeals process actually is a two-way process. Indian lessors can appeal to the Interior Board of Land Appeals in cases where MMS does not issue an order, and royalty lessees, payors, designees, whoever receives an order, can also appeal the actual issuance of an order.

For more information on this part, you can see on the bottom, we've set out which subpart of the Rule this is in. This is in the MMS part of the Rule at 30 CFR part 242.

We've also formalized the preliminary order process. Again, this is one of recommendations of the Royalty Policy

Committee. In it the first thing that happens is MMS or the states or tribes will find a violation. From finding a violation, there's that now an informal or a formalized informal process in which whoever finds the violation will issue a Preliminary Determination Letter. We're -- I'm going to assume for our time line purposes that occurs on May 1st of this year so that you can follow along how long this process takes and how quickly we expect to get to resolution. For this, again, there's also more information -- oops -- in 30 CFR part 242.

The next step that happens is, assuming that a preliminary order has occurred, what MMS will do is issue its Preliminary Determination Letter as occurred. What MMS will next do is issue an order. And that order is either issued by MMS or a delegated state. And that's issued either to the designee or to the lessee, depending upon who was audited. If it's issued to the lessee, copies are sent to the designee. That would occur approximately 60 days after the preliminary decision letter, determination letter, rather.

Then the lessee or designee would

have another 60 days to file their notice of appeal to preliminary statement and to pay a fee in order to appeal, and that would be the date that the appeal would commence for purposes of the 33 months of RSFA under this proposed rule. And for that, that's in 43 CFR part J in sections 4.905 to 4.911. That's the beginning of the process, the docketing process.

What also occurs at this time is sureties need to be posted for all orders to pay. Either the lessee or the designee or another person must post a surety or demonstrate financial solvency on behalf of whoever received that order. The surety is equal to total amount that's due, including all the interest for one year forward from the date of the Order. The alternative is to demonstrate financial solvency, which is a new concept under the RSFA, and that also requires the payment of a fee. What we have determined to be financial solvent is a net worth of $300 million greater than the debt, and so if we have a debt of, say, $20 million you would need a net worth of $320 million. Alternatively, if

the payor or lessee does not have a net worth of $300 million, what we will do is consult a financial reporting service, like Equifax or some other one, or we will use our own program, which would do the same kind of analysis as those programs, and determine whether that there was a low risk for that type of debt, for that size of debt. For more information on that, it's in 30 CFR part 243.

Okay. Then the first thing in the appeals process is that the Dispute Resolution Division, which is the MMS division which will have the authority to organize the appeal process, will document the receipt and determine the timeliness of that receipt of all the things that I talked about earlier.

And then we'll schedule a record development and settlement conference or conferences. Those conferences either could be done together or could be done separately. They can either be in person or over the telephone or both, over a video conference or whatever would work.

Under the rules MMS decides the timeliness of the filing of a notice of appeal

in order to speed up that process. And there's more information here in 4.914, 915 and 924.

Then for the record development and settlement conferences, the conferences really are sort of conceptual rather than actual in the sense that while we've called it a conference, there could be multiple conferences, they could take place over time, they could -- they could be combined record development and settlement at the same time. But in any case, there's a requirement for us to meet but, again, as I said, the meeting could be over the telephone. It does not necessarily require travel by anyone. We've tried to set out the rules so that there's no requirement of travel on the part of any lessee.

In addition to MMS and the appellant, other parties may participate, and the details of that you can find in the Rule itself. That will occur another 60 days after the date of filing. All these dates can be extended by agreement and that -- and that would also extend the 33-month time frame. And then another 30 days after that, MMS and the

appellant must file the record or agree to settle or, again, agree to continue the three-month time frame.

It's our hope that most appeals will continue to be resolved at this level by settlement, by agreement between the parties.

If that's not successful, then the MMS Director will have some choices as to what to do upon seeing the record. The MMS Director will have a chance to review the record together with -- and with the advice of all the parties within MMS who participated in the development of that record. At that point, the MMS Director can rescind, modify or concur with the original order. And that has to be done within 60 days of the receipt of the record, which in this case would be January 25th of the year 2,000. And the MMS Director has an obligation to notify the appellant by that date. If the MMS Director doesn't, then it's deemed concurred with. The MMS Director also must forward the record to the IBLA, and that has to be within 45 days of the receipt of the record and the decision, or 45 days of the decision. For more information here, that's at

4.929 through 932.

At this point, appellants may file notice of appeal with the IBLA. The process that we've set up, this is really the first formal briefing of the case. Up until now, it really has been an informal process of discussion and record development.

The Statement of Reasons must be filed by the appellant with the IBLA within 60 days of the receipt of the decision by the MMS Director, which -- and I'm assuming that it got sent either electronically or by fax so it was received immediately and so 60 days is March 24 of the year 2,000.

In addition to the filing of the Statement of Reasons, there are also other processes that are occurring now. Lessors and states also may choose at this point to intervene by filing an intervention brief, lessors being Indian owners, and that has to be done within 30 days of the Director's decision. So what we've done is we've set up a process that the appellant ought to know before their filing their Statement of Reasons whether there has been an intervention by the states or

Indian lessors so that they have another 30 days after that date in order to file their Statement of Reasons. And for more information here, this is in 9 -- 4.933 through 4.936.

Okay. Instead of the IBLA making decisions, the Assistant Secretary may, essentially, at this point, determine that he or she wants to take a case. Basically these are for cases in which there's some political reason for the Assistant Secretary to be interested, either the Land and Minerals Management Assistant Secretary or the Indian Affairs Assistant Secretary, as appropriate. And that has to be done 30 days before the first brief must be filed, which generally has to be at the same time as the Director's decision as the intervention briefs can be filed within 30 days of the Director's decision. All the same procedural rules that apply to IBLA briefings also apply to the Assistant Secretary decisions, so that if the Assistant Secretary were to be the one making the decision, they still have to follow all the rules that we're going to talk about that would apply to the IBLA. This is in 4.937 through

4.938.

Then we come to the pleading process. The first things that occurs is the appellant must pay another filing fee together with the Statement of Reasons. And then the step after that is that answers to the Statement of Reasons may be filed by either MMS or lessors or any intervening states and lessors. And that has to be done within 60 days of the Statement of Reasons.

Also if there are any Intervention Briefs, those have to be answered within 60 days of receipt of the Director's recision or modification, which is the same date as the original Statement of Reasons would have had to be filed. So, in essence, those are filed together, answers to the Intervention Briefs and the Statement of Reasons, and I assume typically they would be one brief, although I'm sure the Board has not set out that kind of detail or thought about that kind of detail on how it would like briefs filed as of yet. For more information here, you should -- you can find that at 43 CFR 4.939 through 4.942.

Then there may be responsive

pleadings. I've tried to limit the complication of this, but I've also tried to lay out what can occur. Basically anyone has the right to file an Amicus Brief under these rules. Name also must be filed within 60 days either of the Statement of Reasons or of the Intervention Brief. And so, basically, as the Statement of Reasons follows the Intervention Brief, that's going to be May 23 through the year 2,000.

If there is an Amicus Brief, anyone who can file a Statement of Reasons or can file an Intervention Brief may also file a response to the Amicus Brief or a reply to the answer by the appellant. And that has to be done within 30 days of the answer or the Amicus Brief, or approximately June 22 of the year 2,000.

And then in addition from the Amicus Brief or from the reply to the answer of the response, a person who filed an answer, which typically would be an appellant, typically would be MMS, may also file a surr reply or a response to the Amicus Brief. And that has to occur within 20 days of the reply of the Amicus, which in this case is either going to

be June or July the 12th, depending upon whether it's a surr reply or a response. For more information here, you'll find that at 43 CFR 4.943 or 4.944.

We go on to what the Rule now allows, is that additional evidence will be -- is filed at this point in the process after -- after, in essence, there has been some briefing of the case. Any of the parties may request a hearing before an administrative law judge. And that has to be done within 30 days of the filing of all pleadings, or on my time line, by August 11 of the year 2,000. If there is a hearing, the party requesting a hearing must agree to extend the 33-month period. In addition, the IBLA may require additional evidence or arguments, either written or oral, and may make a referral to an ALJ, so we've given the power to the IBLA either to ask for a hearing by an ALJ or to request the evidence be presented directly to it.

If the IBLA has made a referral to an ALJ or the parties has requested a hearing for an ALJ, it depends upon how the IBLA makes that referral, the ALJ may either issue findings or

issue a decision. We've set no particular dates for any of these processes once it gets to the Board. And this can be found at 4.945 to 4.947.

Then we come to the decision process. Now either the IBLA or the Assistant Secretary cited in the case will decide the case before appeal time frame ends, and the appeal time frame ends on the same day of the 33rd month after the appeal begins, which I have incorrectly called May -- it was the 30th, right. So May 30th of the year 2002 is the year by which there has to be a final decision between the Department, unless that time period has been extended. That decision is effective immediately unless it provides otherwise.

And if the decision is a decision that requires recalculation because there's been a modification in the original order and so the amount in the original order was incorrect, the decision still is final, and any recalculations also are final for the Department, and so the only appeal that can be made from the recalculation is to Federal Court. Again, this is to assure that, by and

large, we get -- get the cases into court within the 33 months that the law requires. This can be found at 43 CFR 4.948 to 4.950.

There still is the opportunity for reconsideration. So it's our hope that, by and large, decisions would not occur at the end of the 33 months or that there is, in fact, time for reconsideration from either of the parties. It's our hope that in general the Board will make its decisions within no more than 30 months of the date the appeal commenced. But any party may ask the IBLA to reconsider it's decision with an accompanying brief, and that has to be done within 30 days of the receipt of the decision. The opposing party may answer that request for consideration, and they have to do that within 15 days of the receipt of the request, and then the IBLA may reconsider and, basically, the standard is in extraordinary circumstances. Or, alternatively, the Director of the Office of Hearing and Appeals, which is the umbrella group over the IBLA, or the Secretary may take jurisdiction over a case and determine it instead of having the IBLA reconsider. And

you'll find more information on this in 4.951 to 4.954.

Again, the hope here is that the reconsideration is actually decided within 33 months because otherwise it's useless.

Finally, for the -- to remind us of the time limits, the appeal ends at the same day of the 33 month after the appeal began. So for an appeal that began on August 30, 1999, May 30, 2002 would be the same day of the 33 months unless it's extended by an agreement. Obviously for appeals that would end on the 30th day of a month, I haven't calculated it, but wherever it ended in February, the 28th day of that month would be considered the same as the 30th day. So it doesn't extend on to the next month, even though there aren't enough days in the month.

For federal oil and gas leases the statute requires that if DOI does not issue a final decision by that date the appeal will be deemed decided, and it will be deemed decided with respect to whatever the last form of the Order is. So if there has been no MMS Director modification or recision, that would be on the

original order. If there has been a modification or recision by the director, it would be based upon that modification revision. We don't go back to the original order. We go to the modification or recision. If there's been an IBLA decision but there has been a request for reconsideration so that's not a final -- an absolute final decision, it's still deemed final, so that would be the decision that would be deemed decided. So whichever is the last form of the Order, this appeal -- this rule proposes that the last form of the Order be the one that goes on to Federal Court and be decided. That can be found various places within the Rule, 4.912, 4.956 and through 4.958.

Finally, for appeals by royalty-in-kind purchasers, appeals by royalty-in-kind purchasers are subject to the Contract Dispute Act rather than to RSFA or to FOGRMA or to -- under the Leasing Act or anything else. So decisions to alter any amounts due by purchasers are made by contracting officers, and then decisions by contracting officers may, according to the

statute, be either appealed to the Board of Contract Appeals or to the Court of Federal Claims under the Contract Disputes Act. And that is up to the recipient to determine which one they want to use. Either they can appeal administratively or they can appeal directly to court. And you can find more information on that on 208.16 in the royalty-in-kind sections.

Finally, there are also appeals rules for civil penalties we've had to modify as all the rest of the rules got modified. Basically we tried to follow the same philosophy either in the review of the civil penalty provisions that the appeals go again to the Office of Hearings and Appeals so -- rather than to the MMS Director. So in any case, if you receive a notice of noncompliance, you may request review by hearing on the record within 20 days by the Hearings Division of the Office of Hearings & Appeals. So in all cases, civil penalties get reviewed by the Office of Hearings & Appeals. Penalties do continue to accrue during the review as they do now, but the appellant may request, or the person requesting review, may

request a stay by the ALJ. And all the appeals -- all the civil penalties provisions are found at 30 CFR .241.

MR. IRWIN: Ken, thank you.

We have one more introduction of a member of the team who was out at the front table when you came in. Dixie, could you state briefly where you work and who you are.

MS. PRITCHARD: My name is Dixie Pritchard and I'm an auditor here in the Houston Compliance Division.

MR. IRWIN: Thank you. Since this was an overview, if you have questions about what Ken presented, perhaps you could take them up as we go through the various subject matter parts that I would like to start with now. And I would like to do that with asking Platte Clark to, either from where you're sitting, Platte, or up here, make presentations about the offshore operations appeals, and then we'll move to royalty-in-kind, please.

MR. CLARK: This particular part of the Rule was drafted by a different team. These rules apply to the offshore operations which, rather than focusing on royalty and the

value of production, is dealing more with the operations on the offshore leases similar to what BLM does on shore. So in section 290 -- 30 CFR 290.1, it specifically says that these are decisions or orders issued under subpart B. Now subpart B of the Title 30 of the CFR are the regs that deal with the operations as distinguished from royalty management issues.

The general goal under these revisions are again to eliminate the two separate levels of appeals so that there's no longer an appeal to the MMS Director but rather you appeal directly to IBLA.

Now, in all of the appeals, royalty management and offshore, historically the bulk of the appeals have been settled as distinguished from having decisions issued for them. And this especially applies to these offshore operations appeals. One of the things that we emphasize in this rule is that we have -- you have 60 days to appeal, whereas the IBLA regs require 30 days. So this specifically overrides the IBLA rule and gives you the 60 days to appeal. And the intent is that during that 60-day period, you would

attempt to settle this case with the MMS office that issued the Order.

The other item that is a change is that there's a filing fee here of $150 like the royalty orders that generate appeals.

Again, the Order is effective pending the appeal, as a general rule. Often these orders are dealing with things that can cause harm, either to individuals or the environment, or whatever, it is important that they be enforceable pending the appeal.

Now, in the offshore area, it also has civil penalties so, in effect, there's a dollar amount involved. And in that case, the regs provide that it is possible to provide a bond so that the Order -- so that you don't have to immediately pay the civil penalty. Now, the rules allow you to claim a waiver of the $150 filing fee, but in order to accomplish that you need to demonstrate that it is a financial burden that makes it so it's not practical to pay that $150 filing fee.

And the last section here provides that the way you exhaust your administrative remedies is to appeal to IBLA. So that's the

way you get into court, is by filing this appeal with the Interior Board of Land Appeals.

Are there any questions, or any comments, more preferably? Yes.

MR. SCHAEFER: When you say you appeal to the IBLA, as I read this regulation, it says then it would go under this new appeal system that we've set up, is that correct, so that we got the DRD, or is this different?

