DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals

Minerals Management Service

30 CFR Parts 208, 241, 242, 243, 250, and 290

43 CFR Part 4

RIN 1010–AC21

Appeals of MMS Orders

AGENCIES: Office of Hearings and Appeals (OHA) and Minerals Management Service (MMS), Interior.

ACTION: Proposed rulemaking.

SUMMARY: The Office of Hearings and Appeals and the Minerals Management Service propose to amend their rules governing the appeal of orders from both the MMS's Royalty Management Program and MMS's Offshore Minerals Management Program. Also included in this proposed rulemaking are new regulations governing the issuance of royalty orders and the ability of appellants in royalty appeals to demonstrate financial solvency in lieu of posting a surety in accordance with the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, and new regulations to collect processing fees.

DATES: Comments must be submitted on or before March 15, 1999. MMS will publish a separate document notice in the **Federal Register** indicating date and location of a workshop regarding this proposed rulemaking.

ADDRESSES: Written comments regarding this proposed rule should be sent to David S. Guzy, Chief, Rules and Publications Staff, at the following addresses.

For comments sent via the U.S. Postal Service use: Minerals Management Service, Royalty Management Program, Rules and Publications Staff, P.O. Box 25165 MS 3021, Denver, CO 80225–0165. Courier or overnight delivery address is: Building 85, Room A–613, Denver Federal Center, Denver, CO 80225; or e-mail RMP.comments@mms.gov.

FOR FURTHER INFORMATION CONTACT: David S. Guzy, Chief, Rules and Publications Staff, telephone (303) 231–3432, FAX (303) 231–3385, e-Mail David.Guzy@mms.gov.

SUPPLEMENTARY INFORMATION: We will post public comments after the comment period closes on the Internet at http://www.rmp.mms.gov or contact David S. Guzy, Chief, Rules and Publications Staff, telephone (303) 231–3432, FAX (303) 231–3385.

I. General Background

In May 1994, MMS began a comprehensive review of its administrative appeals process, particularly as it relates to appeals involving orders or decisions issued by the Royalty Management Program (RMP). As part of that review, MMS held several informal meetings with State, tribal, and industry representatives to discuss the problems and possible solutions within the appeals process. The principal problems identified included the length of the appeals process, sometimes taking several years to resolve a case, and the excessive costs of the process to both MMS and appellants.

On August 13, 1996, the President signed the Federal Oil and Gas Royalty Simplification and Fairness Act, Pub. L. 104–185, as corrected by Pub. L. 104–200 (RSFA). Section 4 of RSFA amended the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1701 *et seq.*, and added a new FOGRMA § 115(h), 30 U.S.C. 1724(h), governing the Department's process for resolving appeals of MMS orders or decisions involving royalties and other payments due on Federal oil and gas leases. For appeals involving Federal oil and gas leases covered by this new provision, the Department has 33 months from the date a proceeding is commenced to complete all levels of administrative review. If the Department does not decide the appeal within 33 months, the appeal is deemed decided either for or against the Department, depending on the type of order and the monetary amount at issue in the appeal. The 33-month deadline does not apply to appeals involving Indian leases or Federal leases for minerals other than oil and gas. As a result of this MMS review and the new legislation, MMS announced a proposed rule in the **Federal Register** on October 28, 1996. The proposed regulation provided for amendments to 30 CFR part 290. On December 31, 1997, MMS announced that it intended to withdraw the October 28, 1996, proposed rule when it published a revised notice of proposed rule responding to the Royalty Policy Committee (RPC) report. 62 FR 68244. Accordingly we hereby withdraw the October 28, 1996, proposed rule.

In 1995, the Department of the Interior (DOI) established a RPC under the Minerals Management Advisory Board. The RPC's purpose is 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 includes representatives from States, Indian tribes and allottee organizations, minerals industry associations, Federal agencies and the public. At the RPC's first meeting in September 1995, it established eight Subcommittees, including the Appeals and Alternative Dispute Resolution (ADR) Subcommittee (Subcommittee). The Subcommittee was created to make recommendations to the RPC to improve the processes involving appeals and alternative dispute resolution. Membership in the Subcommittee 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. The Subcommittee agreed that the principal purpose of the MMS administrative appeals process should be the expeditious and independent review of appeals.

The Subcommittee recognized that the MMS appeals process had been under criticism and serious review since 1994 and believed that substantial reform was needed. Some of the problems the Subcommittee identified in the existing appeals process were:

1. Lack of timely resolution;
2. Lack of clarity in some orders;
3. Perceived lack of independence and unfairness of MMS Director-level appeals decisions due to the internal clearance process and communication within the Department between those involved in making the initial decision and those involved in making the decision on appeal;
4. Policy uncertainty—some orders issued without MMS having clearly decided and explained policy issues;
5. Inability of the appellant to determine what the administrative record for the order contains;
6. Allegedly 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; and
7. Duplication of effort between the MMS Director and Interior Board of Land Appeals (IBLA) levels of review.

Throughout its review of the appeals process, the Subcommittee insisted that its recommendations needed to meet certain principles. Any changes in the process:

1. Could not substantially harm the position of MMS;
2. Would need to ensure that the process would be completed within 33 months;

3. Should encourage the parties to develop the facts, clarify the issues, and resolve disputes at the earliest possible opportunity;

4. Would have to reduce the costs of the process to the participants;

5. Would clarify the role of Indian lessors as parties; and

6. Would clarify delegated State participation.

The RPC unanimously adopted and approved the recommendation of the RPC Appeals and ADR Subcommittee and submitted a report (RPC Report) to the Secretary of the Interior on March 27, 1997. The RPC Report recommended a number of specific steps involving both appeals and ADR processes. The RPC recommended changing the current two-stage appeals process into a one-stage IBLA administrative appeal process designed to solve the problems and meet the principles identified above. The Subcommittee recommended that:

1. MMS resolve all fundamental policy questions before it or a delegated State issues an 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 IBLA, under a special set of rules applicable to royalty appeals; and

5. DOI specify the differences in appeals involving Indian leases and Federal leases for minerals other than oil and gas because the provisions of RSFA do not apply to those leases.

On September 22, 1997, the Secretary accepted the RPC Report for implementation with some changes and clarifications. This proposed rule is based primarily on the RPC Report and the changes and clarifications identified in the Secretary's letter dated September 22, 1997.

To implement the RPC recommendations, as modified by the Secretary's letter, MMS formed a regulation writing team comprised of representatives from MMS, the IBLA, the Office of the Solicitor, and State audit offices. That team drafted the proposed rule with the goal of developing an appeals process implementing the RPC's recommendations in accordance with the Secretary's changes and clarifications.

During the drafting process, the team members heard concerns about whether the result of the recommendations of the RPC will actually advance the RPC's primary goal: namely, timely and efficient resolution of appeals. The pre-briefing procedures in the proposed rule are complex in order to meet the following goals:

(1) Implement RSFA provisions setting time limits on appeals and requiring at least one settlement conference for each appeal;

(2) Respond to other RSFA provisions regarding orders and the roles of lessees when their designees receive orders;

(3) Coordinate RSFA time limits with other provisions of the rule; and

(4) Respond to recommendations of the RPC involving enhanced participation of Indian lessors and delegated States in the appeals process; continued ability of the MMS Director to recommend whether to concur with, modify or rescind orders; and continued ability of Assistant Secretaries to decide appeals.

An example of a scenario illustrating the complexity of the proposed rule would be when the MMS Director modifies an order and the delegated State disagrees with the modification and intervenes. Assume in the example that both the appellant and MMS wish to file documents not contained in the record they certified under § 4.919 or to add issues not contained in the ''Joint Statement of Facts and Issues'' (this is often the case under the current process and is possible under the proposed appeals process). As a result of the expedited briefing process under the proposed rule, in the example, MMS and the delegated State would each file up to seven substantive documents (i.e. briefs, replies, responses, requests, surreplies), and the appellant would file up to six substantive documents, all in less than four months. The IBLA may have to issue two orders regarding the record prior to its final decision, and to consider up to twenty substantive pleadings in order to arrive at its final decision. (The current process usually involves three or four substantive pleadings and a single decision by the IBLA.) While this example does not reflect the proposed process in its simplest form, even more complicated processes are possible. Therefore, in cases such as this example, the pre-briefing procedures and more formal IBLA processes described in this proposed rulemaking will add expense to the appeal process for both appellants and MMS.

In recent years under the existing process the MMS Director has been deciding an average of approximately 213 appeals per year. Approximately 75 of these (35%) are appealed to IBLA. Thus, under the current process, a minority of MMS Director's decisions are appealed to IBLA.

Also, in recent years, we estimate that it has taken the IBLA, on average, about 18 months to issue a decision (counting from the date an MMS royalty appeal is fully briefed and ripe for decision). This number is based on data from the IBLA's docketing system.

The proposed rule is likely to increase the IBLA's workload, on average, for individual royalty appeals. Under the proposed rule, the IBLA would have to issue a decision in every appeal that is not resolved or settled by MMS and the appellant or decided by an Assistant Secretary. Even assuming that the IBLA's docket load does not increase under the proposed rule, the IBLA will have to issue a decision in a royalty appeal every 6 days in order to meet the 33-month deadline. This figure is based on 75 royalty appeals per year to the IBLA and 430 days to decide those appeals (20 months less weekends and holidays). It does not include the 130 royalty appeals currently pending before the IBLA, of which 81 are subject to RSFA's 33-month deadline.

Any additional workload also could affect IBLA's ability to timely decide appeals affecting Bureau of Land Management (BLM) and Office of Surface Mining programs, as well as appeals of royalty issues which are not subject to RSFA's 33-month deadline. The Department's Office of the Inspector General (OIG) is currently conducting an audit that is expected to address the timeliness of IBLA's disposition of MMS royalty appeals. OIG is expected to issue a draft audit report before this rule becomes final, and its report may provide information that would be useful in evaluating the implications of this proposed rule as well as any possible alternative proposals.

We recognize that there are deficiencies in the current process. We encourage comments on whether and how the procedures recommended in the RPC Report might serve to, or be modified to, make the appeal process more efficient and effective. We invite comment on whether alternatives to the proposed rule might reach the goal of the Royalty Policy Committee by a simpler route than the processes set forth in the proposed rulemaking.

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. These amendments would:

(a) Implement the RSFA requirements for settlement conferences and default

decisions if appeals are not resolved within 33 months of their commencement (similar to those contained in this rulemaking under §§ 4.906, 4.907, 4.911–4.913, 4.924–4.926, 4.950, 4.951, 4.954, 4.956, 4.957, and 4.970–4.972);

(b) Establish procedures for lessees to appeal notices sent to designees; and

(c) Incorporate internal time constraints for appeals pending before the MMS Director to ensure that the Department decides appeals within the RSFA 33-month deadline, such as those previously proposed, *see* 61 FR 33607 (1996).

However, retaining the current process, with amendments, might not address other goals of the RPC.

Several portions of this proposed rule would implement the RPC recommendations. First, the new proposed 43 CFR part 4, subpart J would establish a new procedure for appeals of royalty orders. The current regulations at 30 CFR part 290 and 43 CFR part 4, subpart E would no longer apply to appeals of royalty orders. Under the new proposed process, MMS's role would be limited to record development and settlement discussions at an early stage of the process and to deciding whether to modify or rescind orders prior to argument at the IBLA or to an Assistant Secretary. The IBLA (or an Assistant Secretary) would decide cases under a new, modified IBLA appeals process, and RSFA time limits would be imposed on appeals that are subject to that Act.

Second, the new proposed 30 CFR part 242 would establish procedures for orders that MMS and delegated States issue. The new part 242 would respond to the RPC recommendations on how MMS and delegated States should communicate their preliminary audit findings and issue orders. *See* RPC Recommendations at paragraphs 5–7. The general principle behind this part is that MMS and delegated States should clearly communicate specific information about the basis for orders. This part also would establish procedures for Indian lessors to request formally that MMS take actions with respect to their leases. That would help to implement the RPC recommendation that the new regulations clarify the standing and role of Indian lessors in the appeals process. *See* RPC Report at page 10. In addition, this part would incorporate certain RSFA provisions regarding orders and orders to perform restructured accounting and regarding notifying lessees when orders are sent to the persons designated by the lessees to pay their royalties. Finally, this part would incorporate appeals and service requirements that currently are found at 30 CFR part 243.

Third, the proposed revision of 30 CFR part 243 would implement changes that RSFA made to requirements for staying orders pending appeal. RSFA § 4(a) amended FOGRMA to add a new § 115(l), 30 U.S.C. 1724(l), ''Stay of Payment Obligation Pending Review.'' Section 115(l) allows any person (as that term is defined by FOGRMA § 102 (12)), who MMS or a delegated State orders to pay any obligation (other than an ''assessment'') subject to RSFA, to demonstrate that the person is ''financially solvent.'' Under the proposed rule, if MMS determines that the person is financially solvent, the person is entitled to a stay of an order (other than one to pay an assessment) without posting a bond or other surety instrument pending an administrative or judicial proceeding. If the person is unable to demonstrate financial solvency, the Secretary will require a bond or other surety instrument satisfactory to cover the obligation. The proposed regulations would explain the process and standards for demonstrating financial solvency. As part of those proposed regulations, MMS also is rewriting 30 CFR part 243 in ''plain language'' and revising it to eliminate references to 30 CFR part 290.

Because MMS is eliminating appeals to the MMS Director under 30 CFR part 290 for RMP orders, MMS rewrote that part to only refer to appeals of the MMS Offshore Minerals Management Program (OMM). MMS determined that it would be advantageous to amend its process for appeals from decisions by officials of OMM at the same time it proposes the revisions to the RMP appeals process. The proposed OMM appeals process is patterned after the process the BLM uses for appeals of BLM officials' decisions because they have similar responsibilities with respect to onshore Federal and Indian trust lands. We request comments on whether we should adopt this process for offshore appeals or whether we should retain the current process.

The Departmental team that drafted the proposed appeals rule received public input initially from the Royalty Policy Committee, as described above, and also conducted two public workshops and five outreach sessions with Indian tribes and individual Indian mineral owners. The two public workshops were held in Denver, Colorado on January 27, 1998, and March 30, 1998. These workshops were announced in the **Federal Register** (62 FR 68244, December 31, 1997, and 63 FR 11634, March 10, 1998) and were attended primarily by representatives of natural gas, oil, and coal producers, including representatives both of large integrated producers and of smaller independent producers. The team distributed to workshop participants copies of preliminary drafts of the proposed rule prior to the sessions, thereby providing participants an opportunity to prepare specific questions, suggestions, and comments.

The five outreach sessions with Indian lessors were as follows:

- *April 29, 1998,* Canadian, Oklahoma, Muskogee Area Office. This outreach meeting was attended by representatives of the Cherokee Nation, Choctaw Nation, and Creek Nation, as well as many individual Indian mineral owners and heirs. BIA Area Office and Agency staff also attended;
- *May 19, 1998,* Bismarck, North Dakota, Aberdeen and Billings Area Offices. BIA Agency representatives from Cheyenne River, Fort Berthold and Standing Rock attended this meeting. In addition, tribal members from the Three Affiliated Tribes (Mandan, Arikara, and Hidatsa) from Fort Berthold attended;
- *May 20, 1998,* El Reno, Oklahoma, Concho Agency. This outreach meeting was attended by individual Indian mineral owners from the Concho and Anadarko areas. BIA Area Office and Agency staff also attended;
- *June 12, 1998,* Scottsdale, Arizona, tribal members of the State and Tribal Audit Committee. This outreach meeting was attended by representatives of the Blackfeet Nation, Navajo Nation, Shoshone and Arapaho Tribe, Southern Ute Indian Tribe, and Ute Mountain Ute Tribe; and
- *July 7, 1998,* Denver, Colorado, Indian Energy and Minerals Conference. Attendees included representatives from various BIA Area Offices and Agencies, as well as representatives of the following Tribes: Alabama and Coushatta Tribes, Assiniboine and Sioux Tribes, Burns Paiute Reservation Tribe, Choctaw Nation of Oklahoma, Eastern Shoshone Tribe, Jicarilla Apache Tribe, Navajo Nation, Osage Tribe, Shoshone Nation, Southern Ute Tribe, Three Affiliated Tribes, and Ute Mountain Ute Tribe.

At these sessions, the team members described the rule and its anticipated effects on Indian lessors and received comments from individual Indian mineral owners, tribal representatives, and MMS and BIA representatives about how best to structure the rule to protect Indian trust resources.

As discussed below in the applicable Section-by-Section analysis, this rulemaking also would propose to

charge reasonable processing fees where appropriate.

II. Section-by-Section Analysis, 43 CFR Part 4, Subpart J

Section 4.901 What is the Purpose of This Subpart?

This section would state that the purpose of this subpart is to explain the procedures for appeals of MMS or delegated State orders, and MMS decisions not to issue orders under 30 CFR part 242, concerning reporting to the MMS RMP and the payment of royalties and other payments due under leases subject to this subpart. This subpart would replace 30 CFR part 290 with respect to appeals of RMP and delegated State actions regarding royalties and other payments. The regulation at 30 CFR part 290 would only apply to appeals of MMS OMM actions regarding offshore lease operational obligations, not to actions regarding royalties and other payments.

Section 4.902 What Leases are Subject to This Subpart?

This section would explain that this subpart applies to all Federal mineral leases onshore and on the Outer Continental Shelf (OCS), and to all federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands regardless of the statutory authority under which the lease was issued or maintained. See Section-by-Section analysis for § 4.903 for an explanation of the definition of ''lease.'' However, some procedures under this rule would apply only to Federal oil and gas leases because the RSFA requirement for deciding appeals within 33 months, 30 U.S.C. 1724(h), applies only to such leases. Accordingly, those procedures would specifically state that they do not apply to Federal solid mineral and geothermal leases, or Indian leases.

Section 4.903 What Definitions Apply to This Subpart?

This section would explain the definitions that you will need to know for this subpart. However, other definitions in this part, or 30 CFR Chapter II, which are not specifically defined in this proposed rule, and do not conflict with definitions in this proposed rule, also would apply.

Affected would mean, with respect to delegated States and States concerned, that the appeal concerns an order regarding a Federal onshore or Outer Continental Shelf lease, within a State's borders or offshore of the State, from which the State, or a political subdivision of the State, receives a statutorily-prescribed portion of the royalties; and, with respect to Indian lessors, that the appeal concerns an order regarding the Indian lessor's federally-administered mineral lease. This definition is intended to distinguish between States concerned, delegated States, and Indian lessors that are directly affected by the action (or inaction) under appeal, and those that are either only indirectly affected or that are merely interested in the appeal's outcome.

Assessment would mean any fee or charge levied or imposed by the Secretary or a delegated State other than: (1) the principal amount of any royalty, minimum royalty, rental, bonus, net profit share or proceed of sale; (2) any interest; or (3) any civil or criminal penalty.

Delegated State would mean a State to which MMS has delegated authority to perform royalty management functions pursuant to an agreement or agreements under regulations at 30 CFR part 227. This definition is essentially the same as that under RSFA § 2(1), adding FOGRMA § 3, 30 U.S.C. 1702(22).

Designee would mean the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf. This definition is essentially the same as that under RSFA § 2(1), adding FOGRMA § 3(24), 30 U.S.C. 1702(24). Accordingly, the definition would cite the rule implementing the requirements of RSFA § 6(g), amending FOGRMA § 102(a), 30 U.S.C. 1712(a), which allows lessees to designate another person to pay royalties on their behalf by written notice filed with MMS. Thus, this definition would apply only to appeals involving royalties and other payments due on production from Federal oil and gas leases after September 1, 1996, because RSFA applies only to such payments.

IBLA would mean the Interior Board of Land Appeals.

Indian lessor would mean an Indian tribe or individual Indian mineral owner with a beneficial or restricted interest in a property that is subject to a lease issued or administered by the Secretary on behalf of the tribe or individual Indian mineral owner.

Lease would mean any contract, net profit share arrangement, joint venture, or other agreement authorizing exploration for or extraction of any mineral, regardless of whether the instrument is expressly denominated as a ''lease.'' This would include all agreements the Secretary approves under the Indian Mineral Development Act, 25 U.S.C. 2101 *et seq.*

Lessee would mean any person to whom the United States, or the United States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this subpart, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this subpart has been assigned. This definition is essentially the same as that under RSFA § 2(1), amending FOGRMA § 3(7), 30 U.S.C. 1702(7), and would include owners of operating rights. RSFA defines ''lessees'' to include holders of operating rights. However, RSFA does not apply to Federal oil and gas leases for production prior to September 1, 1996, other Federal solid mineral and geothermal leases, and Indian leases. Therefore, we did not separately define operating rights owners or operators because recipients of orders not subject to RSFA may appeal under this rule regardless of whether they are a ''lessee'' under RSFA.

Monetary obligation would mean any requirement to pay or to compute and pay any obligation in any order. We included this definition because Congress did not define ''monetary obligation'' in RSFA for purposes of the default decision rule in 30 U.S.C. 1724(h), which §§ 4.956 and 4.972 would implement. Under this definition, ''monetary obligation'' would include amounts that MMS or delegated States assert that lessees, designees, and payors owe, as well as amounts that lessees, designees, and payors assert are owed to them (for example refunds of alleged overpayments). The definition of ''monetary obligation'' would include amounts due as a result of orders to compute and pay because there is no indication that Congress intended to restrict its meaning to only an ''order to pay'' a specifically stated amount. Moreover, orders to compute and pay usually contain an ''order to pay'' additional royalty amounts due based on the test leases and months.

This definition also would clarify what constitutes a single monetary obligation as opposed to separate monetary obligations when an order covers multiple issues. Paragraph (1) would state that if an order asserts a monetary obligation arising from one issue or type of underpayment that covers multiple leases or production months, the total obligation for all leases or production months involved constitutes a single monetary obligation. For example, assume MMS issued an order to you determining that you underpaid royalties on Lease Nos. A, B, and C, for production months January 1, 1996, through December 31, 1996, because you failed to pay royalties on

tax reimbursements that are part of your gross proceeds. The amount owed under that order would constitute one monetary obligation, not three (one for each lease), or twelve (one for each production month), or thirty-six (one for each production month for each lease).

Paragraph (2) would state that if an order asserts monetary obligations arising from different issues or types of underpayments for one or more leases, the obligations arising from each separate issue, subject to paragraph (1), constitute separate monetary obligations. For example, assume the same facts as described under paragraph (1). However, also assume that the order determines that you underpaid royalties on the same leases for the same production months because you improperly calculated a gas processing allowance. In that situation, the gross proceeds issue described in paragraph (1) would constitute one monetary obligation, and the processing allowance issue would constitute another monetary obligation.

Subparagraph (3) would state that if an order asserts a monetary obligation with a stated amount of additional royalties due, plus an order to perform a restructured accounting arising from the same issue or cause as the specifically stated underpayment, the stated amount of royalties due plus the estimated amount due under the restructured accounting, subject to paragraphs (1) and (2), together constitute a single monetary obligation. For example, assume the same facts as described under paragraph (1). Also assume that the order requires you to perform a restructured accounting on all of your leases to determine whether you underpaid royalties on those leases because you failed to pay royalties on tax reimbursements. That order would constitute one monetary obligation. However, assuming the same facts as described under paragraphs (1) and (2), if the order also required you to perform a restructured accounting on all of your leases to determine whether you calculated the proper processing allowance, then the gross proceeds issue described in paragraph (1), together with the requirements to perform a restructured accounting on tax reimbursements, would constitute one monetary obligation, and the processing allowance issue, together with the order to perform a restructured accounting on the processing allowance issue, would constitute another monetary obligation.

Nonmonetary obligation would mean only any duty of a lessee or its designee to deliver oil and gas in kind, or any duty of the Secretary to take oil and gas royalty in kind. This definition is consistent with the definition of ''obligation'' under RSFA § 2(1), adding FOGRMA § 3(25), 30 U.S.C. 1702(25), because these obligations are the only two under the statutory definition that are ''nonmonetary.'' Thus, for example, orders to report or produce information and denials of requests for exceptions from various reporting requirements would not be ''nonmonetary obligations'' because they are not defined as ''obligations'' under RSFA.

Notice of order would mean the notice under 30 CFR part 242 that MMS or a delegated State would provide to a lessee stating that MMS or the delegated State has issued an order to the lessee's designee. As stated above, RSFA allows lessees to designate another person to pay royalties on their behalf by written notice filed to MMS. 30 U.S.C. 1712(a). However, only lessees, not their ''designees,'' are liable for any payment obligations. Id. Thus, if MMS issues a written order to pay to a designee, RSFA's definition of ''order to pay'' requires MMS to serve a notice of that order on that designee's lessee. 30 U.S.C. 1702(26), as added by RSFA § 2(1).

Obligation would mean:

(1) A lessee's, designee's or payor's duty to:

(i) Deliver royalty-in-kind; or

(ii) Make a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment; and

(2) The Secretary's duty to:

(i) Take oil or gas royalty in kind; or

(ii) Make a lease-related payment, refund, offset, or credit, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or interest. This definition is essentially the same as that under RSFA § 2(1), adding FOGRMA § 3(25), 30 U.S.C. 1702(25).

Order would mean any document issued by the MMS Director, officials of the MMS RMP, or a delegated State that contains mandatory or ordering language that requires the recipient of an order to do any of the following for any lease subject to this subpart: report, compute or pay royalties or other obligations, report production, or provide other information. The proposed rule would refer to 30 CFR part 242, which is being proposed in this same **Federal Register** Notice, to refer appellants to the standards for issuing orders contained in that part.

The purpose of this definition is to establish the types of orders that are appealable under this subpart. This section would define what actions are appealable orders and what actions are not appealable orders. Only certain written orders, instructions or other actions by the MMS Director, RMP officials, or a delegated State concerning the reporting and payment of royalties and other payments due under leases subject to this proposed subpart would be appealable ''orders'' under this proposed rule.

Orders would have to include mandatory or ordering language. For example, if you received a written instruction or other action by the MMS Director, RMP, or a delegated State that contained language such as ''you must pay,'' ''you must recalculate and pay,'' ''you are ordered to pay,'' ''you are ordered to recalculate and pay,'' ''you may not take this credit,'' or ''you may not use this exception,'' that would be considered mandatory or ordering language and the order would be appealable under this proposed rule.

Under paragraph (1), orders would include but not be limited to:

(i) An order to pay. Order to pay would be defined under 30 CFR part 242, proposed in this same rulemaking, and that definition would essentially be the same as that under RSFA § 2(1), adding FOGRMA § 3(26), 30 U.S.C. 1702(26);

(ii) An MMS or delegated State decision to deny a lessee's, designee's, or payor's written request that MMS make a payment, refund, offset, or credit of money to the lessee or designee related to the principal amount of any royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or any interest or assessment related to a lease obligation. These are MMS's ''obligations'' as defined under RSFA, § 2(1), adding FOGRMA § 3(25)(A), 30 U.S.C. 1702(25)(A). Thus, for example, if a lessee or designee believes MMS has improperly denied a refund of a claimed overpayment, the lessee or designee may appeal that denial. However, although a lessee would have standing to file an administrative appeal concerning an MMS decision not to take royalty-in-kind, we do not believe that the lessee would have any substantive basis for the appeal because the decision whether to take royalty-in-kind is committed to the Secretary's discretion by law. 30 U.S.C. 192;

(iii) A denial of a request for an exception from any valuation and reporting requirement;

(iv) An order to perform restructured accounting. Orders to perform restructured accounting would be defined under 30 CFR part 242, proposed in this same rulemaking, and that definition would be consistent with the description in RSFA § 4(a), adding FOGRMA § 115(d)(4)(B)(i), 30 U.S.C.

1724(d)(4)(B)(i). However, an order to perform a restructured accounting that requires the recipient to provide schedules of recalculations would not be considered an order to provide documents or information under this proposed rulemaking. *See* RSFA, § 4(a), adding FOGRMA § 115(d)(4)(C), 30 U.S.C. 1724(d)(4)(C), which provides that ''[a]n order to perform a restructured accounting shall not mean or be construed to include any other action by or on behalf of the Secretary or a delegated State;''

(v) An order to file a report related to any royalty or other lease obligation under 30 CFR part 210 or 216; and

(vi) An order to provide documents or information. This section also would make clear that orders to perform a restructured accounting are not ''orders to provide documents or information.'' As discussed below, under proposed § 4.905, an order to provide documents or information is not appealable under this subpart if it is issued by the Associate Director for Royalty Management or by someone to whom that Associate Director has delegated the authority to issue orders to provide documents or information that are final for the Department.

This section also would state what MMS or delegated State actions would not constitute ''orders.'' As a threshold matter, actions that the MMS OMM takes regarding offshore lease operational obligations would not be appealable ''orders'' under this proposed rule. For example, OMM actions that allocate production or otherwise affect production volume would not be appealable ''orders'' under this subpart even if they could affect royalty calculations. Those orders would be appealable under 30 CFR part 290.

Under paragraph (2)(i), orders would not include non-binding requests, information, and guidance such as:

(A) A Preliminary Determination Letter issued under proposed 30 CFR 242.102. These are commonly called ''issue letters'' and do not contain mandatory or ordering language. Rather, they inform the recipient that MMS has made a preliminary determination, and invite responses to that determination prior to issuance of an appealable ''order'';

(B) Advice or guidance on how to report or pay, including a valuation determination, unless it contains mandatory or ordering language. For example, assume that you have asked MMS whether it believes that you are properly valuing your production under a particular regulation. Also assume that MMS responds that under its interpretation of the regulations, it does not believe that you are properly valuing your production. That guidance would not be appealable. However, if you ignored MMS's guidance, and continued valuing your production using your valuation method, MMS could later issue an order stating that you must pay additional royalty because MMS has determined that you improperly valued that production. In such instances, you could appeal that order; and

(C) A policy determination. For example, a general letter to royalty payors advising them of RMP's interpretation regarding a particular issue—such as the RMP May 3, 1993, ''Dear Payor Letter'' on the royalty consequences of gas contract settlements—would not be appealable.

The Department does not consider such documents ''orders'' because they do not require anyone to take any specific action. However, if a valuation determination or a letter to payors includes mandatory language requiring a person to take a specific action with respect to a mineral lease administered by the Secretary, then it is an order. In addition, a person's failure to follow guidance or policy determinations would not preclude that person from later appealing an ''order'' with mandatory language requiring the person to follow such guidance.

Paragraph (ii) would state that subpoenas also would not be considered ''orders.'' Subpoenas are enforceable directly by the United States Government in federal district court under 30 U.S.C. 1717(b), and are not subject to administrative appeal. Therefore, they are not appealable ''orders.''

Under paragraph (2)(iii), orders to pay that MMS issues to refiners or other persons involved in disposition of royalty taken in kind would not be classified as ''orders'' under this subpart, because those orders arise out of contracts for sale of royalty-in-kind (RIK) production and not out of obligations under leases subject to this subpart. *See* related changes to 30 CFR part 208 in this same notice.

Party would mean MMS, any person who files a Notice of Appeal, and any person who files a Notice of Joinder or Intervention Brief in an appeal under this subpart. This definition is necessary because ''parties'' have certain rights and obligations under this proposed rulemaking that other participants in the appeals process do not.

Payor would mean any person responsible for reporting and paying royalties for:

(1) Federal oil and gas leases for production before September 1, 1996;

(2) Federal mineral leases other than oil and gas leases; and

(3) Leases on Indian lands subject to this Subpart. This definition is necessary because the term ''designee'' is used for Federal oil and gas leases subject to RSFA, and ''payor'' is used for leases not subject to RSFA. In addition, designees have certain requirements under this proposed rulemaking, such as serving their Notice of Appeal on their lessee(s) under § 4.907(d).

Reporter would mean a person who submits reports for leases subject to this subpart regardless of whether that person has payment responsibility.

State concerned would mean the State that receives a statutorily-prescribed portion of the royalties from a Federal onshore or Outer Continental Shelf lease. This definition is modeled after the corresponding definition under RSFA, § 2(1), adding FOGRMA § 3(31), 30 U.S.C. 1702(31).

Section 4.904 Who May File an Appeal?

Under paragraph (a), if you receive an order, as defined under this subpart, you could appeal that order if the order adversely affects you, except as provided under § 4.905.

Under paragraph (b), if you are a lessee and you receive a Notice of Order, you would have three options under this proposed rule regarding appealing the order issued to your designee. First, you could appeal the order yourself. If you chose to appeal the order yourself, you could make your own arguments in the appeal as an appellant, regardless of whether your designee also appeals the order or makes those arguments.

Second, you could join in your designee's appeal under § 4.908. We added the joinder provision to protect lessees should the designee decide during some part of the appeals process that it no longer wishes to pursue the appeal. If you chose to join your designee's appeal under § 4.908, you would be deemed to appeal the order jointly with the designee, but the designee would have to fulfill all requirements imposed on appellants under this subpart. Thus, you could not file any submissions or pleadings separately from the designee. The purpose of limiting pleadings to designees is to prevent numerous duplicative submissions by multiple lessees of a single designee.

Third, you could neither appeal nor join, but instead rely on your designee's appeal. However, if you chose this option, your designee's actions with

respect to the appeal, and any decisions in the appeal, would bind you. In other words, if your designee lost the appeal, you could not reappeal the same order. Likewise, if your designee discontinued its appeal, you could not reappeal the same order or continue the appeal for the designee.

Under paragraph (c), if you are an Indian lessor, you could file an appeal of any MMS decision not to issue an order under 30 CFR part 242 that adversely affects you. Part 242, also proposed in this **Federal Register** Notice, would explain the process for Indian lessors to request that MMS issue an order. This paragraph would implement the RPC Report's recommendation that we clarify the appeal rights of Indian lessors. RPC Report, page 10. Note, however, that States could not appeal orders or decisions not to issue orders. Delegated States could intervene under § 4.934 in an appeal of an order. We decided not to allow States to appeal orders or decisions not to issue orders because, unlike Indian lessors, States do not have a property interest in leases. In addition, States can request authority to issue orders pursuant to an agreement or agreements under MMS's regulations at 30 CFR part 227.

Section 4.905 What May I Not Appeal Under This Subpart?

This section would state that you could not appeal:

(a) An action that is not an order, as defined in this subpart;

(b) An order to provide documents or information issued under 30 CFR 242.104(b)(4) by the Associate Director for Royalty Management, or any person to whom that Associate Director has delegated the authority to issue such orders that are final for the Department. We propose to make these orders final for the Department because: (1) courts have consistently upheld MMS's authority to issue orders to produce documents and information, *see Shell Oil Co. (On Reconsideration,* 132 IBLA 354 (overruling *Shell Oil Co.*, 130 IBLA 93), *aff'd, Shell Oil Co.* v. *Babbitt,* 945 F. Supp 792 (D. Del. 1996), *aff'd,* 125 F.3d 172 (3d Cir. 1997); *Santa Fe Energy Products Co.,* 127 IBLA 265 (1993), *aff'd Santa Fe Energy Products Co.* v. *McCutcheon,* No. 94–C–535, slip op., (D. Colo. Mar. 30, 1995), *aff'd,* 90 F.3d 409 (10th Cir. 1996); and (2) it would avoid the delay caused by administrative appeals of such orders. Delays associated with these types of orders are particularly detrimental because they interfere with MMS's and delegated States' ability to determine whether additional royalties or other payments may be due. Accordingly, we propose to make such orders subject to judicial review directly. However, if the order is issued by a person other than the Associate Director for Royalty Management, or a person delegated the authority to issue such final orders, then it would be appealable under this subpart.

(c) A determination of the surety amount or financial solvency under 30 CFR part 243, subparts B or C. These determinations are final for the Department and are not subject to administrative appeal.

Section 4.906 When Must I File an Appeal?

You would have to file your appeal with MMS as required under § 4.960 within 60 days after MMS or a delegated State serves the order or Notice of Order, or MMS serves a decision not to issue an order under 30 CFR part 242. An order, Notice of Order, or decision not to issue an order would be considered served as provided under 30 CFR 242.305.

Formerly, appeals of MMS RMP orders had to be filed within 30 days of the person's receipt of the order. This rule extends the time in which to appeal to 60 days from receipt, as the RPC Report recommended. The 60 day time frame also implements the requirement under RSFA, § 4(a), adding FOGRMA § 115(d)(4)(B)(ii)(V), 30 U.S.C. 1724(d)(4)(B)(ii)(V), that orders to perform a restructured accounting ''provide the lessee or its designee 60 days within which to file an administrative appeal of the order. * * *.''

Unlike other appeals to IBLA, which are filed with the office that issued the decision being appealed (see 43 CFR 4.411), these appeals would be filed with a centralized office in MMS called the MMS Dispute Resolution Division (DRD). We chose this centralized approach to ensure accurate documentation of receipt, to facilitate collection of processing fees, and to minimize delays in initiating record development and settlement efforts. In effect, the DRD would receive the appeals on behalf of the MMS or delegated State office that issued the order being appealed.

We would eliminate the grace period for filing formerly included under 30 CFR 290.5(b) (mailed within the 30 day appeal period and received within 10 days of the 30th day). Instead, we would extend the time period within which to file to 60 days, with no exceptions or grace periods. However, to make filing easier, we would allow filing by telefax, and we plan to centralize the docketing function to ensure that employees are present during business hours to receive appeals. We specifically request comments on what methods of filing we should accept and ways we could provide appellants with documentation of the receipt date other than a return receipt card.

Section 4.907 How Must I File an Appeal?

Under paragraph (a) of this proposed section, for an appeal to be considered filed, the MMS DRD would have to receive the appellant's Notice of Appeal, Preliminary Statement of Issues, and Processing Fee within the time required under § 4.906.

The written Notice of Appeal would have to include a copy of the order, or MMS decision not to issue an order, that the appellant is appealing. Appellants would not be allowed to extend the 60-day period for MMS to receive their Notice of Appeal.

The written Preliminary Statement of Issues would have to state the issues the appellant will raise on appeal. The RPC Report recommended requiring a Preliminary Statement of Issues. The Secretary, in his September 22, 1997, letter to the RPC, modified that RPC Report recommendation to state that appellants must ''specifically identify their legal and factual disagreements with the MMS action.'' However, he stated that it need not be a legal brief or include the level of detail appellants currently provide in a Statement of Reasons to the MMS Director. The Secretary stated that the purpose of the Preliminary Statement of Issues is to ''ensure productive, well-informed record development and settlement efforts.'' Moreover, MMS or the delegated State will have stated the facts and law or regulations relied upon in issuing the order. Thus, it is imperative that the appellant specifically identify the factual and legal disagreements the appellant has with an order so that MMS can properly evaluate the appellant's position. For example, a blanket statement that the appellant disagrees with the order, without stating the legal or factual basis for the disagreement, would not be sufficient information for MMS to determine whether the appellant's position has merit, or to respond to the appellant. Nor would a list of issues, without some explanation of how the facts of the appeal raise those issues, be sufficient. Therefore, the proposed rule would require appellants to specifically identify the legal and factual disagreements they have with the order, or MMS decision not to issue an order, they are appealing. See Appendix A for

an example of a Preliminary Statement of Issues.

In addition to helping MMS and the appellant prepare for the record development and settlement conferences, this requirement would would help highlight those appeals in which it would be appropriate for the MMS Director to take action to rescind or modify the order. This is particularly important because appellants would not be required to provide a Statement of Reasons which comprehensively briefs their legal position until after the MMS Director has the opportunity to rescind, modify, or concur with the order. Accordingly, it is in the appellant's best interest to set out the issues and disagreements specifically, because it will help to save litigation time and expense before the IBLA.

The nonrefundable processing fee would be $150. You would have to pay the processing fee as required under § 4.965 or seek a fee waiver or reduction under § 4.966. Our analysis leading to the choice of $150 as the processing fee at this stage of the appeal is in the Section-by-Section analysis for § 4.965 of this proposed rule. Indian lessors would not have to pay the processing fee.

