United States Department of the Interior

MINERALS MANAGEMENT SERVICE
Royalty Management Program
P.O. Box 25165
Denver, Colorado 80225-0165

March 27, 1997

Secretary of the Interior
Department of the Interior
1849 C. Street, N. W.
Washington, DC 20240

Dear Mr. Secretary:

Please find attached the report of the Royalty Policy Committee with recommendations for reform and re-engineering of the process of appeals and alternative dispute resolution of appeals involving mineral revenues on Federal and Indian lands. I urge you adopt these recommendations.

I am pleased to report that this report was adopted unanimously by the Royalty Policy Committee (RPC), a committee of the Minerals Management Service Advisory Board. The RPC includes representatives of states, which share in mineral revenues from Federal lands, Indian tribes and allottees, whose mineral revenues are collected in trust by the Minerals Management Service, the oil, gas and solid minerals producing industries, who pay royalties, and the public. The membership list is attached.

We believe that these recommendations will lead to a more efficient process for resolving disputed royalty obligations, and will be viewed as fairer for all parties involved in those disputes. As such, it will benefit the Department of the Interior, states, Indian lessors and the producing industry. In particular, this proposal will assist the Department in meeting the requirements of the Federal Oil and Gas Royalty Simplification Act, signed by the President on August 13, 1996.

Please accept this report as comments to the notice of proposed rulemaking published in the Federal Register on October 27, 1996, which would amend the regulations concerning the Minerals Management Service appeals process. We urge you to consider this report seriously, and that you adopt this recommendation in lieu of the proposed rulemaking as you proceed toward new regulations governing appeals of royalty disputes.

Thank you for providing the members of the RPC with the opportunity to advise you on these matters, and for your careful consideration of this report.

Sincerely,

Don Hoffman
Chairman, Royalty Policy Committee

Attachments
Subcommittee on Appeals and ADR Report
List of RPC Members

cc: Solicitor, U.S. Depart.of the Interior
Director, Minerals Management Service
Director, Office of Hearings and Appeals
Royalty Policy Committee Members

ROYALTY POLICY COMMITTEE
SUBCOMMITTEE ON APPEALS
AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

AS ADOPTED BY THE ROYALTY POLICY COMMITTEE
March 21, 1997

Table of Contents

Executive Summary

Introduction

The Department of the Interior (DOI) established a Royalty Policy Committee (RPC) in 1995 under the Minerals Management Advisory Board. The RPC's purpose was to provide advice to the Secretary on the Department's management of Federal and Indian mineral leases, revenues, and other minerals-related policies. The RPC included representatives from states, Indian tribes and allottee organizations, minerals industry associations, Federal agencies and the public. At its first meeting in September 1995, the RPC established eight Subcommittees, including the Appeals and Alternative Dispute Resolution (ADR) Subcommittee.

Appeals and ADR Subcommittee

The Appeals and ADR Subcommittee was created to make recommendations to the Royalty Policy Committee to improve the processes involving appeals and alternative dispute resolution. This report sets forth the Subcommittee's recommendations upon which consensus was reached, for the consideration by the RPC.

Membership in the Appeals and ADR Subcommittee has varied over the course of the year and one-half of its existence. At the conclusion of its deliberations it included eleven representatives from industry, five representatives from states, and two representatives from Indian tribes. In addition to the voting members, the Subcommittee benefitted from the participation of several other persons as non-voting members and of two employees of MMS as staff to the Subcommittee. These representatives and other persons are listed in Appendix A.

Consensus was defined as a two-thirds majority vote. This recommendation has been adopted unanimously.

Purpose of the Administrative Appeals Process

The Subcommittee agreed that the principal purpose of the MMS administrative appeals process should be the expeditious and independent review of cases involving disputed facts, legal issues, or policy upon request of the adversely affected party.

Concerns with Current Appeals Process

The Subcommittee recognized that the MMS appeals process had been under criticism and serious review since 1991 and that substantial reform was needed. Among others, the Subcommittee identified the following problems with the existing appeals process:

1. Lack of timely resolution;

2. Lack of clarity in some orders;

3. The perceived lack of independence and unfairness of the MMS Director level of appeals due to the surname process and possible *ex parte* communication;

4. Policy uncertainty--orders issued without the MMS having clearly decided and explained policy issues;

5. Inability for appellant to know or ascertain exactly what is contained in the administrative record;

6. The conflicting roles of the Solicitor's Office in satisfying institutional needs (assisting in setting policy and overall litigation strategy) and acting as a legal advocate for MMS; (this means that sometimes decisions on individual appeals become secondary to the larger matrix of policy and decision-making); and,

7. Duplication of effort within MMS Director review and Interior Board of Land Appeals (IBLA) level review.

Events Affecting the Subcommittee's Considerations

While the Subcommittee was working, the President signed the Federal Oil and Gas Royalty Simplification and Fairness Act (FOGRSFA), which, among other provisions, established a 33-month time limitation for the Department of the Interior to make final decisions on appeals involving royalties due on Federal oil and gas leases and required a settlement conference for such appeals. This provided a further impetus to the Committee's efforts to reduce overall time for making final Departmental decisions on appeals and to expand opportunities for ADR. In addition, MMS proposed a draft regulation that would place a 16-month time limitation on the MMS appeals process, leaving the rest of the 33-month period for review at the IBLA. The Subcommittee strongly urges that the recommendations in this report be substituted for MMS's proposed regulation.

Recommendations

The Subcommittee has developed a number of specific steps involving both appeals and ADR processes, incorporated into a one-stage IBLA administrative appeal process, which are designed to solve the problems identified above. The Subcommittee recommends that:

1. MMS resolve all fundamental policy questions before it, (or delegated states[1] or Indian tribes), issues a demand or order;

2. DOI encourage the resolution of disputes without completing the formal administrative appeals process;

3. DOI clarify the standing of Indian lessors and "states concerned" with respect to the administrative appeals process;

4. DOI change the structure of the administrative appeals process, so that appeals of MMS, state or tribal orders are taken to the Interior Board of Land Appeals, under a special set of rules applicable to royalty appeals. The rules would specify some differences for appeals involving Indian leases (and possibly solid minerals leases), since the provisions of FOGRSFA do not apply to these categories of leases;

5. each demand or order contain a clear and complete statement of the facts, law, and agency policy decisions upon which the demand is based; and

6. the contents of the administrative record be identified early in the process and prior to the filing of formal briefs with the IBLA.

[1]"Delegated State" is defined in FOGRSFA to be a state which, pursuant to an agreement or agreements under section 205 of the Act, performs authorities, duties, responsiblities, or activities of the Secretary.