MR. CLARK: No. No. First of all, let me interject as a suggestion here. When we have a comment or a question, if you could state your name for the court reporter, as Mr. Hugh Schaefer.

MR. SCHAEFER: Thank you.

MR. CLARK: Basically, you do not use the royalty appeal rules. You simply use the IBLA rules, other than these 11 sections here in the part 290 which, again, are not royalty management rules, they're MMS rules. But -- so basically you comply with these 11 sections, and then you just simply start using the IBLA rules. Is that --

MR. SCHAEFER: That's it. Thank you,

Platte.

MR. CLARK: All right. Now we're going to shift over to the next item on the agenda, which is the rules dealing with a purchaser of royalty-in-kind production. Now, again, this is a little unique as the offshore appeals were unique, and the uniqueness here is that the person, the entity that is dealing with MMS, so that the entity that MMS is challenging or trying to get more money out of, is not a lessee, is not -- did not sign a lease, so all of our rules that we're used to dealing with where we go to the lease and we go to the regs that are dealing with lessees, those provisions are not what controls in these particular appeals. By the way, there are very few of these. Here we have a refiner, for instance, that would be purchasing crude and the MMS auditor comes along and decides the refiner should have paid more money for that crude. Now, because the refiner is purchasing personal property, this crude that's been severed, you have a particular statute that controls. It's called the Contract Disputes Act of 1978. It's in 41 USC. And there are

two factors that we're trying to cover in this -- these brief set of changes here. One is that the statute, the Contract Disputes Act, requires that any claims by the government against the contractor are subject to a decision by a Contracting Officer, that's in writing, explaining the decision and the rights to the party involved. So the regulation here at -- we're talking about part 208 of Title 30 of the MMS regs -- provides in the definition section, 208.2, it defines who is the Contracting Officer and the Contracting Officer's decision. Basically, it defines the Contracting Officer as the MMS Director or whoever the Director has delegated those responsibilities to. And the decision of the Contracting Officer would basically be the decision coming from the MMS auditor.

Now, the real difference here is that the -- this crude, this manufacturer that -- pardon me -- refiner that's purchased the royalty-in-kind production, instead of appealing to IBLA, this statute, Contract Disputes Act, provides the purchaser with the right to appeal to the -- a Board of Contract

Appeals. Now the Interior Department already has an Interior Board of Contract Appeals. And these regs are designed to focus these appeals so that they go to the right tribunal, so they'll go to the Interior Board of Contract Appeals instead of the Interior Board of Land Appeals. The statute also authorizes the purchaser the right to go directly to court, which Ken mentioned in the overview, which, in this case, is the Court of Federal Claims.

Do we have any comments on this small part?

Okay. We will move on.

MR. IRWIN: We'll move on by going back to Ken Vogel for discussion of penalties provisions in 241.

Ken, if you want to come up, that's fine. If you want to work from there, that's fine, too.

MR. VOGEL: I'll try.

MR. IRWIN: Excuse me. Do we have a question? If you want to identify yourself.

MS. BRAGG: Yes. I'm Patsy Bragg. Has the Department ever looked at or decided upon the applicability of the Contracts

Disputes Act with respect to royalty owners?

MR. CLARK: There has been at least a preliminary look at that question, and it -- my understanding is that the production in this the royalty-in-kind is severed from the ground becomes personal property and fits into that statute, whereas the normal situation, is my understanding, has been thought of, is that the crude, while it's still in the ground, is real estate and isn't part of the personal property. Now that's a very, very cryptic cursory analysis, but the question has been looked at. I think that's your question, has it -- have we looked at it? Yes, we've looked at the question.

MS. BRAGG: So you're saying that a tentative decision has been made by the Department that the oil or gas for royalty purposes is not personalty under the Contract Disputes Act, is not personal property?

MR. CLARK: That's what I'm saying.

MS. BRAGG: Thank you very much.

MR. VOGEL: We extensively revised -- this is Ken Vogel again. We extensively revised part 241, which is the penalty part of

the MMS Royalty Rules to put them into plain English, to change the appeals provision of them and to make them comply more closely with the original language of the Federal Oil & Gas Royalty Management Act of 1982. Basically there are two kinds of penalties that the -- that I will call FOGRMA, Federal Oil & Gas Royal Management Act, provides for their -- either subpart -- there's subsection A, penalties, which are penalties that require a period of time to correct, a minimum of 20 days, or there are penalties that are effective immediately because, generally speaking, because they're knowing or willful acts, or MMS believes that the acts were knowing or willful. And we've set out the procedures for each of those kinds of sections. Under the penalties that require a period of time to correct, MMS has a -- will send a notice of a violation, which we call the Notice of Noncompliance. That Notice of Noncompliance must be complied with within 20 days, or whatever time it says in the notice, if MMS determines more than 20 days is appropriate to comply with that Notice of Noncompliance. The

-- if the penalty is not -- if the violation is not corrected within the 20-day time period, the penalties begin to accrue, begin to accrue on the date of receipt of the Notice of Noncompliance, not at the end of the 20th day. So, in essence, there are 20 free days, but it relates back to the original notice. Those penalties can increase by tenfold. At the end of the 40th day after the Notice of Noncompliance is received, those penalties can be up to $500 per violation per day for the first 40 days, and up to $5,000 per violation per day for all days after the 40th day. The appeals process here is that -- that a recipient of a Notice of Noncompliance may request a hearing within that 20-day period by filing a request for a hearing on the record with the Hearings Division of the Office of Hearings & Appeals, and that may be done regardless of whether the notice was complied with or not. So there used to be a distinction between notices that were complied with and notices that weren't complied with. Basically very few people have appealed notices that were complied with, but in anyway case, there did

not appear to be any different procedures whether the notice was complied with or not. There's nothing in the statute that provides for that difference. And in trying to be consistent with the philosophy behind the generic rules that we'll be talking about later that appears more neutral and more fair to have this decision made at the departmental level rather than the MMS level, these appeals also were to be delegated to the Office of Hearings & Appeals.

For knowing or willful penalties there are basically two kinds of knowing or willful penalties. There are penalties under paragraph C of 30 USC 1719, and those are either for knowingly or willfully failing to make a payment by the date specified, or failing or refusing to permit a lawful entry, inspection or audit, or knowingly or willfully failing or refusing to allow access to a lease site within five days of production. The penalties -- the penalties for violation of that section are up to $10,000 per day per violation, according to the statute and regulations, track the statute.

The second kind of penalties are those under -- under 30 USC 1719 (d). These are penalties that can be up to $25,000 a day, according to the statute and, therefore, also to the regulations, and these are for knowingly or wilfully preparing or maintaining or providing false, inaccurate or misleading reports or data or notices or affidavits or records of any other written information, for every violation there's a penalty of up to $25,000 per day. Or knowingly or willfully taking, removing, transporting or using or diverting any oil and gas from a lease site without having authority. I guess theft could be the plain English way of saying that. Fraud and theft, basically. Or purchasing, accepting, selling, transporting or conveying such stolen converted oil or receipt of stolen goods, in common vernacular.

I'm not speaking loud enough?

(Discussion off the record.)

MR. VOGEL: Okay. Again, for penalties under this subsection, under this section, MMS will send a Notice of Noncompliance and a Notice of Civil Penalty at

the same time, because the penalties are effective immediately; in fact, they may have already begun to accrue. For instance, if a false statement was filed in January of 1995, MMS discovers it's false in May of 1999, the penalties may relate back to that original date of knowing or willful noncompliance. Again, no period of time is necessary to correct, no notice is necessary for there to be a penalty under the statute. The penalties can apply retroactively at up to 10,000 or $25,000 per day.

Again, a party receiving the notice of noncompliance, in this case with the notice of civil penalty, again may file their -- I knew there was a reason I turned it off. It may file a notice of appeal with the Office of Hearings & Appeals department within 20 days of receipt.

All these penalties only apply to oil and gas lessees on Federal or Indian lands. They don't apply to solid minerals lessees or geothermal steam lessees. These are all under the Federal Oil & Gas Management Act. We've eliminated provisions in which we purported to

have authority to have civil penalties other than under the Federal Oil & Gas Royalty Management Act because we couldn't figure out what the authority was. And it didn't make sense for us to have a regulation for which we couldn't have -- didn't have authority. We proposed to do that within this rule.

Again, the penalty continues to accrue. If the penalties are not paid, they may accrue interest. In addition, any interest on the underlying debt continues also to accrue in the period of time in which the debt is not paid. So these penalties are penalties in addition to any interest that may be due, and interest may be due on the penalties if they're not paid promptly.

If the hearing on the record follows the rules of the Office of Hearings & Appeals, if you're adversely affected by the decision of the administrative law judge, after the hearing on the record, you may then appeal that determination to the Interior Board of Land Appeals under part 4 of 30 C -- of 43 CFR. Subpart E is the section that deals with appeals from the administrative law judge

decisions. And then these are also appealable to court after a determination by the Interior Board of Land Appeals.

I think that's enough on terms of the general -- MMS may reduce your penalty if you apply to them to reduce your penalty. That determination is by the Associate Director of Royalty Management Program.

Are there any questions or comments on this subpart part?

MR. IRWIN: We welcome comments, so don't hesitate.

MR. VOGEL: That's why we're here.

MR. IRWIN: And as a general matter, if, as the day goes along, you have a comment that relates back to something that was covered earlier, we do reserve time at the end to come back with those questions or comments after you have heard the whole thing. Whether that takes place at 2:40 to 4:00 or whether it takes place earlier, we'll see.

Are you and Dixie prepared to go ahead of the break and be scheduled? Would that be all right.

MS. JOHNSON: Yes.

MR. IRWIN: All right. I don't know how you've divided it up, but go ahead.

MS. JOHNSON: We'll see if this works. I'm just going to go ahead and go over the highlights of orders. I'm not going to go into the specifics of it. This part is written in plain English. The new provisions in the Royalty Policy Committee recommendations, such as the Preliminary Determination Letter that will be sent before a formal order is sent. Also the recommendation that orders contain factual, legal and policy rationale when the Order is issued so that people know what we based our order on. It also includes the Royalty Simplification & Fairness Act provisions for federal oil and gas leases only regarding state issued orders and notices to lessees when orders are issued to their designee. This section distinguishes between orders and actions that are not orders and what is appealable, recommends that orders to perform restructured accounting contain an estimate of additional royalties, allows for the use of new technologies to serve orders and for the appeals process, like electronic mail

and facsimile. And it clarifies the process for Indian lessors to request that MMS issue an order and clarifies their appeal process when MMS does not issue an order or issues a decision that they don't agree with. The Indian lessors will then appeal to IBLA.

Any comments on this section? Yes, sir.

MR. MCGEE: Brian McGee. This one does overlap with the section appeals to the IBLA with the definition of orders if that is involved. I had some questions. Is it better to bring them up under that? I think they're more cleanly under the IBLA procedure. Or do you want to take them right here under this subpart?

MR. VOGEL: It's up to you.

MR. MCGEE: We'll do both, then. Get part of it out.

I'm Brian McGee and I'm here on behalf of the National Mining Association, more specifically representing Cypress AMAX Minerals Company and Peabody Holding Company. And I was on the -- I am on the RPC, Royalty Policy Committee, as well as having been on the

Appeals ADR Subcommittee that started part of this process, I'm afraid.

Under the orders, these are two small ones for clarification. I really like, Karen, the way you phrased on the Preliminary Determination Letter that it will be sent before an order is issued. But my reading of the preamble, and this goes back into the earlier section at page 1959, it seemed much more discretionary even in terms of whether a Preliminary Determination Letter would be sent. When we worked throughout the Committee level, I think our overriding thesis was to try and have demands, orders, disputes resolved at the earliest possible level. There's a strong feeling that it would really help if we could resolve them at the -- what we used to call the preliminary issue letter stage, now the preliminary determination stage. I think we still feel that way. We feel very strongly about that, I think in terms of resolution of facts. I think if there are facts that are in dispute or arrive, if you can resolve the facts you might have gotten to a different conclusion on the Order or the purported demand. So I

will say that in the report from the Appeals ADR Subcommittee we did have three sections on that. I went back and reread it. We did not suggest that it be mandatory. But I think it should be sort of the general rule with the exception being when it is not done. My reading of the preamble commentary was that it was very permissive and an auditor may, as I recall the language, issue a Preliminary Determination Letter without any encouragement, that this should be the general rule rather than the exception.

MR. CLARK: Let me ask you a question. My general impression is that it's already the general rule that they normally send an issue letter even under the historical procedures. Maybe I'm wrong there. Do you have a feeling about that?

MR. MCGEE: That is true. Right now it is de facto, it is done generally.

MR. CLARK: Yes.

MR. MCGEE: We felt it was so important, though, that we wanted to more incorporate it into a formal acknowledgment that this is an important part of the process.

It really kicks off the -- after the audit itself, this is the first thing that really gives any meaning or substance to a dispute or other prospective feeling of underpayment from the agency or the states, whoever is conducting the audit.

MR. CLARK: It also facilitates this ADR concept of getting these things resolved so that the auditor and the company can communicate with each other about what the issue is.

MR. MCGEE: We really haven't done the ADR yet. We had a dual charge within the subcommittee. One was appeals/ADR. We got to the appeals section. Maybe there's another half life for the Committee yet again to look at ADR. But our biggest feeling, Platte, honestly, was that dialogue, communication, if you can work through these things, you end up with a bit of a mutual understanding between the auditors for the state or for the MMS as well as for the respective companies, that you have a much better chance of resolution at that level so that we never even get to the appeals side of the legend. And that was our strong

hope. Then as you have gone through some of it, that same thesis was again whatever the next step is, let's take a real good shot at resolving then so that it never gets to IBLA.

So if you could re-look at that, as I say, my reading of it was that it was very permissive that the auditors may notify the lessee with respect to a Preliminary Determination Letter as opposed to strongly encouraging it be done.

I did have one other that is involved as well. I'll speak to solids because that's where most of background is and I know there is a provision on the oil and gas side and maybe somebody else can interject that one. I presume there probably is one for geothermal as well. But it has to do with 30 CFR 206, 257 (f), which under the oil and -- excuse me -- the coal provisions provides for a request for valuation determination. I think it is a very positive vehicle. It is in the same vein as I just mentioned earlier of the thesis of approaching this and trying to resolve disputes. If a lessee has an issue, and instead of waiting until it went through the

entirety of an audit cycle into an audit, into a Preliminary Determination Letter, then 257 (f) would allow the lessee-payor to come in and make a specific request for a valuation determination, you might say out of time, at which at the earliest point in time, so that you can have a resolution and go forward. At least you know whether you're fish or foul. And the important part of that, two parts, actually, and the language is quite mandatory. I could read it but we can each do that individually. One is that it has to be acted upon expeditiously by the agency which, again, goes to having a more immediate answer rather than a deferred answer. And the other was that it was an appealable decision. And if one was unhappy with the outcome, which if we have to ask the question is it royalty bearing you can probably presume the outcome, then we could at least initiate the appellate procedures. And we could do that anywhere from, in the current situation, before these would be promulgated, maybe four to five to six years, even earlier, and be able to get on with business, get on with our business and get on with your business

as well.

