



**CYPRUS AMAX  
MINERALS COMPANY**

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March 15, 1999

ORIGINAL

Mr. David S. Guzy  
Chief, Rules and Publications Staff  
Minerals Management Service  
Royalty Management Program  
Building 85, Room A-613  
Denver Federal Center  
Denver, CO 80225



RE: Comments on Proposed Rule on Appeals of MMS Orders (64 Fed.Reg. 1930,  
January 12, 1999)

Dear Mr. Guzy:

On January 12, 1999, the Minerals Management Service ("MMS") proposed to amend its regulations governing procedures for appeals of MMS orders. (64 Fed. Reg. 1930) This letter provides Cyprus Amax Minerals Company's ("Cyprus Amax") comments on the proposed rule. Cyprus Amax holds federal coal leases in the states of Colorado, Utah and Wyoming and Indian copper leases in the state of Arizona.

Cyprus Amax supports the Royalty Policy Committee's ("RPC") unanimously adopted recommendations of the RPC Appeals and ADR Subcommittee ("Subcommittee") for the expeditious and independent review of appeals. It must also be noted that by letter dated September 22, 1997, to the RPC, the Secretary of the Interior ("Secretary") stated that "we largely agree with the (RPC) report's recommendations and therefore plan to move forward to implement the recommendations . . ." (See Attachment 4.)

Cyprus Amax does not believe the proposed rule addresses these problems in an equitable or supportable manner for solid minerals. Cyprus Amax's concerns with the proposed rule are discussed below.

**PROPOSED CHANGES WILL NOT ACHIEVE STATED GOALS OF THE RPC AND SECRETARY**

The RPC recommended that the principal purpose of the MMS administrative appeals process should be the expeditious and independent review of cases involving disputed facts, legal issues, or policy upon request of the adversely affected party. As a voting member of the Subcommittee, Cyprus Amax believes that the proposed rule is even more stringent and onerous than the current rule. In addition, the proposed rule has

become more protective of the agency by reinforcing the present two-tier appeal system that is contrary to the unanimously approved recommendation for a one-stage Interior Board of Land Appeals (“IBLA”) administrative appeal process.

*The Diffusion of Innovation*, by Everett Rogers, is generally recognized as the most comprehensive and definitive book on diffusion and how individuals, societies and organizations implement or choose not to implement change. It appears that the MMS may be taking what Mr. Rogers describes as an “opportunistic surveillance” approach to identifying possible innovations to the appeal process. That is, rather than look for solutions to the “identified” problems, the MMS is scanning the environment for interesting ideas and is now trying to see in any of these ideas can solve the existing problems without really making changes to the process.

### CURRENT TWO-LEVEL ADMINISTRATIVE APPEAL PROCESS

The MMS specifically requested comments (*see* page 1931) on whether “the current two-level administrative appeal process should be retained, with amendments.” Cyprus Amax believes that the proposed rule is a *de facto* retention of the current two-level administrative appeal process and is even more convoluted and complex than the current appeal process.

Rather than attempting to salvage the status quo, the MMS should be endeavoring to implement a more streamlined, one-step process to the IBLA as recommended by the RPC and the Secretary. The RPC Appeals Report consisted of but 23 pages, with wide margins and spacing, compared to the 61 pages, single spaced, triple columns proposed rulemaking. The MMS should be implementing an appeals format that is similar to all other appeals within the Department of the Interior (“DOI”). As a participant on the Subcommittee, Cyprus Amax states that the intent of the Subcommittee’s recommendation was to mirror the Bureau of Land Management’s appellate procedures before the IBLA.

### 33-MONTH APPEAL PERIOD—“APPLICABILITY, WITHOUT SANCTIONS”

The proposed rule incorporates the time frames established by Congress in the Federal Oil and Gas Royalty Simplification and Fairness Act (“RSFA”) (Pub. L. 104-185, 110 Stat. 1700). RSFA amended the Federal Oil and Gas Royalty Management Act by adding a new section governing the DOI’s process for resolving appeals of MMS orders or decisions involving royalties and other payments due on Federal oil and gas leases. With respect to oil and gas, Congress affirmed in RSFA the legislative intent and wisdom with respect to the implementation of a 33-month appeal period. While RSFA only applies to oil and gas, there is no rational basis as to why “timeliness” is less important for solid minerals.