Introduction

Probably no aspect of the Minerals Management Service Royalty Management Program has been more studied over the past several years than the MMS Appeals Process. Yet despite a myriad of recommendations and reforms, the customers remain convinced that the process is unfair, too costly, too time consuming and does not constitute a true appeals process. The Royalty Policy Committee constituted this subcommittee on appeals and alternative dispute resolution to 1) study once again the way the appeals, and its associated alternative dispute resolution, process currently works, and 2) recommend changes in those processes, if they are warranted.

The Subcommittee held extensive meetings over the course of many months. There were significant differences among the members during those meetings, but after thorough investigation, the Subcommittee unanimously adopted this report, which recommends fundamental changes in the way the royalty appeals process works. The Subcommittee did not study, and makes no recommendations on changes in other MMS appeals processes involving offshore minerals management.

Throughout its study, the subcommittee insisted that its recommendations needed to meet certain principles: 1) the position of the MMS would not be substantially harmed by changes in process; 2) the process would need to be reasonably completed within less than 33 months, 3) the parties should be encouraged to develop the facts, clarify the issues, and resolve disputes at the earliest possible opportunity; 4) the costs of the process to the participants would be reduced; 5) the role of Indian lessors as parties would be clarified; and 6) the ability of delegated state auditors to assure that their input was considered would be clarified. We believe we have met these principles and more.

We have assured Indian lessors standing as parties. We believe this conclusion is not only good law, but good policy, as the lessor is the real party in interest. We have allowed delegated states to participate in a way akin to parties when the MMS does not support their position. We believe this participation is called for due to both the provisions of section 204 of the Federal Oil and Gas Royalty Management Act (FOGRMA), which provides for suits by states in Federal Court to collect underpayments, and the amendments

to section 205 of FOGRMA contained in section 3 of FOGRSFA, which provide that states may issue orders without MMS consent. The committee concluded that if Congress wanted states to be able to issue orders and to sue, then participation in the administrative process would be consistent with those provisions.

The most fundamental recommendation was to initiate a process wherein royalty cases are appealed directly with the Interior Board of Land Appeals. The committee believed this was necessary 1) to assure the appearance of fairness in the process, 2) to clarify the role of the Solicitor, the MMS, and potential states as advocates, and 3) to assure that the process would reasonably be completed within the 33-month time limit set by FOGRSFA for Federal oil and gas royalty appeals. While that is the fundamental recommendation, the Subcommittee believes that it is the details of its proposal that make the process an improvement. We urge you to read the report carefully and to consider it in its entirety. It is important to realize that consensus, while elusive at times, was reached after months of deliberation. The Subcommittee supports these recommendations and believes that they should be adopted in full by the RPC and the Secretary, and substituted for the MMS proposed rule to change the MMS appeals process.

Background

1. Appeals and Alternative Dispute Resolution (ADR) Subcommittee

The Appeals and ADR Subcommittee of the Royalty Policy Committee met initially on February 29, 1996, to discuss the purposes of the appeals process, concerns with the current process, and possible solutions. The Subcommittee held five additional meetings over the subsequent 12 months, supplemented by various telephone conferences and written communications, in order to prepare this report. This introduction discusses in general terms the findings of the Subcommittee upon which its recommendations are based.

2. Concerns with Current Appeals Process

The Subcommittee members generally shared the following concerns with the current process for appeals of MMS actions:

- The entire process including appeals to the MMS Director and to the Interior Board of Land Appeals (IBLA) takes too long and causes strained relations between MMS and industry.

- There is a lack of discipline in the system--parties are allowed to delay providing facts and arguments in support of their positions, and decision-makers are allowed to delay issuing decisions. Thus, relevant facts and legal issues may arise first at the IBLA stage (or in Federal court), after investment of significant time and resources at the MMS appeals stage. Similarly, policy issues that might have been resolved prior to taking the action or early after the appeal was filed are not resolved until much later in some cases. This has resulted in some cases being put on "hold" rather than being resolved in a timely manner.

- There is not a completely independent review in the appeals process because draft decisions are circulated for extensive reviewing and "surnaming" (that is, they are reviewed by various government officials, including the official who issued the order from which the appeal is taken).

- Parties do not meet face-to-face on a consistent basis early in the appeals process to try to resolve factual issues and come to agreement on the appropriate action based on those facts.

- At the MMS appeals stage, the roles of the Director, the Appeals Division, the office that took the action under appeal, and the Office of the Solicitor are unclear. Many Subcommittee members viewed the current MMS appeals process as unfair because of the lack of prohibitions on *ex parte* communications and the "behind the scenes" involvement of parties that had played a role in the initial decision to take the action under appeal (e.g., various divisions in the Royalty Management Program and the Office of the Solicitor). Others felt that these roles were appropriate for an internal review process by the MMS Director, but agreed that they create an appearance of unfairness.

- Due to reluctance on the part of RMP, the Office of Policy and Management Improvement (PMI), the Director's office, and the Solicitor's office (or combinations or all of them) to make hard policy decisions, the

MMS process is slowed down by pending policy issues that crowd the MMS appeals docket.

- The presence of an official who has direct line authority over the officers issuing orders as well as deciding appeals of those orders, raised an issue of the appearance of partiality. Also, the Subcommittee was concerned that the dual roles of the Solicitor's office, both as an advocate before the IBLA and as an advisor to the appellate official within the MMS, made that office appear to be arguing its own case, rather than defending the actions of the delegated agency.

- Involved parties, such as Indian lessors, other than the MMS and the appellant are not always informed of the existence of the appeal and do not always have an opportunity to make their views known.

- There are neither formal limits on the reasons for which an appeal may be put on hold nor on the duration of such a hold, or any requirement that parties try to negotiate a settlement during a "hold."

In summary, the Subcommittee does not believe that the MMS process actually is a true adjudicatory appeals process. The Director of the MMS indicated at the December 1996 meeting of the RPC that it is more in the nature of an administrative review process. Requiring a formal process, including such steps as legal briefing which are required in a real appeals process, when all that MMS really does is use the process to develop policy or to ensure administrative consistency or legal sufficiency places an unnecessary burden on all the participants. The current practice of circulating draft decisions among MMS, state, and tribal officials prior to issuance makes the MMS process suspect as a true administrative appeal. The Subcommittee believes that MMS can meet all of its requirements for policy development and administrative consistency while minimizing the burden on other participants by more clearly separating the agency's goals into different parts of the process.