And these are also concepts, I should say, and I don't know if there are any state representatives here today or not, certainly none that I recognize from the Committee, but it was these sorts of concerns, too, that the state representatives on the Appeals ADR, and I don't mean to speak for them, I'll just make my own observation about it, that they were very concerned about, was trying to resolve these earlier stages. So both of these comments I think the states would probably concur in, without speaking for them. But this one specifically is one of those issues where the -- getting an answer, sometimes we have to force an answer to try and know how to conduct business, because this is not all done in a vacuum for the respective lessees and payors. We're structuring deals and transactions and we can't wait five or six years to know what your determination would be. What troubles us the most is the passage of time between point A, which is now, and point B, which would be five or six years from now. We've seen quite an evolution and we need to be able to go forward

in a business sense.

So the current regulation as you're proposing it, the royalty valuation determination pursuant to 206, 257 (f), I would read as being designated by your appeals regulation as not being an order and not being appealable. I'm not sure if you intended that. You said it a couple times. So I thought you did do it with direction and intention, but I would suggest that you probably cannot, by virtue of these proposed regulations, obviate an existing regulation that's already there within the valuation regulations.

MR. IRWIN: You see -- I just want to restate so I make sure I understand. Do you see a contradiction, Brian, between 257 (f), which says "act on expeditiously and it is an appealable decision," do you see a contradiction between that existing provision and the approvals here that defines order to exclude valuation determinations?

MR. MCGEE: Yes.

MR. IRWIN: Did I say that correctly?

MR. MCGEE: It's pretty express.

MR. IRWIN: Okay.

MR. MCGEE: I should give you a citation. I believe it's 1935, page 1935. Lower first column, midway down there are examples of that which are not orders. And then further down there are other examples. And down under B at the very bottom on page 1935, first column, including a valuation determination. And I think that that's really a buzz word, maybe.

MS. INDERBITZIN: Where?

MR. IRWIN: 1935, column one.

MR. MCGEE: At the very bottom. And we talked about valuation determinations. I think that is a term of art that exists in the current regulations.

MS. INDERBITZIN: There's a comma, and it says: "Unless it contains mandatory or ordering language." So the intent was if you get something back that just says do what you want to do, you know, the intent was that we may later on determine that that was wrong. If you get a letter back that says you may not do this or you must do it in X way, then we would consider that to be an order because it had

mandatory or ordering language and you would, indeed, be able to appeal that. But if it's informal, contains no mandatory -- contains no mandatory language, then you would not be able to appeal that, unless somewhere down the line MMS found a problem with it and issued an order to pay.

MR. MCGEE: I appreciate that distinction. If you want me to read F, I would hope you would not be denuding 257 (f) by virtue of this sort of equivocation language, and then when I receive -- put in a request under 257 (f), I get back the general sluff, and therefore it's not responsive to 257 (f).

There is, you know, first line, "Lessee may request a value determination." It's exactly the same language that you're using here but you're putting a different spin to it that would seem to entitle you to come back with a soft position which wouldn't have given me the valuation determination I specifically came to you asking for in 257.

MS. INDERBITZIN: Then I would say that maybe you're arguing with 257 (f), not with the appeals rules. We have never set

forth before what we considered to be a valuation determination, and this is where we're doing it.

MR. MCGEE: Well, it's got some very nice language, words like "shall" and -- pretty affirmative.

MR. IRWIN: Language you like.

MR. MCGEE: Well, frankly, it's your language.

MS. INDERBITZIN: It doesn't define what the valuation determination has to contain. It seems to me we're talking about what -- what you want a valuation determination to contain.

MR. MCGEE: It might be easier, sir, if you read F. I hope you have, but after the MMS issues its determination lessee shall make the adjustments. There's whole concepts that's implicit in this paragraph that we make the request, we're entitled to stay with the procedures that we think are appropriate until you make your expeditious determination. Having made the expeditious determination, we shall comply with it. Now that's pretty formal, and I would hope that that would not go

away, and somebody on the oil and gas side has a citation for their role.

MS. INDERBITZIN: I believe it would not go away because if you've got a mandatory order under that particular section, then you would be able to appeal it.

MR. MCGEE: I have to come in for mandamus if you didn't give me a decision, then I mean this is -- there's something here that makes sense, it's helpful, it's in part of the entire thesis that we're trying to go forward with here of having determinations as early in the process as possible, then, gosh, darn it, if we're going do conduct business on it, I think you ought to be able to stand up and stand behind whatever decision you make today and not try to keep the flexibility to change it between now and five and six years from now.

MS. INDERBITZIN: Well, let me ask you this. What would you like to see?

MR. MCGEE: I would like it to stay exactly the way it is under 257 (F) and not make a valuation determination a non-order.

MR. IRWIN: Do we have clarity sufficiently on this question to move on?

Brian, do you have more?

MR. MCGEE: No. Thank you very much.

MR. IRWIN: Mr. Schaefer:

MR. SCHAEFER: This is Hugh Schaefer. I, too, was on the Appeals Subcommittee and I just want to reaffirm what Brian said with respect to the Preliminary Determination Letter. On the Committee we spent a great amount of time, not only with the facilitating effect that a Preliminary Determination Letter would have, but we also had a lengthy discussion with the state representatives about the fact that on their side the Preliminary Determination Letter could become a very effective tool towards resolving an appeal earlier. I'm sure you've all heard that there was, over the years there's been a lot of griping by the industry about the fact that some of these letters are very poorly written, and I think we got at least a tacit understanding from the state and the tribal representatives that they saw where these letters could be improved in their quality, style and -- and preciseness would move things along. And then I think, as Platte said

earlier, and I want to reaffirm that, the thing that he mentioned was exactly what was discussed, if we're going into a type of procedure here where we are always leaving the door open on either side to sit down and talk about things, a Preliminary Determination Letter being optional with the Department I think would only slow down the process and really put a crunch on the other time lines that we have to observe in this regulation. Thank you.

MR. IRWIN: Let's move back to the larger context. Questions, comments to Karen? Brian again.

MR. MCGEE: I just want to follow up. Maybe I can just be a little bit more explicit. I have heard it attributed to the current director that for solids 30 CFR 206, 257 (f) would no longer be utilized, and there's a refusal to utilize it. I have one pending now where it's not being utilized. It's being referred instead to the Royalty Policy Board, which we all know is guidance, even though it kind of comes down on holy grail it is not rulemaking, it is only guidance. So

guidance from the Royalty Policy Board is a lot different, I think, in compliance with 257 (f).

MS. JOHNSON: Thank you for your comments. We need to hear them.

Are there any other comments on orders?

MR. IRWIN: Well, we can do it either way. We could take a small break now or we can let Ken get bonding presented, at least. Break, please?

Let me just say 15 minutes. I won't say ten and it will dribble on. I'll say 15 and I would like you back, please.

(Brief recess.)

MR. IRWIN: I would like to restart us. I, at least, find it warm enough in here that in the spirit of informality, if any of us would like to take off our jacket, please feel free. I'm planning to.

(Discussion off the record.)

MR. IRWIN: We're moving along. I would like to deal with bonding with Ken Vogel making a presentation, and then whatever discussion on that. And then if there's not an

objection, I'd like to start with, oh, the rules in 43 CFR subpart J before lunch and see how far we get. I know at least one person here needs to make a plane, and I have said to you, Schaefer, that he make whatever speeches he wants to at the outset. He didn't actually phrase it that way. My apologies.

Ken on bonding.

MR. SCHAEFER: I knew I should have never asked.

MR. VOGEL: "Ken on bonding."

MS. INDERBITZIN: Sounds a movie.

MR. VOGEL: 30 CFR part 243 was also extensively revised to change it to plain English. Hopefully it's actually understandable. The principal changes to this part are the addition of the ability of a appellant to demonstrate financial solvency rather than to actually post a surety. The Royalty Simplification & Fairness Act applies to federal leases, federal oil and gas leases, and it would mandate that a financial financially solvent company could demonstrate financial solvency in lieu of posting a surety for all obligations under the Act which applies

to obligations concerning production after September 1, 1996. This rule would apply to all federal leases. We've asked for comments on whether it should also apply to Indian leases, but we have not made it apply to Indian leases for reasons of our trust responsibility. The way we've attempted to define financial solvency, we have the easy way and the not so easy way. The easy way was that for any company that has a certified financial statement which, generally speaking for a publicly-traded company, would be their annual report, and which demonstrates that they have over $300 million in assets greater than their potential liability under the orders they have to the Mineral Management Service would have demonstrated financial solvency, find that a relatively straightforward way that eliminates more than half of the orders that we give, because more than half the orders we give and far more than half the dollars that are subject to order are to companies in that category, and that's why we chose that number. It does take care of the great bulk of our orders.

The other way that -- that we would

demonstrate -- that a company could demonstrate financial solvency was to ask MMS to check either with a program and, for instance, the EPA has a -- has an internal program that they use to check on their sureties, or we would consult a financial reporting service, and from either of those demonstrate that the company would be a low risk for a debt of the size of the debt of the potential order.

So for either one of those two ways, a company could demonstrate financial solvency and we would be relieved of any obligation to post sureties for any of its obligations to the states. That would be renewed on an annual basis as long as they had ongoing obligations or potential obligations.

(Discussion off the record.)

MR. VOGEL: Actually, I'm pretty sure that was about as far as I wanted to get in terms of the definitions. The -- there is a fee for MMS to determine whether a company is financially solvent, which basically is the cost it would cost MMS to consult a financial reporting service and the cost to do the paperwork to file the orders.

(Discussion off the record.)

MR. IRWIN: Comments to Ken, or are you done, sir?

MR. VOGEL: I think I'm done.

MR. IRWIN: I didn't mean to rush you. I'm sorry.

MR. VOGEL: That's okay. I do think I'm actually done with what I had to say as a overview of the new rule.

Are there any comments? Great.

MR. IRWIN: All right. I am taking off my moderator's hat for a moment and doing my assignment, which is to go over not all of subpart J as you read it. Many of you have come to the two public workshops that we did last year in Denver, and what we thought might be most helpful to you is to hear what changes we have made that appear in this proposed rule from the last version you saw in Denver in March of last year. You will find a lot of renumbering in this proposed rule compared to the number you saw in the previous one. Some of that is the result of the plain English exercise that the Rule went through to break things down and make them shorter and to give

more headings. Therefore, the numbers I'll be using are the numbers in the proposed rule and not the old numbers, if you had them. And I'll go reasonably quickly in some detail, and then I'll be quite.

In definitions, 4.903, you have new definitions for affected, for Indian lessor, for lease and for nonmonetary obligation.

In the definition of assessment, you will see language that says other than one, two and three. That's new.

In the definition of monetary obligation, you will now see that it refers to the definition of obligation rather than listing out all of the different kinds of payments, including maintenance, as it did before.

In the definition of order, we added the language you now find there about issued by the MMS Royalty Management Program. We substituted the word "recipient" for all of the different people who could have gotten an order. We took out the Order issued to a purchaser of royalty-in-kind and, back to a topic from before, we added that a valuation

determination was not equivalent to an order.

Under 4.904, who may appeal, we added the language except under 4.905, what I may not appeal. That's a new section.

4.906, the "X" office, you will be happy to know, now has a name. It is the Dispute Resolution Division. It will be in Washington. We also added in 4.906 a cross-reference to what it means to be served in 243.205.

4.907, how do I file an appeal, we added the amount of the filing fee. Before we didn't know what it was. We also added the provision that you can request a reduction or a waiver of that fee. We also added that MMS will do a listing of lessees that a designee must serve.

4.911, when does an appeal commence, we added at the end of that rule a provision that covers what "commence" means if you've have asked for a fee waiver or reduction. That's in 4.911 C -- excuse me -- 4.411 C.

What will MMS do after it receives an appeal, 4.914, we added that an MMS decision that an appeal is untimely is appealable to the

Board. That's 4.969.

Record development conference, 4.915, it used to be you were to schedule it. Now the scheduling shall be done by MMS. We also added the concept that it could be conferences, that it would be a process rather than just a conference.

How will the parties develop the record, 4.918, we dropped the language that used to be there that talked about documents or evidence that any party believes are relevant. That language is gone now. We added the exception, which you will find, for evidence that is privileged or cannot be disclosed under law.

What will parties do if they agree at a record development conference, that's now 4.919. MMS will compile the record and draft joint Statement of Facts of the issues and file the record and the statement and the certification that the record is complete, unless, among you, you decide some other party should do that. We also added that the record does not include privileged or not disclosable items.

4.921, you'll see that we did not attempt to draft a new rule governing procedures for privileged and confidential information, as discussed in Denver, so we were left with 4.31 in 43 CFR.

Settlement conferences, 4.924, MMS schedules it.

In 4.927 we deleted the language after the settlement conference from the time frame in which you could decide to settle an appeal.

Submission of the record by MMS to the board in 4.932, that was added. It's simply a housekeeping provision so we know when we get the record.

May an Assistant Secretary decide an appeal under 4.937, we added the language at the end of that, or an intervenor must file it's intervention brief to the timing.

We changed the language in B from if Assistant Secretary will decide, you must file all subsequent documents -- excuse me -- the change to two, you must file all subsequent documents required to the Assistant Secretary. It used to read all applicable time frames and

procedures, and then it spelled out several sections that will apply.

Filing pleading with IBLA is in 4.939. We added a second $150 filing fee.

Look at 4.965 if you want see how the filing fees work.

What if I don't timely file my Statement of Reasons, 4.940, the sanction is now we will dismiss the appeal. It used to say, we'll just not consider the document.

4.945, you may request a hearing if there are issues of fact that could affect the decision. The language used to read, that could alter the disposition of the appeal.

Same change of language in 4.946.

Several of these next things that I'm going to say are related to the next statement. When will IBLA decide my appeal, in 4.948, it used to say "within 30 months." So that if any party wanted to, after that decision came out, they could file a petition for reconsideration. That language is dropped. The board now has 33 months. And the guidance, the language in the -- the old language that said in that 30 months "is only

advisory to the Board" has been dropped.

What if the IBLA requires recalculation of royalties, 4.950, we added the language in subdivision A that limits that section to oil and gas leases under the Royalty Simplification & Fairness Act. We also deleted "or the Tribe" from subsection C.

Because of the change of timing for the Board to decide that I just told you about, in 4.951, "may a party ask the IBLA to reconsider a decision?" We dropped the requirement that the party who asks has to agree to extend the time for the decision by 120 days. That 120 days was the time before.

In 4.952 we dropped the language requiring you to explain why, if the basis for your petition for reconsideration unless that there was new evidence, or evidence that hasn't been previously been offered, we dropped the requirement to explain why.

Also related to the previous comment, we dropped the provision that allowed for you to request that the IBLA suspend its decision while it's reconsidering it.

And then also consistent with the

previous change in 4.954, which now has a heading "On Whom Will IBLA Serve a Decision on Reconsideration," there used to be language in that that said we would decide the petition for reconsideration before appeal, that is before the 33 months. All of those provisions, basically, flow from having decided that the Board has 33 months, not 30.

And also related to the language that you now find in 4.956, "What if the Department Doesn't Decide by the Time the Appeal Ends," the language in subsection E now just says an IBLA decision is final. And if somebody does ask for reconsideration, the IBLA doesn't have to answer the petition for reconsideration before the 33 months.