The following sources arguably reflect a previously consistent MMS/DOI position with respect to the importance of “timeliness” and the implementation of a 33-month appeal period for solid minerals:

- a). the MMS Dear Payor Letter dated February 10, 1997, with respect to “new procedures applicable to appeal decision time limits and formal extensions to these time limits,” which provides that “although these time frames, by law, apply only to Federal oil and gas leases, MMS intends to use the 16- and 33-month time frames as goals for deciding appeals involving Indian leases and leases for minerals other than oil and gas.” (*See Attachment 1*)
- b). the RPC Appeals Report (February 1997), which replete with references to “timeliness” (*see* pages ii and 3) and the “33-month appeal period” (*see* pages 1, 2, 7, 15, 21 and 22) and expressly states:
  - (i) in paragraph 4 (*see* page 7) that “it should be noted that FOGRSFA only applies to oil and gas leases on Federal lands. However, some of the concepts could by regulation be applied to other types of leases administered by the MMS including Indian leases and leases for solid minerals (including coal). As an example, the 33-month period to reach a decision on an appeal may be applied to Indian and solid mineral leases, but the consequences of failure to meet that time frame will be different, at least for Indian leases.”
  - (ii) in paragraph 26(c) (*see* page 21) that “the IBLA will decide your case within 30 months of the date you filed your appeal”; and
  - (iii) in paragraph 28 (*see* page 22), with respect to the “consequences if the Department fails to meet the 33-month time limit,” that “(a) For Federal oil and gas leases, the consequences will be as stated in paragraph 12.b” and “(b) These consequences will not apply to Indian leases, and the Department may choose by regulation to apply such consequences to Federal leases for minerals other than oil and gas.” (*See Attachment 2*)
- c). the successive briefings by the MMS to the RPC concerning “Critical Events in Implementing the Oil and Gas Royalty Simplification and Fairness Act of 1996” (*see, e.g.:* March 21, 1997), with the handout expressly stating that the Department would “process all appeals within 33 months,” and citing the above MMS February 10, 1997 Dear Payor Letter and RPC Appeals Report. (*See Attachment 3*)

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- d) Secretary Babbitt's letter dated September 22, 1997, which informed the RPC that "we largely agree with the report's recommendations." In the "Interior Department Responses" to the RPC Appeals Report (*see* Enclosure 1), it is expressly stated in paragraph 4 under the caption "Proposed structure of a new appeals process" that "we agree with most aspects of the appeals process proposed by the Committee. In particular, we support the emphasis on . . . time limitations for all appeals . . ." (*See* Attachment 4)
  
- e) Memorandum dated September 23, 1997, from Associate Director for Royalty Management, entitled "Policies Regarding Application of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (RSFA) to Federal Leasable Solid Minerals and Geothermal," which stated that with respect to "Appeals," the "MMS intends to publish a final rule applying the 33-month limitation provisions to all Federal mineral resources and commodities currently under MMS's jurisdiction." (*See* Attachment 5)

Jim Byrnes, Chief Judge, Office of Hearings and Appeals, IBLA, stated to the Subcommittee (in a conference call during a Subcommittee meeting) that the IBLA could handle the processing of solid mineral appeals within this 33-month appeal period.

In this context, having made reference to §§ 4.956 and 4.948, proposed § 4.912, captioned "When does my appeal end?", succinctly provides 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." The applicability of the 33-month appeal period is similarly expressed in the Preamble (*see* page 1938), without reference to §§ 4.956 or 4.948. In turn, proposed § 4.948, entitled "When will IBLA decide my appeal?", provides that the IBLA will decide your appeal on or before the date your appeal ends under § 4.912." Unfortunately, proposed § 4.958(a)(1) provides that "if the Department does not issue a decision by the date my appeal ends," the specified "sanctions" do not apply to appeals of orders, or portions of orders, that "involve Indian leases or Federal mineral leases other than oil and gas."

The Preamble discussion (*see* page 1949) of this § 4.958 denial of sanctions is both summary and wholly inept, *i.e.*:

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

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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. (Emphasis added.)

By reference back to § 4.912, the sole applicability of the 33-month appeal period for coal would be for the Department's use "as guidance to track your appeal under § 4.948." This represents a ludicrous regulatory infrastructure. The incongruity of this infrastructure is evidenced by the nonetheless mandatory obligations throughout the proposed rulemaking that if you wish to seek an extension of any of the procedural steps or requirements, a solid mineral lessee must expressly agree to extend the 33-month appeal period and execute an Extension Agreement each time to this effect. Quite obviously, there should be no reason to do so if there are no applicable sanctions with respect to concluding the appeal within the 33-month appeal period.