Unlike the Notice of Appeal, you would be allowed to request an automatic extension of time of up to 60 days to file the Preliminary Statement of Issues and to pay the processing fee. Any such request would have to be in writing and be received by MMS within the time allowed for filing the appeal. After the automatic extension, you could request additional extensions subject to agreement by MMS.

Under paragraph (b), you would have to serve your Notice of Appeal, Preliminary Statement of Issues, and any attached documents as required under § 4.962.

Under paragraph (d), if you are a designee, when you file your appeal under paragraph (a), you would have to serve your Notice of Appeal on the lessees who MMS identifies under proposed 30 CFR 242.105(a)(5)(i) in the order you appealed. We included this requirement because lessees would have to join an appeal under § 4.908(a) within 30 days after they receive the designee's Notice of Appeal. Thus, it is imperative that designees timely serve lessees with the Notice of Appeal.

Section 4.908 If I am a Lessee, Can I Join a Designee's Appeal?

Under this section, if you are a lessee, and your designee files an appeal under § 4.904, you could join in that appeal within 30 days after you received your designee's Notice of Appeal. You could join that appeal by filing a Notice of Joinder with the MMS DRD as required under § 4.960. We added the joinder provision to protect lessees by giving them the ability to continue the appeal if the designee decides during some part of the appeals process that it no longer wishes to pursue the appeal. As stated above, we included a requirement under § 4.907(c) that designees timely serve lessees with the Notice of Appeal to facilitate the joinder process. Lessees also would be required to serve their Notice of Joinder on all parties to the appeal and other persons as required under § 4.962.

Finally, lessees that neither appeal nor join in their designee's appeal would be bound by their designee's actions with respect to the appeal and any decisions in the appeal. In other words, if a lessee neither appealed nor joined its designee's appeal, and the designee did not pursue the appeal, or lost the appeal, the lessee could not continue that appeal either in the Department or in district court.

Section 4.909 What is the Effect of Joining an Appeal?

Under this section, if you joined in an appeal under § 4.908, you would be deemed to appeal the order jointly with the designee. However, as discussed in the Section-by-Section analysis for § 4.904, the designee would have to fulfill all requirements imposed on appellants under this subpart. Thus, if you joined in your designee's appeal, you could not file submissions or pleadings separately from the designee. As discussed above, we limited the submission of pleadings to designees to prevent numerous duplicative submissions by multiple lessees of a single designee.

Finally, a lessee who has joined an appeal under § 4.908 could continue an appeal as an appellant if the designee notified the lessee under § 4.910(a) that it no longer wanted to pursue the appeal. If the lessee wanted to continue the appeal, then it would become the ''appellant'' and would have to meet all requirements of this subpart.

Section 4.910 What Must a Designee do if it Decides to Discontinue an Appeal?

Under this section, if you are a designee and you decide to discontinue participation in the appeal at any time, you would have to serve written notice on all lessees who have joined in the appeal under § 4.908, and on the office or officer with whom any subsequent submissions or pleadings must be filed, no later than 30 days before the next submission or pleading is due. The purpose of serving your lessee if you wish to discontinue the appeal is to give the lessee notice to allow the lessee to continue the appeal in your place under § 4.909(d). You also would have to serve the office where the next pleading is due to allow that office to close the appeal if a lessee does not continue the appeal under § 4.909(d). Additionally, you would have to serve your notice on all parties to the appeal and other persons as required under § 4.962.

Section 4.911 When Does My Appeal Commence?

This section would explain when your appeal commences for purposes of the period in which the Department must issue a final decision in your appeal under 30 U.S.C. 1724(h)(1) and § 4.956 of this proposed rule, or which the Department uses as guidance to track your appeal under § 4.948.

As explained above, under § 4.907(a), the date your appeal would be considered filed would be the date the MMS DRD receives all three items you must file under § 4.907(a)—the Notice of Appeal, Preliminary Statement of Issues, and processing fee. Thus, paragraph (a) of this section would provide that your appeal commences on the date the MMS DRD receives the last of all the items you must file under § 4.907(a).

RSFA did not define ''commencement'' for purposes of the required time for the Department to issue a final decision under RSFA § 4(a), adding FOGRMA § 115(h), 30 U.S.C. 1724(h). RSFA states that:

> The Secretary shall issue a final decision in any administrative proceeding, including any administrative proceeding pending on the date of enactment of this section, within 33 months from the date such proceeding was commenced or 33 months from the date of such enactment, whichever is later.

RSFA § 4(a), 30 U.S.C. 1724(h)(1). An ''administrative proceeding'' is defined under RSFA as ''any Department of the Interior agency process in which a demand, decision or order issued by the Secretary or a delegated State is subject to appeal or has been appealed.'' RSFA § 2, adding FOGRMA § 3(18), 30 U.S.C. 1702(18). RSFA did define ''commence'' ''with respect to a judicial proceeding'' and ''with respect to a demand.'' 30 U.S.C. 1702(20). However, the definition of ''commence'' under 1702(20) clearly does not encompass ''administrative proceedings'' under 30 U.S.C. 1724(h)(1) or 1702(18). Rather, ''commence'' under § 1702(20) deals with the ''commencement'' of judicial proceedings or demands for purposes of the RSFA seven-year limitations period under RSFA § 4(a), adding FOGRMA

§ 115(b), 30 U.S.C. 1724(b). Accordingly, it is necessary for us to define ''commencement'' in this proposed rule for purposes of § 1724(h).

We believe it is more efficient to define ''commencement'' as the date all three items are filed, rather than defining ''commencement'' as the date when the appellant files the Notice of Appeal and then requiring the appellant to seek extensions for all other items required to actually commence the appeal. In addition, we cannot begin to process an appeal until the appellant tells us what issues the appellant is raising on appeal in its Preliminary Statement of Issues. Thus, if you requested an automatic extension of time of 60 days within which to file your Preliminary Statement of Issues, even though you filed your Notice of Appeal and paid your processing fee, your appeal would not ''commence'' until we received your Preliminary Statement of Issues. The same would be true for processing fees so that if you requested an automatic extension of time of 60 days within which to pay your fee, your appeal would not commence until the date we received your processing fee.

Paragraph (c) would tell you when your appeal commences if you requested a fee waiver or reduction under § 4.966. In such instances, your appeal would not commence (assuming you already filed your Preliminary Statement of Issues) until the date the MMS DRD either: (1) grants your request for a waiver; (2) receives the reduced fee if the MMS DRD grants your request for a reduction in the fee; or (3) receives the entire fee if the MMS DRD denies your request for a reduction in the fee.

Section 4.912 When Does My Appeal End?

This section would explain that your appeal ends on the same day of the month of the 33rd calendar month after your appeal commenced under § 4.911, plus the number of days of any applicable time extensions. Thus, if your appeal commenced on January 1, 1998, and you requested an extension of time under § 4.958 of 60 days within which to file your Statement of Reasons, your appeal would ''end'' on November 30, 2000 (January 1, 1998 to October 1, 2000 (33 months), plus 60 days).

If the 33rd calendar month after your appeal commenced does not have the same day of the month as the day of the month your appeal commenced, then the initial 33-month period ends on the last day of the 33rd calendar month. For example, if your appeal commenced on the 31st of a month, but would end 33 months later in a month with only 30 days, your appeal would end on the 30th day of the 33rd month, not on the first day of the 34th month.

Section 4.913 What if a Due Date Falls on a Day the Department or Relevant Office is Not Open for Business?

This section would explain that if a due date required under this subpart falls on a day the relevant office is not open for business (such as a weekend, Federal holiday, or shutdown), then due date would be the next day the relevant office is open for business. Thus, if your Statement of Reasons was due on December 25, 1998, a Federal holiday falling on a Friday, you would be required to file it at the latest on Monday, December 28, 1998. Likewise, if the IBLA is required to issue a decision on December 25, 1998, the IBLA would be required to issue the decision on Monday, December 28, 1998.

Section 4.914 What Will MMS Do After It Receives My Appeal?

This section would explain what the MMS DRD will do with your appeal after it is received.

Paragraph (a) would explain that when MMS receives your appeal, it will date stamp each document received (e.g., your Notice of Appeal and Preliminary Statement of Issues, or request(s) for extension of time to file your Preliminary Statement of Issues and/or processing fee). Date stamping would document whether the appeal is timely filed and be used to calculate the commencement and ending of the appeal. The MMS DRD also would document receipt of your processing fee using any method it deems appropriate for the method of payment. Payments by check would be date stamped on the day received unless received after normal business hours, in which case the date received would be the next business day. For payments by Electronic Funds Transfer, MMS could rely on reports, statements, or online inquiries through an Automated Clearing House or Federal Reserve Wire network.

Paragraph (b) would state that the MMS DRD will decide whether your appeal is filed on time. If the MMS DRD did not receive your Notice of Appeal, Preliminary Statement of Issues, and processing fee, or your request for extension of time to file your Preliminary Statement of Issues or processing fee, or your request for a waiver or fee reduction, by 5:00 p.m. (local time of the MMS DRD) on the 60th day after you received the order, Notice of Order, or MMS decision not to issue an order, your appeal would not be timely filed and would not be considered. In such instances, MMS would notify you under paragraph (c) that your appeal was not timely filed.

The RPC Report recommended that we notify appellants whether their appeal is timely filed within 10 days of the Department's receipt of an appeal. However, we decided not to impose a time requirement in this proposed rulemaking because, although we expect we would usually meet such a 10-day time frame, problems could arise which need further investigation to determine whether the appeal was timely filed. To avoid disputes over the consequences of any such delay, and because there is no significant consequence to any party, we decided to omit the 10-day requirement.

Although appeals would not be under the jurisdiction of MMS, the designated office in MMS would determine whether the appeal was timely filed. This is consistent with other IBLA regulations where appeals are initially filed with the office that issued the decision or order under appeal, and those offices determine whether the appeals are timely filed. *See e.g.,* 43 CFR 4.470.

If your appeal was timely filed, MMS would provide you with a docket number for you to use in future correspondence related to your appeal. The docket number would not be an MMS docket number but, instead, would be a Departmental number. Thus, unlike the past appeals process wherein MMS assigned your appeal an MMS docket number, and the IBLA assigned it an IBLA docket number, you would use the Departmental docket number MMS assigns your appeal through the entire appeal process. This is because it is administratively simpler for both MMS and IBLA to track an appeal through a coordinated docketing system. With its notification of your docket number, MMS would also include instructions regarding scheduling a record development conference and settlement conference.

Section 4.915 How Will MMS Schedule Record Development Conferences?

Paragraph (a) would provide that if you file an appeal under this subpart, MMS will schedule you to attend at least one record development conference within 60 days of the commencement of your appeal under § 4.911. You would be allowed to extend this 60-day period under § 4.958.

Paragraph (b) would provide that you may request that record development conferences take place via telephone, video conference, or in person.

Paragraph (c) would provide that MMS will determine the time and

location of record development conferences and whether record development conferences will take place via telephone, video conference, or in person. MMS would not require you to travel without your agreement.

Section 4.916 Who Must and Who May Participate in Record Development Conferences?

This section would explain who must and who may participate in record development conferences. Our goal is to allow interested affected persons that have an ability to provide useful information, views, or insights to participate in record and issue development.

Paragraph (a) would state that appellants and relevant MMS offices must participate in record development conferences. We believe that those persons must participate because they are the ones with the facts and documentation necessary to develop the record.

Because other interested persons may wish to participate in record development conferences, paragraph (b) would state that an affected delegated State or affected State concerned, an affected Indian lessor, and a lessee, designee, payor, or reporter, if not an appellant, could participate in the record development conferences.

Paragraph (c) would state that any person who refuses to participate in any record development conference as required under paragraph (a) could not file any documents and materials for the record. Under paragraph (d), any person who may participate as allowed under paragraph (b) but doesn't participate in any record development conferences may not file any documents or materials for the record. This means that those parties could not file any documents, at any time, including under § 4.923. The purpose of paragraphs (c) and (d) is to ensure that the record is as complete as possible by the end of the record development process, rather than to allow persons who could or should have participated in that process to add to the record at a later date.

Section 4.917 How Will I Receive Notification of Record Development Conferences?

The purpose of this section would be to identify who in the Department has responsibility for notifying the various participants of the record development conferences. Because MMS would have such information, it would have the primary notification responsibility. Thus, paragraph (a) would explain that after MMS schedules any record development conference under § 4.915, MMS will notify the appellant, lessees that joined under § 4.908, the office that issued the order, affected delegated States, the persons that affected States concerned identify under § 4.961, and affected Indian tribes or appropriate BIA offices of any record development conference.

MMS would not be responsible for notifying individual Indian mineral owners that they may attend record development conferences because it does not have the information necessary to contact those persons. However, BIA does have that information. Thus, paragraph (b) would provide that the appropriate BIA office that MMS notifies under paragraph (a) would make available whatever notice to individual Indian mineral owners it deems appropriate by any method it deems appropriate. This proposal was based on the assumption that area BIA offices are in the best position to know what type of notice would be useful. For example, such notice could be in the form of notice in a local paper, or posting notice on the internet that individual Indian mineral owners could access at their local BIA office. We request comments on the most appropriate way to provide useful notice to individual Indian mineral owners about matters that may affect their revenues.

Section 4.918 How Will the Parties to the Appeal Develop the Record During the Record Development Conferences?

The goals of the record development conference would be to (1) identify and narrow the facts and issues that are in dispute in the appeal, (2) agree to the extent possible on the facts and issues, and (3) provide both sides the opportunity to put into the record documents and other evidence that are relevant to the disputed facts and issues. Although the proposed rule requires a minimum of one record development conference, MMS envisions a record development ''process,'' the goal of which is to have a complete record that all parties can agree upon. Accordingly, we used the plural ''conferences'' because we believe that there may be several record development conferences in the more factually complex cases as part of the entire record development process.

At the record development conferences, the parties would have to identify all documents and evidence that are relevant to disputed legal or factual issues involved in the appeal or that demonstrate material facts. The purpose of this provision is to make it clear that the parties must bring forward relevant information at this stage of the appeal, rather than waiting until later in the process.

Relevant information would include information adverse to the party's position on appeal that the party is aware of, and that was considered in determining the party's position, that is not privileged or prohibited by law. However, this would not create an affirmative duty to seek out information adverse to the party's position that was not considered as part of determining its position.

The requirement to provide information would not, however, preclude a party from adding to the record at a later date in circumstances where the party reasonably would not have known about the information or its relevance to the case. In such instances, the party could request that the IBLA allow it to supplement the record later under § 4.923.

Section 4.919 What Will the Parties Do If They Agree on the Record Contents?

This section would require the parties to compile for the record all material information relevant to the appeal and to file a Joint Statement of Facts and Issues and a certification that the record is complete. We believe this section is largely consistent with the RPC Report recommendations because: (1) parties would file a Joint Statement of Facts and Issues (see RPC Report paragraph 19.d); (2) the record would have to include ''evidence in the work papers or otherwise in the control of either party that bears upon the disputed facts or issues'' (see RPC Report at paragraph 19.e); and (3) parties would attempt to agree on evidence to be provided as part of the record (see RPC Report paragraph 19.f).

Although MMS would usually be responsible for assembling the record and drafting a Joint Statement of Facts and Issues, all parties would be expected to be actively involved in the process, and the parties could agree to allocate the responsibility differently. Thus, the appellant or a delegated State could assemble the record or draft the Joint Statement of Facts and Issues. Accordingly, under paragraph (a), if the parties to the appeal agree on the contents of the record and the facts and issues on appeal, MMS would be responsible for (1) compiling all documents and materials to be included in the record, (2) drafting a Joint Statement of Facts and Issues, and (3) filing the record, Joint Statement of Facts and Issues, and certification that the record is complete, with the MMS DRD within 30 days after the end of the record development conferences. The parties could file the certification jointly

or individually, but the MMS DRD would have to receive all parties' certifications before it will deem the record complete. When MMS deems the record complete it would send notice to all parties that the record is complete. Thus, under the proposed rule, parties would only be able to add to the record at later stages of the process if they submit a request to the IBLA under § 4.923 to add to the record with an explanation of why they did not add the information during the record development process. The RPC recommended both certification, RPC Report paragraph 19.d., and admission to the record of additional information after certification only upon a showing of ''good cause'' to the IBLA. RPC Report paragraph 25.

We believe that requiring certification of the record will increase the incentive for appellants and MMS to take the record development process seriously and to bring forward all evidence and issues during record development. Having a complete record early in the process will provide several benefits. First, we believe that this can help to filter out many cases at an early stage before the process of briefing to the IBLA begins. Facts and issues brought up early in the process can help either or both sides to see any errors in their positions, which can facilitate early resolution of the case. Second, identifying facts and issues at the record development stage will facilitate settlement discussions, which also can obviate the need for more costly briefing to and decision by the IBLA. Third, for cases that proceed to briefing before the IBLA, we think that the briefing will be faster and more efficient if the parties are aware of the facts and issues on appeal before briefing begins. Front-loading the record-development process as proposed here is intended to support efforts to decide appeals faster and to meet the time frames set out elsewhere in this rule. However, we understand that there may be cases where parties identify new issues or facts that are relevant to the case after they have certified the record. In such cases, the parties could petition IBLA under § 4.923 to allow them to add the facts or issues to the record. We believe that § 4.923 will insure an opportunity to supplement the record in cases where the party can show a good reason for not identifying the facts or issues at an earlier stage.

We recognize that the proposed process for certifying the record at the record development stage could slow down the appeals process because the requirement to ask the IBLA for permission to make additional submissions, and explain to the IBLA the reason for the request, requires additional time and cost for the requesting party to prepare the request, and for the IBLA to act on that request. Additionally, the appeals process may become quite complicated and get bogged down in collateral disputes if the IBLA denies a party's request to add to the record, or if another party objects to the request. We further recognize that there may be practical difficulties in being able to assemble all the pertinent facts or materials in the time frame envisioned for the record development conferences, and we request comments on this question.

Moreover, one of the primary goals of the record development process is to develop a complete administrative record for any subsequent judicial review of the Department's ultimate decision. Accordingly, certifying that the record is complete at this early stage, and then requiring parties to ''request'' to add to the record, may be too onerous and ultimately contrary to the goal of administrative record development. Therefore, we specifically request comments on whether we should require parties to ''certify'' the record at this early stage, and then require the parties to separately request to add to the record at later stages of the appeals process. We also specifically request comments on other alternatives, including not requiring any certification and permitting documentary submissions at later stages of the appeals process.

Section 4.920 What Will the Parties Do If They Do Not Agree on the Record Contents?

This section would establish procedures for completing the record in the event the parties cannot agree on the record contents. If the parties to the appeal cannot agree on the contents of the record and the facts and issues on appeal, then under this section, in addition to submitting the material required under § 4.919, each party would have to prepare an Additional Statement of Facts and Issues and supporting documents for the record and file them with the MMS DRD within 30 days after the end of the record development conferences. In addition, each party would have to certify that the Additional Statement of Facts and Issues and supporting documentation it filed comprises the complete record, except as provided in § 4.923 of this subpart. The MMS DRD would have to receive all parties' certifications before it would deem the record complete. When the MMS DRD deemed the record complete it would send notice to all parties that the record is complete.

The RPC Report did not address the process for record development when parties cannot agree on the record and facts and issues in dispute. However, we wanted the record development process to be inclusive, rather than exclusive. We have included the process in this section in the proposed rule because, although it would not accomplish the goal of agreement on the record and issues, it would still accomplish the objective of producing as complete a record as possible as early as possible in the appeals process. This process also would avoid lengthy disputes in which the parties to the appeal would be arguing over what the appeal is about or what should be in the record.

Section 4.921 What Must MMS or I Do If the Record Contains Proprietary or Confidential Information?

This section would explain that if a party considers any of the documents or materials compiled under this subpart to contain proprietary or confidential information, that party would have to follow the procedures under 43 CFR 4.31 to have that information treated as such. On August 4, 1997, MMS proposed a separate rule on this subject (62 FR 16116), but MMS withdrew that proposal on December 31, 1997 (62 FR 68244). We decided to rely on existing procedures under 43 CFR 4.31 rather than create new procedures.

Section 4.922 What if MMS or I Need More time to Develop the Record?

As proposed, the time to complete the record development process would be 120 days, unless a party requested to extend the process. Thus, under this proposed section, if an appellant requires additional record development conferences (or additional time for any other part of the record development process, such as for filing a Joint or Additional Statement of Facts and issues or for certifying that the record is complete) after that time period, then the appellant would have to follow the procedures set out in § 4.958 to request an extension. The purpose of this paragraph is to ensure that the record development process is flexible enough to allow the parties to develop as complete a record as possible at this stage of the appeals process. We did not want to cut off the record development process but needed to make sure that the 33-month period in which to decide Federal oil and gas appeals did not continue to run if the appellant needed more time to complete the process.

Section 4.923 May Parties Supplement the Record or Statement of Facts and Issues After the Record is Deemed Complete?

As discussed above in the Section-by-Section analysis for § 4.919, although parties would have to certify that the record is complete at the end of the record development process, they could request to later add to the record under this section. The RPC Report stated that ''[a]bsent good cause, [appellants could] not raise new issues or facts that were not raised when the administrative record was developed'' in their Statement of Reasons. RPC Report at paragraph 22.d. The proposed rule would make that provision applicable to all parties with the objective of encouraging early record development.

We recognize that there will be situations where additional information or issues are identified after the record development conference. Thus, this section would allow parties to supplement the record at a later stage, provided that they can demonstrate adequate reasons to the IBLA. Accordingly, under paragraph (a), if you are a party, and you want to supplement the record or the Joint or Additional Statement of Facts and Issues at any time after MMS deems the record complete under §§ 4.919 or 4.920 through the time additional responsive pleadings are filed under § 4.944, you would have to file any additional material together with a written request for permission with the IBLA (or an Assistant Secretary who is deciding the appeal under § 4.937) to supplement the record or the Joint or Additional Statement of Facts and Issues. Paragraph (b) would state that a party's request would have to explain why the additional documents, evidence, facts or issues were not available or provided in the certified record or in the Joint or Additional Statement of Facts and Issues and why they are material to a decision on the appeal.

As previously discussed in connection with the proposed § 4.919, we recognize that this approach's practical result may be inefficient or counterproductive to the goal of administrative record development. We specifically request comments on whether we should require parties to request to add to the record, and explain that request, after the record development conferences are complete.

Paragraph (c) would provide that if you are an appellant, you would have to agree in writing to extend the period for the Department to issue a final decision in your appeal under 30 U.S.C. 1724(h)(1) by 45 days, and include that agreement with your request. The purpose of this paragraph is to ensure that the record development process is flexible enough to allow the parties to develop as complete a record as possible but make sure that the 33-month period in which to decide federal oil and gas appeals does not continue to run if the appellant needs additional time to add to the record.

We propose 45 days for the extension of time under paragraph (c) because that time frame would allow the IBLA to act on the request and other parties to respond to the additional submissions. Thus, paragraph (d) would provide that you must serve your request on all parties to the appeal. Paragraph (e) would provide that the IBLA would issue an order either granting or denying your request to supplement the record or Joint or Additional Statement of Facts and Issues under this section within 30 days of its receipt of your request. If the IBLA did not issue an order either granting or denying your request within 30 days of its receipt of your request, your request would be deemed granted. Then, under paragraph (f), if the IBLA granted a request or a request was deemed granted under paragraph (e), any party to the appeal could respond to a party's additional documents, evidence, facts or issues within 15 days of its receipt of the IBLA's order, or, if the IBLA did not issue an order, within 45 days of the party's receipt of the request.

Section 4.924 How Will MMS Schedule a Settlement Conference?

RSFA § 4(a), adding FOGRMA § 115(i), 30 U.S.C. 1724(i), requires that parties to disputed obligations under orders subject to RSFA ''hold not less than one settlement consultation.'' However, the RPC recommended we propose to make at least one settlement conference mandatory for all appeals, not just appeals involving Federal oil and gas production subject to RSFA. Our reason is that participation in a settlement conference imposes little additional burden on any party but may yield substantial benefits in terms of the time and expense of resolving the dispute. We seek comments on whether we should extend this RSFA requirement to all appeals. In particular we specifically request comments on whether this requirement should be mandatory for Indian appeals.

Accordingly, paragraph (a) would state that if you file an appeal under this subpart, MMS will schedule you to attend a settlement conference within 120 days of the commencement of your appeal under § 4.911. You would be allowed to extend this 120-day period under § 4.958. Thus, attendance at one settlement conference would be mandatory for all appeals. However, we would encourage as many settlement conferences as necessary to facilitate early resolution of disputes. We included the provision requiring an extension of the 33-month period because we did not want to cut off the settlement process, but needed to make sure that the 33-month period in which to decide federal oil and gas appeals did not continue to run if the appellant needed more time to complete the process.

Under paragraph (b), you could request that the settlement conference take place via telephone, video conference, or in person. However, under paragraph (c), MMS ultimately would determine the time and location of the settlement conference and whether the settlement conference will take place via telephone, video conference, or in person. MMS would not compel you to travel (*i.e.*, MMS might suggest that the conference be in person at a location remote from the appellant, but if the appellant chose not to travel, MMS would accommodate that choice).

To increase the flexibility and efficiency of the settlement and appeals process, MMS added paragraph (d) to provide that the settlement conference could be held as part of the record development conference scheduled under § 4.915 if you and MMS agree to do so. MMS believes that, in many instances, the record development conference and settlement conference would be concurrent because all necessary parties would be present to discuss the issues, facts, and possible early resolution of the dispute.

Section 4.925 Who Must and Who May Participate in the Settlement Conference?

This section would explain who must and who may participate in settlement conferences. Our goal is to allow interested affected persons that have an ability to provide useful information, views, or insights to participate in settlement conferences.

Paragraph (a) would state that appellants and relevant MMS offices must participate in settlement conferences, as required under RSFA § 4(a), adding FOGRMA § 115(i), 30 U.S.C. 1724(i).

Because States concerned and other interested persons may wish to participate in settlement conferences, paragraph (b) would state that affected delegated States or affected States concerned, affected Indian lessors, and a lessee, designee, payor, or reporter (if

not an appellant) may participate in the settlement conferences.

RSFA § 4(a), FOGRMA § 115(i), provides that for royalties due on production after September 1, 1996, ''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 * * *.'' However, that language does not grant States authority to settle a dispute or give the State a ''veto'' over the Secretary settling a dispute. Rather, the Secretary must determine what is the appropriate action and has determined that it is not mandatory for States concerned to participate in settlement conferences. Thus, if States concerned want to participate, they could do so under paragraph (b).

Section 4.926 How will I Receive Notification of Settlement Conferences?

The purpose of this section is to identify who in the Department has responsibility for notifying the various persons of the settlement conferences. Because MMS would have such information, it would have the primary notification responsibility. Thus, paragraph (a) would explain that after MMS schedules a settlement conference under § 4.924, MMS will notify the appellant, lessees that joined under § 4.908, the office that issued the order, affected delegated States, the persons that affected States concerned identify under § 4.961, and affected Indian tribes or appropriate BIA offices of the settlement conference.

MMS would not be responsible for notifying individual Indian mineral owners that they may attend settlement conferences because it does not have the information necessary to contact those persons. However, BIA does have that information. Thus, paragraph (b) would provide that the appropriate BIA office that MMS notifies under paragraph (a) would make available whatever notice to individual Indian mineral owners it deems appropriate by any method it deems appropriate. This proposal was based on the assumption that area BIA offices are in the best position to know what type of notice would be useful. For example, such notice could be in the form of notice in a local paper, or posting notice on the Internet that individual Indian mineral owners could access at their local BIA office. We request comments on the most appropriate way to provide useful notice to individual Indian mineral owners about matters that may affect their revenues.

Section 4.927 May Parties Resolve an Appeal by Settlement or Using Third Party Neutrals After the Settlement Conference?

Although RSFA § 4(a), adding FOGRMA § 115(i), 30 U.S.C. 1724(i) requires at least ''one settlement consultation,'' MMS wants to make clear that it will engage in settlement negotiations whenever appropriate throughout the appeals process. Thus, paragraph (a) would provide that parties may resolve any appeal by settlement at any time before the Department has issued a final decision.

Under paragraph (b), any party could participate in settlement negotiations at any stage of the appeal. Also, MMS could use any personnel or officials it deems appropriate for settlement negotiations, including representatives of tribes and delegated States. Like the mandatory settlement conference, the Secretary has determined under this proposed rulemaking that it is not mandatory for States concerned to participate in settlement negotiations. However, MMS would consult with States concerned regarding any settlement negotiations and could invite States concerned to participate under this paragraph.

We are proposing paragraph (c) to provide for alternative dispute resolution options other than settlement negotiations. Accordingly, in addition to negotiated settlements, at any stage of the appeal, MMS could use third party neutrals under the Administrative Dispute Resolution Act, 5 U.S.C. 571 *et seq.*, if both MMS and the other parties to the appeal agreed to do so. Thus, parties would not be forced to refer disputes to an arbitrator or mediator. If MMS used third party neutrals, MMS could use the Alternative Dispute Resolution Official from the OHA, or persons named on the roster of third party neutrals that OHA maintains.

Section 4.928 What if I Need More Time to Consider Settlement?

This section would explain how to postpone any filing requirements and the deadline for the Department to issue a final decision in your appeal while settlement efforts are ongoing. To do this, you would have to obtain an extension under § 4.958. We included this provision because we did not want to cut off the settlement process but needed to make sure that the 33-month period in which to decide Federal oil and gas appeals did not continue to run if the appellant needed more time to complete the process.

Section 4.929 May the MMS Director Concur With, Rescind, or Modify an Order or Decision Not to Issue an Order that I Appealed?

One of the goals of the RPC was elimination of the current two-step royalty appeals process wherein an appellant must appeal to the MMS Director, brief that appeal, and receive a decision that is then appealable to the IBLA. Once at the IBLA, appellants must then brief the appeal to the IBLA.

To eliminate the two-step briefing process, yet allow MMS the opportunity to rescind or modify an order after record development, the RPC Report recommended that MMS prepare an internal recommendation on whether an order should be upheld, modified, or rescinded. RPC Report paragraph 21. The RPC Report then recommended that after appropriate consultation with States and tribes, the MMS Appeals Division could rescind or modify an order. *Id.* However, this process would have involved asking the IBLA to remand the appeal, which would be burdensome and time consuming. Also, the internal memorandum would not be shared with the appellant. In his letter of September 22, 1997, the Secretary stated that rather than writing an internal memorandum MMS would issue a letter decision to appellants with copies to appropriate Indian lessors and delegated States stating whether the MMS Director had modified or rescinded the order or decision not to issue an order.

Thus, under paragraph (a), although appeals are not to the MMS Director, this rule is proposing that the MMS Director, within 60 days of the date that the MMS DRD has received the record under §§ 4.919 or 4.920, may concur with, rescind, or modify the order or decision not to issue an order that you have appealed. We felt that MMS should have up to this point to unilaterally act on an order without leave of the IBLA. We also believe that the short 60-day time period within which the MMS Director would have to act was necessary because of the RSFA 33-month period within which to decide Federal oil and gas appeals and the Department's and RPC's desire to decide appeals more quickly than the current process. Although neither the RPC report nor the Secretary addressed the process for the MMS Director to concur with orders, we believe that in addition to issuing letters modifying or rescinding orders, as part of MMS's review practice, MMS should be authorized to issue letters concurring with orders.

The purpose of allowing the MMS Director to rescind or modify the order or decision not to issue an order would be to: (1) formally communicate our reasons for rescission or modification to appellants; (2) eliminate the need to request remand from the IBLA; (3) allow MMS an opportunity to review orders for accuracy and conformity with MMS policy prior to formal briefing to the IBLA; and (4) help resolve appeals or issues prior to formal briefing to the IBLA. The early resolution of appeals is particularly important given RSFA's 33-month time constraint.

Moreover, under the current appeals process, MMS appeals decisions and settlement agreements have resolved more than three-fourths of the complex appeals filed with MMS prior to appeal to the IBLA. MMS hopes that its ability to review and rescind or modify orders in this proposed rule, together with the settlement conferences, will yield a similar result.

The purpose of having the MMS Director affirmatively concur with orders is to speed up the appeals process and give appellants clear documentation of the concurrence (compared to ''deemed'' concurrences under paragraph (e), described below).

Paragraph (b) would provide that MMS will consult informally with the MMS office that issued the order or decision not to issue the order, and with affected tribes or affected delegated States that participated in the record development conference or the settlement conference before the MMS Director rescinds or modifies an order or decision not to issue an order under paragraph (a). This is substantially what the RPC Report recommended, RPC Report paragraph 21.a, except that MMS would not have to consult with affected tribes or affected delegated States that show no interest in the proceedings by failing to participate in the early part of the appeals process. MMS also would not be required to consult with States concerned. This would conserve MMS resources by eliminating the need to inform persons that did not issue the order, participate in the audit that resulted in the order, or participate in the appeals process. This would also encourage interested affected tribes and affected delegated States to participate early in the process and thereby produce more meaningful record development and settlement conferences. However, paragraph (c) would give MMS discretion to consult informally with other relevant MMS offices, States concerned, and affected Indian lessors before the MMS Director rescinds or modifies an order or decision not to issue an order.

Under the current appeals process, for appeals involving Indian leases, MMS prepares the decision, and the Deputy Commissioner of Indian Affairs signs the decision, after the Solicitor, Division of Indian Affairs, reviews the decision. In this proposed rule, the MMS Director would concur with, rescind or modify appeals involving Indian leases. We specifically request comment on what the extent of BIA involvement regarding such appeals should be. For example, should MMS be required to ''consult informally'' with appropriate BIA officials prior to acting on an order under paragraph (b), or should such consultation be at MMS's discretion under paragraph (c)?

Under paragraph (d), MMS would notify appellants in writing that the MMS Director has concurred with, rescinded or modified the order or decision not to issue an order they appealed. A notice of rescission or modification would state the reasons for the rescission or modification. However, we anticipate that these letters would be shorter and would include less written legal analysis than current MMS appeals decisions.

We included paragraph (e) to explain what happens if the MMS Director does not concur with, rescind or modify the order or decision not to issue an order within the 60-day time frame provided in paragraph (a). In such instances, the MMS Director would be deemed to have concurred with the order or decision not to issue an order that you have appealed.

Section 4.930 What Other Persons Will MMS Notify When the MMS Director Concurs With, Rescinds, or Modifies an Order or Decision Not to Issue an Order?

The purpose of this section is to identify the persons, other than the appellant that the Department will notify when the MMS Director concurs with, rescinds, or modifies an order or decision not to issue an order. This would include persons who would not otherwise be aware of such action because they did not receive an order, Notice of Order, or Notice of Appeal. Because MMS would have such information, it would have the primary notification responsibility.

Paragraph (a) would provide that, for appeals filed under § 4.904(a) or (b) (*i.e.*, by parties other than Indian lessors), MMS will send a copy of the notice that it issues under § 4.929(d) to the following persons: (1) the office that issued the order; (2) any affected delegated State; (3) any affected Tribe; and (4) the appropriate BIA office, if the order involves leases on individual Indian lands. The BIA office may make available to individual Indian mineral owners whatever notice it deems appropriate by any method it deems appropriate. MMS would not be responsible for notifying individual Indian mineral owners because it does not have the information necessary to contact those persons. However, BIA does have that information. This proposal was based on the assumption that BIA area offices are in the best position to know what type of notice would be useful. For example, such notice could be in the form of notice in a local paper, or posting notice on the Internet that individual Indian mineral owners could access at their local BIA office. We request comments on the most appropriate way to provide useful notice to individual Indian mineral owners about matters that may affect their revenues.

Paragraph (b) would provide that for appeals filed by Indian lessors under § 4.904(c), MMS will send a copy of the notice it issues under § 4.929(d) to the office that decided not to issue the order and to the lessee or its designee.

Section 4.931 If the MMS Director Rescinds or Modifies an Order, How Does it Affect the Statutory Limitations Period?

RSFA § 4(a), adding the new FOGRMA § 115(b)(1), 30 U.S.C. 1724(b)(1), provides that MMS must commence a demand for an obligation within seven years from the date the obligation becomes due. Thus, orders subject to RSFA must be issued within seven years of the date that additional royalties became due. For purposes of this rulemaking, we needed to clarify the effect of the MMS Director's rescission or modification of orders subject to the seven-year limitations period under RSFA.

Accordingly, for purposes of determining whether an order is timely under the limitations period prescribed in 30 U.S.C. 1724(b)–(d), paragraph (a) of the proposed section would state that if the MMS Director modifies an order under § 4.929, the timeliness of the order is not affected and the modified order is timely if the original order was timely. For example, assume that MMS issued an order to pay additional royalty of $10,000 on January 1, 1998, for royalties that were due on January 1, 1991 from lease X.

Also assume that the designee appealed the order, and that the MMS Director modified the order to find that the lessee underpaid royalties on lease X for the same production by $15,000, not the $10,000 under the order as issued, and to require the lessee to pay the higher amount. In that instance,

because the original order was timely, the modification would be timely, even though it increased the amount of royalties due. However, the MMS Director's modification would not address production not included in the original order. Thus, using the above example, the MMS Director could not modify the order to include additional royalties on production from lease Y, because that production was not included in the original order. Similarly, the Director could not modify the order to include production from lease X for a time period different than the time period in the original order.

Paragraph (b) would provide that for purposes of determining whether an order is timely under the limitations period prescribed in 30 U.S.C. 1724(b)–((d), if the MMS Director rescinded all or part of an order under § 4.929, and the IBLA, an Assistant Secretary, the Director of OHA, the Secretary, or a court reinstates that order, in whole or in part, the reinstated order relates back to the date the order was originally issued, and the reinstated order would be timely if the original order was timely. Thus, as long as an appeal (or intervention) of the rescission was pending within the Department or in federal court, an order would stay ''alive'' for purposes of the 7-year limitations period even though the MMS Director rescinded that order.

Section 4.932 When Will MMS Send the Record to IBLA?

Under this section, the MMS DRD would transmit the record to the IBLA within 45 days of the date MMS notifies the appellant under § 4.929(d). If the MMS Director is deemed to have concurred with an order under § 4.929(e), this section would require that the MMS Dispute Resolution Division transmit the record to the IBLA within 105 days after MMS has received the record under § 4.919 or 4.920. The 45-day deadline under this paragraph would merely be guidance for MMS and would create no substantive rights in parties to the appeal or any other persons.

Section 4.933 What Must I Do, or What May I Do, After the MMS Director Concurs With, Rescinds or Modifies an Order or Decision Not To Issue an Order That I Have Appealed?

This section would explain what an appellant could do regarding the appeal of its order after the MMS Director concurs with, modifies or rescinds an order under § 4.929. Depending on the MMS Director's action, and whether the appellant desires to continue the appeal, there are several options for the appellant. First, under paragraph (a), if the MMS Director concurred with the order or decision not to issue an order that you appealed, and you wanted to continue your appeal, you would have to file your Statement of Reasons under § 4.939 with the IBLA within 60 days after you received the MMS Director's concurrence under § 4.929. The 60-day time period is intended to provide sufficient time for you to determine what action you intend to take and to prepare your Statement of Reasons.

Second, under paragraph (b), if the MMS Director rescinded the order that you appealed, and if an Indian lessor or delegated State intervened under § 4.934, because you would be bound by the Department's final decision in the intervention in your appeal, you could file an Answer to the Intervention Brief under § 4.942 within 60 days after you receive the MMS Director's rescission under § 4.929(d). We assume that appellants would not appeal a recission to IBLA. However, we realize that the substantive rights of appellants may be affected if an Indian lessor or delegated State intervenes under § 4.934. Thus, we wanted to ensure that appellants have the opportunity to address any arguments for reinstatement of a rescinded order an Intervenor makes to IBLA in its Intervention Brief. But we also wanted to make clear that if an appellant chooses not to answer an Intervention Brief, it would still be bound by any IBLA decision regarding the rescission.