4.957, what is the administrative record if an appeal is being decided, that language is added.

4.958, how do I request an extension of time. It used to be that you could not ask for an extension of time to file your processing fee. Now you can.

4.964, what if I don't serve my documents as I'm supposed to. I believe,

although we talked about it before, I believe that the language that says the Board may dismiss the appeal if there's prejudice to an adverse party.

4.966 to 968, how do I request a waiver or reduction of the fee. That language didn't used to be there.

4.969, how do I appeal a decision that my appeal was not filed on time with the MMS, that language is knew.

I'm finished. At least I think I'm finished with what I was going to say.

I don't have any particular structure in mind for how we do comments on this section. Some of these sections in subpart J I'm more familiar with than others, although any of us on the team can respond if there's a comment I can't match.

Mr. Teeter, I have promised Mr. Schaefer that he could go first.

MR. SCHAEFER: I apologize for disrupting the schedule here, but I kind of thought we were going to be working on this appeals part this morning and I've got to catch a plane this afternoon, its only one flight

that I can catch, so I'm a victim of American Airlines in more ways than one.

My first comment deals early on in the preamble, and on page 1931 the Department, in the last full paragraph on the third column says, "We specifically request comment on whether, as an alternative to the procedures described in this proposed rulemaking, the current two-level administrative appeal process should be retained with amendments." And it goes on to describe what these amendments would say.

I've referred to the Secretary's letter to the Royalty Policy Committee of September 22, 1997. And having reviewed that carefully, I think it's a fair assumption to make that we were all left with a Secretarial decision that we were going to go forward and have a rule which was consistent, in general terms, with what the Royalty Policy Committee recommends. Now my concern is, with this statement, first of all, I find nothing in the Secretary's letter to say that, however, we're going to specifically request comment on whether or not we should keep the old system or

refine or go on with the new system. I want to remind the drafting team and the Department as a whole that there are a lot of people who devoted a lot of their own time to working on this project, and I would say it's fair to say, went back as far as 1995 to develop this rule. It was a consensus rule. It was -- states and the tribes were present, plus input from the Department. And I think the one thing that came through loud and clear before that committee is, we are going to have a one-step appeal process, and I think was the hallmark of the recommendation. So just speaking personally as a member of the Committee, I'm very concerned that there's a risk here that all this work of four to five years is going to go down the drain and we'll go back and have a two-step appeal. And I think that would be tragic. I think it would be an insult to the citizens who worked on this committee and -- and to have someone who maybe wasn't there during the -- during the Committee to come up with this idea that, well, we aren't quite ready to let this two-step appeal process go.

I feel that if there was a concern

within the Department as this process was going forward, and even at the level of the workshops, I think we should have been alerted early on that this is -- this may or may not come about. I would strongly urge the Department, and I'll put this comment in writing, that we not go back.

I think the proceedings of the Committee have amply demonstrated that the current system is just fraught with unfairness and it just does not work. I know that the Royalty Simplification Fairness Act is now going to speed it up, but I don't honestly think that a two-step appeal system is going to work within the rubric of the Royalty Simplification Fairness Act.

And I would say if anybody on the panel wants to respond, I would be more than happy to pause at appropriate junctures, but I trust that at least the panel understands my feeling about this.

And then my other comment deals with -- I think there could be a potentially serious issue with respect to when the appeal time starts to run. I'm not an expert on

administrative procedure, administrative law, but I've looked at it and studied it long enough that I should know something. But anyhow, when you file -- when you receive an order from an agency that directs you to take specific action, I believe that under administrative law that does start appellant rights moving. And to defer the running of this time limit because you may have requested time in which to file a Statement of Reasons and also defer the submission of the filing fee, I believe does have remotely, at least, a chilling effect on appellant rights, and I think it may raise serious questions of administrative due process. I would urge you to go back and take a look at that.

Then the prerogative of the Assistant Secretary to take a decision at -- away from the IBLA at the time indicated in the regulation, I was a little disappointed to see that -- some things that had come up during the Royalty Policy Committee deliberations on this matter, and then even in the workshops, and I guess I was, as the Bible says, the voice of one crying in the wilderness, I think all along

during the record of those proceedings I requested clarification on the frequency with which an Assistant Secretary would take jurisdiction of a case from the IBLA, or before it got to the IBLA. I believe the record will show that it was stated that this would be the exception rather than the Rule. And I find nothing in the preamble that confirms that. So again I'm concerned that maybe there could be the taking the resolution of a case by the IBLA may be the exception rather than the Rule as opposed to the Secretary.

And, again, I have given the speech before, but for the record, I'm going to give it again, but I'm going to shorten it. And that is, for those of you who have been around Interior Department adjudication procedures and everything, do you recall back in the sixties there was a Congressional Commission established to -- and it was called the Public Land Law Review Commission. And it not only adopted things that led to the enactment of FLPMA, the Federal Land and Policy Management Act, but it also found that there needed to be a quasi- independent tribunal within the

Department of Interior so that the number of decisions that -- so that not every decision that the Department issued was going to go to court. And I think that it was never the intention of the Committee, by going to a one-step appeal process, that we were going to disturb the findings of that distinguished body. And, again, I would hope that when the final rule comes out that we confirm what is on the record, and that is, the Assistant Secretary taking jurisdiction as a rule rather than exception of appeal I think really flies in the face from what I think is a excellent policy that -- that the Department adopted, with the urging of Congress, in having a quasi-independent tribunal in the Department to decide these cases.

MS. INDERBITZIN: Hugh, can I interrupt for just a second and ask a question?

MR. MCGEE: Yeah.

MS. INDERBITZIN: Would you then advocate setting out in what circumstances? I mean, spelling out in what circumstances the Assistant Secretary can take an appeal?

MR. MCGEE: I think that would be helpful. In other words, and I was coming to the point where I think we need to have some criteria established as to when an Assistant Secretary would take jurisdiction. I don't know that that would completely solve the problem because I think there's some issues in the Department that is probably better that maybe the Assistant Secretary not make what I call a judicial-type ruling, but rather let it pass to the IBLA where we -- I mean it is a tribunal that deals with the law and procedure, both on the Administrative Procedure Act and under the various oil and gas leasing acts. They have longevity on the board. They have experience. And, you know, not always does an Assistant Secretary hang around as long as a judge on the IBLA hangs around. He sort of goes with the winds of political fortune. And I think that, again going back to what the Public Land Law Review Commission said, we want a quasi-independent tribunal that follows the law and applies it in an evenhanded manner.

The other thing I want to comment on is -- and in the Secretary's letter at page 2

under part 4 B where we get into a discussion of the -- the Committee, as you recall, recommended an internal recommendation memorandum, and then the Secretary said we will issue a memorandum/letter decision. Again, the word "decision" I think needs to be clarified, and I believe that it should not be -- I don't think it was the intention -- I don't think it was even the Secretary's intention that the word "decision" would have any -- any similarity to a decision that the MMS Director used to issue under the old regulations. Because if it is going to be interpreted that way, and if it is a decision, then we run into some things that, hopefully, we had hoped that we would avoid. And that is, any decision of an officer of an agency, particularly the senior officer of an agency, has a presumption of regularity about it, it is entitled to deference, and that puts a heavier burden of proof. And when you get into that arena, what you're really looking at is a decision that would be more, under these regulations, appropriate for the IBLA to render and not the Director.

We -- again, one of the principal findings that the Committee recommended and was accepted by the RPC was that there will be one decision. It will be entered decision, quote, unquote. It will be entered by the IBLA or it will be entered by the Assistant Secretary, depending upon the circumstances.

Now coupled with that, and while we're in -- let's move back up to 4 A on page 2 of the Secretary's letter. We would clarify that the Preliminary Statement of Issues that appellants are required to file with their notice of appeal must specifically identify their legal and factual disagreements with MMS action.

Now, if you would, if you have a copy of the text of the regulation as published in the Federal Register on January 12 at -- at section 4.907, which is in the first column, and it would be A (2), we get a description of what a written preliminary statement of reasons must contain. And that tracks verbatim on the Secretary's letter; namely, you must specifically identify the legal and factual disagreements that you have with the Order.

And then they refer you to appendix J, appendix A to subpart J, part 4, on page 1981. And if you will take a look at this form, or suggested -- it's a form. Part 2, you'll see in brackets,"insert citation to applicable case law statutes and/or regulations." And we see it again in part 3, I believe it is, the last sentence in brackets, and again in four. Two, three and four.

Now, my point here is that this was another thing that was debated for a great amount of time in the Appeals Subcommittee. And I think we need some clarification first on what is meant by a decision, and then, secondly, I feel that in this appendix it's unclear whether or not this is what will be expected and required of an appealing lessee or is it just a recommended? That's unclear. But I think if it's -- if what is going to be inspected, the fact that you have put in there the requirement about citation to case law, statutes and everything else, I, as a Secretary, did not require that and I don't think the regulation can either.

And now to kind of go back and just

sort of wrap this up. Let's say that the Department expects the Preliminary Statement of Issues to contain all the things that are set forth in appendix A. And then we have -- now we reach up to this issue of what do we mean by memorandum/decision? It would seem to me that there may be an interpretation taken by the Department, even by a court, Federal Court, to say, well, look, you submitted your Preliminary Statement of Issues, you cited the statutes, the cases and the regulations, we have a decision now and we view this as a decision within the meaning of the Administrative Procedure Act and, therefore, there is a rationale basis between facts found and conclusions made, and that's it, that is entitled to a presumption of regularity, and so what we are, we are back now to a two-step system. We could have that decision that may end up before the IBLA, and what does the IBLA do with that kind of decision where there may be a predicate laid in both law, fact, statute, case law, and then we get a decision of the Director.

I would say that at that point --

well, I don't want to go that far. I just think we need some clarification on what was meant by that.

And thank you very much, Judge Irwin. I'm done.

MR. CLARK: Let me push that thought a little further. Let's say IBLA doesn't issue a decision within 33 months. Then -- that you're going to be in court in the posture that you're talking about there. In other words, that little cryptic decision that said "I concur" is going to be the decision that is and becomes part of the record in court and will be the matter that's under appeal.

MR. SCHAEFER: Well, that's right. I think -- I mean that could happen that way and -- but, again, I think that -- I'm confident that the IBLA, once it gets a case on its docket and the Assistant Secretary doesn't take jurisdiction of it, I am absolutely confident the IBLA will rule, absolutely.

MS. INDERBITZIN: I have a question also.

MR. MCGEE: Sure.

MS. INDERBITZIN: One of last things

you spoke about was, and correct me if I'm wrong, one of your concerns is that we could end up in court with just a preliminary Statement of Reasons that has your citations and a Director's, say, modification and nothing else?

MR. MCGEE: Well, you know, I haven't -- Platte raised that, and I have to think about that for awhile because I hadn't looked at, you know, boy, if we go down that path what happens. Frankly, I have not.

MS. INDERBITZIN: Because just for your own -- if you look at the whole, part of the process tells you what the record is. If we don't get an IBLA decision, and it would include things you are required to file with the IBLA, such as your Statement of Reasons, so say you had something in the preliminary statement, you wouldn't be bound by your Preliminary Statement of Issues by whatever you cited in there to begin with. That's the first point. And the second point would be if you had a further argument or changed your argument or needed to add to your argument in your statement of reasons, that would be part of the

record that went to court.

MR. MCGEE: Well, I was just going to say I don't think -- I think before we would get to the point where the IBLA doesn't rule, then we've completed the record, we have filed Statement of Reasons and we've had a settlement conference, and I would say that lawyers on both sides, if they're worth their salt, are going to make sure that they're satisfied with that record because this case would very well go to court. So I don't -- you know I -- what I'm worried about is -- what I'm just worried about is the way in which this language is used it may carry a presumption of regularity that the IBLA would have to deal with in a manner that it's really not ripe at that point.

MS. INDERBITZIN: So your biggest concern is the deference that might be given to any Director action?

MR. MCGEE: That's right.

MS. INDERBITZIN: Okay.

MR. MCGEE: And before that, the threshold concern is, I'm troubled by the use of the word "decision." I mean that to me, as a lawyer, has its own unique character and it

has -- it's a term that has been well defined in the law, and it is a decision as opposed to an order.

MS. INDERBITZIN: Which would get no deference? Wouldn't that then be the decision of the Department?

MR. MCGEE: What?

MS. INDERBITZIN: If an order is upheld, then that would be entitled to deference also.

MR. MCGEE: Upheld by who? IBLA?

MS. INDERBITZIN: If you ended up in court, if IBLA never acted on an Order and the Director never acted on the Order, then that would be the decision -- the Order would be the decision of the Department.

MR. MCGEE: Well, I would have to say that under the Simplification & Fairness Act, I think that Order has to be acted on now by somebody in the Department.

MR. IRWIN: Before I go forward, other comments, questions from us to Hugh Schaefer?

Mr. Butler, I saw your hand. I did half recognize Mr. Teeter before. Are you

willing to defer?

MR. BUTLER: Go ahead.

MR. IRWIN: Are you still hoping to say something?

MR. TEETER: Bob Teeter with Coastal. A couple of questions, clarifications.

When the MMS issues a PDL, Preliminary Determination Letter, I don't see any procedure to meet, to talk or try to resolve the dispute for the issuance of the Order and, in fact, I see the Order has to be issued -- if I'm reading this correctly -- within 60 days, which seems to me that when you get the PDL you know you're going to get an order in 60 days. Is that -- am I reading that correctly? Is that the intent?

Seems to me that these meetings that are set up after the lessee files an appeal, at least some of those meetings ought to take place after the issuance of this Preliminary Determination Letter.

MR. CLARK: My impression would be there would be an interchange of thought that it would be more with the auditors at that

level because you haven't received an order yet. That I think historically there's -- well, I keep using this presumption that there has generally been issue letters issued and then there has generally been a communication. When the company wanted to communicate, there has been a communication back and forth. And the auditors have often changed their position from the issue letter. And they've worked out something that was closer to the facts because they felt they didn't have access to all the facts until they got a response back from the company. So that there's an interchange that goes on. It's just that it's not at this formalized level dealing -- it isn't considered an appeal yet because there hasn't been an order issued.

MR. SCHAEFER: I'm just wondering by requiring an order to be issued 60 days later, unless I'm reading this wrong, if we're not cutting off all those problems.

MR. VOGEL: You have a cite for that?

MR. SCHAEFER: Your slides here.

MS. INDERBITZIN: Oh, no.

MR. VOGEL: It said generally. The slides said generally that would be 60 days later. It's not a requirement in the regulations that that's when it would occur, but, generally speaking, that's the expected time frame that we would try to issue orders, at least try to issue preliminary decisions -- PDLs, whatever they are, at least 60 days before the date we hoped to get an order on a case there was a limitation issue. But there's no -- there's no requirement of a time frame from when orders must be issued in the regulation. That's just a rough time frame of when we expect them to be issued. But it was, and I guess this is a matter that was much debated within the Committee and elsewhere, were you suggesting that you thought there should be a requirement in the regulation for discussions, meetings between MMS and lessees or their designees or payers on the tribal during the preliminary determination --

MR. TEETER: I would like to see a requirement that the auditor meet with the company if the company desires that meeting after the PDL.

MR. IRWIN: Mr. McGee.