Without a sanction for failing to meet the 33-month appeal period for solid minerals, Cyprus Amax has no assurance that our appeals will not continue to languish within the administrative appeal process as currently. Therefore in the final rule, Cyprus Amax urges the MMS to incorporate the deemed "denial" sanction if a decision is not rendered by the end of the 33-month appeal period, thereby constituting an exhaustion of administrative remedies for solid minerals.

Since several other RSFA provisions are proposed to be applicable to solid minerals (e.g, the 60-day notice of appeal period, the mandatory settlement conference and the self-bonding procedures), Cyprus Amax believes that **SOLID MINERALS SHOULD BE EXCLUDED ENTIRELY FROM THE PROPOSED RULE MAKING IF THE 33-MONTH LIMIT FOR DECIDING A SOLID MINERAL APPEAL IS NOT MANDATORY, TO INCLUDE THE DEEMED "DENIAL" SANCTION.**

#### PRELIMINARY DETERMINATIONS LETTER

Proposed § 242.102 provides that the MMS, State or tribal auditors "may send" a "preliminary determinations letter" to lessees before issuing an order. Cyprus Amax agrees with the RPC Report that it is extremely important to resolve issues informally at the earliest possible stage, in order to avoid unnecessary administrative appeals. Cyprus Amax urges that the MMS amend this provision in the final rule to make the issuance of a preliminary determinations letter mandatory when the proposed royalty adjustment exceeds \$10,000.

#### DEFINITION OF "ORDER"

Proposed § 4.903 defines the orders that can be appealed. Cyprus Amax objects to subsection (2)(i)(B) in the definition of "Order", which states that an order does not

include "advice or guidance on how to report or pay, including a valuation determination, unless it contains mandatory or ordering language." This language is contrary to the MMS regulation at 30 CFR § 206.257(f), "Request for Valuation Determination," that treats such requests as appealable orders. The MMS can not change its current valuation regulations by redefining what is an appealable order in its appeals regulation.

#### CONTENT OF ORDERS

Proposed § 242.105(a)(2) requires that an order must include "the factual findings and the legal or policy basis for the order." Cyprus Amax agrees with the recommendation of the RPC that each demand or order contain a clear and complete statement of the facts, law and agency policy decisions upon which the demand is based. Once the basis for the order or decision has been established, the MMS should not be allowed to change the basis for liability later during the appeal process.

#### PRELIMINARY STATEMENT OF ISSUES

The Preliminary Statement of Issues requires too much detail at an early stage in the appeals process. According to the example Preliminary Statement of Issues, Appendix A to Subpart J of Part 4 (*See* 64 Fed. Reg. 1781), the statement should include "citation to applicable case law, statutes, and/or regulations." When the appeal is filed, the lessee may not have had time to develop such information. In addition, requiring such information in the Preliminary Statement of Issues is contrary to the Secretary's response to the RPC dated September 22, 1997. The Secretary stated in paragraph 4(a) of that letter that the Preliminary Statement of Issues "should not be a legal brief, providing detailed analysis and citations." (*See* Attachment 4) Any references to requiring detailed information on case law, statutes and regulations should be eliminated from the proposed Appendix A.

#### COMMENCEMENT OF AN APPEAL

Proposed § 4.911 provides that an appeal will not commence until the appellant submits: (i) a written Notice of Appeal; (ii) a written Preliminary Statement of Issues, specifically identifying the legal and factual disagreements the lessee has with the order or decision; and (iii) a \$150 nonrefundable processing fee. As is the case under the current MMS appeal rules, Cyprus Amax believes the Notice of Appeal should be sufficient to initiate the commencement of an administrative appeal. It should not be necessary to include additional filings to start the 33-month limit for issuing a final decision of an appeal.

#### RECORD DEVELOPMENT

Proposed § 4.918(b) requires that "at the record development conferences, the parties must identify all documents and evidence that are relevant to disputed legal or

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factual issues that are involved in the appeal, unless the documents or evidence are privileged or their disclosure is prohibited by law.” The Preamble language pertaining to this section (*see* page 1939) goes much further, identifying relevant information as including “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.” This language appears to mandate self-incrimination and should be deleted. A lessee should not have to assist the MMS in developing its case.

If the basis of providing “information adverse to the party’s position” is based upon the term “unpublished policy documents” in paragraph 19(e) on page 18 of the RPC Report, Cyprus Amax, as a participant on the Subcommittee, believes it was the Subcommittee’s understanding, when approving this recommendation, that this term meant unpublished MMS policy documents. This belief is supported by “concern” number 4, page ii, under “Concerns with Current Appeals Process”, that identified “Policy uncertainty—orders issued without the MMS having clearly decided and explained policy issues.” See also, page 3 of the RPC Report, where it further found that “policy issues that might have been resolved prior to taking action or early after the appeal was filed are not resolved until much later in some cases.”