Third, under paragraph (c), if the MMS Director modified the order that you appealed, and if you still wanted to contest the order as modified, you would have to file your Statement of Reasons under § 4.939, and any Answer to an Intervention Brief under § 4.942, within 60 days after you receive the MMS Director's modification under § 4.929. The 60-day time period is intended to provide sufficient time for you to determine what action you intend to take and to prepare your Statement of Reasons and any Answer to an Intervention Brief.

Finally, under paragraph (d), if the MMS Director was deemed under § 4.929(e) to have concurred with the order or decision not to issue an order that you appealed, you would have to file your Statement of Reasons under § 4.939 within 120 days after the date the MMS DRD receives the record forwarded under §§ 4.919 or 4.920. Thus, if MMS did not notify you of its concurrence, modification, or rescission of the order within the time required under § 4.929, then you would have 60 days from the date that the notification should have been sent to file a Statement of Reasons with the IBLA. This would give an appellant sufficient time to determine whether the appeal was deemed concurred with under § 4.929(e), determine what action it intends to take, and prepare its Statement of Reasons.

Section 4.934 Who May Intervene in an Appeal?

The purpose of this section is to provide a means for Indian lessors and affected delegated States to object to an MMS Director's rescission or modification of an order without having to make the Indian lessor or State file a separate appeal of some kind. We felt it would be too confusing and administratively difficult to track dual appeals regarding the same order for purposes of the 33-month period within which to decide appeals of orders concerning federal oil and gas leases. The RPC Report, paragraph 21.e, recommended that delegated States be allowed to ''continue'' an appeal. However, we believe that Indian lessors and affected delegated States are not ''appellants'' when they disagree with an MMS rescission or modification because there already is an ''appellant.'' Rather, they should be regarded as intervenors because they did not appeal the order but challenge MMS's action with respect to an order. *See e.g.*, 43 CFR 4.471 and 4.1110.

This achieves the same effect as the RPC Report recommendation, but, under the proposed rule, appellants have different substantive rights and procedures than intervenors. For example, under various sections of the proposed rule, if an appellant wants additional time to comply with a filing deadline, hold additional record development or settlement conferences, etc., then, under § 4.958, the appellant must request an extension of the period in which the Department must issue a final decision in its appeal under § 4.956, or which the Department uses as guidance to track its appeal under § 4.948. There is no such requirement for Intervenors because they cannot extend the 33-month period. Thus, the Departmental office considering an extension request from an Intervenor would have discretion whether to grant the request considering, among other factors, whether the Intervenor obtained a written agreement from the appellant to extend the 33-month period. Accordingly, under paragraph (a), Indian lessors could intervene in any appeal involving their leases by filing an Intervention Brief under § 4.939 within 30 days after receiving notification of the MMS Director's concurrence, rescission or modification of an order

under § 4.930 that adversely affects them. Likewise, paragraph (b) would provide that affected delegated States could intervene in an appeal if the MMS Director modified or rescinded an order under § 4.929 that the recipient of the order or Notice of Order appealed, by filing an Intervention Brief under § 4.939 within 30 days after the delegated State received MMS's notification of any rescission or modification under § 4.930, if MMS's rescission or modification of the order adversely affected that State.

We believe that only Indian lessors and delegated States that are adversely affected by the MMS Director's actions regarding an order should be allowed to intervene. Thus, an Indian lessor whose leases are not at issue in the appeal, or a delegated State that does not receive revenues from the leases at issue in the appeal, could not intervene. However, if an unaffected Indian lessor or delegated State wished to express views about the merits of MMS's actions, it could file an amicus brief under § 4.943.

Section 4.935 What is the Record for an Appeal if a State or Indian Lessor Intervenes?

Because a record already exists for an appeal when an Indian lessor or a delegated State intervenes, this section would provide that if an Indian lessor or delegated State intervenes under § 4.934, the record for the appeal that the IBLA must consider is the record established under §§ 4.919 or 4.920 before the MMS Director's rescission or modification under § 4.929, plus any additional correspondence to the MMS Director and the MMS Director's notice of modification or rescission under § 4.929(d).

Section 4.936 If an Indian Lessor or Delegated State Intervenes, How Does it Affect the Time Frame for Deciding an Appeal?

As explained above, we believe that Indian lessors and affected delegated States are not ''appellants'' when they disagree with an MMS rescission or modification because there already is an ''appellant.'' Thus, this section would provide that when an Indian lessor or delegated State intervenes, the appeal commences on the appellant's commencement date under § 4.911, not on the date an intervening party files its Intervention Brief. Thus, intervention would not ''recommence'' an appeal.

Section 4.937 May an Assistant Secretary Decide an Appeal?

Under the current two-step appeals process, an Assistant Secretary may take jurisdiction of an appeal and issue a decision at any time prior to an appeal to the IBLA. *Marathon Oil Co.*, 108 IBLA 177 (1989), *Blue Star, Inc.*, 41 IBLA 333, 335–36 (1979). The RPC recommended that if an Assistant Secretary wanted to decide an appeal, the Assistant Secretary would have to petition the IBLA to relinquish jurisdiction of the appeal. RPC Report, paragraph 30. However, in his letter of September 22, 1997, the Secretary stated that the Department would allow an Assistant Secretary to choose to decide an appeal without leave from the IBLA, at any time prior to the Appellant's filing of its Statement of Reasons or an Intervenor's filing of its Intervention Brief with the IBLA. We believe that if policy-level officials in the Department choose to make a decision in a case, there should be no need for them to be granted permission. This also is similar to the procedures for certain other Departmental appeals. *See* 43 CFR 4.332(b).

Accordingly, paragraph (a) of this section would provide that the Assistant Secretary for Land and Minerals Management (or, the Assistant Secretary for Indian Affairs for appeals involving an Indian lease) could choose to decide an appeal by notifying the appellant, the MMS Dispute Resolution Division, and the IBLA in writing that the Assistant Secretary will decide the appeal, at any time up to 30 days before the date the appellant must file its Statement of Reasons or an Intervenor must file its Intervention Brief under § 4.939. The 30-day notification would give appellants and Intervenors time to prepare their Statement of Reasons or Intervention Brief for filing with the Assistant Secretary, rather than with the IBLA. The proposed rule does not specify how an Assistant Secretary would determine to decide an appeal, but we believe any party, including the appellant, could request that an Assistant Secretary decide the appeal.

We believe that the appellant should argue its case to the Assistant Secretary in much the same way as it would argue the matter to the IBLA. Thus, paragraph (b) of this section would provide that, after the Assistant Secretary notifies you of his or her decision to decide your appeal, you must file all subsequent documents required under this subpart with the Assistant Secretary under § 4.960.

In a public meeting we held on earlier drafts of this proposed rule, industry representatives expressed concern over the extent of *ex parte* communications from the MMS and the Solicitor's office to the Assistant Secretary when an Assistant Secretary decides an appeal. Under the proposed procedure, appellants would be able to submit the same arguments to the Assistant Secretary as they would submit to the IBLA. While the procedures would differ from those before the IBLA because there would be no bar on agency or Solicitor's office personnel working with the Assistant Secretary on a decision, any Assistant Secretary's decision would have the benefit of being subject to immediate judicial review. Moreover, it is critical to the Assistant Secretary's decision making process that he or she have available the expertise of both the agency personnel and his or her attorneys. We specifically request comments about any procedures that the Department should consider regarding how it can maintain an efficient and fair process, while providing adequate staff support to the Assistant Secretary, and preserving the Assistant Secretary's prerogative to consult with whomever he or she chooses within the Department.

Section 4.938 Who Will Notify Other Persons That an Assistant Secretary Will Decide an Appeal or Has Decided an Appeal?

The purpose of this section is to identify who in the Department has responsibility for notifying affected persons other than the appellant that an Assistant Secretary will decide an appeal or has decided an appeal, who would not otherwise be aware of such action. Because MMS would be notified of such action, it would have the primary notification responsibility.

Thus, paragraph (a) would explain that MMS will transmit a copy of the Assistant Secretary's notice required under § 4.937 to:

(1) Affected tribes;
(2) Affected delegated States;
(3) Lessees who join under § 4.908;
(4) Intervenors; and
(5) Affected lessees or their designees if an Indian lessor files an appeal under § 4.904 of any MMS decision not to issue an order.

Paragraph (b) would provide that for appeals involving individual Indian mineral owners' leases, in addition to notifying the persons under paragraph (a), MMS would transmit a copy of the Assistant Secretary's notice required under § 4.937 to the appropriate BIA office. That BIA office could make available to individual Indian mineral owners whatever notice it deems appropriate by any method it deems appropriate. MMS would not be responsible for notifying individual Indian mineral owners because it does not have the information necessary to contact those persons. However, BIA does have that information. Thus, this

proposal was based on the assumption that area BIA offices are in the best position to know what type of notice would be useful. For example, such notice could be in the form of notice in a local paper, or posting notice on the Internet that individual Indian mineral owners could access at their local BIA office. We request comments on the most appropriate way to provide useful notice to individual Indian mineral owners about matters that may affect their revenues.

Section 4.939 How Do I File My Statement of Reasons or Intervention Brief?

This section would explain how an appellant would file its Statement of Reasons, and an Intervenor would file its Intervention Brief, with the IBLA or an Assistant Secretary.

Under paragraph (a), you would have to file your Statement of Reasons or Intervention Brief with the IBLA under § 4.960 within the times required under §§ 4.933 and 4.934.

Under paragraph (b), if an Assistant Secretary will decide your appeal under § 4.937, you would have to file your Statement of Reasons or Intervention Brief with that Assistant Secretary under § 4.960 within 60 days after the MMS DRD has received the record under §§ 4.919 or 4.920.

Under paragraph (c), appellants would have to pay a nonrefundable processing fee of $150 with their Statement of Reasons as required under § 4.965 or seek a fee waiver or reduction under § 4.966. Our analysis leading to the choice of $150 as the processing fee at this stage of the appeal is in the Section-by-Section analysis for § 4.965 of this proposed rule. Indian lessors and delegated States would not have to pay the processing fee.

Under paragraph (d) you also would have to serve your Statement of Reasons or Intervention Brief on all parties to the appeal, and on other persons as required under § 4.962. Section 4.962 requires appellants to serve their Statement of Reasons on the office that issued the order, affected tribes, and affected delegated States. The current rules do not require appellants to serve the Statement of Reasons on these entities. However, we added this requirement to ensure that the office that issued the order, affected tribes, and affected delegated States would be informed about the progress of the appeal and to provide them with an opportunity to give the Solicitor's office information they believe is responsive to the Statement of Reasons or file an amicus brief under § 4.943.

Section 4.940 What if I Do Not Timely File My Statement of Reasons, Intervention Brief or Request for an Extension of Time to File Those Documents?

This section would explain that if you do not file your Statement of Reasons, Intervention Brief, or request for extension of time to file either of those documents within the times prescribed in §§ 4.933, 4.934, or 4.939, or within any extension of time requested and granted under § 4.958, the IBLA or the Assistant Secretary will dismiss your appeal, or will not allow you to intervene. Thus, the filing of the Statement of Reasons would be jurisdictional. We would like comments on whether this is the appropriate sanction for failure to timely file, or whether we should have another sanction for not filing timely. For example, the rule could provide that the IBLA or Assistant Secretary would not consider Statements of Reasons or Intervention Briefs that are filed late. This would tend to have a similar substantive result as dismissal but might be more time consuming.

Section 4.941 Who May File an Answer to a Statement of Reasons or Intervention Brief?

This section would explain who may file an Answer to a Statement of Reasons or Intervention Brief with the IBLA or an Assistant Secretary. Like current practice, the Solicitor's office would file Answers on behalf of MMS and Indian lessors.

Paragraph (a) would provide that if the recipient of an order or Notice of Order files a Statement of Reasons under § 4.939, MMS and Indian lessors whose leases are affected may file Answers under § 4.942.

Paragraph (b) would provide that if an Indian lessor files a Statement of Reasons or an Intervention Brief under § 4.939, MMS and any lessee, designee, or payor for the lease(s) involved in the appeal may file Answers under § 4.942. The proposed rule would allow lessees or payors to answer Indian lessors' Statements of Reasons and Intervention Briefs because, under § 4.933(b), they would be bound by the Department's final decision in the intervention in their appeal. Also, if an Indian lessor appeals MMS's decision not to issue an order regarding its leases, lessees or payors would likewise be bound by any decision in that appeal. Thus, the substantive rights of lessee and payor appellants could be affected if an Indian lessor intervenes under § 4.934 or appeals under § 4.904(c). Accordingly, we wanted to assure that those appellants have the opportunity to address any arguments an Intervenor or Indian lessor appellant makes to the IBLA or Assistant Secretary.

Paragraph (c) would provide that if a delegated State files an Intervention Brief under § 4.939, MMS, Indian lessors whose leases are adversely affected, and any lessee, its designee, or the payor for the lease(s) involved in the appeal may file Answers under § 4.942. The proposed rule would allow lessees, their designees, or the payor to answer delegated States' Intervention Briefs because, under § 4.933(b), they would be bound by the Department's final decision in the intervention in their appeal. Thus, the substantive rights of lessee, designee, and payor appellants could be affected if a delegated State intervenes under § 4.934. Accordingly, we wanted to assure that those appellants have the opportunity to address any arguments an Intervenor makes to the IBLA or Assistant Secretary in its Intervention Brief.

Indian lessors' leases could be adversely affected by the Intervention of a delegated State only if the appeal involves an order that addresses both Federal and Indian leases (a State could not file an Intervention Brief in an appeal involving only Indian leases). While we do not expect that the positions of Indian lessors and delegated States would often conflict, because Indian lessors are the lease owners, we thought they should have the opportunity to address Intervention Briefs filed by delegated States in appeals that involve both Federal and Indian leases.

Section 4.942 How Do I File an Answer to a Statement of Reasons or Intervention Brief?

This section would explain that you would have to file your Answer to a Statement of Reasons within 60 days after the date the Statement of Reasons was served upon you, and an Answer to an Intervention Brief within the time limit proposed in § 4.933(b) (*i.e.*, within 60 days after you receive the MMS Director's rescission). This section also would provide that you must file your Answer with the appropriate office under § 4.960 and serve your Answer on all parties to the appeal.

Section 4.943 Who May File an Amicus Brief?

This section would explain that any person may file an Amicus Brief with the appropriate office under § 4.960 within 60 days after the date the Statement of Reasons or Intervention Brief is filed with the IBLA or Assistant Secretary. You would have to serve your

Amicus Brief on all parties to the appeal.

Section 4.944 May Parties File Additional Responsive Pleadings?

Under current IBLA practice, the IBLA can consider responsive pleadings after an Answer is filed. *See* 43 CFR 4.414. Thus, as proposed, this section would provide that if you filed a Statement of Reasons or an Intervention Brief, and another person files an Answer or an Amicus Brief, you could file a Reply to the Answer or a Response to the Amicus Brief within 30 days after the date the Answer or Amicus Brief was served upon you. In addition, if you filed an Answer and another person filed a Reply or an Amicus Brief, you could file a Surreply to that Reply to address new arguments or authorities raised in the Reply, or a Response to the Amicus Brief, within 20 days after the Reply or Response is served upon you. You would have to serve any responsive pleadings under this section on all parties to the appeal. The IBLA retains the right to limit the length of pleadings or the number of pleadings beyond those specifically provided in this rule.

Section 4.945 May I Ask for a Hearing by an Administrative Law Judge?

This section would provide a way for the IBLA, at the request of any party, to seek additional facts or arguments that the party believes are necessary to help decide the appeal.

Any party could request in writing that the IBLA refer a matter to an Administrative Law Judge of the Hearings Division under 43 CFR 4.415 for an evidentiary hearing if there are disputed issues of material fact which could affect the decision on the appeal. The party's request would have to specify the issues of fact that are in dispute. *See, e.g., W.J. and Betty Lo Wells*, 122 IBLA 250, 252 (1992), in which IBLA required that a party requesting a hearing in a case involving a BLM land exchange explain what issues of material fact require a hearing.

In addition, appellants who request a hearing under this paragraph would have to agree in writing to extend the period under § 4.958 by the additional amount of time necessary for the Hearings Division to complete any action with respect to the referral request, including any of the actions authorized under paragraph (c)(3). Thus, up to no later than 30 days after all responsive pleadings are filed under § 4.944, parties could, at any time during the appeals process, including record development, request that disputed issues of material fact be resolved by an Administrative Law Judge. Parties could not, however, require other parties to produce documents.

Paragraph (c) would provide that if the IBLA grants a party's request, the IBLA could issue an order:

(1) Authorizing the Administrative Law Judge to specify additional issues;

(2) Authorizing the parties to add additional relevant issues, with the approval of the Administrative Law Judge; and

(3) Asking the Administrative Law Judge to issue:

(i) Proposed findings of fact;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that would be final for the Department absent an appeal to IBLA.

Section 4.946 May IBLA Require Additional Evidence or Arguments From Parties?

Paragraph (a) would provide that the IBLA may require additional evidence or written arguments from parties by issuing an order:

(1) Requiring any party or all parties to the appeal to produce additional evidence or written arguments or both. Thus, unlike parties, the IBLA has authority to require parties to produce additional information;

(2) Requiring the parties to appear before the IBLA for oral argument; or

(3) Referring the matter to an Administrative Law Judge of the Hearings Division under 43 CFR 4.415 for an evidentiary hearing if there are disputed issues of material fact which could affect the decision on the appeal.

Under paragraph (b), the IBLA's referral under paragraph (a)(3):

(1) Would have to specify the issues of fact upon which the hearing is to be held;

(2) Could authorize the Administrative Law Judge to specify additional issues;

(3) May authorize the parties to add additional relevant issues, with the approval of the Administrative Law Judge; or

(4) Could request that the Administrative Law Judge issue:

(i) Proposed findings of fact;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that would be final for the Department absent an appeal to IBLA.

Paragraph (c) would provide that failure of any party to comply with an IBLA order issued under this section may result in any contested fact being found against the party who does not comply.

Section 4.947 May IBLA Establish Deadlines for Matters Referred to Administrative Law Judges?

This section would provide that the IBLA may establish appropriate deadlines for any matter referred to an Administrative Law Judge under §§ 4.945 or 4.946.

Section 4.948 When Will the IBLA Decide My Appeal?

This section would provide in paragraph (a) that the IBLA would decide your appeal by the date the appeal ends under § 4.912.

Paragraph (b) would state that the IBLA will serve its decision on all parties to the appeal, and other persons as required under § 4.963.

Paragraph (c) would provide that, if an Assistant Secretary will decide your appeal under § 4.937, the Assistant Secretary would decide your appeal on or before the day your appeal ends under § 4.912. The Assistant Secretary would serve that decision on all parties to the appeal and other persons as required under § 4.963.

Section 4.949 When is an IBLA or an Assistant Secretary's Decision Effective?

This section would explain that an IBLA or an Assistant Secretary's decision is effective on the date it is issued, unless the IBLA or the Assistant Secretary provides otherwise. The decision would be the final action of the Department.

Section 4.950 What if IBLA Requires MMS or a Delegated State to Recalculate Royalties or Other Payments?

The purpose of this section is to provide a mechanism for MMS to correct calculations for orders within the 33-month time period in which to decide appeals concerning Federal oil and gas leases subject to RSFA when IBLA directs MMS to recalculate. Thus, we are proposing this section in order to avoid the need for remands, which could be too time consuming to take place within the RSFA 33-month period. Moreover, we were concerned that if cases were remanded, appellants or intervenors would argue that the order responding to the remand might not be timely under the 7-year RSFA statute of limitations applicable to Federal oil and gas leases under RSFA, § 4(a), adding FOGRMA § 115(b), 30 U.S.C. 1724(b). To deal with these concerns, we decided instead to devise a system to make factual adjustments that would be final for the Department and not subject to administrative appeal when IBLA orders such adjustments.

Under paragraph (a), because Indian leases and Federal leases other than oil

and gas are not subject to RSFA, the time limits and finality requirements in this section would not apply.

Paragraph (b) would provide that an IBLA decision modifying an order and requiring MMS or a delegated State to recalculate royalties or other payments, would be the final decision in the administrative proceeding for purposes of the 33-month period under 30 U.S.C. 1724(h). Thus, the IBLA decision on the merits would not be administratively appealable, even if it ordered MMS to perform additional calculations.

Under paragraph (c), after MMS or the delegated State that performed the audit received an IBLA order to recalculate, it would be required to provide to IBLA, and all parties served with IBLA's decision, any recalculation IBLA requires under paragraph (b) within 60 days of its receipt of IBLA's decision. We chose 60 days because if IBLA issues its decision within the 30-month goal provided under § 4.948, MMS or the delegated State that performed the audit would have 60 days to perform the recalculation, and IBLA would have approximately 30 days to review the recalculation before the running of the 33-month period under RSFA. There would be no further appeal within the Department from MMS's or the delegated State's recalculation under paragraph (c). Accordingly, the decision IBLA issues under paragraph (b), together with MMS's or the delegated State's recalculation under paragraph (c), would constitute the final action of the Department that is judicially reviewable under 5 U.S.C. 704. In other words, appellants and intervenors could not appeal the recalculation administratively, nor object to it before IBLA between the time IBLA receives the recalculation and the running of the 33-month period under RSFA.

Section 4.951 May a Party ask IBLA to Reconsider its Decision?

If you were a party, you could submit a request in writing to IBLA that it reconsider its decision within 30 days of the date you receive the decision. The party requesting reconsideration would have to specifically explain to IBLA in its request what it believes the extraordinary circumstances are that require reconsideration.

Like 43 CFR 4.403, paragraph (b) would provide that filing a request for reconsideration would not suspend the effectiveness of IBLA's decision. The purpose of maintaining the effectiveness of IBLA's decision is to assure that IBLA's decision would be deemed the final decision for the Department under the default rule of decision in § 4.956.

Paragraph (c) would provide that a request for reconsideration is not necessary to exhaust administrative remedies.

Section 4.952 Under What Circumstances May IBLA Reconsider its Decision?

The purpose of this section is to establish IBLA standards for reconsideration of appeals subject to this subpart. The standards IBLA would use to determine whether to reconsider a decision under this proposed section would continue IBLA's practice of only reconsidering its decisions ''in extraordinary circumstances.'' *See* 43 CFR 4.403. In addition, unlike the current provision in 43 CFR 4.403 that provides that there must be a ''sufficient reason'' for reconsideration, the proposed rule would specifically state that the following reasons could be sufficient for reconsideration:

(a) Discovery of evidence not before IBLA at the time the decision was issued which demonstrates error in that decision. Accordingly, a request for reconsideration would have to explain why such evidence was not previously available or provided to IBLA;

(b) IBLA's misinterpretation of material facts;

(c) Clear error of law;

(d) Recent judicial development;

(e) Change in Departmental policy; or

(f) Inconsistent agency decisions.

These reasons codify IBLA practice.

Section 4.953 May Other Parties to the Appeal Respond to a Request for Reconsideration?

The purpose of this section is to provide parties with an opportunity to respond to requests for reconsideration. Thus, you could answer a request for reconsideration within 15 days of your receipt of a copy of the request. We believe that 15 days within which to respond to a request for reconsideration is sufficient because the standards for reconsideration under § 4.952 should narrow the scope of requests, and, likewise, any response. You would have to serve your answer to a request for reconsideration on all parties to the appeal.

Section 4.954 On Whom Will IBLA Serve a Decision on Reconsideration?

This section would provide that IBLA will serve its decision on all parties to the appeal, and other persons as required under § 4.963.

Section 4.955 May the Secretary of the Interior or the Director of OHA Take Jurisdiction of an Appeal or Review a Decision?

This section would state that the Secretary or the Director of OHA may take jurisdiction of an appeal or review a decision issued under this subpart.

Section 4.956 What if the Department Does Not Issue a Decision by the Date My Appeal Ends?

This section of the rule is one the Department hopes it will never use. Our intent was to draft a rule that will allow us to decide appeals within the 33-month period RSFA mandates and avoid the necessity of this section. RSFA states that:

> The Secretary shall issue a final decision in any administrative proceeding, including any administrative proceeding pending on the date of enactment of this section, within 33 months from the date such proceeding was commenced or 33 months from the date of such enactment, whichever is later
>
> * * * * *
>
> RSFA § 4(a), adding new FOGRMA § 115(h)(1), 30 U.S.C. 1724(h)(1).

RSFA also tells us what happens if the Secretary does not issue a decision within 33 months in appeals involving monetary or nonmonetary ''obligations.'' In such instances, under 30 U.S.C. 1724(h)(2):

> (A) the Secretary shall be deemed to have issued and granted a decision 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
>
> (B) the Secretary shall be deemed to have issued a final decision 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, and the appellant shall have a right to judicial review of such deemed final decision in accordance with title 5 of the United States Code.

In paragraph (a), the Department makes clear that this section would apply only to appeals of orders or portions of orders involving monetary and nonmonetary obligations under Federal oil and gas leases filed on or after the date this rule becomes effective. (Proposed § 4.972 applies to appeals subject to RSFA but filed before the effective date of this rule.) For Indian leases and Federal mineral leases other than oil and gas, the time limits in 30 U.S.C. 1724(h) and the default rule of decision stated in this section would not apply because those leases are not subject to RSFA. Thus, the default rule of decision in this section also would not apply to appeals of orders or portions of orders regarding Federal oil

and gas leases that do not involve a monetary or nonmonetary obligation. Accordingly, the default rule of decision would not apply to appeals of orders related to reporting of production or providing information under Federal oil and gas leases (e.g., under the authority for investigations under FOGRMA § 107, 30 U.S.C. 1717) because the definition of ''obligation'' under RSFA § 2(1), adding FOGRMA § 3(25), 30 U.S.C. 1702(25), does not include such matters.

In our outreach meetings, representatives of the solid mineral industry requested that we make appeals involving solid mineral leases subject to the 33-month deadline under this section. Specifically, those industry representatives asked the Department to deem solid mineral appeals denied regardless of dollar amount if the Department misses the 33-month time frame. However, the Department decided that the proposed rule would only apply to appeals of orders regarding monetary and nonmonetary obligations as defined under RSFA. Although we plan to use the same time frames to process Indian, solid mineral, and geothermal appeals, we do not plan to impose this section's default rule of decision on those appeals. We believe that the benefits of obtaining IBLA review and decisions outweighs industry's desire for a quick, mandatory decision.

Paragraph (b) would implement the RSFA rule of decision for appeals for which IBLA, an Assistant Secretary, the Secretary, or the Director of OHA does not issue a final decision by the date the appeal ends under § 4.912. In such instances, under 30 U.S.C. 1724(h)(2), the Secretary's default decision on an appeal would be:

(1) In favor of the appellant for any nonmonetary obligation or any monetary obligation with a principal amount of less than $10,000;

(2) In favor of the Secretary for any monetary obligation with a principal amount of $10,000 or more.

Because of the various changes to and dispositions of orders that may occur during the appeals process, such as MMS Director modification or rescission, or IBLA reconsideration, the proposed rule would clarify the application of the RSFA default decision provision in such cases. In essence, the default decision provisions would only apply to those aspects of the appeal still under dispute between the appellant and the Secretary. Thus, paragraph (c) would explain what is deemed decided for orders which have been modified during the appeals process and which an appellant has continued to appeal. Basically, the only portion of an appeal that is subject to the default decision provision is that portion of the original order that is still in dispute between the appellant and MMS, not an intervenor and MMS.

Under paragraph (c)(1), if the MMS Director modified an order and you continued your appeal of the modified order, the decision the Secretary would be deemed to have made under paragraph (b) would apply only to those aspects of the modified order that you continued to contest. Accordingly, those aspects of the Director's modification that you did not contest would stand, and the Secretary would be deemed to have affirmed the modifications you did not contest, regardless of the amount of any monetary obligation, or any nonmonetary obligation, that you did not contest. For example, assume that you appeal an order involving two separate monetary obligations, one worth $15,000, and one worth $20,000. Assume also that MMS agrees with you on the first monetary issue worth $15,000 and modifies the order accordingly to decrease that obligation to $8,000. If you do not dispute that modification, but continue to dispute only the second $20,000 monetary obligation, and the Department does not issue a final decision within 33 months, then, the default decision provision of this section would neither affirm the portion of the initial order that was removed by the MMS Director's modification nor reverse the Director's determination that you owed $8,000 (a monetary obligation less than $10,000). Rather, the order as modified with respect to the $8,000 monetary obligation would stand because there is no longer an administrative proceeding pending with respect to that obligation. In addition, the $20,000 disputed portion of the order would be deemed decided in favor of the Secretary under paragraph (b).

Under paragraph (c)(2), if the MMS Director modified an order and a delegated State intervened in the appeal, and if neither the recipient of the order or Notice of Order nor a joining lessee has continued the appeal, the decision the Secretary would be deemed to have made under paragraph (b) would be to affirm the order as modified by the MMS Director regardless of the amount of any monetary obligation, or any nonmonetary obligation, at issue in the lessee's or designee's appeal. For example, assume that you appeal an order involving two separate monetary obligations, one worth $15,000, and one worth $20,000. Assume also that MMS agrees with the you on the first monetary issue worth $15,000 and modifies the order accordingly to decrease that obligation to $8,000, and that a delegated State intervenes to dispute the modification of the first issue. If you do not dispute that modification but continue to dispute only the second $20,000 monetary obligation, and the Department does not issue a final decision within 33 months, then the order as modified with respect to the $8,000 at issue would stand because there is no longer an administrative proceeding pending with respect to that obligation. Thus, even though the delegated State intervened to contest the modification, the Secretary will be deemed to have affirmed the Director's determination, even though the amount is less than $10,000, because the State is not an appellant. In addition, the disputed portion of the order would be deemed decided in favor of the Secretary under paragraph (b) because the appellant continued to contest that aspect of the order and the amount of the obligation was over $10,000.

Under paragraph (d), if the MMS Director rescinded an order and a delegated State intervened in the appeal, the Secretary would be deemed to have affirmed the MMS Director's rescission in all respects. Although the intervening State disputes the Director's rescission, the original order is no longer in dispute between the Secretary and the appellant—it is in dispute between the Secretary and the delegated State. Therefore, the rescission would be affirmed because the intervening State is not an appellant. We do not believe that Congress intended 30 U.S.C. 1724(h)(2) to operate to reinstate orders the Director had rescinded.

Paragraph (e) would explain the relationship of requests for reconsideration to the default decision provision. If the IBLA issues a decision on or before the date the appeal ends under § 4.912, that decision is the final decision in the administrative proceeding for purposes of 30 U.S.C. 1724(h)(1) and fulfills the requirements of that provision. Thereafter, 30 U.S.C. 1724(h)(1) and (2) have no further application. Section 1724(h)(2) would not apply because the IBLA has already issued a final decision for the Department. Requests for reconsideration do not change the fact that the Department has issued a final decision in the administrative proceeding. IBLA decisions are final for the Department and therefore meet the RSFA 1724(h) standard.

Therefore, if a party requests reconsideration of an IBLA decision, the RSFA provision at 30 U.S.C. 1724(h) does not compel the IBLA to issue a

further decision within the section 1724(h)(1) time frame. Beyond the text of the statute itself, there are several additional reasons why this is so.

First, when the IBLA issues a decision, that decision constitutes final agency action under the Administrative Procedure Act, 5 U.S.C. 704, and the lessee may seek judicial review. If the lessee chooses to seek reconsideration rather than sue for judicial review, it is invoking a purely optional additional procedure within the Department and can have no objection to the IBLA taking the time necessary to rule on the request for reconsideration.

Second, the obvious intent of 30 U.S.C. 1724 (h) is to ensure that the Department issues a judicially reviewable final agency action within the prescribed time frame. When the IBLA issues a decision, it has accomplished that objective and met the statutory purpose.

Third, 30 U.S.C. 1724(h) was not intended to provide lessees a tool to try to thwart IBLA decisions that they don't like that involve principal amounts of less than $10,000 by filing requests for reconsideration. If the IBLA were compelled to issue a second decision within the section 1724(h)(1) time frame, it would leave the IBLA with very little time to act before the section 1724(h)(2) rule of decision automatically reversed the first decision.

Paragraph (f) would provide that if the principal amount of a monetary obligation is not specifically stated in an order and must be computed to comply with the order, the principal amount referred to in paragraph (b) means the principal amount the MMS estimates you would be required to pay as a result of the order. Thus, if MMS issued an order to perform a restructured accounting, MMS could provide an estimate of the principal amount of the monetary obligation for purposes of this section. This estimate normally would be made at the time of the order and included in the order, but it might be done, or revised, later, as more information becomes available during the appeals process, particularly during record development. See proposed 30 CFR 242.105.

Section 4.957 What is the Administrative Record for My Appeal if it is Deemed Decided?

This section would explain that if your appeal is deemed decided under §§ 4.956 or 4.972, regardless of what the deemed decision is under those sections, the record for your appeal is the record established under §§ 4.919 or 4.920, or before the MMS Director in an appeal under former 30 CFR part 290, plus any additional correspondence to the MMS Director, the MMS Director's notice of concurrence, modification, or rescission under § 4.929(d), or MMS Director's decision under 30 CFR part 290, any pleadings to the IBLA, and any IBLA orders and decisions.

For example, assume that the MMS Director modified your order, and you continued your appeal to the IBLA by filing a Statement of Reasons. Assume also that MMS files an Answer. If the IBLA did not issue a decision in your appeal by the end of the RSFA 33-month period, and the MMS Director's modification is deemed decided in the Department's favor under § 4.956, the record would include not only the record developed under §§ 4.919 and 4.920, but also any additional correspondence to the MMS Director, the MMS Director's notice of modification, your Statement of Reasons, and MMS's Answer.

Section 4.958 How Do I Request an Extension of Time?

RSFA, § 4(a), adding new FOGRMA § 115(h)(1), 30 U.S.C. 1724(h)(1), allows extensions of the 33-month time period by any amount ''agreed upon in writing by the Secretary and the appellant.'' To ensure careful tracking of time frames for all appeals, we are proposing the same procedure regardless of whether RSFA applies to the appeal. Regardless of who requests the extension, the Department has sole discretion whether to agree to extensions. However, the time frame cannot be extended without the agreement of the appellant. Thus, if a delegated State Intervenor wanted more time to file its Intervention Brief, the Department could choose not to agree to the extension because the extension could jeopardize meeting the 33-month time frame. However, the State could seek approval of the appellant to extend the 33-month time frame.

This section would explain the process for requesting an extension of time. Parties would be required to follow the procedures in paragraph (a)(1) whenever they needed: (i) additional time after their appeal commenced to meet any filing requirement under this subpart; (ii) additional time for the Department to issue a final decision in their appeal; (iii) to stay their appeal pending settlement efforts; or (iv) additional time for any other reasons. Under paragraph (a)(2), parties would have to submit a written request for an extension of time to the office or official with whom they must file the document before the required filing date.

Paragraph (b) would require appellants to agree in writing in their request to extend the period in which the Department must issue a final decision in their appeal under §§ 4.956 or 4.972, or which the Department uses as guidance to track their appeal under § 4.948, by the amount of time for which they are requesting an extension.

Under paragraph (c), the Department could require any other party seeking an extension of time to submit a written agreement signed by the appellant to extend the period in which the Department must issue a final decision in the appeal under §§ 4.956 or 4.972, or which the Department uses as guidance to track the appeal under § 4.948, by the amount of time for which the other party is requesting an extension.

Section 4.959 May IBLA Consolidate Appeals?

The current IBLA rules do not provide a process for consolidation. Thus, consolidation is at the discretion of IBLA. This section would continue to give IBLA discretion to consolidate appeals when consolidation would make the process more efficient both for parties and the Department.

Paragraph (a) would allow IBLA to consolidate appeals that involve the same order or decision not to issue an order, common issues of disputed material fact, or common issues of law.

In order to prevent concerns about meeting the 33-month time frame and encourage consolidation, proposed paragraph (b) would require appellants that wish to consolidate to extend the 33-month time frame so that all appeals being consolidated are put on the same track as the latest of the appeals being consolidated. However, under paragraph (b)(2)(ii) of this section, the parties and IBLA also could agree to extend the time frame by a different amount.

Paragraph (c) would provide that IBLA will notify all parties to the appeal of any consolidations under this section.

Section 4.960 Where Do I File Documents Required Under This Subpart?

This section departs from the current process whereby all documents at the early stages of the appeals process are filed with the office that issued the order. However, although you would no longer file your documents with the office that issued the order, you could be required to serve that office and other persons under § 4.962.

Accordingly, the substantive sections of the rule would tell you *with whom* you would have to file your document, and this section would provide times

and addresses. Thus, this section would provide that you must file documents required under this subpart in the appropriate office as follows:

(a) With the MMS DRD between 9 a.m. and 5 p.m. local time at: [*address of MMS DRD*], using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (_____) _____–_____.

(b) With IBLA at: Interior Board of Land Appeals 4015 Wilson Boulevard, Arlington, Virginia 22203, using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (703) 235–9014; or

(c) With an Assistant Secretary at: [*address of MMS DRD*], using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (_____) _____–_____.

Currently, the Department does not allow filing by telefax. This rule would allow filing by telefax. However, under paragraph (d), if you filed a document by telefax, you would have to send an additional copy of your document to the same office or official so that it is received within 5 business days of your telefax transmission using the U.S. Postal Service, a private delivery or courier service or hand delivery. The Department added this provision to make filing easier for parties, but wanted to assure that it had a legible hard copy for the file. Because timing is critical, and in some instances jurisdictional, we recommend that parties keep documentation that the proper office received the telefax transmission.

Section 4.961 How Can a State Concerned Receive Notification of Record Development and Settlement Conferences?

For many States concerned, the amount of their revenues from Federal royalties is relatively small, and they therefore do not actively participate in the collection process. Thus, we are not proposing to seek the participation of all States concerned in all record development and settlement conferences that could affect their revenues. However, those States concerned without delegations that would like to participate could inform MMS at any time of their interest, and then MMS would begin notifying them of record development and settlement conferences. Accordingly, if a State concerned wanted to receive notification of record development conferences under § 4.917 and settlement conferences under § 4.924, then the State concerned would have to provide the MMS DRD with the name, title, address, and telephone number of the State official authorized to receive the notifications.

Section 4.962 What Copies of Documents Filed Under This Subpart are Appellants, Lessees, and Intervenors Required to Serve?

This proposal seeks to improve the process of providing appropriate notification about pending appeals to States, Indian lessors, and all parties and others interested in particular appeals. The tables presented in this section and § 4.963 of the proposed rule are an attempt to provide a user-friendly means for each participant in the appeals process to determine when and to whom they must serve copies of documents filed in the appeals process. The requirements for filing the original documents are contained in the sections of this rule discussing each of those specific documents.

This section would apply to appellants, lessees, and intervenors—the requirements for Department of the Interior offices are set out in § 4.963. Who you must serve would be different depending on who the appellant is. The table in paragraph (a) would apply to appellants, lessees, and intervenors participating in appeals filed by recipients of orders or notices of orders involving leases on Federal or Indian tribal lands (*i.e.*, appellants other than Indian lessors).

The table in paragraph (b) would show service requirements for appellants, lessees, and intervenors participating in appeals by recipients of orders or notices of orders involving leases on Federal or Indian tribal lands.

Section 4.963 What Copies of Documents Filed Under This Subpart is the Department Required to Serve?

Who the Department must serve would be different depending on who the appellant is. The table in paragraph (a) would apply to Department of the Interior offices participating in appeals filed by recipients of orders or notices of orders involving leases on Federal or Indian tribal lands (i.e., appellants other than Indian lessors).

The table in paragraph (b) would show service requirements for Department of the Interior offices participating in appeals by recipients of orders or notices of orders involving leases on Federal or Indian tribal lands.

Paragraph (c) would apply to appeals involving individual Indian mineral owners' leases (i.e., leases that are not tribal leases), regardless of who files the appeal.