MR. MCGEE: If I might just for a de facto standpoint go back to that again. Hopefully that's going to happen. We discussed it at some length in terms of the exit audit or the exit briefing, from the audit itself, that should really start that process. And then certainly from a practice standpoint I've never had a difficulty, and we acknowledge that openly in the Committee, of having meetings, submitting documentation, working with the auditors to any extent that was deemed to be effective by both sides. It has been there de facto and I guess the issue should be formalized again.

MR. TEETER: Yeah. I can only give you a very little experience but my one experience is we got a PDL, or an issue letter, very legalistic citing all kinds of regulations and cases and stuff, which looked a lot like an order. We responded in writing and absolutely nothing happened for eight months, and then all of a sudden we get an Order. And then we started -- after we get the Order, we filed a notice of appeal and then filed a request for

extension of time to file the Statement of Reasons, and then proceeded over the next eight months to meet with the auditors three or four times. And it seems to me that you shouldn't get an order until you at least get some kind of response to the response, you know. You shouldn't just get an order out of the blue.

MR. IRWIN: Mr. Butler.

MR. BUTLER: I had a couple of questions. First on 4.907 and the Preliminary Statement of Issues. When you say you must -- you must specifically identify the legal and factual disagreements you have with the Order, there's some statements in the preamble that explain that what we're trying to do there is to keep one, make the appellant actually identify factual and legal disagreements so that the MMS can properly evaluate the appellant's position. They don't want blank statements if the appellant disagrees with the Order without stating the legal or factual basis of the disagreement. And also you're saying that this requirement would require appellants to specifically identify legal and factual disagreements.

Okay. And I guess what I'm saying is although I hear Sarah say that they're really not trying to erect a procedural bar to legal arguments raised by the lessee after the preliminary statement. And my question is: Are you opposed to clarifying that in the Rule that the requirement that someone must specifically identify the legal and factual disagreements shall not operate as a procedural bar to the raising of, you know, additional legal arguments in the Statement of Reasons or at other points?

MS. INDERBITZIN: I believe the Rule does that. I think there's a provision in there that says, even though we certify --

MR. BUTLER: Can you point me to that, please?

MS. INDERBITZIN: Excuse me?

MR. BUTLER: Can you point me to that, please?

MS. INDERBITZIN: Sure. It will take me a minute. It's a big rule.

MR. VOGEL: 4.939?

MS. INDERBITZIN: Let's see. It would be 4.923. Because what you're going to

do is you're -- the parties are going to file their preliminary -- all of this information for the record. Basically, I would assume that we would all agree on it, and at that point you would be able to request to add additional arguments that weren't -- that weren't brought to your attention early on. Because that includes facts and issues, George.

MR. BUTLER: Well, that requires a showing why the additional documents, evidence, facts or issues were not available or provided in the record or a misstatement of facts and issues and why they are material to a decision on the appeal. So I see this as -- as consistent with my concern that what we intended to be something that would assist in the development of the record might be used as a procedural bar. I mean I could see filing this material and making some sort of statement and having that being opposed being, you know, by someone within the Department saying, well, actually you could have included this in your Preliminary Statement of Issues and you did not and, therefore, you should be precluded from raising this argument. Okay. And I don't

think that that was the intent of the RPC. So that is of great concern to me.

And my question is: Would, you know, you be willing to clarify that you are not trying to use 4.907 as a procedural bar to additional, you know, arguments or issues that the lessee may identify during the course of the appeal?

MR. IRWIN: Perhaps tying that to the statement of reasons in 4.933.

MR. VOGEL: Actually it's two places for it, one is in 4.919 in the record development, and the second is in the Statement of Reasons.

MR. IRWIN: Yeah.

MR. VOGEL: I mean, I think you're right at least about the drafters, and obviously we can't comment on the intent of people who might sign the Rule or what might occur in the final rule, but it was not the -- it was the intent of the drafters that -- that additional facts and reasons would be able to be developed, certainly at the Record Development Conference, and the reason for that was that that's the point in time when the

record is being put together, and if -- and to the extent that one knows what the legal issues are, then you know what needs to go into the record in order for it to go forward. So that was the time in which we assumed, and I think that the -- that the Policy Committee and the Secretary assumed there would be additional -- there would be augmentation of that preliminary statement, clearly the preliminary statement's not meant to be anything but a preliminary statement. And it was the intent from the part that Sarah talked about that if there are new issues that arise after the two parties have certified, or the multiple parties have certified, that that is the complete record, that that would require some leave, and that, again, I think is consistent with what the Royalty Policy Committee recommended to the Secretary and the Secretary adopted, and that's why we adopted it that way so that it is principally at the Record Development Conference. But you are right, there's no specific language which says additional issues may be mentioned and, obviously, I have to consider that.

MR. IRWIN: Mr. Butler.

MR. BUTLER: I would also point out that the Royalty Policy Committee, I believe, did recommend as well that when an Assistant Secretary wanted to assume jurisdiction from IBLA, because we had tried to come up with an appeal process that was truly a one-stage appeal process in front of a neutral party, that there should be a showing by the Assistant Secretary of good cause and that the Assistant Secretary should request, I suppose, that the case or that the appeal be kind of remanded by the IBLA to the Assistant Secretary. And I find that what we have in the Rule is just the Assistant Secretary can trump the IBLA at any time, you know, up through the date that, you know, up to the magic date, it can assume jurisdiction. So that what that really does, it sets the Assistant Secretary above the IBLA in having jurisdiction of the case. And then also I would point -- so that's a concern to us.

And the question I would ask is whether you are willing to allow there be some showing of good cause, not just a listing of

conditions, as Hugh Schaefer was requesting, but are you willing to allow a showing of good cause for IBLA to relinquish jurisdiction of an appeal to an Assistant Secretary, since the purpose of all of this is to try to get the -- once you have been through all the settlement conferences and tried your best to settle up through the time you get, you know, to a certain stage, the real issue was to try to get a -- a kind of a fair trier of fact to take a look at this thing.

So my question is: Would you be willing to insert something that says that the Assistant Secretary must make some sort of showing of good cause in order for IBLA to relinquish jurisdiction?

MR. IRWIN: Let me try a response.

One of the changes I did not mention from the March 30, '98 version to the present version was the statement -- give me a second, George. There's a statement in the March '98 version that said you may file an appeal with the IBLA. It doesn't say that anymore. It doesn't say that anymore because we had discussions among us about jurisdiction and

about where jurisdiction was when. It's probably accurate to say removing that language to file an appeal with the IBLA means the appeal now comes into the Department to the Dispute Resolution Division, is handled by MMS, and not until the filing of the Statement of Reasons does the IBLA have something like jurisdiction.

What you have with the Assistant Secretary's ability to decide an appeal does not any longer say the Assistant Secretary takes jurisdiction because IBLA doesn't have jurisdiction from the outset. What you have with the provision about the Assistant Secretary deciding an appeal is a timing matter.

After record development, after settlement, after an MMS Director's action, and before a Statement of Reasons come to the IBLA, the Assistant Secretary may say I'm going to decide this one.

Now your question is would we be willing to consider a statement -- inserting a provision that says the Assistant Secretary has to show good cause before he does that?

I think my answer would be we would consider it. With the explanation I just gave you, is it still a suggestion that you think would work?

MR. BUTLER: Well, I think my comment would be that for you to get together as a group and decide that jurisdictionally the IBLA does not officially or technically assume jurisdiction until a decision for action has been rendered by the Director or, you know -- that floors me, because what that essentially means is that we have a two-step appeal process, and I think nothing indicates it more than that technical view of jurisdiction not arising until the -- until the non-IBLA body, MMS, or the Assistant Secretary, has rendered a decision and renounced jurisdiction so that the IBLA can assume it. That seems to me to be a real two-step process. And I think that what supports that not only are what you just said, but the fact that we are now being asked to post bond twice. If we're really being -- if there were really a one-step appeal process, we would be paying for a one-step appeal process. But basically what you've done is you changed

it to where we're now having to pay to get up through that Director's decision, and then if we want to continue we have to pay again to -- with the IBLA. So that's very troublesome for me. And I would renew my request that you kind of rethink that. And I don't believe that -- I did not -- I never read anything in Secretary Babbitt's response to the RPC that said that IBLA was not going to technically assume jurisdiction until a certain point in the process.

Then another thing that I would like to ask is in 4.955, the Secretary for the Department of the LHA may take jurisdiction of an appeal or review a decision issued under this subpart. Okay? Which I would assume to be that the Secretary, since everybody is beholding to the Secretary, that where -- at whatever stage the case that it's in, whether it's before the Director or whether it's before the IBLA, that the Secretary of the Department, since he's everybody's boss, can step in and assume jurisdiction of the case.

My question is this: Do you consider the Secretary having the right to assume

jurisdiction when a motion for reconsideration is pending?

And the reason that I ask that is on page 1978 in request for reconsideration, it says,"If the IBLA issues a decision on or before the date that the appeal ends. So that's -- then the decision is final in the administrative proceeding and fulfills the requirements of 30 USC 1724 H 1."

I don't have that in front of me, but I assume that that means that we've exhausted administrative remedies and we can go to court; is that correct?

MR. VOGEL: It's the deemed decided provision of RSFA.

MR. BUTLER: Do you have final agency action after an IBLA decision? Okay. So you have final agency action. Okay.

My question is: Do you intend to use 4.955 as a procedural mechanism to request reconsideration of a decision that solicitor doesn't like, the IBLA, makes, or someone doesn't like. Not solicitor. Forgive me. That someone doesn't like, an unfavorable decision that the Department -- that the Agency

doesn't like, do you intend to try to use 4.955 to get a second bite at the apple by requesting reconsideration, and then before the IBLA rules having the Secretary assume jurisdiction?

MR. VOGEL: 4.955 is no different than the current 4.5 in the current rules. I mean there's no change and it's exactly what the Royalty Policy Committee said is that the Royalty Policy Committee assumed that the Secretary would always have the authority to take jurisdiction. So there's no -- there's not intended to be any change, either from the current rules or from -- from the recommendations of the Royalty Policy Committee.

MR. BUTLER: But don't you think the question is still a meaningful question?

MR. VOGEL: Absolutely. One of the possibilities for reconsideration is that the Department would request reconsideration of decisions that they thought were wrongly decided, just as appellants can request reconsideration. Absolutely.

MR. BUTLER: I understand that the --

MR. VOGEL: It's the historical

practice in --

MR. BUTLER: I understand that either party can request reconsideration.

My question is, that is: Do you consider this as applying -- to take jurisdiction of an appeal or review of a decision, do you consider that to apply up through the time the IBLA renders its decision or do you consider that if you file, or anybody files, a Request for Reconsideration that the Secretary or the Director of OHA can effectively come in and take over jurisdiction of the Reconsideration from IBLA?

MR. VOGEL: Yes.

MS. INDERBITZIN: They can now and they could after this rule. Nothing is changing.

MR. VOGEL: Exactly. There's no proposed change in the authority of the Secretary to take jurisdiction of the case at any time. The only change is, it has to be within 33 months from the Federal Oil & Gas --

MR. BUTLER: Okay. So my question to you would be, that if the IBLA has rendered a decision and that is the final departmental

decision, right, or even if the Assistant Secretary of Land & Minerals Management has rendered a decision and it's being reconsidered, okay, do we have exhaustion of administrative remedies for purposes of going to court?

MS. INDERBITZIN: Uh-huh.

MR. BUTLER: So what is the effect of the reconsideration?

MR. VOGEL: You don't have a -- no, not if it's being reconsidered you don't have exhaustion your administrative remedies.

MS. INDERBITZIN: Yes, you do. The IBLA's decision is final unless there is a decision on reconsideration.

MR. BUTLER: Right. So --

MS. INDERBITZIN: You have exhausted -- you've exhausted once. You've appealed to the IBLA.

MR. VOGEL: I think his question, and you can correct me if I'm wrong, George, is that can an appellant take the case to court while the Secretary or the Board is considering the consideration during the 33-month period. And I think the answer to that is no. The case

is still before, while there's a final decision for administrative purposes and we're in the 33 months to expire, the case would be deemed decided. Under the rules, the last decision of the Department being the decision that's final for the Department. It's still before the Department and, therefore, it's not yet ripe for judicial review. I think it's a ripeness rather than an exhaustion question, but I'm going to go back and review my civil procedure.

MS. INDERBITZIN: Well, I'm -- just for clarification. I'm in that situation right now where a decision was issued, the appellant requested reconsideration but also filed in Federal District Court, and rather than have them have to, you know, dismiss the complaint and refile, we just amended all -- they amended all of their complaints and we amended all of our answers once a decision was issued. So it does happen. And it just depends on what the agreement is later down the line.

MR. BUTLER: Thank you.

MS. INDERBITZIN: But we would have an argument that it wasn't ripe. In this situation we decided to do otherwise.

MR. VOGEL: I did just want to make one more comment on both George's and Hugh Schaefer's comments about what the Director does. Nowhere in this rule does it say that the Director makes the decision. The word is not used in the Rule. And I think that's important. I mean, the drafters and the assistant secretaries who signed this rule were mindful of what the Royalty Policy Committee did, and they said the Director has the authority to modify or rescind an order. And that's what it says that the director can do. The Director can modify or rescind an order. There's nothing in here about the Director making the decision. There is not an intent to have a two-stage process here. There's not the intent to have a Directorial decision. Okay. I think, I mean, if you look at the sections in there.

MR. BUTLER: Well, what's the meaning of the language, "review a decision" issued under this subpart? Would that be under an IBLA decision?

MR. VOGEL: Where are you?

MR. BUTLER: 4.955.

MR. IRWIN: The Rule.

MR. VOGEL: 4.955. Right. Yeah. The only decision is the IBLA's decision. Because in 4.929, which is the Director actions on appeals, it says the Director may concur with, rescind or modify an order or decision not to issue an order that you have appealed. But it does not say the Director makes a decision, writes a decision, sends a decision to anybody. It says the Director rescinds or modifies an order or a decision not to issue an order.

MR. BUTLER: Well, I guess what I'm asking is, what do you -- well, then, what do you consider to be the time -- do you agree with what Judge Irwin says with respect to the technical jurisdiction of IBLA?

MR. VOGEL: Yes. We had long metaphysical discussions about what the meaning of the word "jurisdiction" was. And, frankly, having spent weeks about the metaphysical nature of jurisdiction, we gave up and never used the word in the Rule because we didn't understand what it meant. And then we spent weeks trying to discuss what the word

"jurisdiction" meant. So it's not in the Rule anywhere. It doesn't say that IBLA has jurisdiction, doesn't say the Assistant Secretary takes jurisdiction. It says the Assistant Secretary may render a decision. And what the attempt was, and, I mean, and, obviously, we welcome comments on whether or not you think that this is a sensible attempt. The attempt was to limit when the Assistant Secretary could limit it because we believe that was the most likely way to assure some limitation on when the Assistant Secretary would take jurisdiction and have it limited to those cases where it was a matter of importance to the Assistant Secretary because we didn't think that there was a way for a reg writer to, at some future time, you know, limit what an Assistant Secretary could do. None of us believed that the Board with sensibly ever tell an Assistant Secretary they couldn't have a case when he wanted it, so we made a very strict rule, you have to ask for it before there has been any briefing. Thirty days before there's any briefing in the case, you have to say you want to be the one deciding

this case. They have to know early on because we thought that that was the most reasonable time, the most reasonable way to make sure there was a limitation. And we welcome any comments for people who have a better way of achieving the result, but we do believe we were attempting to achieve the same result that the Policy Committee was asking for us to do. We did it using a different framework, but now, I mean the Assistant Secretary can decide a case long after it has been briefed to the Board. The Assistant Secretary can ask for jurisdiction back from the Board. And while I guess theoretically the Board could say no, as the Assistant Secretary is a political person and the Board are non-political people, we believed it would happen very rarely that the Board would have the courage to stand up to its political appointees. And so what we did is we put in a rule with a strict time limit. I mean, but -- I mean but that's -- I mean one could talk about that, what the procedure is and what the wrong procedure is and what -- how to get to the result. We believe when we drafted this this would work, and it would work

strongly. I mean -- I mean, obviously, we welcome comments to the contrary.