#### CERTIFICATION OF THE RECORD

Proposed Section 4.919(a)(3)(iii) requires that when all parties agree on the record contents, each party individually or jointly must certify that the record is complete. Mandating such complete certification goes beyond the RPC recommendation to file a “good faith” certification of completeness. Cyprus Amax objects to the proposed certification unless the rule also provides great flexibility in supplementing the record. As discussed below, the proposed regulation makes it difficult to supplement the record.

#### SUPPLEMENTING THE RECORD

Proposed Section 4.923(b) allows parties to supplement the record or Statement of Facts and Issues after the record is deemed complete only if they can demonstrate to the IBLA 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 appeal. This proposal creates unnecessary barriers for obtaining such permission. It is in the best interest of all parties to have a complete record before the IBLA or later at Federal District Court. As is currently the case before the IBLA, supplementing the record should be permitted between the time when the MMS deems the record complete under §§ 4.919 or 4.920 and the time additional responsive pleadings are permitted under § 4.944.

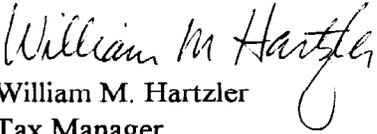
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MMS DIRECTOR'S CONCURRENCE WITH RESCINION OR MODIFICATION OF  
AN ORDER OR DECISION NOT TO ISSUE AN ORDER THAT WAS APPEALED

Proposed § 4.929 allows the MMS Director to “concur with, rescind, or modify an order or decision not to issue an order” within 60 days after receipt of the record developed under proposed §§ 4.919 or 4.920. This section is not necessary for solid minerals because orders and decisions can only be issued by the MMS and not the states. The MMS already has unlimited time to conduct internal review of the proposed solid mineral audit recommendation prior to issuing the order. This provision does not provide certainty to the solid mineral appeals process and would also permit the MMS to change the basis upon which an order is issued midstream.

Cyprus Amax appreciates the opportunity to comment on this proposed regulation.

Sincerely,

  
William M. Hartzler  
Tax Manager

Attachments

Cc S. E. Chetlin, MC 229S (w/o attachments)  
J. D. Flemming, MC 473S (w/o attachments)  
S. A. Strunk, Tempe (w/o attachments)  
G. A. Walker, MC 245S (w/o attachments)

Attachment 1



# United States Department of the Interior

MINERALS MANAGEMENT SERVICE  
Washington, DC 20240

FEB 10 1997

Dear Payor:

This letter explains new procedures applicable to appeal decision time limits and formal extensions to these time limits. On August 13, 1996, President Clinton signed the Federal Oil and Gas Royalty Simplification and Fairness Act (RSFA). This new Act, and the regulations being proposed to implement it, set forth the following time frames:

- The Minerals Management Service (MMS) must issue a decision within 16 months of the date the appellant files the appeal with the MMS Director.
- The Department (generally the Interior Board of Land Appeals) must issue a final decision on all appeals involving Federal oil and gas royalties within 33 months of the date the appellant files the appeal.

The RSFA provides that if the final decision is not issued within the 33 months, appeals will be: (a) deemed to be granted in favor of the appellant as to any nonmonetary obligation and any monetary obligation the principal amount of which is less than \$10,000, and (b) deemed to be decided in favor of the Department as to any monetary obligation the principal amount of which is \$10,000 or more. Although these time frames, by law, apply only to Federal oil and gas leases, MMS intends to use the 16- and 33-month time frames as goals for deciding appeals involving Indian leases and leases for minerals other than oil and gas. The provisions of RSFA relating to appeals deemed to be granted or decided if the final decision is not issued within the 33 months, as described in (a) and (b) of this paragraph, do not apply to appeals involving Indian leases and leases for minerals other than oil and gas.

During various phases of the appeal process, appellants may request that a due date be extended or an appeal be placed on "hold." In the future, any appellant who requests an extension or a hold must also provide a written agreement to extend the 16- and 33-month time frames.

The new procedures for requesting an extension or a hold are outlined below.

## Requests for Extension of Due Dates

- Before MMS files the Field Report: Soon after filing an appeal, the appellant often requests an extension of the due date for submitting the Statement of Reasons (the appellant's explanation of its appeal). The MMS office that issued the original order will approve or deny the request for extension of the due date to file the Statement of Reasons.