3. Purposes of the Administrative Appeals Process

The Subcommittee identified the following purposes of the appeals process:

- to provide parties that disagree with actions taken by MMS staff with a mechanism to obtain timely decisions on the appropriateness of those actions.

- to resolve disputes at an early stage (by appellants complying with MMS' action, by MMS withdrawing or modifying its action, or by ADR), without the need for more expensive litigation.

- to enable senior MMS managers to correct actions taken by subordinates where necessary. This can involve recognition of new facts raised by appellants, review of the legal basis for the initial action, or consideration of whether the action is consistent with existing or developing MMS policy.

- to develop the administrative record for disputes that may proceed to Federal court.

- to provide guidance to MMS staff and appellants on the proper action to take on similar cases in the future.

4. Events Affecting the Subcommittee's Considerations

During the Subcommittee's deliberations, two events occurred that influenced its results. First, on August 13, 1996, the President signed the Federal Oil and Gas Royalty Simplification and Fairness Act (FOGRSFA), Public Law 104-185, which amended the Federal Oil and Gas Royalty Management Act (FOGRMA) in the following three respects regarding the appeals process:

- Section 4(a) of FOGRSFA added a new section 115(h) to FOGRMA (30 U.S.C. 1724(h)), setting a 33-month time limitation on appeals of demands or orders issued by MMS or delegated states regarding royalty and related obligations on Federal oil and gas leases. The 33-month period begins on the date of enactment (August 13, 1996) or on the date the "proceeding was commenced," whichever is later. FOGRSFA also provides for extension of the 33-month period "by any period of time agreed upon in writing by the Secretary [of the Interior] and the appellant."

If the Department of the Interior fails to issue a final decision in any administrative proceeding covered by this provision, then FOGRSFA establishes the following results:

-- for any non-monetary obligation or any monetary obligation with a principal amount of less than $10,000, the appeal is deemed to be granted by the Secretary with respect to the appellant.

-- for any monetary obligation with a principal amount of $10,000 or more, the appeal is deemed to be denied by the Secretary with respect to the appellant, thereby providing the appellant with the right to judicial review.

- Section 4(a) of FOGRSFA also adds a new section 115(d) to FOGRMA (30 U.S.C. 1724(d)), requiring that the Department of the Interior provide lessees or their designees with 60 days to file an administrative appeal of an order to perform a restructured accounting (applicable to such orders issued with respect to production occurring after the date of enactment).

- Also in section 4(a), FOGRSFA adds a new section 115(i) to FOGRMA (30 U.S.C. 1724(i)), as follows:

> COLLECTIONS OF DISPUTED AMOUNTS DUE- To expedite collections relating to disputed obligations due within the seven-year period beginning on the date the obligation became due, the parties shall hold not less than one settlement consultation and the Secretary and the State concerned may take such action as is appropriate to compromise and settle a disputed obligation, including waiving or reducing interest and allowing offsetting of obligations among leases.

FOGRSFA also establishes the authority for the Secretary of the Interior to delegate to states the responsibility and authority to perform certain functions previously performed by the MMS for Federal lands located within the states. Under this provision, the states may issue certain types of demands and orders that are appealable actions. Thus, the process for handling

administrative appeals within the Department of the Interior must take into account this new role likely to be performed by at least some states.

It should be noted that FOGRSFA only applies to oil and gas leases on Federal lands. However, some of its concepts could by regulation be applied to other types of leases administered by the MMS, including Indian leases and leases for solid minerals (including coal). As an example, the 33-month period to reach a decision on an appeal may be applied to Indian and solid minerals leases, but the consequences of failure to meet that time frame will be different, at least for Indian leases. The solid minerals industry representatives participating on the Subcommittee stated that their agreement to this report should not be constrtued as a concession on their part that FOGRMA, including the amendments made by FOGRSFA, applies to solid minerals leases.

The second event influencing the Subcommittee's deliberations was the publication of a proposed rule by MMS which would modify the current MMS appeals procedures in several respects. 61 Fed. Reg. 55,607 (proposing to amend 30 C.F.R. Part 290). The proposed amendments would establish a 16-month time limitation on appeals pending before the MMS Director. If MMS failed to meet this deadline, the appeals would be deemed denied in favor of the MMS, and the appellant could proceed with its case before the IBLA. The proposed regulations also would impose a $100.00 filing fee for appeals to the MMS Director. In making the proposal, MMS stated that it expected the Royalty Policy Committee to review recommendations from its Subcommittee on Appeals and ADR during the pendency of the proposed rule and that it would consider the recommendations of the Royalty Policy Committee as part of the rulemaking process. The MMS extended the comment period for the proposed rule until March 27, 1997, in order to accommodate the Committee's anticipated time frame for discussing this report.

5. Background on the Current Appeals Process

MMS royalty decisions and orders currently are subject to a two-stage appeals process -- first to the Director, MMS, and then to the IBLA. To appeal to the MMS Director, the appellant must file with the office that issued the original decision or order a notice of appeal and a statement of reasons in support of its appeal. The appropriate MMS office then files an field report in response

to the appellant's arguments. The appellant has the opportunity to respond to this field report. Finally, MMS issues a decision on the appeal. Appendix B provides a more detailed description and flowchart of the current MMS appeals process. The MMS process is not subject to any formal *ex parte* prohibitions, so that RMP and Solicitor's office staff who may have participated in the original decision or order may provide advice to the Director or the MMS Appeals Division staff preparing the decision for the Director.

MMS appeals decisions generally are further appealable to the IBLA. Should the appellant elect to appeal to the IBLA, it would file a second notice of appeal and statement of reasons responding to the Director's decision. MMS forwards the administrative record from the Director's decision to the IBLA, and the Solicitor's office files the reply to the appellant's statement of reasons. The IBLA has a more formal and independent appeals process than does MMS--decisions are issued by panels of Administrative Judges, and the Board prohibits *ex parte* communications on cases before it. If parties disagree with an IBLA decision, they may seek reconsideration, or may request that the Secretary or the Director, Office of Hearings and Appeals, take jurisdiction over the case. This is rarely done, however. In some cases, decisions on appeals to the MMS are signed by an Assistant Secretary of the Department of the Interior, which makes these decisions final agency actions and therefore not subject to appeal at the IBLA (they may be appealed to Federal court under Administrative Procedure Act review). Final decisions of the IBLA are also final agency actions and are appealable to Federal court.

Many appeals are settled or otherwise resolved while they are pending within the administrative appeals process.