We do not believe that it is possible or practical to serve copies of all documents filed on individual Indian mineral owners. Instead, the proposal is to serve copies on BIA area offices and for those offices to provide appropriate notification. This could vary depending on the interest of the individual Indian mineral owner and the relative importance of the cases, as well as on other factors relevant to the particular BIA area office and the individual Indian mineral owners.

Thus, such appeals, MMS would transmit a copy of the Notices of Appeal, MMS notices of timely filing, Statements of Reasons, and IBLA decisions required under this subpart to the appropriate BIA office. That BIA office could make available to individual Indian mineral owners whatever notice it deemed appropriate by any method it deemed appropriate.

Section 4.964 What if I Don't Serve Documents as Required?

This section would provide that if you are an appellant, and you fail to serve any person as required under this section, then IBLA could dismiss your appeal if the person you did not serve or the adverse party is prejudiced by your failure to serve.

Section 4.965 How Do I Pay the Processing fee?

This section would provide that you must pay your processing fees to the MMS DRD. You would be required to pay the nonrefundable processing fees required under §§ 4.907(a)(3) and 4.939(a)(2) by Electronic Funds Transfer, unless you requested, and MMS authorized, payment by check or an alternative method before the date the processing fee would be due. The payment would have to include various specified forms of identification in order to properly account for the fee. Indian lessors would not have to pay a processing fee. We request comments on the amount of the processing fee, payment by electronic transfer, and what form of identification should be included with fees.

The Department's authority to recover its costs for appeals involving all leases is the Independent Offices Appropriations Act of 1952, 31 U.S.C. 9701 (originally codified at 31 U.S.C. 483a) (IOAA). In addition, the Department is authorized to recover its costs related to appeals of Federal onshore leases under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701–84. Thus, as part of this proposed rulemaking, we analyzed the proposed appeals rule's processing fees for reasonableness according to the factors in FLPMA § 304(b), 43 U.S.C. 1734(b). Although the IOAA does not contain the same

''reasonableness factors'' as FLPMA § 304(b), the factors MMS considered under FLPMA to determine reasonable fees led it to conclude that the fees for offshore and Indian leases should be the same as for onshore leases.

The October 28, 1996, proposed regulation on appeals also proposed payment of a processing fee. 61 FR 33607 (1996). Several comments to that rule questioned MMS's authority to impose such fees. However, in addition to the authority under the IOAA and FLPMA, the United States Court of Appeals for the District of Columbia Circuit has upheld charging processing fees for administrative appeals. *Ayuda, Inc.* v. *Attorney General,* 848 F.2d 1297 (D.C. Cir. 1988). *See also United Transportation Union-Illinois Legislative Board* v. *Surface Transportation Board,* No. 97–1038, 1997 U.S. App. LEXIS 37560, (D.C. Cir. Nov. 10, 1997) (decision published in table case format without opinion, reaffirming *Ayuda*) (reported in full text format at 1997 U.S. App. LEXIS 37560). The Circuit Court held that processing fees for administrative appeals ''are for a 'service or thing of value' [under the IOAA, 31 U.S.C. 9701(a),] which provides the recipients with a special benefit.'' *Ayuda, Inc.* at 1301. Thus, MMS and OHA have properly determined that under FLPMA and the IOAA they have authority to recover the costs to process appeals because appeals provide ''special benefits or privileges to an identifiable non-Federal recipient above and beyond those which accrue to the public at large.'' 346 Departmental Manual 1.2.A.

The ''reasonableness factors'' set out in FLPMA are: (a) ''actual costs (exclusive of management overhead)'; (b) ''the monetary value of the rights or privileges sought by the applicant''; (c) ''the efficiency to the government processing involved''; (d) ''that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant''; (e) ''the public service provided''; and (f) ''other factors relevant to determining the reasonableness of the costs.''

MMS and the IBLA considered each of the FLPMA factors for appeals processed under this proposed rule. We first estimated the actual cost for processing the appeal, and then considered each of the other FLPMA factors to see if any of them might cause the fee to be set at less than actual cost. If so, we then considered whether any of the remaining factors acted as an enhancing factor that would mitigate against setting the fees at less than actual cost. We then decided the amount of the fee, which cannot be more than the actual processing cost. This method led to fees that are set well below the actual processing costs. Accordingly, for royalty appeals, the fee was set at $150 to be paid with your Notice of Appeal under § 4.907, and at $150 for filing your Statement of Reasons under § 4.939(a)(2). This analysis also applies to the single $150 fee proposed under 30 CFR part 290 for appeals of decisions and orders by the MMS OMM program.

Factor (a)—Actual Costs

Actual costs means the financial measure of resources expended or used by MMS to process a Notice of Appeal, and by the IBLA to process the Statement of Reasons, including, but not limited to the costs to: conduct record development and settlement conferences; issue the MMS Director's concurrence, modification or rescission; consider other pleadings before the IBLA and issue IBLA decisions; or take any other relevant action. Actual costs includes both direct and indirect costs, exclusive of management overhead. Management overhead costs means costs associated with the MMS and OHA directorate. For MMS, this means the entire Washington office staff, except for any Appeals Division staff required to perform work on appeals. For OHA, this means the OHA Director, OHA Deputy Director, and associated staffs. Section 304(b) of FLPMA requires that management overhead be excluded from chargeable costs.

Direct costs include agency expenditures for labor, material, and equipment usage connected with the performance of processing responsibilities. For MMS's costs to process a Notice of Appeal, we calculated actual costs by estimating the average time it would take MMS personnel to perform various phases of the appeals process. That estimate was based on the time it takes to complete current similar processes. We then multiplied the total hours by $50, which is based on an average of MMS's personnel, material and equipment usage costs. MMS's indirect costs include items such as rent and overhead (excluding management overhead). MMS determined its indirect cost rate and applied the rate to direct costs to determine its total actual costs. MMS calculated its indirect cost rate by dividing the indirect costs described above by the total program cost to arrive at an indirect cost percentage of 18.5%. MMS then multiplied the direct costs by the indirect cost percentage and added that figure to its direct costs to determine its total actual costs. This method of calculating costs is a generally accepted practice in both the private and public sectors.

For IBLA's direct costs, we calculated IBLA's total appeals personnel costs, then added costs for supplies and equipment for those appeals. To calculate indirect costs, we determined from information from OHA that 60% of OHA's indirect costs are related to IBLA appeals. We therefore took 60% of OHA's indirect costs and added those to the IBLA's total direct costs to determine total actual costs for all IBLA appeals (not just royalty appeals). We then divided that total actual cost by the average total number of appeals to the IBLA for the last three fiscal years to arrive at an average cost per appeal. The methodology used for determining IBLA's actual costs is different from MMS's methodology because of the different way IBLA keeps and tracks cost information. We believe both methods are reasonable.

Our method of establishing actual costs involved estimating the average cost of processing an individual appeal. We concluded that while it might be possible to track costs and consider the reasonableness factors on a case-by-case basis, doing so would be so inefficient and expensive as to be unreasonable.

As explained above, we propose having two fees for royalty appeals under 43 CFR part 4, subpart J. An appellant would submit one fee with its Notice of Appeal for the costs of processing by MMS. If the appellant decides to file a Statement of Reasons with the IBLA, it would submit a separate fee for the costs of processing by the IBLA. This system would ensure that appellants only pay for the services they receive. We recognized that one larger fee for the entire process would not be fair to appellants who chose not to continue their appeal to the IBLA because they would have ''paid'' for the entire process. For the processing of OMM program appeals under 30 CFR part 290 there would be one fee for the costs of processing by IBLA.

MMS's costs to process a royalty appeal under this proposed 43 CFR part 4, subpart J, would include the cost to consider the Notice of Appeal in various phases at MMS. The first phase would be the MMS DRD performing the following functions:

(1) Receiving and date stamping each document;

(2) Reviewing each appeal for completeness and timeliness;

(3) Docketing the appeal by entering the information into a computer-based tracking system;

(4) Preparing and sending an acknowledgment letter or a denial letter as appropriate;

(5) Preparing an appeal file; and
(6) Copying and forwarding the appeal to the appropriate office.

We estimated based on current processes that the average time to complete this phase would be 3 hours.

The second phase would be the record development process. This would include the following steps:
(1) Preparation for the record development conference by the tribe, delegated State, or MMS office that performed the audit or issued the order under appeal;
(2) Participation in the record development conference by that office as well as an average of three other MMS personnel;
(3) Compilation of the record;
(4) Preparation of the Joint Statement of Facts and Issues, including circulation of a draft statement to all parties, obtaining comments and signatures;
(5) Preparation of the certification of the record, including circulation of a draft certification to all parties, obtaining comments and signatures; and
(6) Submission of the record, statement and certification to the MMS DRD.

We estimated based on current processes that the average time to complete this phase would be 71 hours.

The third phase would consist of the settlement conference. This would include the following steps:
(1) Preparation for the settlement conference by MMS and the tribe, delegated State or MMS office that performed the audit or issued the order under appeal; and
(2) Participation in the actual settlement by an average of four MMS personnel (including a representative from the tribe, delegated State or MMS office that performed the audit or issued the order under appeal).

We estimated based on current processes that the average time to complete this phase (assuming full settlement discussions separate from the record development efforts) would be 64 hours. As discussed below, the settlement conference could be combined with the record development conference to reduce costs and time. However, it is likely that even though the record development and settlement conferences could occur in one meeting the settlement conference would require time in addition to the time to conduct the record development conference. In such instances, we estimate that the time involved for settlement conferences would be 24 hours. Assuming that most appellants would choose to combine the settlement and record development conferences, we determined that 24 hours was a reasonable estimate for the settlement conference.

The final phase of MMS's processing of the appeal would consist of the MMS Director concurring with, modifying or rescinding an order. This includes research for and preparation of the Director's action on the order, as well as transmittal of that action to the appellant and others MMS is required to notify under the proposed rule, and transmittal of the record to the IBLA and Office of the Solicitor if a party continues the appeal before the IBLA. We estimated the average staff-hours the Appeals Division currently spends on each appeal that results in a decision by the MMS Director to be 100 hours. However, much of the work the Appeals Division currently performs would be done during the record development process and would not have to be repeated. For example, the appeals analyst would participate in compiling the record and ensuring it is complete, and would analyze the appeal prior to record development to help ensure all issues were included in the Joint Statement of Facts and issues. Furthermore, under the proposed process, MMS would no longer be writing lengthy decisions, designed for publication. Nevertheless, MMS would spend some time during the MMS Director's determinations to concur with, modify, or rescind orders and documenting that determination (particularly in cases where the order is modified or rescinded). We estimate the time in addition to the record development process necessary to analyze the appeal and draft the MMS Director's concurrence, modification or recission will take 30 hours per appeal.

Thus, the total estimated average hours for MMS to spend on these phases is 3 hours for the docketing of the appeal, 71 hours for the record development process, 24 hours for the settlement conference, and 30 hours for the MMS Director's activity for a total of 128 hours per appeal. This estimate is based on current MMS time requirements for completing similar tasks. Using an estimate of $50 per hour based on an average of MMS's personnel, material and equipment usage costs, we estimate the average direct cost burden for these requests would be $6,400 ($50/hour x 128 hours). MMS's indirect costs for the requests is $1,184 per appeal (18.5% indirect cost rate × $6,400) resulting in total estimated actual costs of $7,584 per average appeal.

After the MMS Director's action, if a party continues the appeal before the IBLA under 43 CFR part 4, subpart J, additional phases would be necessary to process the Statement of Reasons at the IBLA. The costs of this phase at the IBLA would cover the following steps:
(1) Considering all substantive pleadings, requests to supplement the record, and extension requests;
(2) Acting on any requests; and
(3) Researching, writing and issuing a final decision in the appeal.

An additional phase may be necessary if a party requests reconsideration. However, because this occurs infrequently, we have not included any additional costs for the reconsideration request phase in our actual cost estimate.

Rather than estimating IBLA costs by calculating the average number of hours spent on an appeal, we instead added the total IBLA costs and divided by the total number of appeals to the IBLA to arrive at an average cost per appeal. We estimated that the IBLA's average total costs over the last 3 years for all appeals to the IBLA was approximately $3 million. The IBLA decided an average of 620 appeals over that period at an average cost of $4,800 ($3 million divided by 620). Thus, we estimated that the IBLA's total average costs to decide an MMS royalty appeal would be $4800. (This is about the same as the current cost per appeal incurred by the MMS Appeals Division when it renders decisions on appeals.)

Because we will have to modify both the MMS and IBLA docketing and tracking systems we needed to add those costs to our actual costs. We estimate that this will take approximately 3 staff months to complete at a cost of $8,000 per month, for a total cost of $24,000. Moreover, we may incur expenses as startup costs to establish the MMS Dispute Resolution Division. We estimate that moving furniture, phones, data connections and space preparation will cost approximately $24,000 based on a similar reorganization and relocation. Therefore, we added $45 per appeal ($48,000 in costs divided by an average of 213 appeals to the MMS Director per year, spread over 5 years) to our actual cost estimate.

Factor (b)—Monetary Value of the Rights and Privileges Sought

The monetary value of rights and privileges sought means the objective worth of an appeal, in financial terms, to the appellant. The value to an appellant is that of having an error corrected if there is an error in an order. *See Ayuda, Inc.* versus *Attorney General,* 848 F.2d 1297, 1301 (1988). However, the monetary value of having

an error corrected will vary depending on the amount under appeal. Moreover, many appeals will decide a legal question that imparts value to all lessees so the monetary value is not merely equal to the amount under appeal. Therefore, we rejected the idea of trying to calculate monetary value on a case-by-case basis as too speculative, time-consuming, wasteful of resources, and subject to disputes. Instead, we have determined that consideration of this factor should include an examination of equitable considerations related to monetary value, rather than precise figures, which would be very difficult or impossible to calculate.

A major equitable consideration is whether the level of cost reimbursement could burden the applicant to such an extent that the appeal would actually end up being of no monetary value to the appellant whatsoever. An appeal with a small potential value to the appellant, but which triggers high processing costs, would be an example of an instance where the fee might reasonably be set at a figure less than the actual cost of processing due to this factor. Thus, we took into account the costs for an appellant to go through the appeals process relative to the monetary value of the relief sought. After considering this factor, MMS decided that it was reasonable to set fees greatly below actual costs so as not to frustrate Congress' intent under RSFA § 4(a), adding FOGRMA § 115(h), 33 U.S.C. 1724(h), regarding appeals of MMS orders. This is because lessees and their designees would not appeal if our recovery costs are excessive. In fact, during our public meetings on the draft proposed rule, industry representatives expressed that concern. Thus, this factor did cause fees to be set below actual costs.

Factor (c)—Efficiency to the Government Processing Involved

Efficiency to the Government processing means the ability of the United States to process an appeal with a minimum of waste, expense, and effort. Implicit in this factor is the establishment of a cost recovery process that does not cost more to operate than we would collect and does not unduly increase the costs to be recovered. As noted in the above section on actual costs, we have determined that for the appeals process proposed in this rulemaking, it would be inefficient to determine actual cost data on a case-by-case basis. MMS has thus used cost estimates derived from collected data.

The procedures that we would use to process an appeal would be partially based on standardized steps for similar MMS transactions in order to eliminate duplication and extraneous procedures. However, some procedures would require processes in addition to those used under the current appeals process. These additional processes were accounted for under factor (a) above.

Factor (d)—Cost Incurred for the Benefit of the General Public Interest

The cost incurred for the benefit of the general public interest (public benefit) means funds the United States expends, in connection with the processing of an appeal, for studies or data collection determined to have value or utility to the United States or the general public separate and apart from the document processing. It is important to note that this factor addresses funds expended in connection with an appeal. There is another level of public benefit that includes studies which we are required, by statute or regulation, to perform regardless of whether an appeal is received. The costs of such studies are excluded from any cost recovery calculations from the outset. Therefore, no additional reduction from costs recovered is necessary in relation to these studies.

We concluded that the processing of an appeal did not as a rule produce studies or data collection that might benefit the public to any appreciable degree. Therefore, any possible benefits of such studies to the public are balanced by their possible benefits to the appellant. Accordingly, we made no adjustment to the fee recovered based on this factor.

Factor (e)—Public Service Provided

Public service provided means direct benefits with significant public value that are expected as a result of an administrative appeal. This factor is thus concerned with the benefit resulting from the ultimate decision in the appeal, while the previous factor related to the benefits of the document processing itself. Deciding an appeal provides a public service because the primary function of the appeals process is to correct errors in an effort to ensure the ''fair and proper administration of [our] operations . . . .'' *Ayuda*, 848 F.2d at 1301. Indeed, ''the public has a keen interest in the correctness of administrative decisions.'' *Ayuda*, 848 F.2d at 1301. Although the appellant invokes the appeals procedures in order to benefit from them, and therefore receives a ''service or a thing of value,'' *see Ayuda* at *id.*, there also is a substantial benefit to the public. We therefore decided that it was reasonable to set fees greatly below actual costs on the basis of this factor, as well as the monetary value factor.

Factor (f)—Other Factors

The final reasonableness factor is other factors relevant to determining the reasonableness of the costs. Under this factor, we considered fees that other government entities charge for processing administrative appeals (see October 28, 1996, proposed rulemaking, 61 FR at 55609).

After considering all of the reasonableness factors, we concluded that the factors of monetary value and public service make it reasonable to set the fees for royalty (for processing the Notice of Appeal and Statement of Reasons) and OMM program appeals at $150 instead of at the actual costs. None of the other factors mitigated against setting the fees at less than actual costs, and the proposed fee of $150 is within the range of fees other agencies commonly charge. Because these fees would meet the reasonableness factors of FLPMA, they are thus also reasonable under the IOAA.

We invite comments concerning the proposed processing fees. We further specifically request input concerning the value to lessees and designees of using the appeals process.

Section 4.966 How Do I Request a Waiver or Reduction of My Fee?

Under this proposed section, to request a fee waiver or reduction, you would have to submit a written request to the MMS DRD with your Notice of Appeal or Statement of Reasons. In your request, you would have to demonstrate that you are either unable to pay the fee or that payment of the fee would impose an undue hardship upon you.

We invite comments regarding the advisability of including procedures in the proposed rule for granting fee waivers or reductions. We included the fee waiver and reduction provisions because, during our outreach meetings, industry representatives stated that the processing fee might be a hardship on small independent oil and gas producers and feared that the fee would have a ''chilling'' effect on those independents bringing appeals. However, we have already considered hardship and a possible chilling effect in considering the reasonableness factors discussed above, specifically the ''monetary value'' factor. After considering the factors, we decided that it was reasonable to reduce the fee for MMS's processing costs from $7,584 to $150, and for IBLA's processing costs from $4,800 to $150. Thus, we already addressed industry's concerns, and reduced the fee to a nominal fee that

will not cause undue hardship even to small entities.

While waiver procedures for appeals do exist in some other agencies, they may not be applicable in instances such as this where nominal fees are charged. For example, waiver provisions in Department of Transportation Surface of Transportation Board regulations apply to a fee schedule that includes fees ranging up to $23,300 for the filing of a formal complaint 49 CFR 1002.2(c)–(f). *See United Transportation Union-Illinois Legislative Board* versus *Surface Transportation Board*, No. 97–1038, 1997 U.S. App. LEXIS 37560, (D.C. Cir. Nov. 10, 1997) (upheld a Surface Transportation Board fee for handling appeals, in part, because it ''provided a waiver mechanism for fees that would cause undue hardship''). Therefore, we invite comment on whether the waiver and reduction provisions should be removed.

Section 4.967 When Will MMS Grant a Fee Waiver or Reduction?

Under the proposed rule, in extraordinary circumstances, MMS could grant a fee waiver or fee reduction. Extraordinary circumstances would include a demonstrable inability to pay or undue hardship to an entity required to pay the fee.

The MMS DRD would send you a written decision granting or denying your request.

Section 4.968 How Do I Pay My Processing fee if MMS Grants a Reduction or Denies My Request for a Reduction or Waiver?

Under this section, if MMS granted your request for a fee reduction, you would have to pay the reduced processing fee in accordance with this part within 30 days of your receipt of the decision to reduce your fee. If MMS denied your request, that decision would be final for the Department and would not be appealable under this part. Also, if MMS denied your request, you would have to pay the processing fee in accordance with this part within 30 days of your receipt of that denial.

Section 4.969 How Do I Appeal a Decision That My Appeal Was Not Filed on Time?

Under this proposed section, you could appeal MMS's decision on timeliness to the IBLA within 15 days of your receipt of MMS's notification under § 4.914(c)(1) that your appeal was not timely filed. If you choose to appeal that decision to the IBLA, you would be deemed to agree to extend all applicable time periods for deciding your appeal on the merits by the amount of time the IBLA needs to decide your appeal on the issue of timeliness. If the IBLA denied your appeal, the IBLA's decision would be final for the Department, and you would have failed to exhaust required administrative remedies as to the merits of the order or MMS decision not to issue an order.

If you choose not to appeal an adverse timeliness decision to the IBLA, the order, or MMS decision not to issue an order, would be final, and you would have failed to exhaust required administrative remedies as to the merits of the order or MMS decision not to issue an order. Accordingly, neither the IBLA nor a Federal court would have jurisdiction to decide the merits of your appeal. If you appealed an adverse timeliness decision to the IBLA, and the IBLA ruled against you, and if you then sought judicial review of the timeliness issue in Federal court and prevailed in court, your appeal on the merits would commence, and your Preliminary Statement of Issues and processing fee would be due (if you did not already file them), 60 days after the date a final non-appealable judgment was entered.

Section 4.970 What Rules Apply to Appeals Filed Before [Insert Date When This Subpart Becomes Effective]?

Because the RSFA 33-month default decision rule applies to pending appeals, it was necessary to make pending appeals subject to some of the procedures under this subpart. In addition to the current versions of 30 CFR parts 243 and 290, this section and the new 43 CFR 4.901, 4.902, 4.903, 4.911 to 4.913, 4.948, 4.950, 4.957, 4.958, 4.971, and 4.972 would apply to appeals pending on the date this rule becomes effective.

We are placing these transition provisions at the end of the rule so that they can easily be: (1) implemented as a final rule even without the earlier part of this rule (if, for example, we decide not to implement the rest of this rule as proposed or if the implementation of the rest of the rule is delayed beyond May 1999); or (2) removed once they are no longer necessary if this proposed rule becomes final.

This section would make clear that the rules that apply to appeals pending either before the MMS Director or IBLA on the date this rule becomes effective would be the versions of 30 CFR parts 243 and 290 in effect prior to the effective date of this rule, as well as the ''transition'' provisions in this proposed rule. That is because currently pending appeals are subject to a different process than appeals that would be filed under this subpart.

Section 4.971 When Does My Appeal Commence and End if it Was Filed Before [Insert Date This Subpart Becomes Effective]?

RSFA, § 4(a), adding FOGRMA § 115(h)(1), 30 U.S.C. 1724(h)(1) provides, in part, that:

> The Secretary shall issue a final decision in any administrative proceeding, including any administrative proceeding pending on the date of enactment of this section, within 33 months from the date such proceeding was commenced or 33 months from the date of such enactment, whichever is later.

As discussed above, RSFA does not define ''commence'' with respect to appeals. Thus, for purposes of the period in which the Department must issue a final decision in your appeal, paragraph (a) would provide that if your Notice of Appeal and initial Statement of Reasons to MMS was filed on the date RSFA was enacted, your appeal commenced on August 13, 1996.

If your Notice of Appeal or initial Statement of Reasons to MMS was filed after August 13, 1996, paragraph (b) would provide that your appeal commenced on the date MMS received your Notice of Appeal, or, if later, your Statement of Reasons, under 30 CFR 290.3. This proposal is consistent, to the extent possible, with the rules applicable to appeals filed after the effective date of this rule. The current rule provides that:

> [T]he notice of appeal shall incorporate or be accompanied by such written showing and arguments on the facts and laws as the appellant may deem adequate to justify reversal or modification of the order or decision. Within the same 30 day period [for filing the notice of appeal], the appellant will be permitted to file in the office of the official issuing the order or decision additional statements of reasons and written arguments or briefs.

30 CFR 290.3 (1997). Thus, the rules currently in effect require appellants to file their Statement of Reasons with their Notice of Appeal. However, MMS practice, consistent with the current rules at 30 CFR 290.5, has been to allow appellants additional time to file their Statement of Reasons after timely filing the Notice of Appeal, which often contains little or no argument as to why the appellant believes the MMS order or decision should be modified or rescinded. Since enactment of RSFA, in most cases, appellants have agreed to extend the 33-month time period in exchange for MMS's extension of the time within which to file the initial Statement of Reasons. Consistent with the approach to accounting for extensions of time to file the processing fee and Preliminary Statement of Issues

proposed in § 4.907 above, we think the easiest way to account for these extensions is simply to calculate the time frame from the date the initial Statement of Reasons was received, if later than the Notice of Appeal. We also think that this is the most reasonable interpretation of ''commenced'' because an appeal cannot ''commence'' until the appellant tells us why it is appealing. Accordingly, a perfunctory Notice of Appeal merely stating that an appellant is appealing an order does not ''commence'' an appeal.

In some cases, appellants file a Supplemental Statement of Reasons after their initial Statement of Reasons. This supplemental filing would have no effect on the commencement date, but in most cases MMS and the appellants would have agreed to an extension of the 33-month time frame to allow time for such supplemental filings.

Paragraph (c) would state that your appeal ends on the same day of the month of the 33rd calendar month after your appeal commenced under paragraphs (a) or (b), plus the number of days of any applicable time extensions under § 4.958. If the 33rd calendar month after your appeal commenced does not have the same day of the month as the day of the month your appeal commenced, then the initial 33-month period ends on the last day of the 33rd calendar month. *See* the example for calculating the end of your appeal in the Section-by-Section analysis for § 4.912.

Section 4.972 What if the Department Does Not Issue a Decision by the Date My Appeal Ends if I Filed my Appeal Before [Insert Effective Date of This Proposed Subpart]?

This section would be much like § 4.956 but would apply to appeals filed before the effective date of this rule under the current two-level administrative appeals structure.

Paragraph (a) would state that this section applies to appeals of orders, or portions of orders, involving monetary and nonmonetary obligations regarding Federal oil and gas leases pending on the date this rule becomes effective. For orders and portions of orders that do not involve monetary or nonmonetary obligations on Federal oil and gas leases, the time limits in 30 U.S.C. 1724(h)(2) and the default rule of decision stated in this section would not apply. *See* Section-by-Section analysis for § 4.956 for further explanation.

Like § 4.956(b), paragraph (b) would provide that if the IBLA or an Assistant Secretary (or the Secretary or Director of the Office of Hearings and Appeals) does not issue a final decision in an appeal pending on the date this rule became effective by the date the appeal ends under § 4.971(c), then under 30 U.S.C. 1724(h)(2), the Secretary will be deemed to have decided the appeal:

(1) In favor of the appellant for any nonmonetary obligation at issue in the appeal or any monetary obligation at issue in the appeal with a principal amount of less than $10,000;

(2) In favor of the Secretary for any monetary obligation at issue in the appeal with a principal amount of $10,000 or more. *See* Section-by-Section analysis for § 4.956 for further explanation.

Paragraph (c)(1) would state that if the MMS Director has not yet issued a decision under 30 CFR 290.3(c) in your appeal of an order, or portion of an order, under 30 CFR part 290, then the provisions of paragraph (b) apply to the nonmonetary and monetary obligations in the order that you contested in your appeal to the MMS Director. However, under paragraph (2), if the MMS Director has issued a decision under 30 CFR 290.3(c) in your appeal of an order, or portion of an order, under 30 CFR part 290, and if you appealed the Director's decision to IBLA, then the provisions of paragraph (b) apply to the nonmonetary and monetary obligations in the Director's decision that you contested in your appeal to IBLA. For example, assume that you appeal an order involving two separate monetary obligations, one worth $15,000, and one worth $20,000. Assume also that the MMS Director's decision agrees with the you on the first monetary issue worth $15,000 and modifies the order accordingly to decrease that obligation to $8,000. If you do not dispute that modification, but continue to dispute the second $20,000 monetary obligation before IBLA, and the Department does not issue a final decision within 33 months, then the default decision provision of this section would neither affirm the portion of the initial order that was changed by the MMS Director's modification nor reverse the Directors' determination that you owed $8,000 (a monetary obligation worth less than $10,000) that you did not contest. The $8,000 issue would stand because there is no longer an administrative proceeding pending with respect to that obligation. In addition, the disputed portion of the order would be deemed decided in favor of the Secretary under paragraph (b) because it is more than $10,000.

Under paragraph (c)(3), if the MMS Director issued a decision under 30 CFR 290.3(c) in your appeal of an order under 30 CFR part 290, and if you did not appeal the Director's decision to IBLA within the time required under the current version of 30 CFR 290.7 and 43 CFR part 4, then the MMS Director's decision would be the final decision of the Department and 30 U.S.C. 1724(h)(2) has no application.

Paragraph (d) would provide that if any party requests reconsideration of an IBLA decision issued before the date the appeal ends under § 4.971(c), and if IBLA did not issue a decision on reconsideration before the date the appeal ends, then 30 U.S.C. 1724(h)(2) would have no application and the decision the IBLA had issued would be the final action of the Department. *See* Section-by-Section analysis for § 4.956 for further explanation.

Paragraph (e) would provide that if the principal amount is not specifically stated in an order and must be computed to comply with the order, the principal amount referred to in paragraph (b) means the principal amount the MMS estimates you would be required to pay as a result of the order. *See* Section-by-Section Analysis for § 4.956 for further explanation.

We also are proposing §§ 4.971 and 4.972 and the definitions of ''obligation,'' ''monetary obligation,'' and ''nonmonetary obligation'' in proposed § 4.903 as proposed amendments to the existing MMS and IBLA appeals rules in the event that this proposed rule is not promulgated as a final rule. These provisions are needed to implement the RSFA requirements if the present appeals structure is retained. We anticipate that some division and duplication of paragraphs in these sections would be needed to codify the appropriate parts to both 30 CFR part 290 and 43 CFR part 4 in a final rule. However, the substance of such amendments to the current process would not differ from the way these sections would be promulgated if this proposed rule is promulgated as a final rule.

III. Section-by-Section Analysis, 30 CFR Part 208

Section 208.2 Definitions

This section would be amended to define new terms used in the proposed amendment of § 208.16.

Section 208.16 Appeals

This section would be amended to provide a specialized appeals process for appeals filed by refiners or other parties involved in disposition of royalty taken in kind. The purchaser of royalty-in-kind (RIK) production has a contract to purchase personal property from the Federal Government. Such contracts are governed by the Contract

Disputes Act of 1978 (CDA), 41 U.S.C. 601–13. The CDA requires that ''[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer.'' 41 U.S.C. 605(a). It further requires that ''[t]he contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter.'' *Id*.

Under the proposed rule, the contracting officer would be the MMS Director, his or her delegate, or the person designated under a RIK purchase contract. MMS anticipates that the Director will delegate such authority to MMS staff responsible for auditing RIK purchases. Thus, an order issued by an MMS auditor indicating that an RIK purchaser owes additional money to the Government would be a decision of the contracting officer.

The CDA provides for appeals of contracting officers' decisions to the agency's board of contract appeals. 41 U.S.C. 606. Accordingly, there would be no appeal of the contracting officer's decision to the MMS Director. Instead, MMS proposes to provide for appeals of the contracting officer's decision to the Interior Board of Contract Appeals (IBCA) under 43 CFR part 4, subpart C. Note, however, that, although MMS proposes no appeal to the MMS Director, MMS proposes to retain the requirement under the existing provision at 30 CFR 208.12, that appellants must post a bond under 30 CFR part 243 if they decide not to pay pending appeal to the IBCA.

In addition, MMS does not believe that the 33-month limitation for the Department to issue final decisions on appeals under § 4 RSFA, 30 U.S.C. 1724(h), applies to appeals by refiners or other parties involved in disposition of royalty taken in kind. This is because RSFA applies to Federal oil and gas leases and not to the Government's resale under RIK contracts of oil that it receives as royalty under those leases. Thus, appeals to the IBCA under this section would not be subject to any specialized timing requirements such as the default decision rule proposed under 43 CFR 4.956 or 4.972.

The CDA also provides for contractors to bring actions challenging contracting officers' decisions in the United States Court of Federal Claims in lieu of appealing to the agency contract appeals board. 41 U.S.C. 609. Therefore, the proposed amendment to § 208.16 provides for this alternative.

IV. Section-by-Section Analysis, 30 CFR Part 241

This part would be replaced in its entirety by revised provisions making the following general changes.

First, new §§ 241.51 through 241.77 would revise current regulations to clarify the methods to be used to appeal civil penalties authorized by § 109 of FOGRMA, 30 U.S.C. 1719 (Supp. I 1994).

Second, existing § 241.20, which addresses civil penalties authorized by statutes other than FOGRMA, would be deleted. MMS has never used this section. This deletion should not affect MMS's authority to use powers other than civil penalties, such as lease cancellation and debarment, as authorized by other statutes or regulations. MMS welcomes comments regarding whether MMS should keep this section and what form the appeals process should take if it is kept.

Third, this proposal reflects our effort to rewrite this part in ''plain language.'' MMS proposes to use a question and answer format for ease of use.

Fourth, because the amendments to the appeals regulations under this notice are consolidating all royalty appeals before the IBLA, MMS proposes to modify the current rule, which allows certain appeals concerning Notices of Noncompliance to be made to the MMS Director, and allow appeals instead to the IBLA.

Fifth, MMS proposes several changes to make the regulations more consistent with the applicable provisions of FOGRMA.

Finally, MMS proposes to delete the current § 241.53, which addresses assessments for nonperformance. MMS has never used this section and believes that new assessments for chronic erroneous reporting to be proposed under the provisions of the RSFA will be an adequate replacement. MMS welcomes comments suggesting that it be retained and what form the appeals process should take if it is to be retained.

In the new proposed §§ 241.51 through 241.55, MMS would establish the same process for all persons who wish to contest a potential civil penalty that would be assessed under FOGRMA § 109(a) and (b), 30 U.S.C. 1719(a) and (b). Under the current rules, there are separate processes for those persons who comply within the twenty days allowed to correct certain violations under FOGRMA and for those who do not correct within the statutory time frame. The proposed sections would allow all persons served with Notices of Noncompliance to request a hearing on the record before the Hearings Division of the OHA.

The current rule also provides that a person may appeal to the MMS Director if the violation has been corrected within the 20-day cure period. MMS does not believe there is any reason to retain this separate process because we have eliminated appeals to the MMS Director for other appeals involving lease obligations. Thus, consistent with the changes made to 30 CFR parts 243 and 290 and 43 CFR part 4, subpart J, the appeals related to the MMS royalty civil penalty process will also be before the OHA. MMS requests comments on whether MMS should retain the process for appealing royalty civil penalty assessments to the MMS Director.

Section 241.55 would retain the current provision that continues the accrual of penalties during the pendency of appeals. Section 241.63 has a similar provision for penalties authorized by FOGRMA subsections 109(c) and (d), 30 U.S.C. 1719(c) and (d). MMS believes that this provision encourages early compliance with MMS orders when a person in violation believes it is likely to lose on appeal. These provisions would allow a person who receives a Notice of Noncompliance to ask OHA to stay the accrual of penalties.

Section 241.60 would amend the conditions under which MMS may assess penalties without providing recipents with an opportunity to correct them by changing the phraseology from ''for intentional violations'' to be more consistent with FOGRMA. FOGRMA distinguishes between two types of violations: (1) all failures to comply with applicable statutes, regulations, orders, or lease terms, including failures to permit inspection (30 U.S.C. 1719(a) and (b)) and (2) failures to make royalty payments; failures to permit entry, inspection or audit; knowing or wilful failure to inform the Secretary when production commences or resumes (30 U.S.C. 1719(c)); and knowing or wilful preparation, maintenance or submission of false reports; knowing or wilful taking of oil or gas without authority; or purchase, conveyance of oil or gas knowing it was stolen (30 U.S.C. 1719(d)). MMS has previously termed the second group of violations as ''intentional.'' MMS now believes that the use of the term ''intentional violations'' has caused two types of confusion. First, it may have caused the belief that the standard was exactly the same as that for criminal intent. Second, it may have caused confusion by implying that any knowing wrongdoing was covered. MMS believes that using

the same language as the statute will reduce confusion.

MMS therefore is proposing to substitute the specific provisions of FOGRMA for the more generic language in the current rule. This includes increasing the maximum civil penalty up to the $25,000 per day for those acts for which FOGRMA allows such a penalty. MMS does not believe that the regulations should prevent MMS from exercising the full powers granted to it by statute.

Finally, MMS believes that the statutory provision for assessing penalties for ''failure to permit entry, inspection or audit'' applies to failure to provide MMS with documents or information that MMS has requested under the authority of FOGRMA, the regulations, or leases.

V. Section-by-Section Analysis, 30 CFR Part 242

Subpart A—General Provisions

Section 242.1 What Is the Purpose of This Part?

This proposed section would state that the purpose of this part is to explain how MMS or delegated States will issue orders and notices of orders, and serve official correspondence, and how the recipient of an order may appeal that order and exhaust administrative remedies.

Section 242.2 What Leases Are Subject to This Part?

This section would explain that this part applies to all Federal mineral leases onshore and on the OCS, and to all federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands. However, some procedures under this rule would apply only to Federal oil and gas leases because the RSFA provisions regarding notifying lessees when MMS sends orders to their designees applies only to Federal oil and gas leases. The procedures regarding Indian lessor requests for MMS to issue orders under subpart C apply only to Indian leases.

Section 242.3 What Definitions Apply to This Part?

This section would explain the definitions that you will need to know for this part.

Delegated State would mean a State to which MMS has delegated authority to perform royalty management functions pursuant to an agreement or agreements under regulations at 30 CFR part 227. This definition is essentially the same as that under RSFA § 2(1), FOGRMA § 3, 30 U.S.C. 1702(22).

Designee would mean the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf. This definition is essentially the same as the definition under RSFA § 2(1), as added to FOGRMA § 3, 30 U.S.C. 1702(24). Accordingly, the definition cites the rule at 30 CFR 218.52 implementing the requirements of RSFA § 6(g), FOGRMA § 102(a), 30 U.S.C. 1712(a), which allows lessees to designate another person to pay royalties on their behalf. Thus, this definition only would apply to appeals involving royalties and other payments due on production from Federal oil and gas leases after September 1, 1996.

Indian lessor would mean an Indian tribe or individual Indian mineral owner with a beneficial interest in a property that is subject to a lease issued or administered by the Secretary on behalf of the tribe or individual Indian mineral owner.

Lessee would mean any person to whom the United States, or the United States on behalf of an Indian tribe or an individual Indian mineral owner, issues a lease subject to this subpart, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this subpart has been assigned. This definition is essentially the same as that under RSFA § 2(1) and FOGRMA § 3, 30 U.S.C. 1702(7), and would include owners of operating rights. Although RSFA does not apply to Federal oil and gas leases for production prior to September 1, 1996, other Federal solid mineral and geothermal leases, and Indian leases, MMS did not separately define operating rights owners or operators because recipients of orders not subject to RSFA may appeal under this rule regardless of whether they are a ''lessee'' under RSFA.

Obligation would mean:

A lessee's, designee's or payor's duty to:

(1) Deliver royalty-in-kind; or

(2) Make a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment.

This proposed definition is similar to the definition under RSFA § 2(1), FOGRMA, 30 U.S.C. 1702(25), but it does not include MMS's obligations as set out in RSFA's definition of ''obligations,'' because MMS's obligations are not subject to ''orders'' under this part.

Payor would mean any person responsible for reporting and paying royalties for:

(1) Federal oil and gas leases for production before September 1, 1996;

(2) Federal mineral leases other than oil and gas leases; and

(3) Leases on Indian lands subject to this subpart.

This definition is necessary because the term ''designee'' is used for Federal oil and gas leases subject to RSFA, and ''payor'' is used for leases not subject to RSFA.