MR. BUTLER: Do you feel that the process which results in an Assistant Secretary's decision, the process of reviewing and surnaming and everything else, is as impartial as the process by which the IBLA renders a decision?

MR. VOGEL: No, and it's not intended to be. It's intended to be political. But, again, the policy committee, when it made its recommendations, recommended that the Assistant Secretary maintain its ability to take jurisdiction over appeals. And all we've done is follow that recommendation. You're right. We modified it somewhat. It doesn't have to be a showing of good cause. But, frankly, that is, in part, at least, because we didn't believe that that would matter.

MR. IRWIN: Can I intervene for just a minute?

On that last question, George, you will have seen the request for comments on page 1945 in the bottom of column two, the top of column 3, what suggestions will people make for

how that process of an Assistant Secretary proceeding is conducted -- what suggestions would people make for making it just as fair as possible. And I would direct your attention to that and Schaefer's attention to that and ask you think about what you might suggest.

Two, and this is a personal comment, and I make it with modesty because I was not part of the Royalty Policy Committee process and I respect that people who were part of that process would find what I'm about to say annoying.

At least in my own thinking, I found it helpful to strike the words "one-step" and "two-step" process in thinking about the proposed rule. It's a little bit like the debates we had about jurisdiction. You can argue that it appears that it is more or less one-step or two-step, and you can argue it as you did just now, for example, with the suggestion that, well, if I pay my fee twice, why, it's clearly two-step. You can find different things in the proposed rule that will support it's still two-step, or it's one-and-a-half step, or it's not really

one-step. I finally quit trying to think whether it was one-step or two-step and just see if the process worked all right or could be improved. And the suggestion I would make is now that we've come this far, if you can look at it without those words in your mind and then make suggestions about how it can be improved or questions about whether it's internally consistent, I think that will help. It helped me.

But I apologize again if your answer is, look, Will, you were not part of that, and we meant one-step process. We still mean one-step process. And every word in here that slides back toward two steps is offensive. I would respect your saying that.

MR. BUTLER: Well, I would never do that. But what I would say is I would ask if during your deliberations how much emphasis you placed on a perceived need that was expressed for an impartial review rather than an internal review process. And I would submit to you that the process of obtaining a Director decision from MMS or a Secretary decision from MMS, I mean from -- of an appeal, okay, is quite

different from obtaining an impartial review of the facts and issues from IBLA. And my question would be whether you had that distinction in mind when you came up with this process, irrespective of the number of stages and whether or not you feel a sense of obligation to implement what the Royalty Policy Committee I believe recommended, which was, who cares about the number of stages. Let's come up with something that is not a rubber stamp or a mechanism to obtain deference in, you know, during judicial review for a decision that has not been impartially reviewed within the Department.

MR. IRWIN: Okay. Responses to questions here?

MR. IRWIN: Yes, ma'am.

MS. BRAGG: I'm Patsy Bragg. And I must say I really appreciate your candor in this issue. I must say when I read this 4.906, when must I file an appeal, you must file an appeal with MMS, I frankly never contemplated that those words could be -- have the legal significance that you tell us they may now have. I don't know if other readers did

either. I presumed, and I'm looking here at the RPC recommendations, 7 C, orders and demands are appealable to the IBLA. I think the RPC was very, very clear that jurisdiction was once and only in the IBLA. And recommendation number 12 of the RPC said, when IBLA receives the notice of appeal. So it's very clear to people, I think, who have been in the process that it was IBLA. And I think these words in the Rule may have a very different legal consequence and be not at all consistent with the report, nor the Secretary's exception, acceptance of that report, and I just don't know that people reading the Rule would have ever contemplated those significant differences.

MR. VOGEL: I would like everyone to take a look at the rules regarding the filing of appeals for BLM orders and note where those are filed. They are always filed, in the BLM's case, with the actual office that issues the Order. They are not filed with the IBLA. They are filed with BLM. And that's what -- what we've attempted to follow here is the same thing as the recommendations of the Royalty

Policy Committee that we have something that looks like the BLM process. Filing is not a function that IBLA normally takes charge over. We believe that it was better to have it centrally done rather than done in all the various offices within MMS, so we asked that it be filed in Washington in order the meet the time frames that are necessary for the 33 months and otherwise. But there was not an attempt by where things are filed or how is this done anything different than what the Royalty Policy Committee recommended. And I do recommend that you take a look at how that compares with what occurred at BLM. It's an attempt to be the same, it's not an attempt to be different.

MR. MCGEE: I don't think that's true, Ken. I file with the BLM, that's true, but the jurisdiction is with the IBLA. And once I made that filing, if I'm requesting a request for extension of time on my Statement of Reasons or anything whatsoever, even though it hasn't been issued a docket number, that's still with the IBLA. It's a matter of filing at the BLM level so that the BLM can pull the

then administrative record of the case file and forward it to the IBLA. But I've always been under the impression that from day one on a BLM appeal or an LSM MMS appeal that jurisdiction, upon my filing of the notice of appeal, is with the IBLA, which is different than what we are saying here.

MR. VOGEL: And I don't remember what -- I mean can you tell us how the Assistant Secretary can take jurisdiction in a BLM appeal?

MR. MCGEE: Right now it's more --

MR. VOGEL: The only issue here is that, because, again, I think, at least it was our attempt, the process is exactly the same. The reason we're filing with the MMS is for the MMS, together with the appellant, so this is a cooperative process, intended, and that's what follows the RPC's recommendation. Together with the appellant, the MMS and the appellant gather the administrative record together. There's not yet been any filing of a Statement of Reasons. Obviously, if you want an extension of time in the Statement of Reasons under this rule, it's already at the IBLA once

you have -- have a need to file a Statement of Reasons. The first filing of a legal brief is with the IBLA. The only thing that MMS does is it attempts to resolve the case through the settlement conference as required by RSFA, and it attempts to put together an administrative record as was agreed by the Royalty Policy Committee should be done cooperatively rather than by MMS alone. But other than that, I think, again, it tracks exactly what occurs at BLM.

I mean that was our attempt. If you think that we've done -- that somehow there's been some metaphysical variance from that, again we welcome written comments and we can take a look at those variation of rulings. But that was what the Committee was trying to do while we wrote this.

And clearly the big question is how one limits when the Assistant Secretary can decide the case. We came a little bit closer to following the rules of the IBIA than we did to some of the current rules of the IBLA, but those are -- but everything that we've done in here is consistent with some of the rules

within the Office of Hearings and Appeals in terms of the assistant secretaries getting jurisdiction, or whatever you want to call it.

MR. IRWIN: I'm only looking at my agenda. I think what I would like to get a sense of is how much more time for comment and discussion and question to those of you here who feel you would like to have, if it were 10, 15, 20 minutes, I'd say let's keep going and then adjourn for lunch. If you think, well, why don't we go have a chance to talk about this over lunch and come back and we might have some further things to say to you. So I'm happy to adjourn now for lunch and then resume. I don't know how many people have travel plans this would help if we adjourned after a few minutes and then come back. I think I need to come back when we said in the notice of meeting that we were going to be open for business in the afternoon. But what's the sense of how you wish to proceed? And there could be different senses. If we're pretty much done in a couple more comments, let's finish it up and go.

MS. INDERBITZIN: Let me get a

showing of hands how many other people have comments.

MR. IRWIN: Two, three.

MS. INDERBITZIN: Is there any objection to continuing so that some of us can catch earlier flights?

MR. BUTLER: Well, I did have a brief statement to make about the timing of this meeting, and that was on behalf of various New Orleans producers.

I have been asked to state for the record that this hearing was scheduled on a day that made it impossible for New Orleans producers to attend, and that upon receiving timely requests from New Orleans producers to reschedule this meeting, MMS refused to do so.

End of statement.

MR. IRWIN: Thank you.

MR. BUTLER: That's all I have to say.

MR. IRWIN: Patsy and Brian, how much more time would you like?

MS. BRAGG: I'm quick.

MR. IRWIN: You're done?

MS. BRAGG: No, I've got a little bit

more but it will be very short.

MR. IRWIN: "I'm quick." I misunderstood you. I heard "I quit."

MS. BRAGG: "Quick."

MR. IRWIN: My fault.

Brian, I'm reluctant to ask, how much more time you would like?

MR. MCGEE: Just about ten minutes, probably.

MR. IRWIN: I'm going to propose we go forward. Is that acceptable?

(Discussion off the record.)

MR. IRWIN: Patsy, would you like to go first, ma'am?

MS. BRAGG: Sure. There's a couple of definitions. I thought generally the definitions in PRAVISTA were well contained and identical. There were a couple of exceptions that I would just ask for clarification on. In particular, there's a lengthy definition within PRAVISTA of an order to pay. And it might make sense to include that definition within 242.105. In particular, with respect to an order to pay, there are specific requirements, such as the Order must have a reasonable basis

to conclude that the obligation's due and owing, it must have a specific, definite and quantified obligation claim to be due. It must identify the obligation by lease, production, month and monetary amount and the reasons for the obligation to be claimed due must be contained. And I don't see those specific provisions contained within the Rule, which means that folks would have to go back from the statute into the rules, and it may provide some clarity to put that as concepts particularly in the definition of the Order.

MR. IRWIN: Tell me where your cite is from the statute I should note.

MS. BRAGG: Uh, you know, it's in the definitions part, actually.

MR. IRWIN: Okay. So you want the statute's definition in 242.105, please.

MS. BRAGG: There's no definition of order, but there is a definition of order to pay, which is one of the kinds of orders.

The other definition that I just found difficult was the word "affected." And I figured there was conversation in history about the word "affected," because it appears to me

to be the same as concerned state or state concerned for federal leases, federal oil and gas leases. And so you've got "affected" means with respect to delegated states and states concerned, and then it goes on to say it's the same definition as to state concerned. And it's, I thought, confusing to read.

MR. VOGEL: I guess the attempt was to have fewer words, and so "affected" affects both states and Indian lessors. And so you're right, it is the same as a state concerned but it also tries to define who are the Indian lessor who are affected by an order.

MS. BRAGG: I would just ask y'all to look at that again. I think it's confusing, especially when you've got delegated state and state concerned both in there, because it essentially is a state concerned. It's a state that receives your evidence.

MR. VOGEL: But it's also an Indian lessor.

MS. BRAGG: Right. Right.

MR. VOGEL: That's the difference, and that's why we used a different word.

MS. INDERBITZIN: Patsy, I think we

also wanted to make clear that a state wasn't affected just because it didn't like what was going on in another state. So, for example, if an order came out of Wyoming, then, you know, involving Wyoming leases, we didn't want Montana to come in and say, well, we're affected because if the IBLA issues a decision you could apply it to our leases, and this seemed like a good vehicle to clarify that.

MS. BRAGG: So you're saying "delegated" and "state concerned" are limitations on "affected".

MS. INDERBITZIN: No. We accept it as a limitation, meaning it's got -- you -- it's got to come out of that state.

MR. VOGEL: I mean Montana is always a state concerned, right?

MS. INDERBITZIN: Right. But it's not also an affected state concerned.

MR. VOGEL: I mean by definition it is a state concerned. It's not a state concerned with respect to this Order, which is what the word "affected" is supposed --

MS. BRAGG: But give Montana -- I mean if it's an order on a lease in Montana,

it's affected, it's delegated and it's a state concerned?

MS. INDERBITZIN: Yes.

MR. VOGEL: Uh-huh.

MS. INDERBITZIN: Well, we don't know if it's delegated or not. It could be all three of those things.

MS. BRAGG: That's right. I just think there's got to be a better way to define that.

MS. INDERBITZIN: And we went around and around and around on that also, just for your -- this was another metaphysical discussion.

MS. BRAGG: Yeah.

MS. INDERBITZIN: And the intent was just as I described it, we wanted to make sure that you weren't having -- if you appealed something you didn't have ten states intervening because they may somehow be affected by a decision. We wanted to clarify that "affected" meant it's from leases within your state.

MS. BRAGG: So is it -- is it "affected" means the states concerned? For a

state, "affected" means state concerned?

MS. INDERBITZIN: No, because you can be a state concerned but not be affected.

MR. VOGEL: Montana is always a state concerned.

MS. BRAGG: Well, that's not the definition of state concerned. A state concerned is if you've got monies from a lease under that order. It's not under any order, it's under a lease from that order, then you're a state concerned. If you've got monies from a lease that's under an order, you're a state concerned.

MS. INDERBITZIN: But that's not what the definition of "state concerned" says.

MS. BRAGG: With respect to a lease, a state which receives a portion of royalties or other payments under the mineral leasing laws from such lease.

MS. INDERBITZIN: I'm looking at the definition of state concerned.

MS. BRAGG: Right. That's what I'm looking at under the statute.

MR. IRWIN: Oh, all right. Rather than in the reg?

MS. BRAGG: Right. State concerned means with respect to a lease a state which receives a portion of royalties or other payments under the mineral leasing laws from such lease.

MS. INDERBITZIN: Okay. Well, we'll take another look at it and see if we can clarify.

MS. BRAGG: Okay.

MS. INDERBITZIN: Again, this is not something -- this is something we went around on, too, and tried to make it as least confusing as possible, and your comment is valid. Thank you.

MS. BRAGG: Okay. On the definitions of monetary and nonmonetary obligations, I wonder what the thought is behind "monetary obligations." It means any requirement to pay or to compute or pay any obligation in any order. So we're a bit circular there because we're using "obligation" within the definition of monetary obligation. And then I just -- I wonder here, I mean to my way of thinking, obligation was under the Act, and I think this is recognized on the modifications provision an

obligation arises for each lease for each month. And the thoughts within the definition of monetary obligation appear inconsistent with that.

MR. VOGEL: Can you explain that?

MS. INDERBITZIN: Yeah.

MS. BRAGG: Because an obligation, if I have lease A and I owe $20, my obligation for September is $20 on lease A. So that if I get an order it's with respect to each obligation on each lease for each month, right?

So then you get into the definition of monetary obligation and the last line says "constitutes a single monetary obligation." So you roll -- so what this is saying is you roll all these really obligations together to come up with a single monetary obligation. And what the law envisioned, I believe, was each and every obligation for each lease for each month. And that orders would reflect that.