The process described above also applies to certain appeals of actions taken by officials in the MMS Offshore Minerals Management Program. The number of these appeals is much smaller than appeals of MMS royalty actions. The Subcommittee considered only changes with respect to appeals of royalty actions but recognizes that MMS will need to consider whether changes are warranted for these other types of appeals.

Recommendations and Rationale

The Subcommittee recommends that the current process be altered in fundamental ways. First, the Subcommittee recommends that all fundamental policy questions be resolved before MMS, or its delegated states and Indian tribes, initiates an action. Second, the Subcommittee recommends that resolution of disputes without completing the formal administrative appeals process should be encouraged at every step of the process. Third, the Subcommittee recommends that the standing of Indian lessors and "states concerned[2]" with respect to the administrative appeals process should be clarified. Finally the Subcommittee recommends that the structure of the administrative appeals process should be altered, so that appeals of MMS, state or tribal orders are taken to the Interior Board of Land Appeals, under a special set of rules applicable to royalty appeals. We believe these changes will make the process appear more fair, be more timely so as to generally assure compliance with the requirements of FOGRSFA, allow better development of the record, allow complete consideration of the issues by all parties, and allow MMS ample opportunity for policy development and re-consideration of the issues presented in each case.

Resolution of Policy Issues

MMS, states, tribes and lessees are encouraged to resolve policy and valuation issues prior to formal audits of royalty payments. The Subcommittee believes that if policy issues are resolved before orders are issued, appeals may be able to focus on the proper dispute, and time will not be wasted in the appeals process while MMS resolves how to proceed. MMS has traditionally put many appeals cases "on hold" while it attempted to resolve policy differences. The Subcommittee does not believe that the appeals process is the most effective means to accomplish this task.

Encourage Informal Resolution

[2] Under FOGRSFA "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."

In the past, once an appeal has been filed, adequate opportunities to resolve cases informally did not exist, or often were not effectively pursued by the parties. These proposals explicitly encourage settlement at every possible opportunity, including implementing the mandatory settlement conference required by FOGRSFA. The Subcommittee is confident that with this encouragement, more cases will be resolved without full exhaustion of the administrative process available to all parties and will conserve resources for all concerned. The Subcommittee believes that if parties can agree on a resolution of their disputes the solution is likely to be preferable to those achieved through litigation.

Clarification of Standing of Indian Lessors and States

In the past, it has been unclear whether and to what extent Indian tribes and allottees and states, which share in federal royalties, could participate in the resolution of royalty appeals. The Subcommittee believes that affording fuller participation to these entities, under specified conditions, will expedite the resolution of the dispute and will increase the sense of fairness by including the perspective of all persons whose financial interests are affected.

Proposed Structure of An Appeals Process

As discussed above, the Subcommittee identified specific concerns with the current MMS appeals process. Some of these involve the length of time needed to decide an appeal, especially with a two-stage administrative appeals process. In addition, the manner of the MMS decision-making process raised questions about its fairness. With the recent enactment of the FOGRSFA, the appeals process needed to be reformed. These proposals will improve both the settlement and formal decision making processes by requiring better and more cooperative development of the record and earlier identification of the issues. These proposals are worthy of consideration for Indian and solid minerals leases independent of the requirements of FOGRSFA.

We have decided to set out the new process in question in answer format in the expectation that use of plain English principles would allow prompt and constructive consideration by the Royalty Policy Committee and the Department of the Interior.

In the following numbered paragraphs we have used the term “we” to denote MMS and delegated states and tribes, and the term “you” to denote the appellant or potential appellant.

1. How will MMS determine the correct policy to apply when the published regulations and appeals decisions do not give an adequate basis for either a lessee to pay royalties or an auditor to determine whether proper royalties have been paid?

    a. MMS has two currently constituted bodies with the authority to make determinations concerning policy issues. Most policy issues involve uncertainty concerning valuation. The Royalty Valuation Division (RVD) has been delegated the authority to make value determinations. In addition, the MMS has informally constituted a group of senior managers who jointly decide royalty policy disputes. The Royalty Policy Board (RPB) is constituted of the Deputy Director, the Associate Director for Royalty Management, and the Associate Director for Policy and Management Improvement, with the Assistant Solicitor for Royalty Management as a non-voting legal advisor. The RPB may give advice concerning disputes in the application of lease terms, regulations, statutory law and the judicial interpretations thereof. In addition, for issues that do not require a decision at the level of the RPB, MMS may develop policy with the involvement of appropriate offices in MMS (including RVD) and with input from states and tribes. MMS may seek legal advice at this stage, from the Solicitor’s office and possibly from the staff with legal training in the Appeals Division and the Office of Enforcement.

2. How should the RVD and RPB be used?

    a. You are encouraged to bring policy questions to the RVD for resolution. If the questions are either of general interest or not related to valuation, RVD will refer the questions to the RPB, or to another appropriate body if one is constituted by the Department of the Interior (Department) or the MMS. If you bring a policy question to the RVD for resolution, MMS will not issue any civil penalties concerning the issue to you as long as the question is pending.

b. MMS, state and tribal auditors are encouraged to bring open policy questions to the RVD or RPB for resolution, prior to communicating findings that could be affected.

3. Are RVD or RPB determinations appealable?

   a. You may appeal our order or demand to the Interior Board of Land Appeals (IBLA) under the provisions of 43 C.F.R. Part 4, as amended by these recommendations. If an RVD or RPB decision constitutes an order it may be appealed, but it (or its logic) may still be used as the basis for other orders, including demands even if its effectiveness is stayed pending appeal. If an RVD or RPB decision does not constitute an order or demand, it is not appealable, but if at some later time the RVD or RPB determination is used as the basis for an order, that order may be appealed and you will not be barred from contesting the application of the determination due to your failure to appeal the determination. In addition, since such determinations, when they are not orders, are not appealable, failure to comply with their recommendations cannot be used as the basis for civil penalties.

4. What are the steps that MMS, state and tribal audit officials typically take prior to issuing an order, including a demand?

   a. MMS, state and tribal audit officials typically will issue a preliminary findings letter (PFL) (also known as an issue letter) to the lessee or designee prior to serving an order. Those letters will describe the findings, and the legal and factual basis therefore.

   b. Other parts of MMS (e.g. RVD) are encouraged to use PFL's prior to issuing formal decisions, orders, or demands.

5. What is the effect of a PFL?

   a. When you receive a PFL, it is a preliminary determination, based on the facts as understood by the office that issued the PFL. If no additional considerations are brought to the attention of that office, an order or demand will be issued. You should discuss the findings with the office that issued the order or demand to clarify any misunderstandings, including any facts the office failed to consider. You also should attempt to resolve your disagreements at the earliest possible time, both before and after the PFL is issued.

b. The PFL is not an order and is therefore not appealable.