Reporter would mean a person who submits reports for leases subject to this subpart regardless of whether that person has payment responsibility.

Subpart B—Orders

Section 242.100 What Is the Purpose of This Subpart?

This section would state that the purpose of subpart B is to explain how MMS or delegated States will issue orders and notices to persons concerning the following functions related to leases subject to this subpart: (a) reporting production; (b) reporting, computing, and paying royalties; (c) reporting, computing, and making other payments; and (d) providing documents and other information. This subpart would: (1) respond to the RPC recommendation that lessees receive a ''preliminary determination letter'' before they receive an order and that orders should contain specific information about the basis for the order; and (2) conform to RSFA provisions regarding orders and orders to perform restructured accounting and for service of Notices of Orders on lessees when orders are sent to designees.

Section 242.101 Who May Issue Orders?

This section would specify which officials within and outside the Department of the Interior may issue orders. Within the Department, the Assistant Secretary—Land and Minerals Management, could issue orders in exercise of his or her delegated authority from the Secretary. In addition, the MMS Director, or other officials within the Department of the Interior to whom the MMS Director delegates authority, could issue orders with respect to both Federal and Indian leases. However, only the MMS Associate Director for RMP or higher officials within the Department could issue notices to perform a restructured accounting for leases and time periods subject to RSFA.

Outside the Department, under RSFA § 3, FOGRMA § 205, 30 U.S.C. 1735, and its implementing regulations at 30 CFR part 227, delegated States could issue orders. This section of the rule would specify that for delegated States, the

highest delegated State official having ultimate authority over the collection of royalties, or other State officials to whom that authority has been delegated could issue orders. However, in accordance with RSFA § 4, FOGRMA § 115, 30 U.S.C. 1735(d)(4)(B)(ii), only the highest delegated State official having ultimate authority over the collection of royalties could issue orders to perform restructured accounting. The authority for delegated States to issue orders to perform only applies to leases and time periods subject to RSFA.

MMS specifically requests comments on whether the rule also needs to address the potential for Indian tribes to issue orders. Under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450f (1994), Indian tribes could assume the function of issuing orders for additional royalties and other payments. Because no tribes to date have formally sought this authority, and because MMS wants to avoid any unnecessary complications in the rule, MMS has not addressed this potentiality in the proposed rule. However, such orders would be handled in the same way as orders delegated States issue. If commentators think that the rule should address this potentiality, then MMS would appreciate specific recommendations on how best to address it.

Section 242.102 What May MMS, Tribes, or Delegated States Do Before Issuing an Order?

This section of the rule would implement the RPC recommendation that MMS, State, or tribal auditors issue a ''preliminary findings letter'' to lessees before issuing them an order. RPC Report recommendations, paragraph 4. Because there may be time constraints or other factors making such preliminary notices overly burdensome in some cases, the rule would not make this a mandatory step. Instead, the rule would specify that auditors ''may'' notify lessees, designees, or payors through a ''Preliminary Determination Letter.'' This is the same as the current step auditors usually take to send informal, non-mandatory ''issue letters'' to persons to provide an opportunity to the recipient to discuss the issues and resolve them informally before issuing an order. Thus, the proposed rule would seek to resolve issues informally at the earliest possible stage in order to avoid unnecessary administrative appeals and litigation. Accordingly, this proposed section would make it clear that Preliminary Determination Letters are not appealable.

Section 242.103 What Does a Preliminary Determination Letter Contain?

This section specifies that Preliminary Determination Letters will provide information about the scope of the audit, the factual findings, the legal and policy basis for the preliminary determination, and instructions on how to respond to the letter and seek an informal resolution.

Section 242.104 What Is an Order?

This section would define what an order is for purposes of this part. This section is similar to the definition of order in the proposed new 43 CFR 4.903, but it provides some additional detail not contained in that section and it excludes certain actions (such as denials of lessee requests for MMS to perform some obligation) that are treated as orders under the proposed new definition at 43 CFR 4.903, for the purpose of defining what is appealable.

This section would distinguish between ''orders'' and actions that are not orders. ''Orders'' would contain mandatory language requiring a person to take some action or prohibiting a person from taking some action, whereas actions that are not orders would not contain such language.

Specifically, this section would establish that orders to pay and orders to perform restructured accounting are orders for the purposes of this section. The description of an order to pay would be essentially the same as the definition of that term in RSFA § 2, FOGRMA § 3, 30 U.S.C. 1702(26). Thus, an order to pay would be a demand or order that asserts a specific, definite, and quantified obligation. The types of obligations that could be included in an order include those defined in RSFA § 2, FOGRMA § 3, 30 U.S.C. 1702(25)(B), including duties arising from or relating to a mineral lease administered by the Secretary such as duties to: deliver royalties in kind; pay the principal amount of any royalty, minimum royalty, rental, bonus, net profit share, or proceed of sale; or pay any interest, penalty, or assessment.

The description of an order to perform restructured accounting would largely mirror the description of that term in RSFA § 4, FOGRMA § 115, 30 U.S.C. 1724(d)(4)(B)(i). Thus, orders to perform restructured accounting would have to be based on a finding by MMS or a delegated State that a lessee, designee, or payor made identified underpayments or overpayments as demonstrated by repeated, systemic reporting errors for a significant number of leases, or for a single lease for a significant number of reporting months, such that the errors constitute a pattern of violations. However, because RSFA did not define what ''errors constitute a pattern of violations,'' this proposed rule would state that a person's admission of its failure to comply with lease terms, statutes, or regulations would constitute a pattern of violations likely to result in significant underpayments or overpayments. Such admissions may be sufficient to justify an order to perform because an admitted failure to follow lease terms, regulations, or statutory provisions is *per se* a systemic reporting or payment error that constitutes a pattern of violations that may result in significant overpayments or underpayments. Moreover, nothing in RSFA's description of restructured accounting orders contradicts that interpretation.

This section also would specify what other MMS or delegated State actions constitute ''orders.'' Orders would include denials of requests for exceptions from various valuation and reporting requirements, orders to file reports, and orders to provide documents or other information. This section would make clear that orders to perform a restructured accounting are not ''orders to provide documents or information.'' In addition, under the proposed rule, an order to provide documents or information would not be appealable under 43 CFR part 4, subpart J if the order is issued by Associate Director for Royalty Management, or by a person to whom that Associate Director delegates the authority to issue such orders that are final for the Department. MMS proposes to make such orders final for the Department because (1) courts have consistently upheld MMS's authority to issue orders to produce documents and information, *see Shell Oil Co. (On Reconsideration,* 132 IBLA 354 (overruling *Shell Oil Co.*, 130 IBLA 93), *aff'd, Shell Oil Co.* v. *Babbitt,* 945 F. Supp 792 (D. Del. 1996), *aff'd,* 125 F.3d 172 (3d Cir. 1997); *Santa Fe Energy Products Co.*, 127 IBLA 265 (1993), *aff'd Santa Fe Energy Products Co.* v. *McCutcheon,* No. 94–C–535, slip op., (D. Colo. Mar. 30, 1995), *aff'd,* 90 F.3d 409 (10th Cir. 1996) (1996)), and (2) it would avoid the delay caused by administrative appeals of such orders. Delays associated with these types of orders are particularly detrimental because they interfere with MMS's and delegated States' ability to determine whether additional royalties or other payments may be due. Accordingly, such orders would only be subject to judicial review. Such delays also are contrary to the intent of RSFA, which

attempts to assure that amounts due will be determined quickly.

This section also would state what MMS or delegated State actions would not constitute ''orders.'' Orders would not include non-binding requests for information and guidance. For example, the rule would specify that Preliminary Determination Letters, advice or guidance on how to report and pay, such as valuation determinations, and policy determinations are not ''orders.'' For example, a letter sent to lessees, designees, reporters, or payors with guidance on how to report or pay would not be an order unless it included language mandating that the recipients follow the guidance. Similarly, a policy paper approved by MMS's Royalty Policy Board or other MMS offices would not be appealable. This is because such items do not require anyone to fulfill any obligations associated with Federal or Indian mineral leases. However, if a valuation determination or a letter to payors included mandatory language requiring a person to fulfill an obligation associated with a mineral lease administered by the Secretary, then it would be considered an order. In addition, a person's failure to follow such guidance would not preclude them from later appealing an ''order'' with mandatory language requiring them to follow such guidance.

Subpoenas also would not be ''orders'' under this proposed section. The recipient of a subpoena is obligated to comply with the subpoena. However, if the recipient of a subpoena does not comply, subpoenas are only enforceable by the United States Government in Federal district court under 30 U.S.C. 1717(b), and, thus, are not appealable ''orders.''

Also, orders to pay that MMS issues to refiners or other parties involved in disposition of royalty taken in kind would not be ''orders'' under this section. This is because such orders are under royalty-in-kind contracts between MMS and the purchasers; they are not under leases subject to this part. *See* changes to 30 CFR part 208 proposed elsewhere in this notice.

Section 242.105 What Does an Order Contain?

This proposed new section would implement the RPC's recommendation that orders should contain specific information about the factual, legal, and policy basis for the order. Thus, this section would require orders to include a description of the audit, review or investigation that led to the order, the facts and legal or policy basis for the order, instructions on how to comply, and instructions on how to appeal. Orders also would have to include a list of other persons affected by or involved in the order, including representatives of affected Indian lessors (appropriate BIA Area offices in the case of individual Indian mineral owners), States concerned, relevant MMS offices, delegated States, tribal offices, and any lessees MMS notified of the order under proposed § 242.106(b).

To determine whether the principal amount of any monetary obligation contained in an order to perform a restructured accounting is $10,000 or more (for purposes of determining the consequence of any failure to meet the 33-month time limit for appeals involving Federal oil and gas leases under RSFA § 4, FOGRMA § 115(h)(2), 30 U.S.C. 1724(h)(2)), this section would provide that orders to perform a restructured accounting may contain an estimate of the additional royalties due. This section also would apply to orders involving leases other than Federal oil and gas leases, because such an estimate could be helpful to any appeal. If MMS or a delegated State later adjusted the estimate based on additional information obtained or on a refined estimation technique, then MMS or the delegated State would inform the recipient of the order in writing of such adjustment.

Section 242.106 How Will MMS and Delegated States Serve Orders?

This section would, in part, redesignate and rewrite the section formerly codified at 30 CFR 243.4(a) in ''plain language.'' However, the proposed rewritten section would allow the use of new technologies, such as facsimile and electronic mail, to serve orders, if the new technology provides for a receipt confirming delivery at the applicable address.

This proposed section also would implement the requirement in RSFA § 2, FOGRMA § 3, 30 U.S.C. 1702(23), that MMS or delegated States notify lessees of Federal oil and gas leases whenever MMS or a delegated State issues an order to a lessee's designee. The Notice of Order would include information on the designee who received the order to facilitate contact between the lessee and the designee. Where appropriate and practicable, MMS or a delegated State could send the lessee a copy of the order sent to the designee with the Notice of Order.

However, under paragraph (c), there is an exception to the requirement that MMS or a delegated State serve lessees with a Notice of Order. If a lessee does not designate a designee in writing as required under 30 CFR 218.52, then MMS or a delegated State will serve orders on the person currently making royalty or other payments on the lessee's behalf. Currently, although lessees continue to have persons report and pay on their behalf, few lessees have complied with § 218.52's requirement that they designate a designee in writing as mandated by RSFA § 6, FOGRMA, 30 U.S.C. 1712(a). Thus, because such lessees have not complied with either MMS regulations or RSFA:

(1) MMS or a delegated State would not be required to serve the lessee with the Notice of Order required under paragraph (b) (because RSFA only requires notice to the lessee who has designated the designee in writing to the Secretary); and

(2) The lessee would remain liable for any royalty or other payments due under the order, regardless of the fact that MMS or a delegated State did not serve the lessee with a Notice of Order under paragraph (c)(1).

Subpart C—Requests From Indian Lessors for MMS To Issue an Order

Section 242.200 What Is the Purpose of This Subpart?

This section would state that the purpose of this subpart is to explain how Indian lessors may request that MMS issue an order concerning the reporting and payment of royalty and other payments due under their leases when Indian lessors believe additional royalties or other payments are due based on the lessor's interpretation of the lease, statutes, or regulations.

This subpart only would apply to Indian lessors. MMS is not proposing a similar process for States that receive a portion of the revenues from Federal leases because: (1) States do not hold a property interest in the leases from which they derive a portion of the royalties, and (2) States can obtain a delegation to issue orders themselves under 30 CFR part 227.

Section 242.201 How Can an Indian Lessor Request That MMS Issue an Order?

This section would describe the formal process for lessors to request that MMS issue an order. However, this is not the only process available and, indeed, is not the preferred process. MMS strongly encourages Indian lessors to consult with MMS informally when they believe there are potential problems with royalty payments prior to resorting to use of this subpart. In many cases, MMS could research the issues the Indian lessor raises and take appropriate action, which would avoid

disputes between MMS and the Indian lessor. Thus, Indian lessors only should use this section in those situations where informal efforts do not lead to a result that is satisfactory to the Indian lessor. If informal efforts did not lead to a satisfactory result, they could formally request the MMS issue an order under this section.

Paragraphs (a) and (b) would address requests that MMS issue an order from individual Indian mineral owners or tribes. These paragraphs would state what a request would have to include and who the individual Indian mineral owner or tribe without a cooperative agreement must submit the request to at MMS. Specifically, a request would have to state with specificity why the Indian lessor thinks there is a problem with royalty payments or reports. The Indian lessor also would have to provide any information that he or she has that would support the belief that there is a problem with the royalty payments or reports and that would help MMS to investigate the problem.

Paragraph (c) would address requests that MMS issue an order from tribes with cooperative agreements under § 202 of FOGRMA, 30 U.S.C. 1732 and the regulations at 30 CFR part 228. Because tribes with a cooperative agreement typically would prepare a draft order which they would send to MMS with a request that MMS issue the order, they could not make a request under this section unless MMS does not agree to issue that order in a manner that is satisfactory to the tribe. Any such request would have to be filed with the office that administers the tribe's cooperative agreement, not with the MMS offices listed in paragraph (a). However, such tribes would have to follow the requirements for what a request must include specified under paragraph (b).

Paragraph (d) would explain where tribes and individual Indian mineral owners who do not have cooperative agreements must submit their requests.

Section 242.202 What Will MMS Do After It Receives My Request?

This section would state that MMS will investigate requests filed under the proposed new § 242.201 and will either issue an appropriate order or deny the request and not issue the order.

Section 242.203 How Will MMS Notify Me of Its Decision on My Request That It Issue an Order?

This section would explain how MMS will provide Indian lessors with written notification of its decision to either grant or deny their request that MMS issue an order. If MMS granted your request, MMS would send a copy of the order with the notification. If MMS denied your request, then MMS would state the reasons for denial and advise you of your appeal rights under 43 CFR part 4, subpart J.

Section 242.204 May I Appeal MMS's Decision To Deny My Request to Issue an Order?

This section would state that an Indian lessor may appeal an MMS decision not to issue an order under the proposed new rules at 43 CFR part 4, subpart J. With its appeal, the Indian lessor would have to provide a copy of its request and the notification MMS provided denying the request under proposed § 242.203(b).

Subpart D—Appeals and Service

This subpart would contain essentially the same requirements as those currently found in MMS's regulations at 30 CFR 243.1, 243.3, and 243.4. MMS rewrote this proposed subpart in ''plain language'' and added language necessary to conform to changes made elsewhere in this proposed rule. Such necessary changes were: (1) to eliminate references to 30 CFR part 290 on how to appeal orders, because that part no longer applies to appeals of orders and decisions not to issue orders issued under this part; and (2) to refer to the proposed IBLA rules at 43 CFR part 4, subpart J, that would be applicable to appeals of orders and decisions not to issue orders issued under this part. Also, this section would expand the methods of service in the same manner and for the same reasons as discussed above for the proposed new § 242.106. Finally, the proposed section would expand the persons who are ''addressees of record'' to include not only ''payors,'' but also lessees, designees and reporters, and for participants in the royalty-in-kind (RIK) program, the section would expand the addressee of record from a ''refiner'' to a ''refiner or other party involved in disposition of royalty taken in kind.''

VI. Section-by-Section Analysis for 30 CFR Part 243

Currently, 30 CFR 243.2, regarding suspension of orders or decisions pending appeal, specifies the types of surety instruments MMS accepts for appeals on royalty and other payments due on Federal and Indian mineral leases. However, RSFA § 4(a) amended FOGRMA to add a new § 115(l), 30 U.S.C. 1724(l), ''Stay of Payment Obligation Pending Review.'' Section 115(l) allows any person (as that term is defined by FOGRMA § 102(12)), who MMS or a delegated State orders to pay any obligation (other than an ''assessment'') subject to RSFA, to demonstrate that the person is ''financially solvent.'' If MMS determines that you meet the MMS standard for financial solvency, you would be allowed to stay of order (other than one to pay an assessment) without posting a bond or other surety instrument pending an administrative or judicial proceeding. MMS will use the phrase: ''eligible for self-bonding'' in this preamble to describe MMS's determination that a person is financially solvent and thus entitled to a stay of an order without posting a bond or other surety instrument pending an administrative or judicial proceeding.

If MMS orders you to pay an ''assessment,'' which RSFA defines as:

> [A]ny fee or charge levied or imposed by the Secretary or a delegated State other than—
> (A) The principal amount of any royalty, minimum royalty, rental bonus, net profit share or proceed of sale;
> (B) Any interest; or
> (C) Any civil or criminal penalty,

RSFA § 2(19), you would be entitled to a stay of such an order without posting a surety or demonstrating financial solvency.

This proposed rule provides for ''self-bonding'' by allowing you, a lessee, as that term is defined under FOGRMA, 30 U.S.C. 1701(7), as amended by RSFA, § 2, to demonstrate financial solvency in lieu of the current requirement that you post a bond or other surety instrument for each MMS or delegated State order to pay any obligation that you appeal. Designees who lessees designate to report and pay on their behalf under 30 CFR 218.52 and other persons also could demonstrate financial solvency on behalf of lessees.

The proposed rule also would delete the current part 243 in its entirety and rewrite it using ''plain language.''

RSFA applies to royalties and other payments due on production from Federal oil and gas leases beginning September 1, 1996. Congress made the policy determination that RSFA's ''self-bonding'' provision applies to oil and gas produced from Federal lands after September 1, 1996. However, MMS believes that there is no practical reason, under this proposed part, to treat oil and gas production from earlier periods, and other types of Federal mineral leases, differently than it treats production subject to RSFA. MMS also believes that administration of the sureties will be simplified for both MMS and for lessees receiving MMS decisions or orders to pay any obligation under Federal leases for minerals other than

oil and gas if similar rules apply to all Federal mineral leases. Therefore, MMS proposes to allow self-bonding for all appeals of MMS or delegated State orders to pay any obligation for Federal oil and gas, geothermal, and solid mineral leases, regardless of the date of production. This would:

- Treat all production dates consistently;
- Streamline the administrative appeals process;
- Simplify record keeping; and
- Reduce costs for both Government and industry.

However, the rule retains the requirement that you post a bond or other surety instrument for MMS or delegated State orders to pay any obligations for Indian leases.

MMS specifically requests comments regarding the application of these rules to appeals concerning amounts due on Indian leases. Should MMS raise the amount for which a bond is required for Indian leases to $10,000 and allow the lease bonds to cover amounts less than that? Should MMS allow for self-bonding with respect to appeals of amounts potentially due on Indian leases; or does our trust responsibility to Indian tribes and individual Indian mineral owners preclude the elimination of surety bonds even when the person responsible for paying a demand is financially solvent?

Subpart A—General Provisions

Section 243.1 What Is the Purpose of This Part?

This section would state that the purpose of this part is to explain how a lessee, its designee, or the recipient of an order may suspend compliance with an order that it has appealed under 43 CFR part 4, subpart J or 30 CFR part 208. This part also would explain when a surety must be submitted or when a demonstration of financial solvency could be made.

Section 243.2 What Leases Are Subject to This Part?

This section would explain that this proposed part would apply to all Federal mineral leases onshore and on the OCS, and to all federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands.

Section 243.3 What Definitions Apply to This Part?

This section would explain the definitions that you will need to know for this part. However, other definitions in this subchapter, or 43 CFR part 4, subpart J, which are not specifically defined in this proposed rule and do not conflict with definitions in this proposed rule would apply.

Assessment would mean any fee or charge levied or imposed by the Secretary or a delegated State other than: (1) the principal amount of any royalty, minimum royalty, rental, bonus, net profit share or proceed of sale; (2) any interest; or (3) any civil or criminal penalty.

Designee would mean the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

Lessee would mean any person to whom the United States, or the United States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this part, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this subpart has been assigned.

MMS bond-approving officer would mean the Associate Director for Royalty Management or an official to whom the Associate Director delegates that responsibility.

MMS-specified surety instrument would mean an MMS-specified administrative appeal bond, an MMS-specified irrevocable letter of credit, a Treasury book-entry bond or note, or a financial institution book-entry certificate of deposit.

Notice of order would mean the notice under 30 CFR part 242 that MMS or a delegated State provides to a lessee stating that MMS or the delegated State has issued an order to the lessee's designee.

Order would mean any written order to pay a monetary amount appealable under 43 CFR part 4, subpart J or 30 CFR part 208. Orders may be issued by the MMS Director, officials of the MMS Royalty Management Program (RMP), or a delegated State.

Appeals of orders that do not involve the payment of amounts specified by MMS or delegated State officials would not require the posting of a bond or other surety to stay compliance. For example, appellants would not have to post a bond when appealing MMS or delegated State decisions to deny a lessee's, designee's, or payor's written request that MMS make a payment, refund, offset, or credit of money to the lessee or designee related to the principal amount of any royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or any interest or assessment related to a lease obligation.

Person would mean any individual, firm, corporation, association, partnership, consortium, or joint venture.

Self-bond would mean an MMS-approved demonstration of financial solvency under this part.

Section 243.4 Who Must Post a Bond or Other Surety Instrument or Demonstrate Financial Solvency Under This Part to Suspend Compliance With an Order?

Paragraph (a) of this section would provide that if you appeal an order that requires you to make a payment, you may suspend compliance with the order by either posting a bond or demonstrating financial solvency. Paragraph (b) would provide that you do not need to bond or demonstrate financial solvency if the order is an assessment. Paragraph (c) would provide that another way to meet the requirements of paragraph (a) is if another person fulfills these requirements on your behalf.

Section 243.5 May Another Person Post a Bond or Other Surety Instrument or Demonstrate Financial Solvency on My Behalf?

Under § 243.5, MMS would allow any person to either bond or demonstrate their financial solvency on behalf of a lessee.

Section 243.6 When Must I or Another Person Meet the Bonding or Financial Solvency Requirements Under This Part?

This section would state that, if you must meet the bonding or financial solvency requirements under § 243.4, or if another person is meeting your bonding or financial solvency requirements, then you or the other person must post a bond or other surety instrument or demonstrate financial solvency within 60 days of your receipt of the order or the Notice of Order.

Section 243.7 What Must a Person Do When Posting a Bond or Other Surety Instrument or Demonstrating Financial Solvency on Behalf of an Appellant?

This section would explain the requirements for assuming the responsibility to post a surety or to demonstrate financial solvency on behalf of another person. First, in paragraph (a) you would need to notify MMS in writing that you wish to assume another person's responsibility with respect to an appealed order.

Second, in paragraph (b) you would need to agree that if you post a bond or demonstrate financial solvency on behalf of another person, you could not use your possible non-liability for the underlying monies due, either under the

provisions of RSFA or otherwise, as a defense.

Thus, a designee would not be able to use the fact that it is not liable for royalties or other payments made, under FOGRMA, 30 U.S.C. 1712(a), as amended by RSFA § 6(g), as a defense if MMS calls its bond or requires it to fulfill its responsibility covered by its financial solvency. MMS does not believe this requirement is equivalent to imposing liability on designees. Designees retain the ability to decide whether they are willing to assume this contingent responsibility. If a designee does not wish to act as the surety for the lessees for whom it is paying, it does not need to do so. MMS will attempt to collect first from the liable persons, the lessees, and will only demand payment from designees who accept this responsibility if MMS is unable to collect from the liable person.

Under paragraph (c), you would not be able to end the responsibility you assumed for the appellant under this section unless either the appellant or another person has taken over the responsibility. The purpose of this section is to ensure that if you have assumed the bond responsibilities of another person, you cannot simply walk away from them.

MMS expects that the persons who most commonly would assume responsibility for another person, would be designees who appeal on behalf of their lessees, or affiliates who may have greater assets and be able to lower their affiliate-lessee's bonding costs. However, MMS proposes to allow any person to be able to undertake these responsibilities. MMS welcomes comments on whether the ability to bond or demonstrate financial solvency on behalf of another should be limited.

Section 243.8 When Will MMS Suspend My Obligation to Comply With an Order?

Under paragraph (a)(1) MMS will increase the minimum amount under appeal for which you must post a bond or other surety instrument for Federal mineral leases from $1,000 to $10,000. Appeals with monetary amounts less than $10,000 typically involve appellants who have adequate lease surety coverage to secure the indebtedness during the administrative appeals process. Thus, MMS believes that lease bonds should be sufficient surety for orders of less than $10,000. Moreover, the additional cost to both MMS and appellants to post bonds for amounts less than $10,000 outweighs any benefits to the United States for requiring bonds for lesser amounts.

For appeals of $10,000 or more, under paragraph (a)(2), you would have the option of either posting a bond or other surety instrument under this section or demonstrating financial solvency under subpart C.

Paragraph (b) provides the process for suspending compliance with MMS or delegated State orders to pay any obligation concerning Indian leases. This paragraph continues to require a bond or other surety instrument for appeal amounts of $1,000 or more. This proposal treats lessees and payors with respect to Indian leases differently from lessees and payors with respect to Federal leases in two ways. First, lessees/payors of Indian leases may only assure the financial responsibility for their potential obligations by posting a surety, not by demonstrating financial solvency. Second, lessees/payors of Indian leases would be required to post a surety for any debt of $1,000 or more, while lessees/payors of Federal leases must post a surety for debts of $10,000 or more. MMS has treated Indian and Federal lessees/payors differently because it is concerned that its trust responsibility to Indian lessors may require heightened precaution with respect to potential debts to Indian lessors that remain unpaid. MMS specifically requests comment on whether lessees or payors with contested debts on Indian leases should be treated the same as lessees or payors with contested debts on Federal leases, *i.e.*, whether they should be allowed to self-bond and whether sureties or self-bonding should only be required only for contested debts of $10,000 or more.

Both paragraphs (a) and (b) continue the provision that the MMS, with notification, may choose to not suspend the requirement to comply with an MMS decision or order you appeal. This provision is for circumstances where MMS believes that a stay would not be in the best interests of the United States or Indian lessors. Orders where a bond would serve as adequate surety would not normally be the type of orders where the interests of the United States or Indian lessors would require immediate compliance.

Finally, paragraph (c) continues the proviso that you may pay or comply pending appeal.

Section 243.9 Will MMS Continue To Suspend My Obligation To Comply With an Order if I Appeal to a Federal Court?

This section continues the current requirement that sureties remain in effect if you seek judicial review in Federal court for orders that MMS stayed pending appeal. It also maintains that MMS will notify you in writing of a decision to not suspend your obligation to comply with an order during judicial review.

Section 243.10 When Will MMS Initiate Collection Actions Against a Bond or Other Surety Instrument or the Person Demonstrating Financial Solvency?

This section explains that when your appeal is decided adversely to you, MMS may initiate collection actions 30 days after the decision is issued by either IBLA, the Director of OHA, an Assistant Secretary, the Secretary, or a court of competent jurisdiction. MMS may also initiate collection actions if you or another person do not maintain an adequate surety under § 243.101 or if you or another person are no longer financially solvent under § 243.202.

Section 243.11 May I Appeal the MMS Bond-Approving Officer's Determination of My Surety Amount or Financial Solvency?

MMS proposes to delegate the determination of financial solvency to a bond-approving officer. The designated bond-approving officer for MMS's RMP is the Associate Director for Royalty Management or a delegated official. MMS proposes that the decision by the bond-approving officer be final and not subject to appeal. MMS believes that allowing administrative appeals of MMS's determination of financial solvency would delay the securing of a surety and defeat the purpose of requiring either a surety or a demonstration of financial solvency. MMS requests comments on our election to make this decision final.

Section 243.12 May I Substitute Financial Solvency for a Bond Posted Before the Effective Date of This Rule?

This section would provide for a transitional rule that would allow you to replace a surety with a self-bond if you had posted a bond or other surety prior to the effective date of these regulations.

Subpart B—Bonding Requirements

Section 243.100 What Standards Must My MMS-Specified Surety Instrument Meet?

For purposes of this section, an ''MMS-specified surety instrument'' would have to be in a form MMS specifies. MMS would provide you with standard forms and information.

In addition, MMS would use a bank rating service to determine whether a financial institution has an acceptable rating to provide a surety instrument adequate to indemnify the lessor from loss or damage. Your appeal bonds would have to be from a qualified surety

company which the Department of the Treasury has approved. If you decide to use an irrevocable letter of credit or certificate of deposit, it would have to be from a financial institution acceptable to us with a minimum 1-year period of coverage subject to automatic renewal up to 5 years.

Section 243.101 How Will MMS Determine My Bond or Other Surety Instrument Amount?

The amount of your bond or other surety instrument would be determined by adding the principal amount owed to any accrued interest on that amount and projecting interest on the total for a 1-year period. If your appeal is not decided within 1 year from the date it was filed, then MMS would project additional annual interest and require an amended bond or other surety instrument.

You could submit a single surety that covers multiple appeals if you amend the surety annually to either add new amounts under appeal or remove amounts that have been decided in your favor or that you have paid. However, you would be required to file a separate surety for new amounts under appeal until those new appeals are covered by the single (consolidated) surety during the annual amendment.

Subpart C—Financial Solvency Requirements

Section 243.200 How Do I Demonstrate Financial Solvency?

MMS is proposing to add this new section to provide the procedure for lessees or their designees who appeal MMS or delegated State orders to pay any obligation to demonstrate financial solvency and ''self-bond.'' This would also apply to other persons who wish to demonstrate financial solvency on a lessee's behalf. The proposed regulation allows you to demonstrate financial solvency in two ways. First, you can submit an audited financial statement demonstrating that you have a net worth in excess of $300 million. Second, if you have a net worth less than the $300 million benchmark amount, or you do not have an audited financial statement documenting your net worth, you can ask MMS to consult an MMS determined-business information or credit reporting service or program.

Section 243.201 How Will MMS Determine if I am Financially Solvent?

If your net worth is greater than $300 million, you are presumptively deemed financially solvent and do not need to post a bond or other surety instrument. MMS believes that a company with a net worth in excess of $300 million would clearly be financially solvent. This benchmark value would allow half of the companies that currently post a bond or other surety instrument to ''self-bond.''

The net worth benchmark of $300 million represents the total net worth of all your affiliated entities that you agree would be responsible for paying MMS orders to make a payment. MMS also will deduct the contingent liability of all of your appeals, including your affiliates' appeals, in considering whether your net worth exceeds the benchmark amount. Therefore, if you have a net worth of $325,000,000, and MMS and its delegated States issued one or more orders, which could result in your paying $40,000,000 in additional royalties, including interest, then MMS would not consider you to have a net worth in excess of $300 million. Consequently, you would not be eligible to self-bond under this section. However you would still be eligible to apply for self-bonding by requesting that MMS consult a business information or credit reporting service or program, as described more fully below.

The rule would require you to submit your audited financial statement at the first appeal for which you wish to substitute financial solvency or self-bonding for surety. If MMS determined that you were financially solvent and could self-bond, you would not be required to update the audited financial statement you provided if you file subsequent appeals during the calendar year for which you demonstrated financial solvency unless you file for bankruptcy under the bankruptcy code, Title 11, United States Code. Thereafter, you would submit this statement annually as long as you have pending appeals.

If you had a net worth less than the $300 million benchmark amount, you could ask MMS to consult an MMS-determined business information or credit reporting service or program. In such cases, MMS would consult such services or programs to provide additional information concerning whether you are eligible for self-bonding. Our intent is to look to the information gathered from these commercial services or programs, such as Experian (formerly TRW), to provide information regarding the risk of your default for an obligation equal to the magnitude of the MMS order to make a payment that you appealed, plus accrued interest.

For example, if a commercial service would consider you a low to moderate risk if you were applying for a loan of the same amount as the order, MMS might not require you to post a bond or other surety instrument. However, MMS could determine that you are not financially solvent if, for example, you:

- Have insufficient cash flow to take on new debt, often determined from your financial ratios, and have no alternative source of repayment; or
- Have a poor credit history of late payments, loan defaults, or bankruptcies.

MMS intends to use these and other factors to decide whether an appellant with an audited net worth less than $300 million is eligible to self-bond. If MMS determines that an appellant's risk is low to moderate, we would allow that appellant to self-bond. MMS specifically requests comments concerning the appropriate level of risk that MMS should use in determining whether an appellant is eligible to self-bond.

If you asked MMS to consult a commercial service or program to determine your financial solvency, you would have to submit a non-refundable fee of $50. The fee would have to be paid with the original request and annually thereafter as long as you wish to continue self-bonding. MMS is recovering its costs under the Independent Offices Appropriations Act of 1952, 31 U.S.C. 9701 *et seq.* (IOAA), for Federal solid mineral, geothermal, and offshore leases, and Indian leases, and the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* (FLPMA), for Federal onshore leases. Thus, as part of this interim final rulemaking, MMS analyzed the rule's cost recovery fees for reasonableness according to the factors in FLPMA § 304(b), 43 U.S.C. 1734(b). The ''reasonableness factors'' set out in FLPMA are: a) ''actual costs (exclusive of management overhead),'' b) ''the monetary value of the rights or privileges sought by the applicant,'' c) ''the efficiency to the government processing involved,'' d) ''that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant,'' e) ''the public service provided,'' and f) ''other factors relevant to determining the reasonableness of the costs.''

For the recovery of costs to process a lessee's or its designee's request that MMS consult a commercial service or program to determine their financial solvency under 30 CFR 243.201(c), the method MMS used to evaluate the FLPMA factors is twofold. First, MMS estimated actual costs and MMS evaluated each of the remaining FLPMA reasonableness factors (b) through (f) individually to decide whether the factor might reasonably lead to an

adjustment in actual costs. Second, MMS then weighed that factor against remaining factors to determine whether another factor might reasonably increase, decrease, or eliminate the contemplated reduction. On the basis of this twofold analysis, MMS determined what final fee is reasonable for requests to determine financial solvency. MMS cannot recover an amount greater than its actual costs, so any final adjustment cannot result in a fee greater than actual costs.

For processing a request that a lessee or another person wishes MMS to consult a commercial service or program to determine its financial solvency under 30 CFR 243.201(c), MMS analyzed the FLPMA factors as follows:

Factor (a)—Actual Costs

Actual costs means the financial measure of resources expended or used by the Minerals Management Service in processing a lessee or another person's request that MMS consult a commercial service to determine its financial solvency under 30 CFR 243.201(c), including, but not limited to, the costs of special studies, or any other relevant action. Actual costs includes both direct and indirect costs, exclusive of management overhead. Management overhead costs means costs associated with the MMS directorate, which means the entire Washington Office staff, except where a member of such staff is required to perform work on a specific case. Section 304(b) of FLPMA requires that management overhead be excluded from chargeable costs.

Direct costs include agency expenditures for labor, material, stores, and equipment usage connected with the performance of processing responsibilities. MMS's indirect costs include program support such as systems, appeals, enforcement, and rulemaking. Indirect costs are allocated to specific projects on a pro rata basis. MMS determined the indirect cost rate and applied the rate to its direct costs to determine its total actual costs. This method of calculating costs is a generally accepted practice in both the private and public sectors.

MMS's method of establishing actual costs involved measuring the cost to MMS of processing an individual request for a financial solvency determination. MMS concluded that measuring the cost of an individual request was reasonable because the actual costs will not vary substantially from one individual request to another.

The costs to process a lessee or another person's request that MMS consult a commercial service to determine its financial solvency under 30 CFR 243.201(c) would include MMS's cost to request information from commercial services and to evaluate the lessee or another person's financial solvency, in other words, to process the request. On average, services such as Experian charge MMS $22.50 per request for information. In addition, MMS has determined that the average burden hour estimate to the Federal Government to process each request is ½ hour per request. This estimate is based on current MMS time requirements for completing similar tasks. Using an estimate of $50 per hour based on the salary of the MMS personnel responsible for processing such requests, MMS estimates the average direct cost burden for these requests is $25 ($50/hour ×½ hour). MMS's indirect costs for the requests is $5 per request (18.5% indirect cost rate × $25 rounded) resulting in total estimated actual costs of $52.50 per average request.

Factor (b)—Monetary Value of the Rights and Privileges Sought

The monetary value of rights and privileges sought means the objective worth of self-bonding, in financial terms, to the lessee or its designee. In this instance, the monetary value to each lessee or another person would be the value of not having to post a bond. Thus, the monetary value will vary depending on the amount under appeal, time value of the amount under appeal, etc. Accordingly, MMS rejected the idea of trying to calculate monetary value on a case-by-case basis as too time-consuming, wasteful of resources, and subject to disputes. Instead, MMS took into account equitable considerations involving its savings in not having to process and maintain bonds relative to the monetary value to the lessee or another person for not having to post a bond. Accordingly, this equitable factor would be offset by the savings to MMS as discussed under factor (e) below. Thus, MMS did not upwardly adjust its actual costs for this factor.

Factor (c)—Efficiency to the Government Processing Involved

Efficiency to the government processing means the ability of the United States to process a lessee's or another person's request that MMS consult a commercial service to determine its financial solvency under 30 CFR 243.201(c) with a minimum of waste, expense and effort. Implicit in this factor is the establishment of a cost recovery process that does not cost more to operate than MMS would collect and does not unduly increase the costs to be recovered. As noted in the above section on actual costs, MMS has determined that for the requests in this rulemaking, it would be inefficient to determine actual cost data on a case-by-case basis. Estimates based on MMS experience indicate that the cost of maintaining actual cost data on specific cases is unreasonably high where the amount potentially collectible is relatively small. This is principally because MMS's automated accounting system would have to be extensively reprogrammed to add a relatively few items of information. MMS has thus used cost estimates derived from collected data.

MMS determined that the processing of requests in this proposed rulemaking would be reasonably efficient. The procedures that MMS will use in processing the data would be based on standardized steps for similar MMS transactions in order to eliminate duplication and extraneous procedures. Therefore, MMS believes this would be the most efficient processing method. Accordingly, because this is an efficient processing method, MMS has made no adjustment to actual costs as a result of this factor.

Factor (d)—Cost Incurred for the Benefit of the General Public Interest

The cost incurred for the benefit of the general public interest (public benefit) means funds the United States expends in connection with processing a lessee's or another person's request that MMS consult a commercial service to determine its financial solvency under 30 CFR 243.201(c), for studies and/or data collection determined to have value or utility to the United States or the general public separate and apart from the document processing. It is important to note that this definition addresses funds expended in connection with a request. There is another level of public benefit that includes studies which MMS is required, by statute or regulation, to perform regardless of whether a request is received. The costs of such studies are excluded from any cost recovery calculations from the outset. Therefore, no additional reduction from costs recovered is necessary in relation to these studies.

MMS analysts concluded that the processing of the requests in this rulemaking did not as a rule produce studies or data collection that might benefit the public to any appreciable degree. Therefore, any possible benefits of such studies to the public are balanced by their possible benefits to the applicant. Accordingly, MMS made no adjustment to the fee recovered based on this factor.

Factor (e)—Public Service Provided

Public service provided means tangible improvements or other direct benefits, such as reduced administrative costs, with significant public value that are expected in connection with processing the request to determine financial solvency. This definition distinguishes the factor of ''public service provided'' (a benefit resulting from activities associated with determining financial solvency) from the factor of ''costs incurred for the benefit of the general public interest'' (which relates to benefits of the document processing itself).