MS. INDERBITZIN: Where does the statute say that, Patsy?

MS. BRAGG: I'm sorry. The Rule, I'm at monetary obligation definition parens one talks about a single monetary obligation, and

then it talks about second monetary obligation.

MS. INDERBITZIN: Right. I understand that. What are you saying that conflicts with?

MS. BRAGG: This statutory definition of obligation. Because it's your duty to pay on each lease each month.

MR. IRWIN: So in any year on a lease you have 12 obligations?

MS. BRAGG: Right.

MR. IRWIN: And if you get an order applying to an entire year, you would say I have 12 obligations, not a single obligation? And I'm beyond my ten here, but what difference would it make, possibly?

MS. BRAGG: Because of when your obligation becomes due and owing.

MR. IRWIN: Namely, end of --

MS. BRAGG: It's 30 days at the month following the month of production, right.

MR. IRWIN: And for purposes of an appeals rule definition, to have the regulatory definition as you find it inconsistent with the statutory definition does what to you?

MS. BRAGG: I don't think the 33

months portion of the law with respect to obligation can or should be read differently than other parts of the law.

Then a question here on nonmonetary obligation, there's twofold here on the definition means any duty of a lessee or its designated deliver oil and gas in kind or any duty of the Secretary to take oil or gas in kind. I'm wondering why the group put in here duties of the Secretary at all in the Rule and why in nonmonetary but not monetary. All the other duties in the appeals rules are the duties of the lessees or designates, and all of a sudden we have a reference to duties of the Secretary here. Was there a reason for that?

MR. IRWIN: I don't remember.

MS. BRAGG: Okay.

MR. IRWIN: Does any of us remember?

MR. VOGEL: I mean the definition of obligation that we've used I think is the same one of RSFA, and it does track the lessee's, designee's or payor's duties and the Secretary's duties. And the nonmonetary tracts that. And you're absolutely right, there does not appear to be anything about the Secretary's

monetary obligations, which I guess is an obligation to make a refund.

MS. BRAGG: Right.

MR. VOGEL: I don't know why that's there.

MS. INDERBITZIN: Well, I believe, and this is just -- and I'm not sure, Patsy, that it was because we felt that if the Assistant Secretary refused to issue a refund that that would be a monetary obligation and you would appeal that, so it would be covered by your -- you know, it could just buy whatever you needed to appeal.

MS. BRAGG: So the denial of a demand on the Secretary is appealable?

MS. INDERBITZIN: If it involves a monetary obligation, yes.

MS. BRAGG: See, I don't see that in this rule.

MS. INDERBITZIN: Okay. We'll take a look at that. That was, I believe, the intent.

MS. BRAGG: Okay. And then the definition of reporter, is that for purposes of filing reports other than making royalty

payments, primarily?

MR. VOGEL: Primarily.

MS. BRAGG: I think that's it. Thank you.

MS. INDERBITZIN: Thank you.

MR. IRWIN: I meant no disrespect, Mr. McGee, with my earlier comment.

MR. MCGEE: None taken.

MR. IRWIN: Sir.

MR. MCGEE: Brian McGee. I introduced myself previously. I mentioned the associations that I was here on behalf of but I didn't provide my own affiliation, which is with the firm of Jackson & Keller in Denver, Colorado.

First what I wanted to comment on, and I'll try not to go backwards too far, was on page 1931 of the proposed rulemaking down the third column, lower right-hand corner having to do with requested comments, on whether a -- staying with the two-tier system with amendments might be appropriate just maybe as a slight counterbalance. And I found that the proposed rulemaking was very convoluted and common class. And I know the team drafters

felt that was necessary. We had had 23 pages in the report and it was wide-spaced, broad margins, lots of spacing, and here's the 61 pages, single space, triple columns, et cetera. It seems like it's gone further and become more stringent and more of a straightjacket. We've had some discussion on what was intended, and I think we started out, honestly, with one of the last digressions, that having to do with trying to, in some sense, mirror the BLM process and/or the OSM process, and/or any other process that exists within DOI, with the MMS being more the Maverick in the throes of it. I would hope that we could endeavor to salvage, you know, a streamlined process here and implement that. I go back to the comments on the taking of a jurisdictional element with the MMS continued involvement up until the point, as I understand it now, I'd like to thank Judge Irwin for the jurisdictional overview, until the appellant files a statement of reasons that the jurisdiction review with the MMS, and we didn't call it a decision, or you didn't, and I hadn't caught -- picked up on that, Ken, that you do

refer to it eventually as a notice of concurrence or recision or modification. But whatever we do call it, a rose is still a rose, I guess. If you have those three things, you can concur, you can rescind and you can modify. You know, there's really nothing in between but those three components. So jurisdiction really, in a large sense, does reside with the MMS to maintain a control posture. Now, by way of preamble discussion, it would be referred to as a notice and not a decision. I still think I had -- I was left with the impression, just from my personal standpoint, that in response to your comment request at the bottom of 1931 that, in fact, we were somewhat staying with the two-tier process, and that there was more complexity in it and more -- the amendments that are alluded to have been incorporated. And while certainly the Appeals Subcommittee wanted to go much more to the IBLA -- excuse me -- to BLM, I think we were ending up much closer to the two-tier system with amendments, as your comments, I think they prejudge your request for comments we might be there. This is just an overview.

I talked to a fair few people that are very active in this area, and this has been so daunting that the answers, I'm going to be honest with you, I haven't read it. This is -- to the extent they tried to skim it, I felt a little embarrassment, having been on the Committee, did we create a monster. And I'd ask you when you look at it and go forth in the next phase is, is all of it necessary. I think we've gone to a very strict standard in it and I think we've gone -- we've taken out flexibility that we hoped we would have. I jumped ahead on that one. But there's a small example on the record. We discussed the record an awful lot that it would be a good faith effort to try and do what you could at that time within that which you knew at the time. Well, there's obviously no reference any longer to good faith. It becomes almost a very stringent or strict standard. And if you didn't do it at the outset through the record development and otherwise and you get to the certification, then it is pretty rigid and you then have a much higher standard that you have to go through in explaining why you would like

to supplement it maybe at the IBLA level. So a great deal of discussion that this has always been permissible in the BLM process to include affidavits or declarations or further documentation as attachments to the Statement of Reasons at the IBLA.

So I'd ask you, maybe, did we go too far with too much of the stricture? Do we tighten this down so much that we do have a two-tier process again that's more stricter than it needs to be.

Leaving that one, going on, it won't come as much of a surprise that one of the things that the solids minerals industry would be concerned about has to do with the application of the 33-month appeal period. The regulations read, well, if one is at section 4.912 or 4.948, it certainly reads that the 33 months would be applicable to all appeals to all mineral leases. And then when we get to section 4.956, what we really end up with is applicability without sanction or without effect or without import then. And I don't think that's what anybody really intended. There's been a bit of a litany here to suggest

that timeliness and the 33 months has meaning, it has a lot to recommend it. Certainly Congress had an affirmation of this fact when they, pursuant to RSFA, incorporated that as one of the cornerstone provisions of RSFA, the 33-month appeal period, timeliness was important. If that happened RSFA only applied to oil and gas.

There was then a February 10th, 1997 Dear Payor letter that pretty much said it will be applicable to all minerals. There was then the report of the Committee itself where the statements are replete in terms of timeliness being very important, as well as the applicability of the 33-month period, IBLA will decide your case within 32 months of the date, which is the old approach, and then the 33 months is the new approach.

It was the Secretary's endorsement September 22 of 1997 which said that we support the emphasis on time limitations for all appeals. Then there was Lucy Burg Restinnet memorandum of September 23, 1997 where again she said that the processing would apply to solid minerals and the 33 months would be

applicable.

If you read the regulations or proposed regulations it's replete at every turn where we have to request an extension of the 33-month period as it applies to all appellants, we also have to file the MMS form for the request for extension for an MMS appeal. We've been doing this since RSFA was implemented, so we've been going through all of these motions as if the 33 months applies to us, and then when we get to the bottom line there is no sanction, therefore, there is no applicability.

I would also observe, and you can correct me, that during some of our sessions it had also been mentioned that to include solids within the 33-month period would be something that would be administratively doable from the IBLA standpoint, that this would not be a burden which could be invoked with by the IBLA.

Then when one gets to the discussion about it in regulations, proposed regulations, under 9.56 on page 1949, one would have to forgive me if I refer to it as the "blow-off"

quotation, and the bottom line being, we believe that the benefits of obtaining an IBLA review and decision outweighs industry's desire for a quick mandatary solution, which is the antithesis of what everything has been about, what all of the regs read, that's what 912 reads, what 948 reads, why we have to have request for extensions along the way for everything because the 33 months does apply and then it doesn't.

I realize that there are some constraint when we try to apply RSFA. In the proposal from the solid minerals industry has been not to get into the monetary demarcation that existed in RSFA, that if the Order had to do with an amount under $10,000 it would be deemed accrued for the applicant appellant, or the oil gas lessee, and then if it was over $10,000 we would be denied. In either event you had closure, you had to exhaust administration remedies and you go on to U. S. District Court. We would like to stay clear of that monetary hurdle so as not to bring up any statutory impediments or giving away the Treasury's funds, but rather ask that when you

revisit this that you look at it, and if the decision for solids has not been rendered within the same 33-month period as provided for in 9.2, that it would just be a deemed denial. And that we, then, too, would have an exhaustion. And, frankly, it's a great concern to us that if there should ever be a crunch within the IBLA and there's a 33-month hammer for oil and gas leases, that there would be a natural tendency for slippage. And that doesn't seem fair when there's been this very long history of confirmation of the importance of the timeliness and how it should be applicable to all minerals. It slipped here and it got lost. So I'd ask you to consider that. If there's an answer as to why the suggestion of just deemed denial and we've got other deemed denials within the regulations themselves, too, that if the Director doesn't act within, you know, 60 days it's a deemed denial, the IBLA doesn't act, it's a deemed denial. We would hope that that would be appropriate and that would be in everyone's interest to be able to resolve disputes. If there's a reason that I wasn't able to glean

from the preamble as why there's a legal impediment to it, I would appreciate somebody enlightening me.

MR. VOGEL: I did just have a question as to -- because your last comment raises, and that's whether you believe that also ought to be applicable to Indian leases?

MR. MCGEE: Ken, I couldn't go there. In the Committee the tribes were represented. Ellen Teridesch was there earlier and then Perry Shirley was represented and was always their very strong concern that whatever was done here was done independent and that it not apply to Indian leases. They would then like to look at that individually and ascertain, frankly, I think there would be a modicum of picking and choosing, that they would like some of this to be applicable to Indian demands and orders and other portions of it not. But I couldn't address that, Ken.

MR. IRWIN: I think the only -- and I'd encourage you to not trust my memory. The only memory I have of discussing this is the point you made, it is required under RSFA for oil and gas, it isn't for solids. If we don't

have to, we won't. I don't think that means we wouldn't consider a suggestion of just having it deemed denial. Go on it. And I would encourage you to write the comment. We heard it today, but I don't recall it being "we've heard this but there's no way we're going to do that." I don't recall that sense of it.

MR. MCGEE: There -- I made this request repeatedly, I think if there's anybody that's been in the Committee meetings and otherwise would know. And in this one vein, and I was really hopeful that we might see it in the final version here. That it's one of those difficult things I wanted to just find another reference, if I could, and paraphrase the reading. This happens to be from Mr. Corky Restinnet's memoranda of September 23, 1997. If you forgive me a slight juxtaposition. MMS has proposed to amend it's regulations in regard to the 33-month appeal period. Current -- MMS's current position is that the 33-month appeal period can be applied to solid mineral resources as well to oil and gas as mandated RSFA. The 33-month appeal period would promote consistent treatment of all production dates of

the various lease types, streamlining the administrative appeal process, simplification of record keeping, and it would reduce cost for both industry and government.

Paraphrasing there was that that didn't have to do with the 33-month period but had to do with self bonding which, obviously, is something we do like. But I think the rationale or the tenor in what is being portrayed is still important. And then, quite frankly, there were other provisions that have been incorporated in the proposed rulemaking that are also derivatives of RSFA and would not otherwise be applicable to coal or solids, one of which would be the settlement conference. And we also think that's a good idea. Another might be that the 60-day appeal period, I think that's another good idea. So I think there are those provisions, and just to say because it's not -- RSFA only applies to oil and gas that it should not extend to solid minerals or coal would be inappropriate because there are several other provisions in RSFA that I think common sense and convenience of administration have suggested should be in there, and I do not

discern a reason why the 33-month period could not be also made applicable to solids in terms of a deemed denial.

MR. VOGEL: I just have a question, Brian.

MR. MCGEE: Sure.

MR. VOGEL: Have you done any research or seen any cases, because I have not seen any cases, in which there is some other provision regarding deemed denials of administrative orders and what the effect of that is on Chevron deference?

MR. MCGEE: I do not know of any cases. I think it would be, again, synonymous with whatever the deemed denial is going to be with oil and gas decisions, and --

MR. VOGEL: Obviously that's a statutory requirement, so the Rule incorporates that, but -- and I do think that the Department may be more at ease if it knew that a case that was deemed denied would have the same deference as a case that was, in fact, decided with a decision on the record, and that the Court, upon reviewing a deemed denied case, would treat it with the same deference as it would if

the IBLA had made a judgment, and I do think that that probably -- again, this was not a decision by this committee but was a decision by the political leadership who signs these rules that they might be more at ease if they were assured that there would no loss to the Department, other than what Congress has mandated through the Simplification Act, be applicable to federal oil and gas leases, there wouldn't be any loss by extending that to other leases. I think that probably is the chief concern. And, obviously, after a few years we know what the answer to that is in terms of federal leases, federal oil and gas leases, the Department would be a little sanguine about extending it. I think that's probably the concern that we have. There's no knowledge that we were able to find that may be more at ease.

MR. MCGEE: I do not know of any case law to ease the concern of the burden. I just close by saying that it is a bit of a charade to have 912 and 948 with no meaning or import or sanction in terms of enforceability. I'm certainly not going to file a writ of mandamus

on Judge Irwin to try and bring him to task.

MR. VOGEL: We did think that having the same structure would, in general, put moral suasion on the board to try and try the cases in the Order in which they are filed, and they would generally not put aside coal and Indian cases, or BLM and OSM cases, in order to decide federal oil and gas royalty cases first. You know, there's a statutory mandate on what occurs. So we did believe that having the same structure in general would get all the coal cases decided without having that, perhaps. Perhaps there is no rule without sanctions, but we do think that the morality of the Board would win the day.

MR. MCGEE: Right. I did sit and listen to some of your briefings to that very effect. So that was part of the fabric and background as well.

MR. IRWIN: Other things, sir?

MR. MCGEE: A couple of very quick ones. I will try and be brief.

Reference again to appendix A, which first appears in the lower right-hand corner on page 1936, then the example on page 1981. It

was either Hugh or George that made reference to paragraphs two, three and four in terms of the bracketed material for the insert. And I just draw your attention to the language in the Secretary's letter of September 22, with reference on the appendix was to insert citations of two applicable case law statutes and regulations. The secretary's expressed reference was there should not be a legal brief providing detailed analysis or citations.