6. What may I do upon receiving a PFL?

   a. You may, at your option, respond within 30 days of receipt of the PFL. If you need additional time, you may request it. We will grant requests for additional time, as long as they do not impact our ability to issue timely orders under the FOGRSFA. If you do not intend to respond, please notify the auditor who issued the PFL, as early as reasonably possible.

   b. If you respond to the PFL, you will not be limited to the facts and arguments that you present at this stage, if we issue an order or demand. Any facts and arguments you do submit may be incorporated by reference in any subsequent communications and filings.

7. What will be included in an order or demand of the MMS or a delegated state or tribe?

   a. Orders and demands will include citation of specific facts, policy and law under which the order or demand is issued. Order and demands may incorporate such citations from the PFL by reference. Prior to issuance, the issuing office should seek review of open policy questions before the RVD or RPB or through other appropriate mechanisms.

   b. If you are a designee, we will notify all affected lessees who designated you when we issue any demand.

   c. Orders and demands are appealable to the IBLA. Demands are appealable by both designees and lessees. Orders and demands will include appeal instructions, including the persons to receive copies of all filings. This service list will be used in all subsequent filings by any person. It will include the relevant MMS offices, the states concerned and Indian tribes and BIA area offices.

8. May I continue to discuss the issues in the order or demand with the issuing office after the order or demand has been issued?

   a. You are encouraged to continue to discuss the order or demand with the issuing office even after it has been issued within the time limits specified in the order or demand. However, such discussions do not toll any requirements to file a notice of appeal within the time limits specified

in paragraph 11.

9. When can I appeal an action of the Minerals Management Service, or a delegated state or tribe?

   a. If you are a lessee, operator, or designee, you may appeal an order or demand signed by a division or office chief of the MMS or the designated official of a delegated state or tribe that adversely affects your interests. Such appeal must be filed within the time limits specified in the order or demand.

   b. If you are a lessor of lands for which the Minerals Management Service exercises administrative powers, you may appeal any order that adversely affects you. You may also appeal any failure to issue an order that you have requested be issued by the designated division or office chief of the MMS.

10. What do I need to file?

   a. If you are a lessee, operator or designee appealing under paragraph 9.a, you need to file a notice of appeal together with a preliminary statement of the issues you will raise on the appeal. The notice of appeal must be filed in accordance with the instructions in the order or demand, including service on all parties listed in the instructions and on the MMS (for demands and orders issued by delegated states).

   b. If you are a lessor appealing under paragraph 9.b, you need to file a notice of appeal together with a preliminary statement of the issues you will raise on the appeal. You must serve copies on all affected lessees.

   c. Although these actions start the formal appeals process, the parties are encouraged to continue efforts throughout the process to work together to develop the facts, clarify issues, and resolve the matter at the earliest possible opportunity.

11. How long do I have to file?

   a. If you are a lessee, operator, designee or a lessor, you must file the appropriate notice and statements within 60 days of the date that you receive the order. The time for filing the notice of appeal may not be extended, but upon request you can obtain an extension of time to file the preliminary statement of issues if you agree to toll the 33-month time

period.

b. If you are a lessor appealing a failure of MMS to issue an order, you first must inform the MMS division with which you have made a request that you intend to appeal their non-action as a denial of your request. The MMS division has 30 days to respond; if it does not respond within those 30 days, you must file the appropriate notice and statements within the 60 days following the end of the 30 days following your filing the intent to appeal notification. You may obtain an extension of time to file the statement, but not the notice of appeal.

12. Does the filing of the notice of appeal have any legal effect?

a. When IBLA receives the notice of appeal, the Department has 33 months to issue a final decision with respect to orders and demands issued concerning Federal oil and gas leases.[3]

b. If the Department does not issue a final decision with respect to orders and demands concerning Federal oil and gas leases within 33 months, the decision shall be deemed:

i. To have been issued and granted in favor of the appellant as to any nonmonetary obligation and any monetary obligation the principal amount of which is less than $10,000; and

ii. To have been issued in favor of the Secretary, which decision shall be deemed to affirm those issues for which the agency rendered a decision prior to the end of such period, as to any monetary obligation the principal amount of which is $10,000 or more. The appellant shall have a right of judicial review of such deemed final decision in accordance with title 5 of the United States Code.

13. What will be MMS's response to the filing of an appeal?

a. MMS will send you a letter noting our receipt of our copy of the notice of appeal, and will contact you to set up a meeting, more fully described in paragraph 14, either in person or by telephone, to discuss the issues and facts of the appeal and to explore the possibility of settlement.

[3]It may be unclear as to when the FOGRSFA 33-month period begins to run, but it is our recommendation that the regulations provide for the commencement of the FOGRSFA 33-month period when the notice of appeal is filed.

b. If a lessee and designee both appeal from the same order, MMS will consolidate the case files and notify the IBLA that they should consolidate the cases.

14. How long does MMS have to respond?

a. MMS will contact you and other necessary parties within 10 days to make arrangements for the meeting to develop the record, as described in paragraph 19.b

15. May any other parties participate?

a. Yes, any Indian tribe or owner of the mineral rights from an Indian allotment may participate in an appeal by a lessee as a matter of right as the real party in interest, when its property is impacted by the order and appeal.

b. If an appeal from a lessor results in an order to a lessee, the lessee may appeal that demand or order in the same manner as described here for any other demand or order.

c. States would participate as provided in paragraph 16.

16. What is the role of the MMS division or the appropriate state or tribe?

a. The division or appropriate state (including the state that issued the order, the state that conducted the audit, or the state in which any affected lease is located) or the tribe whose lands are affected will also participate in the meeting to develop the record (see paragraph 19.b) and in the settlement conference (see paragraph 20.a).

b. The division or state or tribe will also provide information from the record from which the order was issued to assist the Appeals Division in making a recommendation on how MMS may proceed in the case.

c. The division or state or tribe will participate in internal discussions to determine whether MMS will support, modify or reject the order.

d. The division or state or tribe will assist the Solicitor in gathering information to draft briefs to the IBLA.

e. If MMS decides not to defend an order issued either by MMS or a tribe or a delegated state, the tribe whose lands are affected or the delegated states in which the subject leases are located may continue

the appeal to the IBLA.

17. What is the role of the MMS Office of Enforcement?

    a. The Office of Enforcement will organize the record development meeting (see paragraph 19.b) and the settlement conference (see paragraph 20.a).

    b. The Office of Enforcement will organize any subsequent settlement discussions in exchange for an extension of the 33-month statutory appeals period.

    c. The Office of Enforcement may participate in internal discussions to determine whether MMS will support, modify or reject the order.