MMS has determined that the requests under this rule provide the public service of reducing its costs by decreasing the total number of hours it must devote to monitoring and maintaining bonds. Therefore, MMS has determined that the Government would benefit under this factor to some extent. However, MMS has determined that the administrative savings would be relatively minor and, as discussed above, would be offset by the relative benefit to the lessees from not posting a bond. Accordingly, MMS has not further reduced actual costs as a result of these minor savings.

Factor (f)—Other Factors

The final reasonableness factor is other factors relevant to determining the reasonableness of the costs. MMS examined the requests in this rulemaking to determine whether other factors warranted a reduction in the proposed fee.

MMS has determined that there are no other factors that warrant a reduction to MMS's actual costs.

MMS personnel with expertise and program management responsibilities in the particular area of the requests in this rulemaking reviewed the requests and weighed the proposed processing fee against their knowledge of the value of similar transactions. In the case of the requests in this rulemaking, the MMS analysts concluded that the value of the rights was clearly so far above the expected processing cost that a fee set at actual costs is appropriate. As a result, MMS has determined that a processing cost of $50 would meet the reasonableness factors of FLPMA for onshore leases. Although the IOAA does not contain the same ''reasonableness factors'' as FLPMA section 304(b), the factors MMS considered under the IOAA to determine reasonable fees led it to conclude that the fees for offshore leases are the same as that for onshore leases.

MMS invites specific comments concerning the proposed processing fee.

Section 243.202 When Will MMS Monitor My Financial Solvency?

Under paragraphs (a) and (b) MMS would monitor your financial solvency each time you appeal a new order and at least annually as long as you have active appeals.

In paragraph (c) MMS explains that if the MMS bond-approving officer determines that you are no longer financially solvent, a bond or other surety would be required.

VII. Section-by-Section Analysis for 30 CFR Part 250 and 290, Offshore Minerals Management Appeal Procedures

OMM proposes to amend the regulations related to appeals of OMM decisions or orders to clarify and simplify the appeals process. The proposed OMM appeals process would eliminate the appeal to the MMS Director and provide for a 60-day period to informally resolve the dispute within the Office of the OMM officer that issued the decision or order. If the dispute is not resolved informally, the proposed rule would provide for an appeal to the IBLA. Sections 290.3 and 290.10 of this proposed rule would supersede 43 CFR 4.411(a) and 43 CFR 4.21(a), allowing 60 days to file an appeal with the IBLA and stating that an OMM decision or order will remain in effect during the 60-day period unless otherwise specified in the decision or order.

The proposed MMS rule would require an appellant pay a nonrefundable $150 processing fee with each appeal. See Section-by-Section analysis for 43 CFR 4.965 for our analysis leading to the choice of $150 as the processing fee.

The proposed MMS rule would require the appellant to post a bond when an MMS Reviewing Officer's final decision on a civil penalty is appealed. MMS is committed to safety and environmental protection and only imposes penalties when: (1) a threat of serious, irreparable, or immediate harm or damage to human life, the environment, any mineral deposit, or property resulted from a violation; or (2) the violation was not corrected within the time provided by MMS. The requirement to post a bond is designed to ensure that funds will be available to cover the final civil penalty assessment if the appeal is denied, and to discourage any appeals filed for the sole purpose of delaying payment of that assessment.

These rules will be effective for decisions or orders received by appellants 60 days or more after the final rule is published.

VIII. Procedural Matters

Regulatory Planning and Review E.O. 12866

This document is not a significant rule and is not subject to review by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an annual effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule does not require the payment of additional revenues. This rule sets out how the Department will review MMS's implementation of royalty and OCS operations policy.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The primary function of MMS appealable actions are for the collection of royalties from the minerals industry and the operations of mineral leases on the OCS. Other agency functions do not cover these areas. This rule consolidates the MMS appeals process with the IBLA process. IBLA also provides this function for other agencies such as BLM and Office of Surface Mining. This rule also provides for bonding changes and defines agency orders.

(3) This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. The administrative appeals process from MMS orders regarding royalty or OCS operational matters have no impact or relation to grants, user fee, loan programs, or the rights and obligations of their recipients.

(4) This rule does not raise legal or policy issues. Some of the proposed rules may be controversial (processing fees, self bonding, placing time limits on the appeals process), but they are not novel. Some procedures have been used in the past but not formalized. This proposed rule was developed in cooperation with States, tribes, and industry.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Accordingly, a Small Entity Compliance Guide is not required.

This rule will affect three groups of individuals or companies; (1) Indian lessors, (2) lessees and operators on

offshore leases, and (3) lessees, payors, and designees on Federal and Indian leases (onshore and offshore). Indian lessors are either tribes or individuals. However, Indian tribes are not considered to be small entities for the purposes of RSFA, and individuals do not fit the definition of small entities. As for the remaining groups, the majority of lessees, designees, payors, and operators on Federal and Indian leases would be classified as small businesses according to the definitions in the Small Business Administration Standard Industry Code (SIC). Changes in the proposed rule that could have an economic effect on these groups are the establishment of processing fees for filing a Notice of Appeal and a Statement of Reasons, requirement of using electronic transfers, posting a bond, and serving Statement of Reasons on all affected parties, and an increase in the maximum civil penalty to $25,000.

Any processing fees contained in this proposed rule also provide for a waiver or fee reduction to allow relief to small entities. The processing fees are to be paid by electronic fund transfer but again, small entities may be granted a waiver from this provision.

Bonding or payment is mandatory for appealed amounts above $10,000 on Federal leases and $1,000 for Indian leases. Appealed amounts less than $10,000 for Federal and $1,000 for Indian leases do not require bonding which typically provides relief to small entities. The ability to self bond provides relief of credit charges from surety companies.

The proposed rule requires the appellant to serve copies of the Statement of Reasons to all affected parties in the appeal such as the office that issued the order, affected tribes, and affected delegated states. The cost of serving these papers is not significant, even for a small entity. The number of pages for the Statement of Reasons filed under the proposed rule are less than the number of pages and documentation now being filed under the current rule. Much of the documentation presented under the current rule will have been obtained during the record development and settlement conferences.

The proposed rule changes the maximum civil penalty up to $25,000 per day for those acts for which FOGRMA allows such a penalty. A larger penalty should not have significant economic impacts because MMS assesses penalties only when business operations have reached a very poor level of conduct. A variety of remedies are available to businesses prior to the assessment of a penalty (including alternative dispute resolution) which should be used.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The required record development and settlement conferences could lead to quicker resolution of most appeals causing a reduction in the amount of money required for a legal defense. These conference meetings can be conducted over the phone, video conference, at MMS locations, or at the appellant's office. The appellant is not required to travel to these conferences.

While this rule proposes a processing fee of $150 at certain stages in the appeals process, the rule also provides for waiver or reduction in the fee. MMS receives an average of 400 appeals a year which means a total of $60,000 and IBLA receives an average of 75 MMS appeals which means a total of $11,250, a relatively small amount, would be collected in one year if no waivers or reductions in fees were requested.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This is an administrative review process; there is no impact on these things. The proposed rule allows for faster appeal resolution on onshore and offshore leases, sets a time limit on when an appealed issue must be resolved or decided, gives relief for maintaining bonds, defines what an order is, and clarifies the order process.

Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State local or tribal governments or the private sector. This proposed rule does not change the relationship between MMS, IBLA, and State, local, or tribal governments. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (E.O. 12630)

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. The proposed rule would not take away or restrict an entity's right to appeal or bond orders received from MMS or a delegated State. A takings implication assessment is not required.

Federalism (E.O. 12612)

In accordance with Executive Order 12612, the proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The proposed rule does not change the role or responsibilities between Federal, State, and local governmental entities. The rule does not relate to the structure and role of States and will not have direct, substantive, or significant effects on States. A Federalism Assessment is not required.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this proposed rule does not unduly burden the judicial system and meets the requirements of §§ 3(a) and 3(b)(2) of the Order. The proposed rule has been reviewed and provides clear language as to what is allowed and what is prohibited. The IBLA and MMS have drafted this proposed rule in plain language and have consulted with The Department of the Interior's Office of the Solicitor, RPC Subcommittee, States, and tribes throughout the drafting process.

Paperwork Reduction Act

There are three information collections associated with this rulemaking. The information collections are at OMB for review and approval. As part of our continuing effort to reduce paperwork and respondent burden, IBLA and MMS invite the public and other Federal agencies to comment on any aspect of the reporting burden. Submit your comments to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the U. S. Department of the Interior, Washington, DC 20503.

OMB has up to 60 days to approve or disapprove this collection of information but may respond after 30 days. Therefore, public comments should be submitted to OMB within 30 days in order to assure their maximum consideration. However, IBLA and MMS will consider all comments received during the comment period for this notice of proposed rulemaking.

MMS estimates that there will be 400 respondents requesting an appeal and

preparing a Preliminary Statement of Issues (PSI) document and that the average annual burden hour estimate for each respondent will be 90 hours. Respondents will review the issues presented by the MMS order, research the accounting transactions or legal documents related to those issues, and prepare documentation to refute those items where disagreement exists. MMS estimates that the annual burden is 36,000 hours (400 PSI's × 90 hours). Using an estimate of $50 per hour for industry cost, the annual cost burden is $1,800,000 (36,000 burden hours × $50 per hour).

There also will be costs associated with the processing fees and with requests for waiver and reduction. MMS believes that only small businesses would seek a waiver or reduction of the fee. MMS estimates that 49 percent of the appeals it receives are filed by small businesses. Thus, of the 400 appeals filed annually, MMS estimates that 196 appeals will be filed annually by small businesses. However, because the proposed processing fee is nominal, MMS believes that few small businesses will request a waiver or reduction. If a small business did request a fee waiver or reduction, MMS estimates that the burden for each respondent requesting a waiver or reduction of the processing fee would be 5 hours.

Using an estimate of $50 per hour for industry cost, the cost burden would be $250 per request (5 burden hours × $50 per hour). Because MMS thinks that most appellants would pay the nominal fee of $150 rather than incur the costs to request a waiver or reduction, MMS estimates that it could receive up to 20 requests per year for a waiver or reduction of the initial fee due with the Notice of Appeal (10 percent of the 196 appeals per year filed by small businesses). (MMS recognized that some appellants might request a waiver and spend more than the $150 processing because of concerns of a more general nature about the fee.) Thus, the total industry costs to prepare requests for waiver or reduction of the initial fee could be up to $5,000 (20 requests per year × $250 per request). Based on an MMS estimate that about one-half of all appeals would proceed to briefing at the IBLA, MMS estimates that the annual industry costs for seeking a waiver or reduction of the second $150 fee they are required to submit with a Statement of Reasons would be about half of the amount for the first fee, or $2,500. Thus, total annual industry costs for fee waiver or reduction requests could be $7,500 if appellants sought a waiver or reduction of both fees.

Based on the assumption that 10% of small business appellants might seek a fee waiver or reduction, industry would pay the full amount of the initial fee (without a waiver or reduction request) 380 times per year, for a total amount of $57,000. MMS estimates that, the combination of waiving some fees, granting reductions for others, and denying requests for waiver or reduction could halve the amount paid overall by those appellants seeking waiver or reduction. Thus, the initial processing fees paid by those seeking waiver or reduction would be $1,500 (½ × 20 requests per year × $150). Based on these estimates, the total amount of initial processing fees paid would be $58,500. Including the amounts paid for the fee paid with the Statement of Reasons, MMS estimates that the total amount paid for processing fees would be $87,750 (1.5 × $58,500).

MMS estimates that it would take 2 hours per request for MMS to process requests for a fee waiver or reduction. This time is spent reviewing the reasons for the waiver or reduction and preparing a response to the requestor. Thus, the cost per request would be $100. Based on the estimate of 20 requests per year, MMS's total costs to process requests for waiver or reduction of the initial processing fee would be $2,000 per year (20 requests per year × $100 per request). Including costs to process waivers or reductions of the processing fee paid with the Statement of Reasons (based on an assumption that there would be ½ the number of requests for this fee waiver or reduction, i.e., 10 × $100), MMS estimates total costs to process fee waiver or reduction requests to be $3,000 ($1,000 + $2,000).

MMS estimates that it will take 3 hours to review the Notice of Appeal and PSI, record the payment of the processing fee, and generate a letter to document receipt of the appeal. MMS estimates the burden to the Federal government for processing 400 PSI's is 1,200 hours (400 PSI's × 3 hours initial appeals processing). Using an estimate of $50 per hour, MMS estimates that the annual costs for processing this information is $60,000 per year (1,200 hours × $50).

MMS estimates that 12 Indian lessors will submit a request for an order annually. It will take an estimated 15 hours to prepare a request which will result in 180 annual burden hours (12 requests × 15 hours = 180 annual burden hours). Based on $25 per hour, the annualized cost of this collection to Indian lessors is estimated to be $4,500 (180 total burden hours × $25).

MMS expects it will take on average 32 hours to evaluate the merits of each request for an order. Of the expected 12 requests annually, MMS estimates that four will actually result in an order being issued. MMS expects it will take approximately 50 hours to issue each resulting order. Total cost to the Federal Government for this process is $29,200 as described below:

Request Evaluation

12 requests × 32 hours = 384 annual burden hours

384 annual burden hours × $50 hour = $19,200 annual cost

Resulting Orders

4 orders × 50 hours = 200 annual burden hours

200 annual burden hours × $50 hour = $ 10,000 annual cost

The total annual burden is 584 hours, and the total annual cost is $29,200.

Regardless of the type of surety collected (bonds, letters of credit, certificates of deposit), the estimated reporting and record keeping burden is 1 hour. MMS estimates that there will be 136 bonds, 63 Letters of Credit, 100 Self-bonds, and 1 Certificate of Deposit submitted each year. MMS has not had any Treasury Securities submitted as sureties, but would estimate that they would also require one hour for reporting and recording keeping, if any were to be filed. The burden for submitting these sureties is 300 hours; the annual cost burden is $15,000 (300 hours × $50).

The estimated cost to the Federal Government is essentially the same for each type of surety instrument, approximately 1 hour per instrument. MMS estimates there will be 136 bonds, 100 self-bonds, 63 Letters of Credit, 1 Certificate of Deposit and no Treasury Securities. We estimate that the burden for the processing, input, review, approval, and handling of 136 bonds is 136 hours; the annual cost burden is $6,800 (136 burden hours × $50). We estimate that the burden for the processing, input, review, approval, and handling of the 63 LOCs we receive is 63 hours; the annual cost burden is $3,150 (63 burden hours × $50). We estimate that the burden for the processing, input, review, approval, and handling of the 1 certificate of deposit we receive is 1 hour; the annual cost burden is $50 (1 burden hour × $50).

MMS proposes to consult a business information or credit reporting service for all small entities or non-publicly traded companies that cannot comply with the audited, consolidated balance sheet requirement or for a publicly traded company that does not meet our established net worth of $300 million.

We estimate that 100 requests to self-bond will be made each year.

We estimate 25 of those requests will require that we consult with a business information or credit reporting service. It will require approximately 25 hours to review the requests and process the inquiries (1 hour per inquiry) by both MMS and by the business information or credit reporting service. Using an estimate of $50 per inquiry, we estimate the annual cost to the Federal Government will be $1,250 (25 inquires × $50 per request). Using an estimate of $25 per inquiry, we estimate the annual cost to access the business information or credit reporting service to the Federal Government will be $625 (25 inquires × $25 per request). The remaining 75 requests will also require one hour to process by MMS at $50 per hour or $3,750. The total cost to review and process all self-bonding requests is $5,625 ($1,250 + $625 + $3,750).

In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, IBLA and MMS are providing notice and otherwise consulting with members of the public and affected agencies concerning this proposed increase in the collection of information in order to solicit comment to (a) evaluate whether this expanded collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

The Paperwork Reduction Act of 1995 provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required.

Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with this clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (A ''section'' appears in bold type and is preceded by the symbol ''§'' and a numbered heading; for example § 4.904.) (5) Is the description of the rule in the ''Supplementary Information'' section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW, Washington, DC 20240. You may also e-mail the comments to this address: Exsec@ios.doi.gov.

List of Subjects

43 CFR Part 4

Administrative practice and procedures, Coal, Continental Shelf, Geothermal energy, Indian lands, Mineral royalties, Natural Gas, Petroleum, Public Lands—mineral resources.

30 CFR Part 208

Continental shelf, Government contracts, Mineral royalties, Petroleum, Public lands—Mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Small businesses, Surety bonds.

30 CFR Part 241

Coal, Continental shelf, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Penalties, Petroleum, Public lands—Mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 242

Coal, Continental shelf, Geothermal energy, Indian lands, Investigations, Mineral royalties, Natural gas, Oil and gas reserves, Penalties, Petroleum, Public lands—Mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 243

Coal, Continental shelf, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Petroleum, Public lands—Mineral resources, Surety bonds.

30 CFR Part 250

Continental shelf, Environmental impact statements, Environmental protection, Government contracts, Incorporation by reference, Investigations, Mineral royalties, Natural gas, Oil and gas development and production, Oil and gas exploration, Oil and gas reserves, Penalties, Petroleum, Pipelines, Public lands—Mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Sulphur development and production, Sulphur exploration, Surety bonds.

30 CFR Part 290

Administrative practice and procedure.

Sylvia V. Baca,

Acting Assistant Secretary—Land and Minerals Management.

Robert L. Baum,

Director, Office of Hearings and Appeals.

Hilda A. Manuel,

Deputy Commissioner of Indian Affairs.

For the reasons set out in the preamble, OHA and MMS propose to add 43 CFR part 4, subpart J and 30 CFR part 242 and to amend 30 CFR Parts 208, 241, 243, 250, and 290, as follows:

PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES

1. The authority citation for part 4 continues to read as follows:

Authority: R.S. 2478, as amended, 43 U.S.C. sec. 1201, unless otherwise noted.

1a. In 43 CFR part 4, subpart J is added to read as follows.

Subpart J—Special Rules Applicable to Appeals Concerning Royalties and Related Matters

Sec.

Purpose, Applicability and Definitions

Appeal Rights

How to Appeal or Join an Appeal

Calculating Time Frames for Appeals

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

Subpart J—Special Rules Applicable to Appeals Concerning Royalties and Related Matters

Purpose, Applicability and Definitions

§ 4.901 What is the purpose of this subpart?

This subpart tells you how to appeal Minerals Management Service (MMS) or delegated State orders, and MMS decisions not to issue orders under 30 CFR part 242, concerning reporting to the MMS Royalty Management Program (RMP) and the payment of royalties and other payments due under leases subject to this subpart.

§ 4.902 What leases are subject to this subpart?

This subpart applies to:

(a) All Federal mineral leases onshore and on the Outer Continental Shelf (OCS); and

(b) All federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands, regardless of the statutory authority under which the lease was issued or maintained.

§ 4.903 What definitions apply to this subpart?

Affected means, with respect to delegated States and States concerned, that the appeal concerns an order regarding a Federal onshore or OCS lease, within a State's borders or offshore of the State, from which the State, or a political subdivision of the State, receives a statutorily-prescribed portion of the royalties; and, with respect to Indian lessors, that the appeal concerns an order regarding the Indian lessor's federally-administered mineral lease.

Assessment means any fee or charge levied or imposed by the Secretary or a delegated State other than:

(1) The principal amount of any royalty, minimum royalty, rental, bonus, net profit share or proceed of sale;

(2) Any interest; or

(3) Any civil or criminal penalty.

Delegated State means a State to which MMS has delegated authority to perform royalty management functions pursuant to an agreement or agreements under regulations at 30 CFR part 227.

Designee means the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

IBLA means the Interior Board of Land Appeals.

Indian lessor means an Indian tribe or individual Indian mineral owner with a beneficial or restricted interest in a property that is subject to a lease issued or administered by the Secretary on behalf of the tribe or individual Indian mineral owner.

Lease means any agreement authorizing exploration for or extraction of any mineral, regardless of whether the instrument is expressly denominated as a ''lease,'' including any:

(1) Contract;

(2) Net profit share arrangement;

(3) Joint venture; or

(4) Agreement the Secretary approves under the Indian Mineral Development Act, 25 U.S.C. 2101 *et seq.*

Lessee means any person to whom the United States, or the United States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this subpart, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this subpart has been assigned.

Monetary obligation means any requirement to pay or to compute and pay any obligation in any order. For purposes of the default rule of decision in §§ 4.956 and 4.972, and 30 U.S.C. 1724(h):

(1) If an order asserts a monetary obligation arising from one issue or type of underpayment that covers multiple leases or production months, the total obligation for all leases or production months involved constitutes a single monetary obligation;

(2) If an order asserts monetary obligations arising from different issues or types of underpayments for one or more leases, the obligations arising from each separate issue, subject to paragraph (1) of this definition, constitute separate monetary obligations; and

(3) If an order asserts a monetary obligation with a stated amount of additional royalties due, plus an order to perform a restructured accounting arising from the same issue or cause as the specifically stated underpayment, the stated amount of royalties due plus the estimated amount due under the restructured accounting, subject to paragraphs (1) and (2) of this definition, together constitutes a single monetary obligation.

Nonmonetary obligation means any duty of a lessee or its designee to deliver oil or gas in kind, or any duty of the Secretary to take oil or gas royalty in kind.

Notice of order means the notice under 30 CFR part 242 that MMS or a delegated State provides to a lessee stating that MMS or the delegated State has issued an order to the lessee's designee.

Obligation means:

(1) A lessee's, designee's or payor's duty to:

(i) Deliver oil or gas royalty in kind; or

(ii) Make a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment; and

(2) The Secretary's duty to:

(i) Take oil or gas royalty in kind; or

(ii) Make a lease-related payment, refund, offset, or credit, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or interest.

Order means any document issued by the MMS Director, MMS RMP, or a delegated State that contains mandatory or ordering language that requires the recipient to do any of the following for any lease subject to this subpart: report, compute, or pay royalties or other obligations, report production, or provide other information. An order includes any order issued under 30 CFR part 242 by MMS or a delegated State.

(1) Order includes but is not limited to the following:

(i) An order to pay;

(ii) An MMS or delegated State decision to deny a lessee's, designee's, or payor's written request that MMS make a payment, refund, offset, or credit of money to the lessee or designee related to the principal amount of any royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or any interest or assessment related to a lease obligation;

(iii) A denial of a request for an exception from any valuation and reporting requirement;

(iv) An order to perform restructured accounting;

(v) An order to file a report related to any royalty or other lease requirement under 30 CFR part 210 or 216; and

(vi) An order to provide documents or information. An order to perform a restructured accounting is not an order to provide documents or information.

(2) Order does not include:

(i) A non-binding request, information, or guidance, such as:

(A) A Preliminary Determination Letter issued under 30 CFR 242.102;

(B) Advice or guidance on how to report or pay, including a valuation determination, unless it contains mandatory or ordering language; and

(C) A policy determination;

(ii) A subpoena; or

(iii) An order to pay that MMS issues to a refiner or other party involved in disposition of royalty taken in kind.

Party means MMS, any person who files a Notice of Appeal, and any person who files a Notice of Joinder or Intervention Brief in an appeal under this subpart.

Payor means any person responsible for reporting and paying royalties for:

(1) Federal oil and gas leases for production before September 1, 1996;

(2) Federal mineral leases other than oil and gas leases; and

(3) Leases on Indian lands subject to this subpart.

Reporter means a person who submits reports for leases subject to this subpart regardless of whether that person has payment responsibility.

State concerned means the State that receives a statutorily prescribed portion of the royalties from a Federal onshore or Outer Continental Shelf lease.

Appeal Rights

§ 4.904 Who may file an appeal?

(a) If you receive an order that adversely affects you, you may appeal that order except as provided under § 4.905.

(b) If you are a lessee and you receive a Notice of Order, and if you contest the order, you may either appeal the order or join in your designee's appeal under § 4.908.

(c) If you are an Indian lessor, you may file an appeal of any MMS decision

not to issue an order under 30 CFR part 242 that adversely affects you.

§ 4.905 What may I not appeal under this subpart?

You may not appeal under this subpart:

(a) An action that is not an order, as defined in this subpart;

(b) An order to provide documents or information issued under 30 CFR 242.104(b)(4) by the Associate Director for Royalty Management or a person to whom that Associate Director delegates the authority to issue such orders that are final for the Department; or

(c) A determination of the surety amount or financial solvency under 30 CFR part 243, subparts B or C.

How to Appeal or Join an Appeal

§ 4.906 When must I file an appeal?

You must file your appeal with the MMS Dispute Resolution Division (DRD) under § 4.960 within 60 days after you are served the order, Notice of Order, or MMS decision not to issue an order under 30 CFR part 242. An order, Notice of Order, or decision not to issue an order is considered served as provided under 30 CFR 242.305.

§ 4.907 How must I file an appeal?

(a) For your appeal to be filed, the MMS DRD must receive all of the following by the deadline in § 4.906:

(1) A written Notice of Appeal and a copy of the order, or MMS decision not to issue an order, that you are appealing. You cannot extend the 60-day period for MMS to receive your Notice of Appeal;

(2) A written Preliminary Statement of Issues you will raise on appeal. You must specifically identify the legal and factual disagreements you have with the order, or MMS decision not to issue an order, that you are appealing. See appendix A to this subpart for an example of a Preliminary Statement of Issues;

(3) A nonrefundable processing fee of $150 or a request for reduction or waiver under §§ 4.965 or 4.966. Indian lessors do not have to pay a processing fee.

(b) You must serve your Notice of Appeal, Preliminary Statement of Issues, and any attached documents as required under § 4.962.

(c) You may request an automatic extension of time of up to 60 days to file the Preliminary Statement of Issues or the processing fee required under this paragraph. Your request must be in writing and must be received by the MMS DRD within the time allowed for filing your appeal.

(d) If you are a designee, when you file your appeal under paragraph (a) of this section, you must serve your Notice of Appeal on the lessees who MMS identifies under 30 CFR 242.105(a)(5)(i) in the order you appealed.

§ 4.908 If I am a lessee, can I join a designee's appeal?

If you are a lessee, and your designee files an appeal under § 4.904, you may join in that appeal. To join you must:

(a) File a Notice of Joinder with the MMS DRD as required under § 4.960 within 30 days after you receive your designee's Notice of Appeal; and

(b) Serve your Notice of Joinder on all parties to the appeal and other persons as required under § 4.962.

(c) If you are a lessee and you neither appeal nor join in your designee's appeal under § 4.908, your designee's actions with respect to the appeal and any decisions in the appeal bind you.

§ 4.909 What is the effect of joining an appeal?

If you join in an appeal under § 4.908:

(a) You are deemed to appeal the order jointly with the designee;

(b) The designee must fulfill all requirements imposed on appellants under this subpart;

(c) You may not file submissions or pleadings separately from the designee; and

(d) If the designee notifies you under § 4.910(b) that it declines to further pursue the appeal, then you become an appellant and must then meet all requirements of this subpart as the appellant.

§ 4.910 What must a designee do if it decides to discontine an appeal?

If you are a designee who has appealed under § 4.904 and you decide to stop participating in the appeal, you must notify the following parties in writing at least 30 days before the next submission or pleading is due:

(a) All lessees who have joined in the appeal under § 4.908;

(b) The office or officer with whom any subsequent submissions or pleadings must be filed; and

(c) Other persons as required under § 4.962.

Calculating Time Frames for Appeals

§ 4.911 When does my appeal commence?

(a) For purposes of the period in which the Department must issue a final decision in your appeal under § 4.956, or which the Department uses as guidance to track your appeal under § 4.948, your appeal commences on the date the MMS DRD receives the last of all the items you must file under § 4.907(a).

(b) If you file a request for an extension of time to file your Preliminary Statement of Issues or processing fee under § 4.907(c), your appeal does not commence until the date the MMS DRD receives your Preliminary Statement of Issues and processing fee.

(c) If you requested a fee waiver or reduction under § 4.966, your appeal does not commence until the date the MMS DRD:

(1) Grants your request for a waiver;

(2) Receives the reduced fee, if MMS grants your request for a reduction in the fee; or

(3) Receives the entire fee if MMS denies your request for a reduction in the fee.

§ 4.912 When does my appeal end?

For purposes of the period in which the Department must issue a final decision in your appeal under § 4.956, or which the Department uses as guidance to track your appeal under § 4.948:

(a) Your appeal ends on the same day of the month of the 33rd calendar month after your appeal commenced under § 4.911, plus the number of days of any applicable time extensions, and

(b) If the 33rd calendar month after your appeal commenced does not have the same day of the month as the day of the month your appeal commenced, then the initial 33-month period ends on the last day of the 33rd calendar month.

§ 4.913 What if a due date falls on a day the Department or relevant office is not open for business?

If a due date under this subpart falls on a day the relevant office is not open for business (such as a weekend, Federal holiday, or shutdown), then the due date is the next day the relevant office is open for business.

How MMS Processes Appeals

§ 4.914 What will MMS do after it receives my appeal?

(a) *Documentation of receipt.* When the MMS DRD receives your appeal, it will date stamp each document received. The MMS DRD also will document receipt of your processing fee using any method it deems appropriate.

(b) *Decision on timeliness.* The MMS DRD will decide whether your appeal is filed on time. If the MMS DRD does not receive your Notice of Appeal, Preliminary Statement of Issues, and processing fee, or your request(s) for extension of time to file your Preliminary Statement of Issues and processing fee, or your request for a waiver or fee reduction, by 5:00 p.m. (local time of MMS Dispute Resolution Division) on the 60th day after you

received the order, Notice of Order, or MMS decision not to issue an order, your appeal is not timely filed and will not be considered.

(c) *Notification of decision on timeliness.* The MMS DRD will notify you in writing of its decision on whether your appeal was filed on time.

(1) If MMS notifies you that your appeal was late, you may appeal that decision under § 4.969.

(2) If MMS notifies you that your appeal was filed on time, MMS will give you a docket number to use in future communications regarding your appeal. The notification will include instructions regarding:

(i) A record development conference under § 4.915; and

(ii) A settlement conference under § 4.924.

Record Development Procedures

§ 4.915 How will MMS schedule record development conferences?

(a) If you file an appeal, MMS will schedule you to attend at least one record development conference within 60 days of the commencement of your appeal under § 4.911. You may extend this 60-day period if you agree in writing under § 4.958.

(b) You may ask to hold the record development conferences via telephone, video conference, or in person.

(c) MMS will determine the time and location of record development conferences and whether record development conferences will take place via telephone, video conference, or in person. MMS will not compel you to travel.

§ 4.916 Who must and who may participate in record development conferences?

(a) *Mandatory participation.* The following persons must participate in all record development conferences:

(1) The appellant; and

(2) Relevant MMS offices.

(b) *Optional participation.* The following persons may participate in the record development conferences:

(1) An affected delegated State or affected State concerned;

(2) An affected Indian lessor; and (3) A lessee, designee, payor, or reporter, if not the appellant.

(c) *Consequence of nonparticipation by mandatory participants.* If a person must participate in any record development conference under paragraph (a) of this section, but refuses to do so, then that person my not file any documents or materials for the record.

(d) *Consequence of nonparticipation by optional participants.* If a person may participate in any record development conferences under paragraph (a) of this section, but participates in none of them, then that person may not file any documents or materials for the record.

§ 4.917 How will I receive notification of record development conferences?

(a) After MMS schedules a record development conference under § 4.915, MMS will notify the following persons of the time and location of the conferences:

(1) The appellant;

(2) Lessees that joined under § 4.908;

(3) The office that issued the order;

(4) Affected delegated States;

(5) The persons that affected States concerned identify under § 4.961; and

(6) Affected Indian tribes or appropriate BIA offices.

(b) The BIA office that MMS notifies under paragraph (a)(6) of this section will make available whatever notice to individual Indian mineral owners it deems appropriate by any method it deems appropriate.

§ 4.918 How will the parties to the appeal develop the record during the record development conferences?

(a) During the record development conferences, the parties to the appeal will attempt to agree on the facts and issues on appeal.

(b) At the record development conferences, the parties must identify all documents and evidence that are relevant to disputed legal or factual issues involved in the appeal or that demonstrate material facts, unless the documents or evidence are privileged or their disclosure is prohibited by law.

§ 4.919 What will the parties do if they agree on the record contents?

(a) If the parties to the appeal agree on the contents of the record and the facts and issues on appeal at the record development conferences, unless the parties agree that a party other than MMS will perform this function, MMS will:

(1) Compile for the record all documents and materials listed in paragraph (b) of this section;

(2) Draft a ''Joint Statement of Facts and Issues;'' and

(3) File the following items with the MMS DRD within 30 days after the end of the record development conference:

(i) The record compiled under paragraph (a)(1) of this section;

(ii) The ''Joint Statement of Facts and Issues'' developed under paragraph (a)(2) of this section; and

(iii) A certification that the record is complete, except as provided in § 4.923 of this subpart. The parties may file the certification jointly or individually, but the MMS DRD must receive all parties' certifications before it will deem the record complete. When the record is complete, MMS will notify all parties;

(b) At a minimum, the record compiled under paragraph (a)(1) of this section must include the following, unless they are privileged or their disclosure is prohibited by law:

(1) The order or decision not to issue an order under appeal and associated documents;

(2) All documents and materials that MMS or a delegated State directly or indirectly considered in issuing the order or decision not to issue an order;

(3) All relevant correspondence between applicable MMS or delegated State or tribal offices and the recipient of the order or decision not to issue an order; and

(4) Any evidence in the control of either party that bears upon the disputed facts or issues that are subject to the appeal of the order.

§ 4.920 What will the parties do if they do not agree on the record contents?

If the parties to the appeal cannot agree on the contents of the record and the facts and issues on appeal, each party must:

(a) Jointly or individually submit the material listed under §§ 4.919(a)(3);

(b) File an Additional Statement of Facts and Issues and supporting documentation with the MMS DRD within 30 days after the end of the record development conferences; and

(c) Certify that in the view of the party submitting the certification, the materials filed in paragraphs (a) and (b) of this section comprise the complete record, except as provided in § 4.923 of this subpart. The MMS DRD must receive all parties' certifications before it will deem the record complete. When the record is complete, MMS will notify all parties.

§ 4.921 What must MMS or I do if the record contains proprietary or confidential information?

If a party wishes MMS or IBLA to treat any of the documents or materials compiled under this subpart as proprietary or confidential information, that party must follow the procedures under 43 CFR 4.31.

§ 4.922 What if MMS or I need more time to develop the record?

If you are an appellant and you need more time to complete the record development process, you must obtain an extension under § 4.958.

§ 4.923 May parties supplement the record or Statement of Facts and Issues after the record is deemed complete?

(a) If you are a party, and you want to supplement the record or any

Statement of Facts and Issues submitted under § 4.919 or 4.920, you must:

(1) File any additional material together with a written request for permission to supplement the record or Joint or Additional Statement of Facts and Issues to IBLA (or an Assistant Secretary who is deciding your appeal under § 4.937); and

(2) File these materials and your request between the time MMS deems the record complete under § 4.919 or 4.920 and the time additional responsive pleadings are filed under § 4.944.

(b) Your request must explain why the additional documents, evidence, facts or issues were not available or provided in the record or in the Statement of Facts and Issues and why they are material to a decision on the appeal.

(c) If you are an appellant, you must include with your request your written agreement to extend the period for the Department to issue a final decision in your appeal under 30 U.S.C. 1724(h)(1) by 45 days.

(d) You must serve your request on all parties to the appeal.

(e) IBLA will issue an order either granting or denying your request within 30 days of receiving your request. If IBLA does not issue such an order within 30 days of receiving your request, then your request is deemed granted.

(f) If IBLA grants a request or a request is deemed granted under paragraph (e) of this section, any party to the appeal may respond to the additional material. The party must respond within 15 days of receiving IBLA's order, or, if IBLA does not issue an order, within 45 days of the party's receiving the request.

Settlement Procedures

§ 4.924 How will MMS schedule a settlement conference?

(a) If you file an appeal, MMS will schedule you to attend a settlement conference within 120 days of the commencement of your appeal under § 4.911. You may extend this 120-day period if you agree in writing under § 4.958.

(b) You may ask to have the conference take place via telephone, video conference, or in person.

(c) MMS will determine the time and location of the settlement conference and whether the settlement conference will take place via telephone, video conference, or in person. MMS will not compel you to travel.

(d) The settlement conference may be held as part of the record development conference scheduled under § 4.915 if you and MMS agree to do so.

§ 4.925 Who must and who may participate in the settlement conference?

(a) *Mandatory participation.* The following persons must participate in all settlement conferences:

(1) The appellant; and

(2) Relevant MMS offices.

(b) *Optional participation.* The following persons may participate in the settlement conference:

(1) An affected delegated State or affected State concerned;

(2) An affected Indian lessor; and

(3) A lessee, designee, payor, or reporter, if not the appellant.

§ 4.926 How will I receive notification of settlement conferences?

(a) After MMS schedules a settlement conference under § 4.924, MMS will notify the following persons of the time and location of the conference:

(1) The appellant;

(2) Lessees that joined under § 4.908;

(3) The office that issued the order;

(4) Affected delegated States;

(5) The persons that affected States concerned identify under § 4.961; and

(6) Affected Indian tribes or appropriate BIA offices.

(b) The BIA office that MMS notifies under paragraph (a)(6) of this section will make available whatever notice to individual Indian mineral owners it deems appropriate by any method it deems appropriate.

§ 4.927 May parties resolve an appeal by settlement or using third party neutrals after the settlement conference?

(a) Parties may resolve any appeal by settlement at any time before the Department has issued a final decision.

(b) Any party may participate in settlement negotiations at any stage of the appeal. MMS may use any personnel or officials it deems appropriate for settlement negotiations, including representatives of tribes and delegated States.

(c) In addition to negotiated settlements, at any stage of the appeal, MMS may use third party neutrals under the Administrative Dispute Resolution Act, 5 U.S.C. 571 *et seq.*, if both MMS and the other parties to the appeal agree to do so. If MMS uses third party neutrals, MMS may use the Alternative Dispute Resolution Official from OHA, or a person from OHA's roster of third party neutrals.

§ 4.928 What if I need more time to consider settlement?

If you are an appellant, and you need more time to continue settlement efforts, you must obtain an extension under § 4.958.

MMS Director Actions on Appeals

§ 4.929 May the MMS Director concur with, rescind, or modify an order or decision not to issue an order that I appealed?

(a) Within 60 days after the MMS DRD receives the record under §§ 4.919 or 4.920, the MMS Director may concur with, rescind, or modify the order or decision not to issue an order that you have appealed.

(b) Before the MMS Director rescinds or modifies an order or decision not to issue an order under paragraph (a) of this section, MMS will consult informally with:

(1) The MMS office that issued the order or decision not to issue the order; and

(2) Affected tribes or affected delegated States that participated in any record development or settlement conference.

(c) MMS also may consult informally with:

(1) Other relevant MMS offices;

(2) States concerned; and

(3) Affected Indian lessors.

(d) MMS will notify you in writing that the MMS Director has concurred with, rescinded or modified the order or decision not to issue an order you have appealed. A notice of rescission or modification will state the reasons for the rescission or modification.

(e) If the MMS Director does not act by the deadline in paragraph (a) of this section, the MMS Director is deemed to have concurred with the order or decision not to issue an order.

§ 4.930 What other persons will MMS notify when the MMS Director concurs with, rescinds, or modifies an order or decision not to issue an order?

MMS will send a copy of any notice that it issues under § 4.929(d) as follows:

If the appeal was filed by:	Then MMS will send a copy of the notice under § 4.929(d) to:
(a) The recipient of an order or notice of order under § 4.904(a) or (b).	(1) The office that issued the order; (2) Any affected delegated State; (3) Any affected tribe; and (4) The appropriate BIA office, if the order involves leases on individual Indian lands. The BIA office will provide whatever notice to individual Indian lessors that it deems appropriate by whatever method it deems appropriate.
(b) An Indian lessor under § 4.904(c)	(1) The office that decided not to issue the order, and (2) The lessee or its designee.