And one more, I'm jump shifting a little bit. This would be on record development on page 1939 of the proposed rulemaking having to do with section 4.918, in the third column, upper-right corner. I have gone back and checked the Committee report on my references with respect to a -- what I'll have to read as a mandatory burden upon the appellant to provide adverse information that may exist in their files with respect to how they determined and reached decisions or conclusions about a specific business transaction and now has royalty consequences. Whether this gets into a little self-incrimination or not, I don't know how we

want to characterize it, but certainly be making the case out against ourselves. I think this is going too far. I will acknowledge that in the report at paragraph 19 E on page 18, the committee's report, this subject was discussed. I don't think it was quite as pointed as it is here in the preamble, but as a general matter, that concerns me that unless it's privileged or prohibited by law, confidential, that there'd be an overt burden to divulge and expunge all company files for the benefit of helping the MMS to make their case. I feel that's an inappropriate standard of burden.

MR. IRWIN: Can I ask -- I think about on the other side, I think of it as MMS having to come forward with things in their files that were considered, advice they got, drafts they did, they revised, now the final decision comes out, and if you looked through the historical records you'd find that they kind of finally gotten here, and they'd have to say that they got there after some misgivings and some internal reservations, would you want that kind of information in?

MR. MCGEE: I think the difference is the demands being made by the agency for a monetary amount or underpayment of, I assume not an overpayment, an underpayment, and think that burden is what makes the difference. They're coming forward with the demand for the revenues for the underpayment, and I think it has to substantiate their case to that extent.

And I find, in large measure, I haven't had maybe the luck that you've alluded to of having all information in, let the record reflect my fish tail, circuitous journey, and I had to resort to FOIAs quite a few times, and even that's unsuccessful, and then there's -- seems to be a broader umbrella of confidentiality in -- applicable for trying to discern what some of the internal thinking was, what maybe the models were that were used by the agencies that will not divulge. So there's really quite a bit that I never do get to. So I'm not sure that even the way you depicted it it would have been appropriate. But I think it's a little different when we're on the responding end and defending against it. My understanding is that's not required in an IRS

process, that you're only really required to pay the royalty that's owed by law and not to pay the highest amount conceivably possible. I think that was Justice Hand. So in this instance, I think this is going too far.

And then, very lastly, one of the issues I certainly do have, and we talked about it an awful lot, is the supplementing of the record. My understanding coming out of the Committee was this would be a fair bit more flexible, we would have the good faith attempt to certify the record, and there is a normal course here that one goes through. And then you have the audit period where the Agency really does go through the process, goes through all the records, looks at everything it wants to, and gets really quite knowledgeable in the process. Most of the companies are involved in that process, yes, but it's in response. They're not out generating the information. And it really turns out that you hope that the audit matter is going to go away, that it will be resolved. I do not have the time or the inclination, never mind the finances, to exhaustively develop every case.

Some cases, frankly, aren't worth the exhaustive development from a factual standpoint. And very often you only get to that point when you start to write a Statement of Reasons in the current procedures, you know, whether it's at the MMS level and/or at the IBLA level. And there is more flexibility under the current system to permit the augmentation of the record because you have learned facts by asking better questions as the process has gone on. And it would be very difficult to overcome a presumption that I could have known the facts if I had asked all the right questions at an earlier point in time and gone into the record that much more heavily. It doesn't get done that way. And it's almost impossible to really -- I would hope that the provisions with respect to 923 on page 1941 of the preamble would be more akin to the current IBLA practice, with the Statement of Reasons there can be a supplementation with respect to pertinent facts and/or affidavits that have been derived to support the factual portrayal that otherwise had been alluded to but not definitively set forth, and

documentation that again supplements the underlying appeal of the facts that have been asserted in a much more general vein in the earlier period of this appeal process.

Those are the end of the comments. Thank you very much for your duration.

MR. VOGEL: Mr. McGee, I had a question regarding that because there's obviously a point where we spent a lot of time discussing both here in our Committee and in the Subcommittee. And the principal question is, to what extent there is no affirmative obligation to be as forthcoming with the facts as possible at the earliest possible phase, will the Record Development Conference and Settlement Conferences serve the purposes for which they were set out by the Subcommittee and the Policy Committee and the Secretary, which is to get things resolved at the earliest possible time if there is no sanction for withholding information, at that point, for making it difficult for the MMS Director to make a sensible determination on whether the Order should have been rescinded and not bothered getting a brief to the IBLA, do we

eviscerate the purpose of those conferences?

MR. MCGEE: I think as it developed through this Committee that the premise was that it was in the mutual interest of the parties to do so, the parties in that sense would go forward on that basis, that there would be, then, the good-faith attempt to reconcile, at least. My concern is, even though you've gone through that process, have you been definitive? Can you be definitive? And that's where the current system of practice before both the MMS Director's level and the IBLA is more flexible in allowing additional -- I don't know that it's really different facts that come up, but it's additional facts that amplify the facts that are already before it. It's the extension. It's the step-out from, it's the making it more clear. And, frankly, it'd be coming up with an affidavit rather than just reciting it by paragraph in a document, it might be attributed to two or three different sources. There might be not a company source, there might be a third-party public utility that was involved, or the buyer, or what their perceptions were or what their transactions or

their involvement in the transactions were that, frankly, I would think would be very helpful to the Board. How much do I bring out at these preliminary stages? It's nice to say everything, if I knew what everything was, but I really don't. And I think it goes back to some of my early comments on the complexity and the stringent nature of what we're getting to is, whatever we end up doing, I just really hope this is workable when we finish up, because, again, we really want to get these disputes revolved early, we don't want to make -- I mean it's not so bad for the coal companies. Usually our appeals are large. I mean, we don't appeal small ones. We just call it a cost of business and go on. But for small independent oil and gas operators, you know, this has got to be a nightmare. This could be an absolute killer that they just don't have the capacity either in manning or just the personnel or the time or the effort or money to go forward on some of this things. This has got to work, whatever we can collectively do to go us there, because that's what we started out to do, because our only hope was to make the

system a little bit better and get on to decisions so that you've got yours, we pay what we owe, and we go on about our business. Because this shouldn't be our business. And this scares me that this could become a lot of business and it shouldn't be there.

MR. VOGEL: I want to go back to the comment I made at the beginning when I did the overview. The assumption is on the Agency and on the IBLA that we will resolve most cases before there is a Statement of Reasons. And part of what the Policy Committee did and what this Rule, which we believe very strongly follows what the Policy Committee did, in terms of its recommendations, is to put pressure on both MMS and the companies to put the facts on the table at the earliest possible time and to get the cases resolved voluntarily at the earlier possible time. What we've done, again following the Policy Committee, is to try and leave the approximately 18 months that the Board currently takes once the case is fully briefed to the Board. That leaves a 12- to 15-month period, roughly, depending upon how -- whether you want any time at all at the end of

that 33-month period for the possibility of reconsideration, for the case to be fully briefed with all the replies. And to the extent that we push the process back further out of the first four months into the latter months, it makes it very difficult to meet that goal being able to meet the mandate of RSFA. I think that's -- that's the, you know, the dilemma that both the Policy Committee and the Department faced when it came up with these suggestions. And when you, as you write down more formal comments, I urge you to keep that in mind.

MR. MCGEE: And I think you're right, Ken. It is a dilemma, and it's how we can balance it to keep it flexible enough to make it workable, because I would respond a little bit in how paranoid do you need to make me? Because if I'm going to lose my appeal by virtue of not having done the nth degree of research, mostly I'm talking factual, not legal, at this juncture, I'm -- we're going to slow this process down to a snail's pace because I can't afford not to be definitive. If this is what this is going to tell me, then

I've got to keep going, I've got to keep pushing. And when these appeals come up five or six years later with the demands through the audit cycle and the rest of it, even stretch goes along for the time being, I mean the people have moved on. Richard was just telling me that his company has been acquired by another company here in the last couple of weeks. If we're doing something with Richard and it's four or five years from now, where are all my Richards? I mean, they're all gone. They're all gone someplace else, they've retired, they're with other companies, and to get in touch with the people that were involved, if I've got to be that paranoid and that definitive without making the good-faith-type concept approach, which is what I thought the Committee recommended rather than more the straightjacket approach, then I think we can do it. But if we've got to become scared to death that if we don't bring certain facts up or get the composite in there, then the only -- then your argument is going to be, well, the facts were there, you just didn't discern them. I don't have an answer to that

because that's absolute. I just didn't even know where Richard was any more. I didn't know where some of other people were anymore. When I'm trying to go to third parties, I can assure you I can't get a declaration or statement out of them in three months or four months. By the time it gets massaged, that usually takes me closer to six months because they're so paranoid.

But I just throw it out, as you go back over, I think the most important thing is that it will work. It has to be flexible to an extent so that we can accommodate a myriad of things that are going to come up that we can't sit here and fathom right now.

Thank you.

MS. JOHNSON: A comment through the current way that you're talking about within industry is going on with an MMF, every time you talk to somebody in MMS about the Rule they're like, can't do it, we can't look at the deadline, you're putting bridles on us that we can't do certain things, they're very unhappy about it. It's how do you get both groups to come in and play fair, play honest and put

everything up front and try to resolve it. That's what we are trying to do.

MR. MCGEE: We didn't have answers for that within the Committee, and I think it was -- it had to be, and I don't think it can be regulated, an implicit desire that it's as much in the company's benefit to resolve these, again at that lowest possible level as early as possible and go on about other business, because when they have to get into appeals, this is all totally unproductive. This is not good for any of the payors, lessees, designees, or whomever you want to get into, that this is negative time and these are negative dollars, and if there's a way to resolve it, I think every company represented here would be all for moving on to something more productive than this. I'm really afraid this is going to become a very, very expensive -- I called it a monster earlier and I hope I'm wrong.

MS. JOHNSON: That wasn't the intent, though. I can see where it could happen.

MR. MCGEE: It drifted. It drifted from our 23 pages in the report to the 61 pages, single spaced, triple column.

MR. IRWIN: A specific comment and then a general question to Brian, to all of you who are here and to all of your colleagues who could not be here. I can't emphasize enough how helpful it will be to us to receive written comments from the general statement of concern that you just made, Brian, down to are you sure that comma is in the right place, you guys. The deadline is March 15. And then we have essentially six weeks to digest it and direct responses and try to get a final rule out by May 13th. So a request for comments, if you would like, and a question to you. Does any of you wish to go to lunch and come back upon it further? The second part of the question, does any of you know colleagues who were planning to come this afternoon because that's when subpart J was going to be talked about and now we're almost done with subpart J, that I should come back and wait for them?

MR. MCGEE: I'll come back and wait with you.

MR. IRWIN: I'm not looking to extend this. I think most of us would prefer to go on with the rest of the day, but I don't

want to cut it short and I don't want to leave anybody out who had planned, that you know of.

Are there further things, sir?

MR. MCGEE: I just had one question. Would the March 15th comment deadline, is that a drop-dead deadline or is there a --

MR. VOGEL: Assume it is.

MR. IRWIN: What we've been told is that's what we are operating on.

MR. MCGEE: Is May 15th required by RSFA?

MR. VOGEL: May 13th is end of the 33 months for all appeals to be decided that were pending before the Department of Interior for federal oil and gas that the RSFA was passed.

MR. IRWIN: So we need these procedures in place, basically.

MR. MCGEE: That's the driving force that you really cannot extend.

MR. VOGEL: That's why I said assume that that is a drop-dead date.

MR. MCGEE: Unless the states ask you to do so.

MR. VOGEL: No. Unless Secretary Babbit says something.

MR. MCGEE: Well, the Governor calls the Secretary, so it works.

MR. IRWIN: Sir.

MR. PACHALL: Just a quick question about the transcript of the meeting. Will that be on the Internet prior to the comment due date?

MR. IRWIN: I don't know.

MR. MILANO: We can post it as soon as it's available. It will be part of the record at March 15th. So as soon as I have it, I can post it out there, yes.

MR. PACHALL: Well, I guess my concern is that I had some folks from, because of the Mardigras thing, and it would be nice for them to be able to read these comments. I'm not going to be able to convey everything that was said here today to win the battle, so I'm just curious as to whether or not this transcript will be on the machine to look at prior to us making our comment?

MR. MILANO: Yes. We should have plenty of time before March 15th to put it out there. It will be on the MMS home page.

MR. IRWIN: Further, ladies and

gentlemen?

MR. TEETER: Well, I have some questions. Have we decided whether we're going to come back after lunch.

MR. IRWIN: At this point I'm going to say we're not coming back after lunch. If you have questions, you make them now.

MR. TEETER: This is really just a clarification. When the lessee files his preliminary Statement of Reasons, does the MMS file any response to that? I guess in the old days that would be a field report.

MR. IRWIN: I don't believe that's provided for now.

MR. VOGEL: I mean, and again, the Statement of Reasons, as the preliminary statement, whatever it's called, it's filed to MMS is merely meant to inform the parties as to what the issues are so that they can construct the record. But the response is in the record development conferences and it's meant to be a cooperative, again, in following the recommendations of the Royalty Policy Committee the attempt was to make whatever is occurring for the briefing to IBLA be a cooperative

process rather than a shifting of papers back and forth, again on the assumption that if parties got together and discussed the facts most cases would resolve from that discussion rather than --

MR. TEETER: Well, so it would be your intent --

MR. VOGEL: -- back and forth.

MR. TEETER: -- entirely, but building on what Brian and George said earlier, if that's the intent, then why is there a requirement that you have to cite cases, laws, and all that kind of stuff, and then if you want to change it you have to get permission to supplement the record. It seems to me to be cross purposes.

MR. VOGEL: No. There is no requirement, I mean, and to the extent the examples, you need us to require everything, the appendix was meant to be examples. We believed, perhaps wrongly, that most people would find citing cases a shorthand way of explaining what their legal position was, so that's why we threw that in. It is not a requirement. There's nothing in the Rule that

says you must follow the examples in appendix A. That was not intent.

MR. TEETER: Well, I guess if that's what that is, there's nothing specifically that says you're not bound by what you say, like the comments, again, that Brian and George made, I just don't get any comfort out of the way the rules are written that I can file truly a preliminary, not a full legal brief, and have the freedom to come back after the negotiations have failed and then go ahead and file my full-blown legal brief. I don't find comfort in the Rule as written.

MR. VOGEL: I think we've heard that part.

MS. INDERBITZIN: Further things, sir? Mr. Teeter, other questions or comments?

MR. TEETER: No, that's it.

MS. INDERBITZIN: Going once, going twice. Thank you all for coming. Thank you for the assistance we have already received. Please, if have you more suggestions or comments or questions, please provide them. And have a good afternoon. Travel safely. Thank you very much.

State of Texas

I, David R. Beard, Certified Shorthand Reporter in and for the State of Texas, certify that the caption to this deposition correctly states the facts set forth herein; that the examination of the witness named in said caption was correctly reported in shorthand by me at the time and place and under the agreement set forth in said caption and has been transcribed from shorthand into typewriting under my direction and supervision in the foregoing transcript; and that said transcript contains a correct record of the proceedings had at said time and place.

I further certify that I am neither attorney or counsel for, nor related to or employed by the parties hereto or financially interested in said action.

Given under my hand and official seal of office this the 18th day of February 1999.

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