18. What is the role of the MMS Appeals Division?

    a. The Appeals Division will organize the determination of whether to recommend to the Director whether the order should be rescinded, modified or supported.

    b. The Appeals Division will assure that the record is developed and transmitted to the IBLA with copies to all parties on the case service list (see paragraph 10.a and 10.b.)

    c. The Appeals Division may assist the Solicitor in drafting briefs to the IBLA, with copies to all interested parties.

    d. The Appeals Division will keep track of deadlines and the overall time limitation.

19. How will the record be developed?

    a. We and you will jointly determine the content of the administrative record.

    b. The MMS Office of Enforcement will organize a meeting, to be held within 60 days of the filing of the notice of appeal, to determine the content of the record. All affected parties (including interested states and tribes) may participate. If you fail to identify in the preliminary statement required by paragraph 10.a all factual and legal issues, you may be required to participate in a second record-development meeting within the original time frame for such meetings (unless you agree to extend the 33-month time frame). The MMS Appeals Division may

participate in the record development meeting. MMS will prepare a draft joint statement(s) of issues and facts for the meeting. Also, the office that issued the order should prepare any additional materials they think are necessary, based on the issues raised by the appellant and any legal advice they receive, prior to this meeting.

c. The meeting can be held in person or by teleconference.

d. The participants will file a statement of agreed facts and issues within 30 days of the conclusion of the meeting. This statement will be a part of the record. This time may be extended, with tolling of the 33-month time limitation period, where applicable.

e. The record must include: the order, PFL; all correspondence between the division, state, or tribe that issued the order and the lessee, operator, or designee that appealed the order, the joint statement referred to in paragraph 19.d; and evidence in the work papers or otherwise in control of either party that bears upon the disputed facts or issues that are subject to the appeal of the order, including any unpublished policy documents that are relevant to the determination of the issues in dispute.

f. The parties will attempt to agree on evidence to be provided as part of the record. To the extent they cannot agree, either party may petition an Administrative Law Judge of the Office of Hearings and Appeals or an agreed upon arbitrator to resolve the disputes. The record must be completed within 120 days of the filing of the notice of appeal unless the parties agree to extend the time by mutual consent. You will need to agree to toll the 33-month time period if more time is required to have a third party resolve discovery disputes. The parties will file a joint good faith certification of the completeness of the record on appeal and forward the record to the IBLA with copies to all parties on the service list provided in paragraph 7.c.

g. The parties may decide to begin settlement negotiations or any other form of ADR before completing the record. They may extend the 33-month time limit on appeals by mutual consent and notification to the IBLA

20. Must I participate in a settlement conference?

a. MMS and the lessee or designee who appeals an MMS or state or tribal demand or order will hold a settlement conference as part of the appeals process. This settlement conference is intended to satisfy the requirement of FOGRSFA for Federal Oil and Gas leases. This requirement may be waived at the option of any Indian tribe with respect to appeals involving that tribe's leases. This meeting may be held either in person or by teleconference, as agreed upon by the parties.

b. The purpose of the meeting will be to discuss the issues candidly to see whether the differences between MMS (and/or the delegated state) and the appellant can be narrowed. If they can be narrowed enough, it may be worthwhile to resolve them through Alternative Dispute Resolution: negotiation, mediation, fact-finding or non-binding arbitration.

c. This meeting must take place within 120 days of the filing of the notice of appeal unless extended by mutual consent.

d. This meeting will take place after the record has been certified as complete, in paragraph 19.g.

21. If we cannot come to a settlement agreement, will the MMS Director make a determination in my case?

a. The Appeals Division will meet informally with the division or state or tribe that issued the order or that performed the audit, other relevant MMS divisions (Valuation, Enforcement, Policy, etc.), states in which the leases are located, and affected Indian tribes, to determine the proper application of MMS rules and policy to the facts of the case.

b. The Appeals Division will then recommend whether the order should be upheld, modified or rescinded, or in the case of an order issued by a delegated state or on behalf of an Indian tribe or an Indian lessor, whether to recommend that the Solicitor not defend the order. This recommendation will be shared with interested MMS offices, states and tribes, within 30 days of the conclusion of the settlement conference. This memo is not a part of the administrative record, but is rather in the form of a privileged attorney-client communication.

c. If the Appeals Division decides to modify or rescind an MMS order, that modified order will be issued by the Appeals Division, after consultation

with the originating division. The Appeals Division will not modify or rescind an order issued on behalf of an Indian tribe without their consent. The Appeals Division will request a remand of the appeal to MMS from the IBLA prior to modification of an order. You may request an extension of time to modify the record if the order has been modified, provided that you agree to extend the 33-month time limit.

d. The Appeals Division will notify the appellant within 30 days of the conclusion of the settlement conference regarding whether MMS will defend the order or has modified the order or rescinded the order.

e. If MMS decides not to defend an order issued either by MMS or a delegated state, the delegated state in which the subject leases are located may continue the appeal to the

22. When must I file my statement of reasons for my appeal?

a. Your statement of reasons must be filed with the IBLA within 30 days of receipt of the notice from MMS in paragraph 21.d.

b. You may apply to the IBLA for an extension of time to file, which will be granted upon good reason and upon agreement to extend the 33-month time limit.

c. Copies of the statement of reasons must be served upon all parties served with the notice of appeal and preliminary statement of issues as specified in paragraphs 10.a and 10.b.

d. Absent good cause, you may not raise new issues or facts that were not raised when the administrative record was developed.

23. Who may answer the statement of reasons?

a. The Office of the Solicitor will normally file an answer on behalf of the MMS and its delegated states and tribes. MMS may file the answer when the Solicitor does not.

b. Tribes and individual Indian mineral lessors may also file answers in cases affecting their royalty interests.

c. If neither the MMS nor the Solicitor files an answer in a case, the delegated state in which the subjectl eases are located may file the answer. If MMS or the Solicitor files an answer, the State concerned

may file an amicus brief as a matter of right. Other interested parties may file for leave to file an amicus brief.

d. No answer is required. MMS or the Solicitor must notify the IBLA and the appellant when no answer will be filed.

e. All answers and amicus briefs will be filed within 60 days of the date the statement of reasons is filed (see paragraph 22.b) and must be served on all parties served with the statement of reasons (see paragraphs 10.a and 10.b).