§ 4.931 If the MMS Director rescinds or modifies an order, how does it affect the statutory limitations period?

For purposes of determining whether an order is timely under 30 U.S.C. 1724(b)-(d):

(a) If the MMS Director modifies an order under § 4.929, the timeliness of the order is not affected and the modified order is timely if the original order was timely. The MMS Director's modification will not address production not included in the original order.

(b) If the MMS Director rescinds all or part of an order under § 4.929, and if IBLA, an Assistant Secretary, the Director of OHA, the Secretary, or a court reinstates that order, in whole or in part, then the reinstated order relates back to the date the order was originally issued, and the reinstated order is timely if the original order was timely.

§ 4.932 When will MMS send the record to IBLA?

(a) The MMS DRD will send the record to the IBLA within 45 days of the date MMS notifies the appellant under § 4.929(d).

(b) If the MMS Director is deemed to have concurred with an order under § 4.929(e), the MMS DRD will send the record to the IBLA within 105 days after MMS receives the record under §§ 4.919 or 4.920.

(c) The MMS deadline under this section is only guidance for the MMS DRD. It creates no substantive rights in parties to the appeal or any other persons.

Appellant Response to MMS Action

§ 4.933 What must I do, or what may I do, after the MMS Director concurs with, rescinds or modifies an order or decision not to issue an order that I have appealed?

(a) *Concurrence.* If the MMS Director concurs with the order or decision not to issue an order that you have appealed, and you wish to continue your appeal, you must file your Statement of Reasons under § 4.939 within 60 days after you receive the MMS Director's concurrence under § 4.929.

(b) *Recission.* If the MMS Director rescinds the order that you have appealed, and if an Indian lessor or delegated State intervenes under § 4.934, because you will be bound by the Department's final decision in the intervention in your appeal, you may file an Answer to the Intervention Brief under § 4.942 within 60 days after you receive the MMS Director's rescission under § 4.929(d).

(c) *Modification.* If the MMS Director modifies the order that you have appealed, and if you contest the order as modified, you must file your Statement of Reasons under § 4.939, and any Answer to an Intervention Brief under § 4.942, within 60 days after you receive the MMS Director's modification under § 4.929.

(d) *Deemed concurrence.* If the MMS Director is deemed under § 4.929(e) to have concurred with the order or decision not to issue an order that you have appealed, you must file your Statement of Reasons under § 4.939 within 120 days after the date the MMS DRD receives the record forwarded under §§ 4.919 or 4.920.

Intervening in an Appeal

§ 4.934 Who may intervene in an appeal?

(a) *Indian lessors.* If you are an Indian lessor, you may intervene in any appeal involving your lease(s) by filing an Intervention Brief under § 4.939 within 30 days after you receive notification of the MMS Director's concurrence, rescission or modification of an order under § 4.930 that adversely affects you.

(b) *Affected delegated States.* If you are an affected delegated State, and the MMS Director modifies or rescinds an order under § 4.929 that the recipient of an order or Notice of Order has appealed, you may intervene in that appeal by filing an Intervention Brief under § 4.939 within 30 days after you receive MMS's notification of any rescission or modification under § 4.930 if MMS's rescission or modification of the order adversely affects you.

§ 4.935 What is the record for an appeal if a State or Indian lessor intervenes?

If an Indian lessor or delegated State intervenes under § 4.934, the following documents are added to the record established under §§ 4.919 or 4.920:

(a) Any additional correspondence to the MMS Director; and

(b) The MMS Director's notice of modification or rescission under § 4.929(d).

§ 4.936 If an Indian lessor or delegated State intervenes, how does it affect the time frame for deciding an appeal?

If an Indian lessor or delegated State intervenes under § 4.934, the appeal commences on the appellant's commencement date under § 4.911, not on the date an intervening party files its intervention brief. The time frame for deciding the appeal under § 4.956 or tracking the appeal under § 4.948 is calculated from that commencement date.

Assistant Secretary Decisions

§ 4.937 May an Assistant Secretary decide an appeal?

(a) The Assistant Secretary for Land and Minerals Management (or the Assistant Secretary for Indian Affairs for an appeal involving an Indian lease) may decide an appeal if the Assistant Secretary notifies the appellant, the MMS DRD, intervenors, and IBLA in writing any time up to 30 days before the date the appellant must file its Statement of Reasons or an intervenor must file its Intervention Brief under § 4.939.

(b) If an Assistant Secretary will decide under paragraph (a) of this section, you must file all subsequent documents required under this subpart with the Assistant Secretary under § 4.960.

§ 4.938 Who will notify other persons that an Assistant Secretary will decide an appeal or has decided an appeal?

(a) MMS will transmit a copy of the Assistant Secretary's notice required under § 4.937 to:

(1) Affected tribes;

(2) Affected delegated States;

(3) Lessees who join under § 4.908;

(4) Intervenors; and

(5) Affected lessees or their designees if an Indian lessor files an appeal under § 4.904 of any MMS decision not to issue an order.

(b) For any appeal involving a lease on individual Indian lands, in addition

to notifying the persons under paragraph (a) of this section, MMS will transmit a copy of the Assistant Secretary's notice required under § 4.937 to the appropriate BIA office. That BIA office may make available to individual Indian lessors whatever notice it deems appropriate by any method it deems appropriate.

Filing Pleadings With IBLA

§ 4.939 How do I file my Statement of Reasons or Intervention Brief?

(a) If the IBLA is deciding your appeal, you must file your Statement of Reasons or Intervention Brief with IBLA under § 4.960 within the times required under §§ 4.933 and 4.934.

(b) If an Assistant Secretary is deciding your appeal under § 4.937, you must file your Statement of Reasons with that Assistant Secretary under § 4.960 within 60 days after the MMS DRD has received the record under §§ 4.919 or 4.920.

(c) You must pay a nonrefundable processing fee of $150 with your Statement of Reasons as required under § 4.965 or seek a reduction or waiver under § 4.966 within the time required under §§ 4.933 and 4.934. Indian lessors and delegated States do not have to pay a processing fee.

(d) You must serve your Statement of Reasons or Intervention Brief on all parties to the appeal, and on other persons as required under § 4.962.

§ 4.940 What if I do not timely file my Statement of Reasons, Intervention Brief or Request for an Extension of Time to File those documents?

If you do not file your Statement of Reasons, Intervention Brief, or request for extension of time to file either of those documents within the times prescribed in §§ 4.933, 4.934, 4.939, or within any extension of time requested and granted under § 4.958, IBLA or the Assistant Secretary will dismiss your appeal, or will not allow you to intervene.

§ 4.941 Who may file an Answer to a Statement of Reasons or Intervention Brief?

(a) If the recipient of an order or Notice of Order files a Statement of Reasons under § 4.939, MMS and Indian lessors whose leases are affected may file Answers under § 4.942.

(b) If an Indian lessor files a Statement of Reasons or an Intervention Brief under § 4.939, MMS and any lessee, designee or payor for the lease(s) involved in the appeal may file Answers under § 4.942.

(c) If a delegated State files an Intervention Brief under § 4.939, the following may file Answers under § 4.942:

(1) MMS;

(2) Indian lessors whose leases are adversely affected; and

(3) Any lessee, its designee, or the payor for the lease(s) involved in the appeal.

§ 4.942 How do I file an Answer to a Statement of Reasons or Intervention Brief?

(a) If you may file an Answer:

(1) To a Statement of Reasons under § 4.941, you must file your Answer within 60 days after the date the Statement of Reasons is served upon you; or

(2) To an Intervention Brief under § 4.933(b), you must file your Answer within the time required under that section.

(b) You must file your Answer with the appropriate office under § 4.960.

(c) You must serve your Answer on all parties to the appeal.

§ 4.943 Who may file an Amicus Brief?

(a) Any person may file an Amicus Brief with the appropriate office under § 4.960 within 60 days after the date the Statement of Reasons or Intervention Brief is filed with IBLA or Assistant Secretary.

(b) You must serve your Amicus Brief on all parties to the appeal.

§ 4.944 May parties file additional responsive pleadings?

(a) If you filed a Statement of Reasons or an Intervention Brief, and another person files an Answer or an Amicus Brief, then you may file a Reply to the Answer or a Response to the Amicus Brief with IBLA or an Assistant Secretary under § 4.960 within 30 days after the date the Answer or Amicus Brief was served upon you.

(b) If you filed an Answer under § 4.942 and if another person files a Reply or an Amicus Brief, then you may, within 20 days after the Reply or Amicus Brief is served upon you, file under § 4.960:

(1) a Surreply to that Reply to address new arguments or authorities raised in the Reply; or

(2) a Response to the Amicus Brief.

(c) You must serve any responsive pleadings under this section on all parties to the appeal.

Additional Evidence, Arguments, and Hearings

§ 4.945 May I ask for a hearing by an Administrative Law Judge?

(a) If you are a party, you may request a hearing by an Administrative Law Judge of the Hearings Division under 43 CFR 4.415 if there are disputed issues of material fact which could affect the decision on the appeal.

(1) You must file your request in writing within 30 days after all responsive pleadings are filed under § 4.944.

(2) You must specify the issues of fact that are in dispute.

(b) If you are an appellant, you must agree in writing under § 4.958 to extend the period in which the Department must issue a final decision in your appeal under § 4.956, by the additional amount of time necessary for the Hearings Division to complete any action with respect to the referral request, including any of the actions authorized under paragraph (c) of this section.

(c) If IBLA grants a party's request, IBLA may:

(1) Authorize the Administrative Law Judge to specify additional issues;

(2) Authorize the parties to add additional relevant issues, with the approval of the Administrative Law Judge; and

(3) Ask the Administrative Law Judge to issue:

(i) Proposed findings of fact;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that would be final for the Department absent an appeal to IBLA.

§ 4.946 May IBLA require additional evidence or arguments from parties?

(a) IBLA may require additional evidence or written arguments from parties by issuing an order:

(1) Requiring any party or all parties to the appeal to produce additional evidence or written arguments or both;

(2) Requiring the parties to appear before IBLA for oral argument; or

(3) Referring the matter to an Administrative Law Judge of the Hearings Division under 43 CFR 4.415 for an evidentiary hearing if there are disputed issues of material fact that could affect the decision on the appeal.

(b) IBLA's referral under paragraph (a)(3) of this section:

(1) Must specify the issues of fact upon which the hearing is to be held;

(2) May authorize the Administrative Law Judge to specify additional relevant issues;

(3) May authorize the parties to add additional relevant issues, with the approval of the Administrative Law Judge; and

(4) May request that the Administrative Law Judge issue:

(i) Proposed findings of fact;

(ii) A recommended decision that includes findings of fact and conclusions of law; or

(iii) A decision that would be final for the Department absent an appeal to IBLA.

(c) Failure of any party to comply with an IBLA order issued under this section may result in any contested fact being found against the party who does not comply.

§ 4.947 May IBLA establish deadlines for matters referred to Administrative Law Judges?

IBLA may establish appropriate deadlines for any matter referred to an Administrative Law Judge under §§ 4.945 or 4.946.

Decision on an Appeal

§ 4.948 When will IBLA decide my appeal?

(a) IBLA will decide your appeal on or before the date your appeal ends under 4.912.

(b) The IBLA will serve its decision on all parties to the appeal, and other persons as required under § 4.963.

(c) If an Assistant Secretary is deciding your appeal under § 4.937, the Assistant Secretary will:

(1) Decide your appeal on or before the day your appeal ends under § 4.912; and

(2) Serve the decision on all parties to the appeal and other persons as required under § 4.963.

§ 4.949 When is an IBLA or an Assistant Secretary's decision effective?

An IBLA or an Assistant Secretary's decision is effective on the date it is issued, unless IBLA or the Assistant Secretary provides otherwise. The decision is the final action of the Department.

§ 4.950 What if IBLA requires MMS or a delegated State to recalculate royalties or other payments?

(a) This section applies to appeals of orders involving the reporting and payment of royalties or other payments due under Federal oil and gas leases. For Indian leases and for Federal mineral leases other than oil and gas, the time limits and finality requirements for purposes of 30 U.S.C. 1724(h) stated in this section do not apply.

(b) An IBLA decision modifying an order and requiring MMS or a delegated State to recalculate royalties or other payments is a final decision in the administrative proceeding for purposes of 30 U.S.C. 1724(h).

(c) MMS or the delegated State must provide to IBLA and all parties served with IBLA's decision any recalculation IBLA requires under paragraph (b) of this section within 60 days of receiving IBLA's decision.

(d) There is no further appeal within the Department from MMS's or the State's recalculation under paragraph (c) of this section.

(e) The IBLA decision issued under paragraph (b) of this section together with recalculation under paragraph (c) of this section are the final action of the Department that is judicially reviewable under 5 U.S.C. 704.

Reconsideration of a Decision

§ 4.951 May a party ask IBLA to reconsider its decision?

(a) If you are a party, you may ask the IBLA to reconsider its decision by:

(1) Submitting a written request to IBLA within 30 days of the date you receive the decision;

(2) Explaining the extraordinary circumstances that justify reconsideration; and

(3) Serving your request on all parties to the appeal.

(b) Filing a request for reconsideration will not suspend the effectiveness of IBLA's decision.

(c) A request for reconsideration is not necessary to exhaust administrative remedies.

§ 4.952 Under what circumstances may IBLA reconsider its decision?

IBLA may reconsider its decision in extraordinary circumstances for reasons such as:

(a) Discovery of additional evidence that demonstrates error in the decision;

(b) IBLA's misinterpretation of material facts;

(c) Clear error of law;

(d) Recent judicial developments;

(e) Change in Departmental policy; or

(f) Inconsistent agency decisions.

§ 4.953 May other parties to an appeal respond to a request for reconsideration?

(a) If you are a party, you may answer a request for reconsideration within 15 days of the date you received a copy of the request.

(b) You must serve your answer to a request for reconsideration on all parties to the appeal.

§ 4.954 On whom will IBLA serve a decision On reconsideration?

The IBLA will serve its decision on all parties to the appeal, and other persons as required under § 4.963.

Jurisdiction of the Secretary or Director, Office of Hearings and Appeals

§ 4.955 May the Secretary of the Interior or the Director of OHA take jurisdiction of an appeal or review a decision?

The Secretary or the Director of OHA may take jurisdiction of an appeal or review a decision issued under this subpart. See 43 CFR 4.5.

Consequences if the Department Does Not Issue a Decision On Time

§ 4.956 What if the Department does not issue a decision by the date my appeal ends?

(a) *Applicability of section.* This section applies to any appeal of an order, or portion of an order, involving a monetary or nonmonetary obligation under a Federal oil and gas lease filed on or after [insert the date this proposed subpart becomes effective], where the Department does not issue a final decision by the date the appeal ends under § 4.912. The time limits in 30 U.S.C. 1724(h)(2) and the rule of decision stated in this section do not apply to appeals of orders, or portions of orders, that:

(1) Involve Indian leases or Federal mineral leases other than oil and gas; or

(2) Relate to Federal oil and gas leases but do not involve a monetary or nonmonetary obligation.

(b) *General provision.* If IBLA or an Assistant Secretary (or the Secretary or the Director of OHA) does not issue a final decision in an appeal by the date the appeal ends under § 4.912, then under 30 U.S.C. 1724(h)(2), the Secretary will be deemed to have decided the appeal:

(1) In favor of the appellant for any nonmonetary obligation at issue in the appeal, or any monetary obligation at issue in the appeal with a principal amount of less than $10,000;

(2) In favor of the Secretary for any monetary obligation at issue in the appeal with a principal amount of $10,000 or more.

(c) *Orders modified by the MMS Director.* If the MMS Director has modified an order under § 4.929 that you appealed:

(1) If you continued to appeal the order, or any portion of the order, as modified by the Director, then the rule of decision prescribed in paragraph (b) of this section will apply only to those portions of the modified order that you contested.

(2) If neither you nor a joining lessee continues to contest the order, or any portion of the order, as modified by the Director, and a delegated State has intervened in the appeal to contest a modification that neither you nor a joining lessee contests, then the Secretary will be deemed to have affirmed the MMS Director's modification, regardless of the amount of any monetary or nonmonetary obligation that neither you nor a joining lessee contests.

(d) *Orders rescinded by the MMS Director.* If the MMS Director has rescinded an order under § 4.929 that

you appealed, and if a delegated State intervened in the appeal, then the Secretary will be deemed to have affirmed the MMS Director's recission in all respects.

(e) *Requests for reconsideration.* If the IBLA issues a decision on or before the date the appeal ends under § 4.912, that decision is the final decision in the administrative proceeding and fulfills the requirements of 30 U.S.C. 1724(h)(1). The provisions of 30 U.S.C. 1724(h)(1) and (2) have no further application. If any party requests reconsideration of an IBLA decision, the IBLA is not required to issue a decision on reconsideration before the date the appeal would have ended under § 4.912 had there been no IBLA decision.

(f) *Estimation of principal amount of monetary obligation.* If the principal amount of a monetary obligation is not specifically stated in an order and must be computed to comply with the order, the principal amount referred to in paragraph (b) of this section means the principal amount MMS estimates you would be required to pay as a result of the order.

§ 4.957 What is the administrative record for my appeal if it is deemed decided?

If your appeal is deemed decided under §§ 4.956 or 4.972, the record for your appeal consists of:

(a) The record established under §§ 4.919 or 4.920, or before the MMS Director in an appeal under former 30 CFR part 290;

(b) Any additional correspondence to the MMS Director;

(c) The MMS Director's notice of concurrence, modification or rescission under § 4.933(d);

(d) The MMS Director's decision under former 30 CFR part 290;

(e) Any pleadings to the IBLA; and

(f) Any IBLA orders and decisions.

Extensions of Time

§ 4.958 How do I request an extension of time?

(a) If you are a party to an appeal, and you need additional time after an appeal commences:

(1) You may obtain an extension of time under this section:

(i) To meet any filing requirement under this subpart;

(ii) For the Department to issue a final decision in your appeal;

(iii) To stay the appeal pending settlement efforts; or

(iv) To stay the appeal for any other reasons; and

(2) You must submit a written request for an extension of time to the office or official with whom you must file the document before the required filing date, or with the office or official who is responsible for that stage of the appeals process.

(b) If you are an appellant, in addition to meeting the requirements of paragraph (a) of this section, you must agree in writing in your request to extend the period in which the Department must issue a final decision in your appeal under §§ 4.956 or 4.972, or which the Department uses as guidance to track your appeal under § 4.948, by the amount of time for which you are requesting an extension.

(c) If you are any other party, the office or official with whom you must file the request may require you to submit a written agreement signed by the appellant to extend the period in which the Department must issue a final decision in the appeal under §§ 4.956 or 4.972, or which the Department uses as guidance to track the appeal under § 4.948, by the amount of time for which you are requesting an extension.

(d) The office or official with whom you must file your request has the discretion to decline any request for an extension of time.

(e) You must file requests submitted to the MMS DRD, IBLA or an Assistant Secretary as required under § 4.960.

(f) You must serve your request on all parties to the appeal.

Consolidation

§ 4.959 May IBLA consolidate appeals?

(a) IBLA may consolidate appeals that involve:

(1) The same order or decision not to issue an order;

(2) Common issues of disputed material fact; or

(3) Common issues of law.

(b) If you are an appellant and you request consolidation, you must:

(1) Notify all parties to the appeals for which you have requested consolidation; and

(2) Agree in writing under § 4.958 to extend the period for the Department to issue a final decision in each appeal you wish to consolidate to either:

(i) The date by which the Department must issue a final decision in the most recently filed appeal; or

(ii) Any other date to which you and IBLA agree.

(c) IBLA will notify all parties to the appeal of any consolidations under this section.

Filing, Notification and Service Requirements

§ 4.960 Where do I file documents required under this subpart?

You must file documents required under this subpart in the appropriate office as follows:

(a) With the MMS DRD between 9 a.m. and 5 p.m. local time at: [*address for MMS DRD*] using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (_____) _____–_____.

(b) With IBLA at: Interior Board of Land Appeals 4015 Wilson Boulevard, Arlington, Virginia 22203, using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (703) 235–9014; or

(c) With an Assistant Secretary at: [*address for MMS DRD*] using the U.S. Postal Service, a private delivery or courier service, hand delivery or telefax to (_____) _____–_____.

(d) If you file a document by telefax, you must send an additional copy of your document to the same office or official using the U.S. Postal Service, a private delivery or courier service or hand delivery so that it is received within 5 business days of your telefax transmission.

§ 4.961 How can a State concerned receive notification of record development and settlement conferences?

If a State concerned wants to receive notification of record development conferences under § 4.917 and settlement conferences under § 4.924, the State concerned must give the MMS DRD the name, title, address, and telephone number of the State official authorized to receive the notices.

§ 4.962 What copies of documents filed under this subpart are Appellants, Lessees and Intervenors required to serve?

(a) *Appeals by parties other than Indian lessors.* For any appeal filed by a recipient of an order or Notice of Order involving a lease on Federal or Indian lands, appellants, lessees that have joined, and Intervenors must serve copies of required filings under this subpart as follows:

If you are the:	Then you must serve copies of the:	On the following:
(1) Person filing the Notice of Appeal	(i) Notice of Appeal and Preliminary Statement of Issues.	(A) The office that issued the order;
		(B) Affected tribes;

If you are the:	Then you must serve copies of the:	On the following:
		(C) Affected delegated States; and (D) Lessees under § 4.907(c) if you are the designee.
	(ii) Statement of Reasons	(A) The office that issued the order; (B) Affected tribes; (C) Affected delegated States; (D) Lessees that join under § 4.908; (E) Intervenors; (F) The Office of the Solicitor at the address required under 43 CFR 4.413(c)(1)(i); and (G) MMS DRD.
(2) Lessee joining under § 4.908	(i) Notice of Joinder	(A) The designee who appealed the order; (B) The office that issued the order; (C) Affected tribes; and (D) Affected delegated States.
(3) Intervenor under § 4.934	(i) Intervention Brief	(A) The office that issued the order; (B) Affected tribes; (C) Affected delegated States; (D) Lessees that join under § 4.908; (E) The appellant; (F) The Office of the Solicitor at the address required under 43 CFR 4.413(c)(1)(i); and (G) MMS DRD.

(b) *Appeals by Indian lessors.* For any appeal filed by an Indian lessor, appellants must serve copies of required filings under this subpart as follows:

If you are the:	Then you must serve copies of the:	On the following:
(1) Person filing the Notice of Appeal	(i) Notice of Appeal, and Preliminary Statement of Issues.	(A) The office that refused to issue the order under 30 CFR part 242; and (B) The lessee or payor for the leases involved.
	(ii) Statement of Reasons	(A) The office that refused to issue the order under 30 CFR part 242; (B) The lessee or payor for the leases involved; (C) The Office of the Solicitor at the address required under 43 CFR 4.413(c)(1)(i); and (D) MMS DRD.

§ 4.963 What copies of documents filed under this subpart is the Department required to serve?

(a) *Appeals by parties other than Indian lessors.* For any appeal filed by a recipient of an order or Notice of Order involving a lease on Federal or Indian tribal lands, Department of the Interior offices must serve copies of required filings under this subpart as follows:

If you are the:	Then you must serve copies of the:	On the following:
(1) MMS DRD	(i) Notice that an appeal is timely filed ..	(A) The office that issued the order; (B) Affected tribes; (C) Affected delegated States; and (D) Lessees that join under § 4.908.
(2) IBLA or Assistant Secretary	(i) Decisions and Decisions on Reconsideration.	(A) The office that issued the order; (B) Affected tribes; (C) Affected delegated States; (D) Persons who file amicus briefs under § 4.943; (E) The Office of the Solicitor at the address required under 43 CFR 4.413(c)(1)(i); and (F) MMS DRD.

(b) *Appeals by Indian Lessors.* For any appeal filed by an Indian lessor, Department of the Interior offices must serve copies of required filings under this subpart as follows:

If you are the:	Then you must serve copies of the:	On the following:
(1) MMS DRD	(i) Notice that an appeal is timely filed ..	(A) The office that refused to issue the order under 30 CFR part 242; and

If you are the:	Then you must serve copies of the:	On the following:
(2) IBLA or Assistant Secretary	(1) Decisions and Decisions on Reconsideration.	(B) The lessee or payor for the leases involved. (A) The office that refused to issue the order under 30 CFR part 242; (B) The lessee or payor for the leases involved; (C) Persons who file amicus briefs under § 4.943; (D) The Office of the Solicitor at the address required under 43 CFR 4.413(c)(1)(i); and (E) MMS DRD.

(c) For any appeal involving a lease on individual Indian lands, the following service requirements also apply:

(1) MMS will transmit to the appropriate BIA office a copy of the following documents:

(i) Notices of Appeal;

(ii) Notices of Joinder;

(iii) Notices by designees that they are discontinuing an appeal,

(iv) MMS notices of timely filing,

(v) Statements of Reasons,

(vi) Intervention Briefs, and

(vii) IBLA decisions.

(2) That BIA office may make available to individual Indian lessors whatever notice it deems appropriate by any method it deems appropriate.

§ 4.964 What if I don't serve documents as required?

If you are an appellant, IBLA may dismiss your appeal if:

(a) You do not serve any person as required by § 4.962; and

(b) The person you did not serve or the adverse party is prejudiced by your failure to serve.

Processing Fees

§ 4.965 How do I pay the processing fee?

(a) You must pay the processing fee to the MMS DRD.

(b) You must use Electronic Funds Transfer using the Federal Reserve Communications System (FRCS) link to the Financial Service Fedwire Deposit System unless you request and MMS authorizes payment by check or by an alternative method before the date the processing fee is due.

(c) You must include with the payment:

(1) Your taxpayer identification number;

(2) Your payor identification number, if applicable; and

(3) The number of the order, the bill number, or any other applicable identification of the order that you are appealing.

§ 4.966 How do I request a waiver or reduction of my fee?

To request a waiver or reduction you must:

(a) Send a written request to the MMS DRD when you send your Notice of Appeal or Statement of Reasons; and

(b) Demonstrate in your request that you are unable to pay the fee or that payment of the fee would impose an undue hardship upon you.

§ 4.967 When will MMS grant a fee waiver or reduction?

(a) MMS may grant a fee waiver or fee reduction in extraordinary circumstances.

(b) The MMS DRD will send you a written decision granting or denying your request.

§ 4.968 How do I pay my processing fee if MMS grants a reduction or denies my request for a reduction or waiver?

(a) If MMS grants your request for a fee reduction, you must pay the reduced processing fee within 30 days of the date you recieved the decision to reduce your fee.

(b) If MMS denies your request:

(1) You must pay the processing fee within 30 days of your receipt of the decision; and

(2) That decision is final for the Department.

Appeals not Filed on Time

§ 4.969 How do I appeal a decision that my appeal was not filed on time?

If MMS notifies you under § 4.914(c)(1) that your appeal was not filed on time:

(a) You may appeal that decision to IBLA within 15 days of the date you received MMS's notification.

(1) Your appeal constitutes agreement in writing to extend the period in which the Department must issue a final decision in your appeal under § 4.956, or which the Department uses as guidance to track your appeal under § 4.948. The period is extended by the amount of time it takes IBLA to decide whether your appeal was filed on time.

(2) If IBLA denies your appeal, IBLA's decision is final, and you have failed to exhaust required administrative remedies as to the merits of the order or MMS decision not to issue an order.

(b) If you do not appeal MMS's decision to IBLA under paragraph (a) of this section, you have no further right to appeal within the Department. In that event, the order, or MMS decision not to issue an order, is final, and you have failed to exhaust required administrative remedies as to the merits of the order or MMS decision not to issue an order.

(c) If IBLA or a court of competent jurisdiction later determines that MMS's or the IBLA's decision under this paragraph was incorrect, and that your appeal was filed on time, your appeal commences, and your Preliminary Statement of Issues and processing fee are due (if you have not already filed them), 60 days after the date a final non-appealable judgment is entered.

Provisions for Appeals Filed Before [insert date this proposed subpart becomes effective]

§ 4.970 What rules apply to appeals filed before [insert date this proposed subpart becomes effective]?

The following provisions apply to appeals filed either with the MMS Director or IBLA before [insert date this proposed subpart becomes effective]:

(a) 30 CFR parts 243 and 290 in effect prior to [insert date this rule becomes effective]; and (b) 43 CFR 4.901, 4.902, 4.903, 4.911—4.913, 4.948, 4.950, 4.957, 4.958, 4.971, and 4.972.

§ 4.971 When does my appeal commence and end if it was filed before [insert date this proposed subpart becomes effective]?

For purposes of the period in which the Department must issue a final decision in your appeal under § 4.972:

(a) If you filed your Notice of Appeal and initial Statement of Reasons with MMS before August 13, 1996, your appeal commenced on August 13, 1996.

(b) If you filed your Notice of Appeal or initial Statement of Reasons with MMS after August 13, 1996, your appeal commenced on the date MMS received your Notice of Appeal, or, if later, your initial Statement of Reasons under 30 CFR 290.3.

(c) Your appeal ends on the same day of the month of the 33rd calendar month after your appeal commenced under paragraphs (a) or (b), plus the number of days of any applicable time extensions under § 4.958. If the 33rd calendar

month after your appeal commenced does not have the same day of the month as the day of the month your appeal commenced, then the initial 33 month period ends on the last day of the 33rd calendar month.

§ 4.972 What if the Department does not issue a decision by the date my appeal ends if I filed my appeal before [insert effective date this proposed subpart]?

(a) This section applies to any appeal of an order, or portion of an order, involving a monetary or nonmonetary obligation under a Federal oil and gas lease filed before [insert the date this proposed subpart becomes effective], where the Department does not issue a final decision by the date the appeal ends under § 4.971(c). The time limits in 30 U.S.C. 1724(h)(2) and the rule of decision stated in this section do not apply to appeals of orders, or portions of orders, that:

(1) Involve Indian leases or Federal mineral leases other than oil and gas; or

(2) Relate to Federal oil and gas leases but do not involve a monetary or nonmonetary obligation.

(b) If the IBLA or an Assistant Secretary (or the Secretary or the Director of OHA) does not issue a final decision in an appeal filed before [insert date this proposed subpart becomes effective] by the date the appeal ends under § 4.971(c), then under 30 U.S.C. 1724(h)(2), the Secretary will be deemed to have decided the appeal:

(1) In favor of the appellant for any nonmonetary obligation at issue in the appeal, or any monetary obligation at issue in the appeal with a principal amount of less than $10,000;

(2) In favor of the Secretary for any monetary obligation at issue in the appeal with a principal amount of $10,000 or more.

(c)(1) If your appeal ends before the MMS Director issues a decision in your appeal of an order under 30 CFR 290.3(c), then the provisions of paragraph (b) of this section apply to the monetary and nonmonetary obligations in the order that you contested in your appeal to the Director.

(2) If the MMS Director issues a decision in your appeal of an order under 30 CFR 290.3(c) before your appeal ends, and if you appealed the Director's decision to IBLA, then the provisions of paragraph (b) of this section apply to the monetary and nonmonetary obligations in the Director's decision that you contested in your appeal to IBLA.

(3) If the MMS Director issues a decision in your appeal of an order under 30 CFR 290.3(c), and if you did not appeal the Director's decision to IBLA within the time required under 30 CFR 290.7 and 43 CFR part 4, then the MMS Director's decision is the final decision of the Department and 30 U.S.C. 1724(h)(2) has no application.

(d) If any party requests reconsideration of an IBLA decision issued before the date the appeal ends under § 4.971(c), and if IBLA does not issue a decision on reconsideration before the date the appeal ends, then 30 U.S.C. 1724(h)(2) does not apply and the decision the IBLA has issued is the final action of the Department.

(e) If the principal amount of any monetary obligation is not specifically stated in an order or MMS Director's decision and must be computed to comply with the order or MMS Director's decision, then the principal amount referred to in paragraph (b) of this section means the principal amount MMS estimates you would be required to pay as a result of the order.

Appendix A to Subpart J of Part 4

Xxxxxxx Production Company
Appeal of MMS Order dated
Bill/Invoice No. [if any]
$ amount disputed
Date

Preliminary Statement of Issues

Under the regulations at 43 CFR 4.907(a)(2)(i) (1998), Xxxxxxx hereby submits the following preliminary facts and arguments as reasons for its appeal of the Minerals Management Service (MMS) order dated _____, 1998, (Bill No. _____):

1. The MMS claims are barred by § 4(b) of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, P.L. 104–185 (August 13, 1996), which States that a demand which arises from an obligation ''shall be commenced within seven years from the date on which the obligation becomes due.'' Here, the transactions upon which MMS bases its demand took place on _____, and MMS did not issue its demand for payment to Xxxxxxx Production Company until _____, which was more than seven years after the date(s) of the transactions.

2. Xxxxxxx's ownership of less than 50 percent of the ABC Gas Plant merely creates a rebuttable presumption of control. That presumption should be deemed rebutted by the fact that at the time Xxxxxxx executed its Agreement with the ABC Gas Plant, Xxxxxxx's ownership interest in the ABC Gas Plant was significantly lower than its current ownership (i.e., only ____ percent). Therefore, its Agreement with the ABC Gas Plant should be considered arm's-length. [Insert citation to applicable case law, statutes, and/or regulations.]

3. Xxxxxxx's non-arm's length sales were at fair market prices and were consistent with other, comparable sales in the field or area. For example, data available to Xxxxxxx from [source] indicate that in _____ 19____ comparable sales in the field or area were in the range of $____.____ to $____.____ per mcf, while the non-arm's length sales challenged by the order were at $____.____ per mcf. Therefore, those sales should be treated the same as arm's-length sales for royalty purposes. [Insert citation to applicable case law, statutes, and/or regulations.]

4. The MMS erred in billing the entire amount of the subject assessment to Xxxxxxx. Until _____ ____, 19____, Lease Nos. _____ were owned by XYZ Corporation. When Xxxxxxx acquired Lease Nos. _____ from XYZ Corporation, Xxxxxxx did not assume responsibility for obligations that predated the effective date of that acquisition. [Insert citation to applicable case law, statutes, and/or regulations.]

Please contact the undersigned for all matters relating to this appeal. Respectfully submitted this _____ day of _____, 1999.

By: _____
[name]
Xxxxxxx Production Company
[address]
[phone no.]

TITLE 30—MINERAL RESOURCES

PART 208—SALE OF FEDERAL ROYALTY OIL

2. The authority citation for part 208 is revised to read as follows:

Authority: 5 U.S.C. 301 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 41 U.S.C. 601 *et seq.*; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

3. In § 208.2, new definitions are added in alphabetical order to read as follows:

§ 208. Definitions.

* * * * *

Contracting officer means the Director, his or her delegate, or the person designated under a royalty oil purchase contract.

Contracting officer's decision means an MMS order or decision that a contracting officer issues under this part to a purchaser of oil under a royalty oil purchase contract.

* * * * *

Service means served as provided under 30 CFR 242.305.

4. Section 208.16 is revised to read as follows:

§ 208.16 How to appeal a contracting officer's decision that you receive.

If you receive a contracting officer's decision, you may:

(a) Appeal that decision to the Board of Contract Appeals in the Office of Hearings and Appeals, Office of the Secretary, in accordance with the procedures provided in 43 CFR part 4, subpart C; or

(b) File an action in the United States Court of Federal Claims.

PART 241—PENALTIES

5. The authority citation for part 241 continues to read as follows:

Authority: 25 U.S.C 396 *et seq.*; 25 U.S.C. 396a *et seq.*; 25 U.S.C. 2101 *et seq.*; 30 U.S.C. 181 *et seq.*; 30 U.S.C. 351 *et seq.*; 30 U.S.C. 1001 *et seq.*; 30 U.S.C. 1701 *et seq.*; 43 U.S.C. 1301 *et seq.*; 43 U.S.C. 1331 *et seq.*; and 43 U.S.C. 1801 *et seq.*

§ 241.20 [Removed]

6. Section 241.20 is removed and subpart A is reserved.

7. Subpart B is revised to read as follows:

Subpart B—Penalties for Oil and Gas Leases

Sec.

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

Subpart B—Penalties for Oil and Gas Leases

Definitions

§ 241.50 What definitions apply to this subpart?

The terms used in this subpart have the same meaning as in 30 U.S.C. 1702.

Penalties After a Period to Correct

§ 241.51 What may MMS do if I violate a statute, regulation, order, or lease term relating to a Federal or Indian oil and gas lease?

(a) If we believe that you have not followed any requirement of a statute, regulation, order, or terms of a lease for any Federal or Indian oil or gas lease, we will send you a Notice of Noncompliance telling you what the violation is and what you need to do to correct it to avoid civil penalties under 30 U.S.C. 1719(a) and (b).

(b) We will send the Notice to your address of record under 30 CFR 242.304 using the standards of service under 30 CFR 242.305.

§ 241.52 What if I correct the violation?

The matter will be closed if you correct all of the violations identified in the Notice of Noncompliance within 20 days of your receipt of the Notice (or within a longer time period specified in the Notice).

§ 241.53 What if I do not correct the violation?

(a) We may send you a Notice of Civil Penalty if you do not correct all of the violations identified in the Notice of Noncompliance within 20 days of your receipt of the Notice of Noncompliance (or within a longer time period specified in that Notice). The Notice of Civil Penalty will tell you how much penalty you must pay. The amount of penalty may be up to $500 per day, beginning with the date of the Notice of Noncompliance, for each violation set out in the Notice of Noncompliance for as long as you do not correct the violations.

(b) If you do not correct all of the violations identified in the Notice of Noncompliance within 40 days of your receipt of the Notice of Noncompliance (or 20 days following the expiration of a longer time period specified in that Notice), we may increase the amount of the penalty to up to $5,000 per day, beginning with the date of the Notice of Noncompliance, for each violation for as long as you do not correct the violations.

§ 241.54 How may I request a review of a Notice of Noncompliance?

You may request a hearing on the record to review a Notice of Noncompliance by filing a request within 20 days of the date you received the Notice of Noncompliance with the Hearings Division (Departmental), Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. You may do this regardless of whether you correct the violations identified in the Notice of Noncompliance.

§ 241.55 Does my request for a hearing on the record affect the penalties?

(a) If you do not correct the violations identified in the Notice of Noncompliance, the penalties will continue to accrue even if you request a hearing on the record.

(b) You may petition the Departmental Hearings Division to stay the accrual of penalties pending the hearing on the record and a decision by the Administrative Law Judge under § 241.73. You must file your petition within 45 calendar days of receiving the Notice of Noncompliance. The Hearings Division will grant or deny the petition under 43 CFR 4.21(b).

Penalties Without a Period to Correct

§ 241.60 May I be subject to penalties without prior notice and an opportunity to correct?

The Federal Oil and Gas Royalty Management Act sets out several specific violations for which penalties accrue without an opportunity to first correct the violation.

(a) Under 30 U.S.C. 1719(c), you may be subject to penalties of up to $10,000 per day per violation for each day the violation continues if you:

(1) Knowingly or willfully fail to make any royalty payment by the date specified by statute, regulation, order or terms of the lease;

(2) Fail or refuse to permit lawful entry, inspection, or audit; or

(3) Knowingly or willfully fail or refuse to notify the Secretary, within 5 business days after any well begins production on a lease site or allocated to a lease site, or resumes production in the case of a well which has been off production for more than 90 days, of the date on which production has begun or resumed.

(b) Under 30 U.S.C. 1719(d), you may be subject to civil penalties of up to $25,000 per day for each day each violation continues if you:

(1) Knowingly or willfully prepare, maintain, or submit false, inaccurate, or misleading reports, notices, affidavits,

records, data, or other written information;

(2) Knowingly or willfully take or remove, transport, use or divert any oil or gas from any lease site without having valid legal authority to do so; or

(3) Purchase, accept, sell, transport, or convey to another person, any oil or gas knowing or having reason to know that such oil or gas was stolen or unlawfully removed or diverted.