24. May I file a reply and may MMS respond?

a. Additional briefs may be filed at the discretion of the IBLA. The IBLA may condition its leave to file additional briefs upon agreement to extend the 33-month time limit.

25. Are all interested parties who were eligible to participate in the record development meeting limited to the issues and facts in the record certified in paragraph 19.d?

a. Yes, unless the party seeking to add new information can show good cause why it was not raised at an earlier stage. If new facts, evidence or issues are raised by any party, the IBLA may decide on the admissibility thereof, after consideration of all pertinent circumstances. If the IBLA determines that a party withheld evidence or failed to raise an issue in violation of the good faith certification of the record, it may decide to exclude those facts, evidence or issues. The IBLA may admit the evidence, or permit the party to raise an additional issue, if it is material to the determination of the case. If the evidence or issue is presented by an appellant, the IBLA may condition its admissibility on the appellant's consent to extend the 33-month time limit.

26. How will the IBLA decide my case?

a. The IBLA may affirm, reverse, vacate, set aside, or modify the order consistent with its existing statutory or regulatory authority. This includes any combination of these types of orders.

b. If the IBLA believes that the parties have not fully briefed any issue that the IBLA believes is necessary to a final Secretarial determination, it may require additional briefings and evidentiary supplementation, as

needed. Supplementary briefings and evidence are to be used in lieu of remands of the case to the issuing office.

c. The IBLA will decide your case within 30 months of the date you filed your appeal, except to the extent the 33-month time limit was extended by consent. Copies of the decision will be sent to all parties served with the statement of reasons as set out in paragraphs 10.a and 10.b.

27. May the decision of the IBLA be reconsidered, or may the Secretary take jurisdiction?

a. The powers of the Secretary and the Director of the Office of Hearings and Appeals in 43 C.F.R. § 4.5 apply to these appeals. The Secretary or Director will complete any decision on reconsideration within 90 days of the filing of the IBLA decision.

b. A decision of the Board shall constitute final agency action and be effective upon the date of issuance, unless the decision itself provides otherwise. The Board may reconsider a decision in extraordinary circumstances for sufficient reason. A petition for reconsideration shall be filed within 30 days after the date of receipt of a decision. The petition shall, at the time of filing, state with particularity the error claimed and include all arguments and supporting documents. The petition may include a request that the Board stay the effectiveness of the decision for which reconsideration is sought. No answer to a petition for reconsideration is required unless so ordered by the Board. The filing, pendency, or denial of a petition for reconsideration shall not operate to stay the effectiveness or affect the finality of the decision involved unless so ordered by the Board. A petition for reconsideration need not be filed to exhaust administrative remedies. The Board will complete its decision on reconsideration by the end of the 33-month time limit.

28. What are the consequences if the Department fails to meet the 33-month time limit?

a. For Federal oil and gas leases, the consequences will be as stated in paragraph 12.b.

b. These consequences will not apply to Indian leases, and the Department may choose by regulation to apply such consequences to

Federal leases for minerals other than oil and gas.

29. May the parties still attempt to resolve the dispute by ADR after briefing has begun?

    a. You are encouraged to attempt to resolve the dispute by negotiated settlement and other forms of ADR at any time. MMS will also seek to resolve disputes through ADR.

30. May an Assistant Secretary decide a case with final agency action effect under the provisions of *Blue Star*?

    a. An Assistant Secretary may petition the IBLA to relinquish jurisdiction. If the IBLA grants the request, the Assistant Secretary may make a decision in the case, which constitutes final agency action.

    b. Prior to the filing of a notice of appeal, an Assistant Secretary may issue an order constituting final agency action.

Appendix A

Membership Roster

George Butler*
Chevron
P.O. Box 3725
Houston, TX 77253
Ph#: (713) 754-7809
FAX#: (713) 754-3366

John Clark*
Conoco
P.O. Box 1267
Ponca City, OK 74602-1267
Ph#: (405) 767-5044
FAX#: (405) 767-3686

David Blackmon*
Burlington Resources
801 Cherry Street
Fort Worth, TX 76102
Ph#: (817) 347-2354
FAX#: (817) 347-2877

William M. Hartzler*
Cyprus Amax Minerals Co.
P.O. Box 3299
Englewood, CO 80112-3299
Ph#: (303) 643-5229
FAX# (303) 643-5363

Wayne Pachall
Texaco
P.O. Box 4325
Houston, TX 77210-4325
Ph#: (713) 752-7412
FAX#: (713) 752-4660

Hugh Schaefer* - IPAMS
Welborn Sullivan Meck & Tooley
1775 Sherman St., #1800
Denver, CO 80203
Ph#: (303) 830-2500
FAX: (303) 832-1332

Patsy Bragg* - IPAA
Gardere & Wynne
200 Oneok Plaza
100 West Fifth Street
Tulsa, OK 74103-4298
Ph#: (918) 699-2920
FAX# (918) 699-2929

Carla Wilson
IPAMS
518 17th Street, #620
Denver, CO 80202-4167
Ph#: (303) 623-0987
FAX#: (303) 893-0709

Ben Dillon
IPAA
1101 16th Street, N.W.
Washington, D.C. 20036
Ph#: (202) 857-4722
FAX#: (202) 857-4799

Wendy F. Daboval*
Texaco In.
400 Poydras Street
New Orleans, LA 70130
Ph#: (504) 595-1075
FAX# (504) 595-1062

Inge-Lise Goss*
Utah
210 No. 1950 W.
Salt Lake City, UT 84134
Ph# (801) 297-4608
FAX#: (801) 297-4799

Wanda Fleming*
Montana
Mt. Dept of Revenue
P.O. Box 202701
Helena, MT 59620
Ph#: (406) 444-3573
FAX#: (406) 444-2900

Mike Santos*
Colorado
400 S. Colorado Blvd., #400
Denver, CO 80202
Ph#: (303) 355-0400 Ext. 782
FAX#: (303) 355-0951

Randy Bolles*
Wyoming
Herschler Bldg, 3rd East
Cheyenne, WY 82002
Ph#: (307) 777-7547
FAX#: (307) 777-5341

Richard McPike*
Fina Oil & Chemical Co.
P.O. Box 2159
Dallas, TX 75221
Ph#: (214) 750-2820
FAX#: (214) 750-2987

Debbie Haglund*
Mobil
3000 Pegasus Pk.
Dallas, TX
Ph#: (214) 951-3349
FAX# (214) 951-2029

Hugh Hilliard
MMS
1849 “C” Street NW
Washington, D.C. 20240
Ph#: (202) 208-3398
FAX#: (202) 208-4891