§ 241.61 How will MMS inform me of violations without a period to correct?

We will inform you of violations without a period to correct by issuing a Notice of Noncompliance explaining what the violation is and how to correct it. We also will send you a Notice of Civil Penalty stating the amount of the penalty. The Notice of Noncompliance and Notice of Civil Penalty may be issued simultaneously. We will send the Notice of Noncompliance and the Notice of Civil Penalty to your address of record under 30 CFR 242.304 using the standards of service under 30 CFR 242.305.

§ 241.62 How may I request a review of a Notice of Noncompliance regarding violations without a period to correct?

You may request a hearing on the record of a Notice of Noncompliance regarding violations without a period to correct by filing a request within 20 days of the date you received the Notice of Noncompliance with the Hearings Division (Departmental), Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. You may do this regardless of whether you correct the violations identified in the Notice of Noncompliance.

§ 241.63 Does my request for a hearing on the record affect the penalties?

(a) If you do not correct the violations identified in the Notice of Noncompliance regarding violations without a period to correct, the penalties will continue to accrue even if you request a hearing on the record.

(b) You may ask the Departmental Hearings Division to stay the accrual of penalties pending the hearing on the record and a decision by the Administrative Law Judge under § 241.73. You must file your petition within 45 calendar days of your receipt of the Notice of Noncompliance. The Hearings Division will grant or deny the petition under 43 CFR 4.21(b).

General Provisions

§ 241.70 How does MMS decide what the amount of the penalty should be?

We determine the amount of the penalty by considering the severity of the violations, your history of compliance, and if you are a small business.

§ 241.71 Does the penalty affect whether I owe interest?

(a) The penalties under this section are in addition to interest you may owe on any underlying underpayments or unpaid debt.

(b) If you do not pay the penalty by the date stated in the order assessing the penalty issued under § 241.75, MMS will assess you late payment interest on the penalty amount at the same rate interest is assessed on late royalty payments for the number of days the penalty payment is late.

§ 241.72 How will the Office of Hearings and Appeals conduct the hearing on the record?

If you request a hearing on the record under §§ 241.54 or 241.62, the hearing will be conducted by a Departmental Administrative Law Judge from the Office of Hearings and Appeals. After the hearing, the Administrative Law Judge will issue a decision in accordance with the evidence presented and applicable law.

§ 241.73 How may I appeal the Administrative Law Judge's decision?

If you are adversely affected by the Administrative Law Judge's decision, you may appeal that decision to the Interior Board of Land Appeals in accordance with the procedures set forth in 43 CFR part 4, subpart E.

§ 241.74 May I seek judicial review of the decision of the Interior Board of Land Appeals?

Under 30 U.S.C. 1719(j), you may seek judicial review of the decision of the Interior Board of Land Appeals. Review by the District Court is only on the administrative record and not *de novo.* An appeal to the District Court shall be barred unless filed within 90 days after the final order.

§ 241.75 When must I pay the penalty?

(a) We will send you an order assessing the penalty, in accordance with the Notice of Civil Penalty issued under §§ 241.53 or 241.61, if:

(1) You do not request a hearing on the record under §§ 241.54 or 241.62;

(2) You do not appeal the determination of the Administrative Law Judge to the Interior Board of Land Appeals under § 241.73; or

(3) The Interior Board of Land Appeals issues a final decision for the Department under § 241.73.

(b) You must pay the penalty assessed in that order within 30 days of receiving it, unless you have sought judicial review of the decision of the Interior Board of Land Appeals under § 241.74 and obtained a stay from the district court.

(c) The order assessing the penalty is not appealable.

(d) If you do not pay, that amount is subject to collection under the provisions of § 241.77.

§ 241.76 Can MMS reduce my penalty once it is assessed?

Under 30 U.S.C. 1719(g), the Associate Director for Royalty Management may compromise or reduce civil penalties assessed under this section.

§ 241.77 How may MMS collect the penalty?

(a) MMS may use all available means to collect the penalty including, but not limited to:

(1) Requiring the lease surety, for amounts owed by lessees, to pay the penalty;

(2) Deducting the amount of the penalty from any sums the United States owes to you;

(3) Using judicial process to compel your payment under 30 U.S.C. 1719(k).

(b) If the Department uses judicial process, or if you appeal to a Court under § 241.74 and lose, the Court shall have jurisdiction to award the amount assessed plus interest assessed from the date of the expiration of the 90-day period referred to in § 241.74. The amount of any penalty, as finally determined, may be deducted from any sum owing to you by the United States.

Criminal Penalties

§ 241.80 May the United States criminally prosecute me for violations under mineral leases?

If you commit an act for which a civil penalty is provided at 30 U.S.C. 1719(d) and § 241.60(b), the United States may assess criminal penalties as provided at 30 U.S.C. 1720, in addition to any authority for prosecution under other statutes.

8. The heading of part 242 is revised and subparts A through D are added to part 242 to read as follows.

PART 242—ORDERS

Subpart A—General Provisions

Subpart B—Orders

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

Subpart A—General Provisions

§ 242.1 What is the purpose of this part?

This part explains how the Minerals Management Service (MMS) or delegated States will issue orders and notices of orders, and serve official correspondence, and how the recipient of an order may appeal that order, and exhaust administrative remedies.

§ 242.2 What leases are subject to this part?

This part applies to all Federal mineral leases onshore and on the Outer Continental Shelf (OCS), and to all federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands.

§ 242.3 What definitions apply to this part?

Delegated State means a State to which MMS has delegated authority to perform royalty management functions pursuant to an agreement or agreements under regulations at 30 CFR part 227.

Demand means an order to pay issued under this part.

Designee means the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

Indian lessor means an Indian tribe or individual Indian mineral owner with a beneficial interest in a property that is subject to a lease issued or administered by the Secretary on behalf of the tribe or individual Indian mineral owner.

Lessee means any person to whom the United States, or the United States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this part, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this part have been assigned.

Obligation means a lessee's, designee's or payor's duty to:

(1) Deliver oil or gas royalty in kind; or

(2) Make a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment.

Payor means any person who has been assigned or has assumed the responsibility to report and pay royalties on its own behalf, or on behalf of another person for:

(1) Federal oil and gas leases for production before September 1, 1996;

(2) Federal mineral leases other than oil and gas leases; or

(3) Leases on Indian lands subject to this part.

Reporter means a person who submits reports for leases subject to this part regardless of whether that person has payment responsibility.

Subpart B—Orders

§ 242.100 What is the purpose of this subpart?

This subpart explains how MMS or delegated States issue orders and notices to lessees, designees, payors, reporters, and any other persons concerning the following functions related to leases subject to this part:

(a) Reporting production;

(b) Reporting, computing, and paying royalties;

(c) Reporting, computing, and making other payments; and

(d) Providing documents and other information.

§ 242.101 Who may issue orders?

(a) The Assistant Secretary for Land and Minerals Management, the MMS Director, or other officials to whom the MMS Director delegates authority, may issue orders concerning reporting of production and reporting and paying royalties and other payments due under leases subject to this part.

(b) For States to whom MMS has delegated the authority to issue demands, orders and notices under 30 CFR part 227:

(1) The highest delegated State official having ultimate authority over the collection of royalties, or other State officials to whom that authority has been delegated, may issue demands, orders and notices (other than notices to perform a restructured accounting), concerning reporting and paying royalties and other payments due under any lease for which the State has delegated authority; and

(2) Only the highest delegated State official having ultimate authority over royalty collection may issue orders to perform a restructured accounting.

§ 242.102 What may MMS, tribes, or delegated States do before issuing an order?

Before issuing an order under this subpart, MMS, a tribe, or a delegated State may send you a Preliminary Determination Letter. MMS, the tribe, or the delegated State may send you this letter if it believes that you have not properly:

(a) Provided information related to your lease; or

(b) Reported or paid royalties or other payments due under your lease.

§ 242.103 What does a Preliminary Determination Letter contain?

A Preliminary Determination Letter:

(a) Does not have mandatory or ordering language;

(b) Is not appealable under 43 CFR part 4, subpart J;

(c) Will include:

(1) A description of the scope and conduct of the audit, review, or investigation that led to the letter;

(2) The factual findings and the legal or policy basis for the preliminary determination; and

(3) Instructions on how to respond to the letter to attempt to resolve informally any disagreement you may have with the preliminary determination.

§ 242.104 What is an order?

(a) An order is any document that the MMS Director, MMS RMP, or a delegated State issues that contains mandatory or ordering language that requires the recipient to do any of the following for any lease subject to this subpart: report, compute, or pay royalties or other obligations, or report production, or provide documents or other information.

(b) Orders include but are not limited to the following:

(1) A demand or order to pay which—

(i) Asserts a specific, definite, and quantified amount or obligation claimed to be due; and

(ii) For production from Federal oil and gas leases after September 1, 1996,

specifically identifies the obligation by lease(s), production month(s) and monetary amount of such obligation claimed to be due and ordered to be paid, as well as the reason or reasons such obligation is claimed to be due, but such term does not include any other communication or action by or on behalf of MMS or a delegated State;

(2) Orders to perform restructured accounting that MMS or a delegated State issues to a lessee, designee, or payor when MMS or a delegated State determines that the lessee, designee or payor should recalculate amounts due on an obligation based upon a finding that the lessee, designee or payor has made identified underpayments or overpayments as demonstrated by repeated, systemic reporting errors for a significant number of leases or for a single lease for a significant number of reporting months with the same type of error which constitutes a pattern of violations likely to result in either significant underpayments or overpayments. A person's admission that it has not complied with lease terms, statutes or regulations regarding the reporting and payment of royalties *per se* constitutes a pattern of violations;

(3) Orders to file a report related to any reporting, royalty, or other lease requirement under 30 CFR parts 210, 216, 218, 220, and 250; and

(4) Orders to provide documents or information.

(i) Orders to perform a restructured accounting are not orders to provide documents or information.

(ii) An order to provide documents or information issued under this part by the MMS Associate Director for Royalty Management, or by a person to whom the Associate Director delegates the authority to issue such orders that are final for the Department, is final for the Department and is not appealable under 43 CFR part 4, subpart J.

(c) Orders do not include:

(1) Non-binding requests, information, and guidance, such as:

(i) Preliminary Determination Letters issued under § 242.102;

(ii) Advice or guidance on how to report or pay, including valuation determinations, unless they contain mandatory or ordering language; and

(iii) Policy determinations;

(2) Subpoenas; and

(3) Orders to pay that MMS issues to refiners or other parties involved in disposition of royalty taken in kind.

§ 242.105 What does an order contain?

(a) An order must include:

(1) A description of the audit, review, or investigation that results in the order;

(2) The factual findings and the legal or policy basis for the order;

(3) Instructions on how to comply with the order;

(4) Instructions on how to appeal the order; and

(5) A list specifying:

(i) Lessees who receive notice under § 242.106(b);

(ii) Representatives of any Indian lessors affected by the order; and

(iii) Relevant MMS offices, the Office of the Solicitor, delegated State or tribal offices, and representatives of States concerned.

(b) An order may include references to the Preliminary Determination Letter issued under § 242.102 and any responses to that letter.

(c) An order to perform a restructured accounting under § 242.104(b)(2) may include an estimate of additional royalties due which MMS or a delegated State may adjust based on new information. If MMS or the delegated State adjusts the estimate, it will send written notice to the recipient of the order.

§ 242.106 How will MMS and delegated States serve orders?

(a) MMS and delegated States will serve orders under § 242.303 to the address that you provide under § 242.304.

(b) If MMS or a delegated State serves an order to a designee, as defined in 30 U.S.C. 1701(23), MMS or the delegated State will notify the designee's lessee(s). This notification will be in the form of a Notice of Order that:

(1) Tells the lessee that MMS or the delegated State has issued an order to the lessee's designee;

(2) Includes information about the designee who received the order; and

(3) Is served at the same time and in the same way the order was served.

(c) If a lessee does not designate a designee in writing as required under 30 CFR 218.52, then MMS or a delegated State will serve the order on the person currently making royalty or other payments on the lessee's behalf. In these cases:

(1) MMS or the delegated State is not required to serve the lessee with the Notice of Order required under paragraph (b) of this section; and

(2) The lessee remains liable for any royalty or other payments due under the order, regardless of the fact that MMS or the delegated State did not serve the lessee with a Notice of Order under paragraph (c)(1) of this section.

Subpart C—Requests from Indian Lessors for MMS to Issue an Order

§ 242.200 What is the purpose of this subpart?

This subpart explains how Indian lessors may formally request that MMS issue an order to persons concerning the reporting of production and the reporting and payment of royalties and other payments due under their leases.

§ 242.201 How can an Indian lessor request that MMS issue an order?

(a) If you are an Indian lessor, you may request in writing that MMS issue an order to a lessee, payor or reporter concerning the reporting and payment of royalties and other payments due under any of your leases if you believe that royalties or other lease payments have been underpaid, or that reports are inaccurate.

(b) Your request must:

(1) Specifically state why you believe that royalties or other lease payments have been underpaid, or that reports are inaccurate;

(2) Include evidence, including documents, that you may have that supports your belief that royalties or other lease payments have been underpaid, or that reports are inaccurate;

(3) Include your name, address, the affected lease number(s), and any other information you may have that will help MMS to investigate your request, including the name and address of the lessee, payor, or reporter for the lease(s).

(c) If you are a tribe with a cooperative agreement under § 202 of FOGRMA, send your request to the office designated in your contract.

(d) Other tribes and individual Indian mineral owners must submit their requests to the Office of Indian Royalty Assistance.

(1) You must mail your request to the: Minerals Management Service, Royalty Management Program, Office of Indian Royalty Assistance, MS 3010, PO Box 25165, Denver CO 80225–0165; or

(2) You must deliver your request in person at one of the following offices:

(i) Minerals Management Service, Royalty Management Program, Office of Indian Royalty Assistance, Building 85, Denver Federal Center, Kipling Street and Sixth Avenue, Lakewood, Colorado 80225, (303) 231–3410;

(ii) Minerals Management Service, Royalty Management Program, Oklahoma Indian Royalty Assistance, 4013 NW Expressway, Suite 230, Oklahoma City, OK 73116, (405) 879–6050; or (iii) Department of the Interior, MMS, BIA, and BLM Services, Farmington Indian Minerals Office,

1235 LaPlata Highway, Farmington, NM 87401, (505) 599–8960.

§ 242.202 What will MMS do after it receives my request?

When MMS receives your request, it will:

(a) Investigate your belief that royalties or other lease payments have been underpaid, or that reports are inaccurate; and

(b) Determine whether royalties or other lease payments have been underpaid, or whether reports are inaccurate.

(1) If MMS determines that royalties or other lease payments have been underpaid, or that reports are inaccurate, MMS will issue an appropriate order.

(2) If MMS determines that royalties or other lease payments have not been underpaid, or that reports are not inaccurate as you allege in your request, MMS will deny your request and will not issue an order.

§ 242.203 How will MMS notify me of its decision on my request that it issue an order?

(a) If MMS grants your request, it will notify you in writing of any order that it issues and will give you a copy of the order.

(b) If MMS denies all or part of your request, MMS will explain why in a notice it will issue to you. The notice also will tell you about your appeal rights under 43 CFR part 4, subpart J.

§ 242.204 May I appeal MMS's decision to deny my request to issue an order?

You may appeal MMS's decision to deny your request to issue an order under 43 CFR part 4, subpart J. You must include with your appeal a copy of your request and the notification MMS gave you under § 242.203(b).

Subpart D—Appeals and Service

§ 242.300 What is the purpose of this subpart?

This subpart explains how the recipient of an order may appeal that order, exhaust administrative remedies, and how MMS or delegated States will serve official correspondence.

§ 242.301 How do I appeal an order?

If you receive an order, you may appeal that order under 43 CFR part 4, subpart J.

§ 242.302 How do I exhaust administrative remedies?

If you receive an order, you must appeal that order to the Interior Board of Land Appeals (IBLA) to exhaust administrative remedies (43 CFR part 4, subpart J) unless the Assistant Secretary for Land and Minerals Management or IBLA makes the order immediately effective under 43 CFR part 4, notwithstanding an appeal.

§ 242.303 How will MMS and delegated States serve official correspondence?

(a) MMS and delegated States will serve official correspondence using a method that provides for receipt confirming delivery, such as: certified mail, overnight delivery service, or personal service.

(b) For purposes of this subpart, official correspondence includes all orders that are appealable under 30 CFR part 242.

§ 242.304 Who is the addressee of record?

The addressee of record for each type of official correspondence is shown in the following table:

For correspondence about:	The addressee of record is:	And:
(a) A refiner or other party involved in disposition of Federal royalty taken in kind.	The position title, department name and address, or individual name and address in the executed royalty sale contract; or a different position title, department name and address, or individual name and address that the refiner or other party under the executed royalty sale contract identifies in writing for billing purposes.	The refiner or other party must notify MMS in writing of all addressee changes.
(b) Any person required to report energy and mineral resources removed from Federal and Indian leases to the RMP Production Accounting and Auditing System.	The most recent position title, department name and address, or individual name and address that RMP has in its records for the reporter/payor.	The reporter/ payor must notify RMP, in writing, of any addressee changes.
(c) Onshore Federal leases	The current lessee	The lessee must notify BLM of any addressee changes.
(d) Indian leases	The current lessee	The lessee must notify BIA of any addressee changes.
(e) Offshore leases	The current lessee	The lessee must notify OMM of any addressee changes.
(f) Reviews and audits of lessee, designee, reporter or payor records.	The position title, department name and address, or individual name and address the lessee, designee, reporter or payor identifies in writing at the initiation of the audit; or the most recent addressee that the lessee, designee, reporter or payor specified in writing.	The lessee, designee, reporter or payor must notify MMS of any addressee changes.
(g) Reporting on the ''Report of Sales and Royalty Remittance'' (Form MMS–2014).	The most recent position title, department name and address, or individual name and address that the lessee, designee, reporter or payor identifies in writing.	The lessee, designee, reporter or payor is responsible for notifying RMP in writing of any addressee changes.
(h) Remittances regarding rental and bonuses from nonproducing Federal leases.	The most recent position title, department name and address, or individual name and address maintained in RMP records.	The lessee, designee, reporter or payor is responsible for notifying RMP in writing of any addressee changes.

For correspondence about:	The addressee of record is:	And:
(i) Orders, demands, invoices, or decisions, and other actions identified with lessees, designees, reporters or payors reporting to the RMP Auditing and Financial System not identified in paragraphs (a) through (h) of this section.	The position title, department name and address or individual name and address for the lessee, designee, reporter or payor identified on the most recent Payor Confirmation Report (Report No. ARR 290R) of a Payor Information Form (PIF) (Form MMS–4025 or Form MMS–4030) that RMP returned to the lessee, designee, reporter or payor.	See 30 CFR 210.51.

(j) If official correspondence relates to more than one category identified in paragraphs (a) through (i) of this section, then MMS or the delegated State may serve the correspondence on any one category of affected party.

§ 242.305 When is official correspondence considered served?

(a) Except as provided in paragraph (b) of this section, official correspondence is considered served on the date that it is received at the address of record under § 242.304. A receipt from any person at the address of record is evidence that the correspondence was received. If official correspondence is served by more than one method, the date of service is the earliest date it is received by a method authorized under § 242.303(a).

(b) If MMS or a delegated State cannot deliver the official correspondence after reasonable effort to the addressee of record under § 242.304, official correspondence is deemed to have been constructively served 7 days after the date that MMS or a delegated State mailed the document. This provision covers such situations as nondelivery because:

(1) The addressee has moved without providing a forwarding address in writing to MMS as required under § 242.304;

(2) The forwarding order expired;

(3) Delivery was expressly refused; or

(4) The official correspondence was unclaimed and U.S. Postal Service authorities verify MMS's attempt to deliver.

9. Part 243 is revised to read as follows:

PART 243—SUSPENSIONS PENDING APPEAL AND BONDING—ROYALTY MANAGEMENT PROGRAM

Subpart A—General Provisions

Sec.

Subpart B—Bonding Requirements

Subpart C—Financial Solvency Requirements

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

Subpart A—General Provisions

§ 243.1 What is the purpose of this part?

This part explains how a lessee or recipient of an order may suspend compliance with an order that the lessee, its designee, or the recipient of an order has appealed under 43 CFR part 4, subpart J, or 30 CFR part 208, and when a bond or other surety must be submitted or a party may demonstrate financial solvency.

§ 243.2 What leases are subject to this part?

This part applies to all Federal mineral leases onshore and on the Outer Continental Shelf (OCS), and to all federally-administered mineral leases on Indian tribal and individual Indian mineral owners' lands.

§ 243.3 What definitions apply to this part?

Assessment means any fee or charge levied or imposed by the Secretary or a delegated State other than:

(1) The principal amount of any royalty, minimum royalty, rental, bonus, net profit share or proceed of sale;

(2) Any interest; or

(3) Any civil or criminal penalty.

Designee means the person designated by a lessee under 30 CFR 218.52 to make all or part of the royalty or other payments due on a lease on the lessee's behalf.

Lessee means any person to whom the United States, or the United States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this subpart, or any person to whom all or part of the lessee's interest or operating rights in a lease subject to this subpart has been assigned.

MMS bond-approving officer means the Associate Director for Royalty Management or an official to whom the Associate Director delegates that responsibility.

MMS-specified surety instrument means an MMS-specified administrative appeal bond, an MMS-specified irrevocable letter of credit, a Treasury book-entry bond or note, or a financial institution book-entry certificate of deposit.

Notice of order means the notice under 30 CFR part 242 that MMS or a delegated State provides to a lessee stating that MMS or the delegated State has issued an order to the lessee's designee.

Order means an order to pay a monetary obligation appealable under 43 CFR part 4, subpart J, or 30 CFR part 208.

Person means any individual, firm, corporation, association, partnership, consortium, or joint venture.

Self-bond means an MMS-approved demonstration of financial solvency under this part.

§ 243.4 Who must post a bond or other surety instrument or demonstrate financial solvency under this part to suspend compliance with an order?

(a) If you appeal under 43 CFR part 4, subpart J or 30 CFR part 208, an order that requires you to make a payment, and you want to suspend compliance with that order, you must post a bond or other surety instrument or demonstrate financial solvency under this part, except as provided in paragraphs (b) and (c) of this section.

(b) You need not meet the requirements of paragraph (a) of this section if the order is an assessment.

(c) You need not meet the requirements of paragraph (a) of this section if another person agrees to fulfill these requirements on your behalf under § 243.5.

§ 243.5 May another person post a bond or other surety instrument or demonstrate financial solvency on my behalf?

Any other person, including a designee, payor, or affiliate, may post a bond or other surety instrument or demonstrate their financial solvency under this part on behalf of an appellant required to post a bond or other surety instrument under § 243.4(a).

§ 243.6 When must I or another person meet the bonding or financial solvency requirements under this part?

If you must meet the bonding or financial solvency requirements under § 243.4, or if another person is meeting your bonding or financial solvency requirements, then you or the other person must post a bond or other surety instrument or demonstrate financial solvency within 60 days of your receipt of the order or the Notice of Order.

§ 243.7 What must a person do when posting a bond or other surety instrument or demonstrating financial solvency on behalf of an appellant?

If you are another person assuming an appellant's responsibility to post a bond or other surety instrument or demonstrating financial solvency under § 243.5, you:

(a) Must notify MMS in writing at the address specified in § 243.200(a) that you are assuming the appellant's responsibility under this part;

(b) May not assert that you are not otherwise liable for royalties or other payments under 30 U.S.C. 1712(a), or any other theory, as a defense if MMS calls your bond or requires you to pay based on your demonstration of financial solvency; and

(c) May end your voluntarily-assumed responsibility for either posting a bond or other surety instrument under this part on behalf of the appellant only after the appellant either pays or posts a bond or other surety instrument or demonstrates financial solvency under this part.

§ 243.8 When will MMS suspend my obligation to comply with an order?

(a) *Federal leases.* For orders appealed under 43 CFR part 4, subpart J, regarding the payment and reporting of royalties and other payments due from Federal mineral leases onshore and on the OCS:

(1) If the amount under appeal is less than $10,000 or does not require payment of a specified amount, MMS will suspend your obligation to comply with the order. MMS will use the lease surety posted with the Bureau of Land Management for onshore leases, and MMS for OCS leases, as collateral for the obligation;

(2) If the amount under appeal is $10,000 or more, MMS will suspend your obligation to comply with that order if you:

(i) Submit an MMS-specified surety instrument under subpart B within a time period MMS prescribes; or

(ii) Demonstrate financial solvency under subpart C of this part.

(3) MMS may inform you that it will not suspend your obligation to comply with the order because suspension would harm the interests of the United States.

(b) *Indian leases.* For orders appealed under 43 CFR part 4, subpart J, regarding the payment and reporting of royalties and other payments due from Indian mineral leases subject to this part:

(1) If the amount under appeal is less than $1,000 or does not require payment, MMS will suspend your obligation to comply with the order. MMS will use the lease surety posted with the Bureau of Indian Affairs as collateral for the obligation;

(2) If the amount under appeal is $1,000 or more, MMS will suspend your obligation to comply with that order if you submit an MMS-specified surety instrument under subpart B within a time period MMS prescribes.

(3) MMS may inform you that it will not suspend your obligation to comply with the order because suspension would harm the interests of the United States or the Indian lessor.

(c) Nothing in this part prohibits you from paying any demanded amount or complying with any other requirement pending appeal. However, voluntarily paying any demanded amount or otherwise complying with any other requirement when suspension of an order is otherwise available under these rules does not create judicially reviewable final agency action under 5 U.S.C. 704.

§ 243.9 Will MMS continue to suspend my obligation to comply with an order if I appeal to a Federal court?

(a) If you seek judicial review of an IBLA decision or other final action of the Department of the Interior regarding an order, MMS will suspend your obligation to comply with that order pending judicial review if you continue to meet the requirements of this part.

(b) Notwithstanding the provisions of paragraph (a) of this section, MMS may decide that it will not suspend your obligation to comply with an order. The Department will notify you in writing of that decision and state the reasons for that decision.

§ 243.10 When will MMS initiate collection actions against a bond or other surety instrument or the person demonstrating financial solvency?

If you maintain a bond or an MMS-specified surety instrument or have demonstrated financial solvency, or if another person maintains a bond or other surety instrument or demonstrates financial solvency on your behalf, for an appeal of an order under this part, MMS may initiate collection actions against the bond or other surety instrument or the person demonstrating financial solvency:

(a) If the IBLA, the Director of the Office of Hearings and Appeals, an Assistant Secretary, or the Secretary decides your appeal adversely to you, and you do not pay the amount due or pursue judicial review within 30 days of the decision;

(b) If a court of competent jurisdiction issues a final non-appealable decision adverse to you, and you do not pay the amount due within 30 days of the decision;

(c) If you do not increase the amount of your bond or other surety instrument as required under § 243.101(b), or otherwise fail to maintain an adequate surety instrument in effect, and you do not pay the amount due under the order within 30 days of notice from MMS under § 243.101(b);

(d) If the MMS bond-approving officer determines that you are no longer financially solvent under § 243.202(c), and you do not pay the order amount or post a bond or other MMS-specified surety instrument under subpart B within 30 days of that determination.

§ 243.11 May I appeal the MMS bond-approving officer's determination of my surety amount or financial solvency?

Any decision on your surety amount under subpart B or your financial solvency under subpart C is final and is not subject to appeal under 43 CFR part 4, subpart J.

§ 243.12 May I substitute financial solvency for a bond posted before the effective date of this rule?

If you appealed an order before the effective date of this rule and you submitted an MMS-specified surety instrument to suspend compliance with that order, you may replace the surety with a demonstration of financial solvency under this part when the surety instrument is due for renewal.

Subpart B—Bonding Requirements

§ 243.100 What standards must my MMS-specified surety instrument meet?

(a) An MMS-specified surety instrument must be in a form specified in MMS instructions. MMS will provide you with written information and standard forms for MMS-specified surety instrument requirements.

(b) MMS will use a bank-rating service to determine whether a financial institution has an acceptable rating to provide a surety instrument adequate to indemnify the lessor from loss or damage.

(1) Administrative appeal bonds must be issued by a qualified surety company which the Department of the Treasury has approved.

(2) Irrevocable letters of credit or certificates of deposit must be from a financial institution acceptable to MMS with a minimum 1-year period of coverage subject to automatic renewal up to 5 years.

§ 243.101 How will MMS determine my bond or other surety instrument amount?

(a) The MMS bond-approving officer may approve your surety if he or she determines that the amount is adequate to guarantee payment. The amount of your surety may vary depending on the form of the surety and how long the surety is effective.

(1) The amount of the MMS-specified surety instrument must include the principal amount owed under the order plus any accrued interest MMS determines is owed plus projected interest for a 1-year period.

(2) Treasury book-entry bonds or notes amounts must be equal to at least 120 percent of the required surety amount.

(b) If your appeal is not decided within 1 year from the date your appeal is filed, you must increase the surety amount to cover additional estimated interest for another 1-year period annually on the date your appeal was filed. MMS will determine the additional estimated interest and notify you of the amount so you can amend your surety instrument.

(c) You may submit a single surety instrument that covers multiple appeals of orders, and you may add new amounts under appeal or remove amounts that have been adjudicated in your favor or that you have paid if you amend the single surety instrument annually on the date you filed your first appeal. However, you must submit a separate surety instrument for new amounts under appeal until those new appeals are covered by the single surety instrument during the annual amendment.

Subpart C—Financial Solvency Requirements

§ 243.200 How do I demonstrate financial solvency?

(a) To demonstrate financial solvency under this part, you must submit an audited consolidated balance sheet, and up to 3 years of tax returns if requested by the MMS bond-approving officer, to the Minerals Management Service, Debt Collection Section using:

(1) The U.S. Postal Service or private delivery at P.O. Box 5760, MS 3031, Denver, CO 80217–5760; or

(2) Courier or overnight delivery at MS 3031, Denver Federal Center, Bldg. 85, Room A–212, Denver, CO 80225–0165.

(b) You must submit an audited consolidated balance sheet annually, and additional annual tax returns if requested, on the date MMS first determined that you demonstrated financial solvency as long as you have active appeals, or whenever MMS requests.

(c) If you demonstrate financial solvency in the current calendar year, you are not required to redemonstrate financial solvency for new appeals of orders during that calendar year unless you file for protection under any provision of the U.S. Bankruptcy Code (Title 11, U.S.C.), or MMS notifies you that you must redemonstrate financial solvency.

§ 243.201 How will MMS determine if I am financially solvent?

(a) The MMS bond-approving officer will determine your financial solvency by examining your total net worth, including, as appropriate, the net worth of your affiliated entities.

(b) If your net worth, minus the amount MMS would require as surety under subpart B for all orders you have appealed is greater than $300 million, you are presumptively deemed financially solvent, and MMS will not require you to post a bond or other surety instrument.

(c) If your net worth, minus the amount MMS would require as surety under subpart B for all orders you have appealed is less than $300 million, you must submit the following to the MMS Debt Collection Section by one of the methods in § 243.200(a):

(1) A written request asking MMS to consult a business-information, or credit-reporting service or program to determine your financial solvency; and

(2) A nonrefundable $50 processing fee.

(i) You must pay the processing fee to by Electronic Funds Transfer using the Federal Reserve Communications System (FRCS) link to the Financial Service Fedwire Deposit System unless you request and MMS authorizes payment by check or an alternative method before the date the processing fee is due. Include with the payment:

(A) Your taxpayer identification number;

(B) Your payor identification number, if applicable; and

(C) The Interior Board of Land Appeals or Interior Board of Contract Appeals Docket Number for the order you appealed, the number of the order, the bill number, or any other applicable identification of the order that you appealed.

(ii) You must submit the fee with your request under paragraph (c)(1) of this section, and then annually on the date MMS first determined that you demonstrated financial solvency, as long as you are not able to demonstrate financial solvency under paragraph (a) of this section and you have active appeals.

(d) If you request that MMS consult a business-information or credit-reporting service or program under paragraph (c) of this section:

(1) MMS will use criteria similar to that which a potential creditor would use to lend an amount equal to the bond or other surety instrument MMS would require under subpart B;

(2) For MMS to consider you financially solvent, the business-information or credit-reporting service or program must demonstrate your degree of risk as low to moderate:

(i) If the MMS bond-approving officer determines that the business-information or credit-reporting service or program information demonstrates your financial solvency to MMS's satisfaction, the MMS bond-approving officer will not require you to post a

bond or other surety instrument under subpart B;

(ii) If the MMS bond-approving officer determines that the business-information or credit-reporting service or program information does not demonstrate your financial solvency to MMS's satisfaction, the MMS bond-approving officer will require you to post a bond or other surety instrument under subpart B or pay the obligation.

§ 243.202 When will MMS monitor my financial solvency?

(a) If you are presumptively financially solvent under § 243.201(b), MMS will determine your net worth as described under §§ 243.201(b) and (c) to evaluate your financial solvency at least annually on the date MMS first determined that you demonstrated financial solvency as long as you have active appeals and each time you appeal a new order.

(b) If you requested that MMS consult a business-information or credit-reporting service or program under § 243.201(c), MMS will consult a service or program annually as long as you have active appeals and each time you appeal a new order.

(c) If the MMS bond-approving officer determines that you are no longer financially solvent, you must post a bond or other MMS-specified surety instrument under subpart B.

PART 250—OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

10. The authority citation for part 250 continues to read as follows:

Authority: 43 U.S.C. 1331, *et seq.*

10a. Section 250.1409 is revised to read as follows:

§ 250.1409 What are my appeal rights?

(a) When you receive the Reviewing Officer's final decision, you have 60 days to either pay the penalty or file an appeal in accordance with 30 CFR part 290.

(b) If you file an appeal, you must submit to the Regional Adjudication Office in the Region where the penalty was assessed, a surety bond in the amount of the penalty. Instructions on submitting the surety bond will be included in the Reviewing Officer's final decision.

(1) In the alternative, you may notify the Regional Adjudication Office in the Region where the penalty was assessed, that you want your lease-specific/areawide bond on file to be used to cover the penalty amount.

(2) The Regional Director may determine that additional security (*i.e.*, security in excess of your lease-specific/areawide bond) is necessary to ensure sufficient coverage during an appeal. If additional security is required, the Regional Director will require that the appellant post the supplemental bond with the regional office in a manner consistent with the regulations established for supplemental bonding in § 256.53(d) through (f). If the Regional Director determines the specific appeal should be covered by a lease-specific abandonment account then the appellant will establish an account consistent with the rules and regulations established in § 256.56.

(c) If you do not either pay the penalty or file a timely appeal, MMS will take one or more of the following actions:

(1) MMS will collect the amount you were assessed, plus interest, late payment charges, and other fees as provided by law, from the date of assessment until the date MMS receives payment;

(2) MMS may initiate additional enforcement, including, if appropriate, cancellation of the lease, right-of-way, license, permit, or approval, or the forfeiture of a bond under this part; or

(3) MMS may bar you from doing further business with the Federal Government according to Executive Orders 12549 and 12689, and § 2455 of the Federal Acquisition Streamlining Act of 1994, 31 U.S.C. 6101. The Department of the Interior's regulations implementing these authorities are found at 43 CFR part 62, subpart D.

11. Part 290 of subchapter C is transferred to subchapter B and is revised to read as follows:

PART 290—OFFSHORE MINERALS MANAGEMENT APPEAL PROCEDURES

Sec.

Authority: 5 U.S.C. 301 *et seq.*; 43 U.S.C. 1331 *et seq.*

§ 290.1 What is the purpose of this part?

The purpose of this part is to explain the procedures for appeals of Minerals Management Service (MMS) Offshore Minerals Management (OMM) decisions and orders issued under subchapter B.

§ 290.2 Who may appeal?

If you are adversely affected by an OMM official's final decision or order issued under 30 CFR subchapter B, you may appeal that decision or order to the Interior Board of Land Appeals (IBLA). Your appeal must conform with the procedures found in this part and 43 CFR part 4. A request for reconsideration of an MMS decision concerning a lease bid, authorized in 30 CFR 256.47(e)(3) and 281.21(a)(1), or a deep water field determination, authorized in 30 CFR 203.79(a) and 30 CFR 260.110(d)(2), is not subject to the procedures found in this part.

§ 290.3 What is the time limit for filing an appeal?

You must file your appeal within 60 days after you receive OMM's final decision or order. The 60-day time period supersedes the time period provided in 43 CFR 4.411(a). A decision or order is received on the date you sign a receipt confirming delivery or, if there is no receipt, the date otherwise documented.

§ 290.4 How do I file an appeal?

For your appeal to be filed, MMS must receive all of the following within 60 days after you receive the decision or order:

(a) A written Notice of Appeal together with a copy of the decision or order you are appealing in the office of the OMM officer that issued the decision or order. You cannot extend the 60-day period for that office to receive your Notice of Appeal; and

(b) A nonrefundable processing fee of $150.00 paid under § 290.5. You cannot extend the 60-day period for payment of the processing fee.

§ 290.5 How do I pay my processing fee?

(a) You must pay the processing fee to the MMS DRD by Electronic Funds Transfer using the Federal Reserve Communications System (FRCS) link to the Financial Service Fedwire Deposit System unless you request and MMS authorizes payment by check or an alternative method before the date the processing fee is due. Include with the payment:

(1) Your taxpayer identification number; and

(2) The number of the decision or order, or any other applicable identification of the decision or order that you are appealing.

(b) MMS may grant a fee waiver or fee reduction in extraordinary circumstances.

(c) To request a waiver or reduction you must:

(1) Send a written request to the MMS DRD when you send your Notice of Appeal.

(2) Demonstrate in your request that you are unable to pay the fee or that payment of the fee would impose an undue hardship upon you.

§ 290.6 How will MMS notify me of its action on my request?

The MMS DRD will send you a written decision granting or denying your request.

(a) If MMS grants your request for a fee reduction, you must pay the reduced processing fee within 30 days of your receipt of the decision to reduce your fee.

(b) If MMS denies your request, that decision is final for the Department. You may not appeal this denial, and you must pay the processing fee within 30 days of your receipt of the decision.

§ 290.7 What is the filing date for my appeal?

For purposes of this part, the date your appeal is filed is the date the MMS DRD receives the last of all the items that you submit under § 290.4.

§ 290.8 Can I obtain an extension for filing documents?

(a) You cannot obtain an extension of time to file the Notice of Appeal. See 43 CFR 4.411(c).

(b) You may ask for additional time to submit your statement of reasons or other supporting documents by following the procedures in 43 CFR 4.22(f).

§ 290.9 Are informal resolutions permitted?

You may seek informal resolution with the issuing officer's next level supervisor during the 60-day period established in § 290.3.

§ 290.10 Do I have to comply with the decision or order while my appeal is pending?

(a) The decision or order is effective during the 60-day period for filing an appeal under § 290.3 unless:

(1) OMM notifies you that the decision or order, or some portion of it, is suspended during this period because there is no likelihood of immediate and irreparable harm to human life, the environment, any mineral deposit, or property; or (2) The appellant posts a surety bond under 30 CFR 250.1409 pending the appeal challenging an order to pay a civil penalty.

(b) This section supersedes 43 CFR 4.21 (a).

(c) After you file your appeal, IBLA may grant a stay of a decision or order under 43 CFR 4.21 (b); however, a decision or order remains in effect until IBLA grants your request for a stay of the decision or order under appeal.

§ 290.11 How do I exhaust my administrative remedies?

(a) If you receive a decision or order issued under this subchapter, to exhaust administrative remedies, you must appeal that decision or order to IBLA under 43 CFR part 4 subpart E;

(b) This section does not apply if the Assistant Secretary for Land and Minerals Management or the IBLA makes a decision or order immediately effective notwithstanding an appeal.

SUBCHAPTER C [Removed]

12. Subchapter C is removed.

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