Brain E. McGee*
Parcel, Mauro, Hultin & Spaanstra
1801 California Street, # 3600
Denver, CO 80202
Ph#: (303) 292-6511
FAX: (303) 295-3090

Edward L. Sullivan*
Peabody Holding Co., Inc.
701 Market Street, #700
St. Louis, MO 63011
Ph#: (314) 342-7794
FAX: (314) 342-3419

Perry Shirley*
Navajo Nation
Minerals Dept.
P.O. Box 3750
Window Rock, AZ 86515
Ph#: (520) 871-6340
FAX#: (520) 871-7832

Valdean Severson*
New Mexico
Box 5374
Santa Fe, NM 87502-5374
Ph#: (505) 827-0953
FAX#: (505) 827-0940

Alan Taradash*
Nordhaus Law Firm
Suite 1050
500 Marquette Ave. N.W.
Albuquerque, NM 87102
Ph#: (505) 243-4682
Fax#: (505) 243-4464,

Kenneth Vogel
MMS
P.O. Box 25165
Denver, CO 80225
Ph#: (303) 231-3749
FAX#: (303) 231-3362

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*Voting Member

Appendix B

Description of Current MMS Appeals Process

Most final actions taken by MMS officials are appealable to the Director under the regulations at 30 CFR Part 290 (1996). These regulations, which have existed in a form essentially like the current version since 1942, contain the following basic provisions:

- who may appeal: "any party adversely affected by a final order or decision . . . unless the decision was approved by the Secretary or the Director prior to promulgation." Section 290.2.
- notice of appeal: filed with the office of the official who issued the original order or decision within 30 days from service of the order or decision. Section 290.3.
- statement of reasons: due within same 30 day period.
- extensions of time: no extensions may be granted for filing the notice of appeal, but there is a grace period for appeals mailed before the due date and received within 10 days of the due date. Section 290.5. Extensions may be granted for the statement of reasons. Id.
- field reports: the officer with whom the appeal is filed must transmit the appeal to the Director, with a full report and recommendations on the appeal. Section 290.3.
- oral argument: the Director may allow oral argument. Section 290.4.
- signature of the decisions: by the Director, except for appeals involving Indian lands, for which the Deputy Commissioner for Indian Affairs signs.
- further appeal: decisions rendered by the Director (or Deputy Commissioner of Indian Affairs) are appealable to the Interior Board of Land Appeals. Section 290.7.
- stay pending appeal: most orders involving royalties may be suspended pending appeal (to the Director and to the IBLA), provided that the appellant posts a surety instrument. 30 CFR § 243.2 (1996).

There are two types of MMS appeals: non-routine and routine.

A *routine* appeal challenges a bill for additional money owed due to 1) the late filing or the erroneous completion of required reports, or 2) the late payment of royalties. These appeals usually revolve around factual issues rather than legal or regulatory issues; therefore, in 1993, MMS delegated to Division Chiefs in the Royalty Management Program the authority to render decisions on these appeals. Another category of routine appeals are appeals that are untimely filed—regardless of the underlying issue raised in the appeal, these are classified as routine. MMS revised its assessment policy in the fall of 1995, which has greatly reduced the number of bills (and appeals) regarding assessments for late and erroneous reporting. Thus, the number of routine appeals is expected to drop far below the levels experienced in recent years.

A *non-routine* appeal most often challenges a bill for additional royalties owed due to the royalty payor not valuing production correctly for royalty calculation purposes. The resolution of these appeals requires the interpretation of leases, royalty valuation regulations, mineral leasing statutes, other statutes, as well as fact-finding. These appeals are handled through the administrative appeals process as described below and as shown in Figure 2.

Non-routine appeals process: After a royalty payor receives a royalty bill or order, a royalty payor may challenge that bill by filing a notice of appeal within 30 days with the RMP office which issued the bill. If an appeal is not filed within the 30-day time frame (with a ten day grace period for appeals that are postmarked within the 30-day period), it is dismissed. This 30-day time period cannot be extended. As discussed above, untimely filed appeals are classified as routine appeals and therefore generally are decided by the chief of the office receiving the appeal.

Either together with the notice of appeal or in a later filing, the appellant (e.g., royalty payor) submits its legal arguments and any other supporting information to the RMP office in a document know as a Statement of Reasons. The Statement of Reasons generally is due within 60 to 90 days from the receipt of the bill or order. The RMP office reviews the Statement of Reasons and documents why the Appellant's arguments and supporting information either do or do not persuade that RMP office to cancel or modify the bill. This document is called a Field Report and is provided to the appellant and to the Appeals Division. The appellant has the option of providing further arguments and information on any points raised in the Field Report (generally due within 21 days of the date of the letter transmitting the field report). Extensions of time to file Statements of Reasons may be granted by officials in the Royalty Management Program, while extensions of time to file comments on Field Reports may be granted by officials in the Office of Policy and Management Improvement.

The Field Report should provide a complete record of the case and forms the basis for the case file. An appeals analyst reviews the file for completeness, sometimes requesting additional information from RMP, the appellant, or even third parties. After all the data and legal precedents are analyzed, the appeals analyst drafts a decision indicating whether the RMP bill was issued in compliance with all applicable statutes and regulations. The draft decision is reviewed within the MMS Office of Policy and Management Improvement and the Royalty Management Program for accuracy, completeness and consistency. (In the event of appeals of orders originating with auditors working for states or Indian tribes, these auditors generally have the opportunity to review the draft decisions.)

A further review is performed by officials in the Department's Office of the Solicitor. After review, the decision is signed by the appropriate official (generally the Associate Director for Policy and Management Improvement, or for appeals involving Indian lands, the Deputy Commissioner for Indian

Affairs). The appellant then usually has 30 days to comply with the decision. If the appellant is not satisfied with the MMS decision, the appellant may appeal to the Interior Board of Land Appeals*. After that step, the appellant may appeal further through the Federal court system.

At any point along the administrative process, the appellant, with MMS' approval, may choose to temporarily stop the process (put the appeal "on hold") in order to avoid expenses while seeking to settle the case, to wait for a precedential decision from the IBLA or Federal court, or for other reasons. The MMS also has placed appeals on hold for other reasons, but the vast majority of holds are because of settlement negotiations or agreements to precedential decisions. In some cases, MMS and the appellant continue to process appeals during settlement negotiations, and the appellant then may withdraw the appeal when and if a settlement agreement is reached.

*Those decisions that are signed by an Assistant Secretary are appealed directly to the Federal Court system rather than to the IBLA.

Appendix C

Revised Flow Chart of appeals process as redesigned