Both MMS and the appellant must use the "Extension Agreement for MMS Appeal" (see enclosure 1) to extend the due dates and the appeal decision time frames.

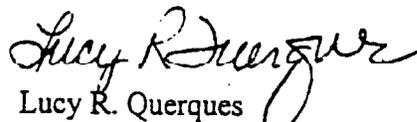
- **After MMS files the Field Report:** After MMS files the Field Report, the Appeals Division will approve or deny the appellant's request for an extension of the due date to file documents, such as a response to the Field Report. Both MMS and the appellant must use the "Extension Agreement for MMS Appeal" (see enclosure 1) to extend the due dates and to extend the appeal decision time frames.

**Requests for Holds Pending Negotiations and Litigation**

If settlement negotiations are in the final stages, the MMS Office of Enforcement will initiate the process to place the appeal on hold. Cases can also be placed on hold for other reasons, such as when the parties are awaiting a court decision in another case where the issues are similar and a precedent could be established. Both MMS and the appellant must use the "Hold Agreement for MMS Appeal" (see enclosure 2) to place the appeal on hold and extend the 16- and 33-month time frames. The Chief, Appeals Division, will approve or deny requests for delay and formalize the hold.

If you have any questions, please call either Kenneth R. Vogel at (303) 231-3749 or Judy Comm at (303) 231-3883.

Sincerely,

  
Lucy R. Querques  
Associate Director for  
Royalty Management

Enclosures

**Extension Agreement for MMS Appeal**

Appellant: \_\_\_\_\_

Docket No. MMS-\_\_\_\_-\_\_\_\_-\_\_\_\_ [Execute separate agreement for each docket no.]

I hereby request a \_\_\_\_\_ day extension of time to file a:

- \_\_\_\_\_ Statement of Reasons
- \_\_\_\_\_ Response to the Field Report
- \_\_\_\_\_ Supplemental Statement of Reasons

for the appeal listed above filed under 30 CFR 290. The extension will be measured from the date the document was due.

I also agree to extend for the same number of days the 33-month time frame for processing appeals as set out in 30 U.S.C. 1725(h)(1) and any time frame that MMS may provide for by regulation.

The Appellant's representative and the Secretary's Designee executing this agreement, warrant that they are duly authorized to represent and bind the parties hereto. The MMS Appeals Division concurrence is required to validate this agreement.

Appellant: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_ Date Executed: \_\_\_\_\_

FAX Number: \_\_\_\_\_

Approved by:

Secretary's Designee: \_\_\_\_\_

Authorized Royalty Management Program Official (prior to issuance of the field report)

FAX Number: \_\_\_\_\_, or

Chief, MMS Appeals Division (after issuance of field report)

Concurrence: \_\_\_\_\_

Chief, MMS Appeals Division

Forms may be filed by fax with the appropriate Royalty Management Program office (pre-field report) or with the MMS Appeals Division (post-field report, Fax no. 202-219-5565). After concurring, the Appeals Division will fax copies back to the appellant and the appropriate Royalty Management Program official.

### Hold Agreement for MMS Appeal

Appellant: \_\_\_\_\_

Docket No. MMS-\_\_\_\_-\_\_\_\_-\_\_\_\_ [Execute separate agreement for each docket no.]

I hereby request that the appeal listed above, filed under 30 CFR 290, be put on hold for \_\_\_\_\_ days pending completion of settlement discussions between the appellant and MMS or pending a decision on a related case currently pending at the Interior Board of Land Appeals or in Federal Court. I request that the due date for any documents otherwise required from the appellant regarding this appeal be extended until the end of this hold period and that MMS not issue a decision on this appeal during this hold period.

I also agree to extend for the same number of days the 33-month time frame for processing appeals as set out in 30 U.S.C. 1725(h)(1) and any other time frame for processing appeals that MMS may provide for by regulation.

Either the Appellant or the MMS may terminate this agreement by giving written notice. Such notice will terminate the hold, the extension of time to file any documents by the appellant, and the extension of time frames for processing the appeal 30 days after the date of the notice.

The Appellant's representative and the Secretary's Designee executing this agreement, warrant that they are duly authorized to represent and bind the parties hereto. The MMS Appeals Division concurrence is required to validate this agreement.

Appellant: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_ Date Executed: \_\_\_\_\_

FAX Number: \_\_\_\_\_

Approved by:

Secretary's Designee: \_\_\_\_\_

Authorized Royalty Management Program Official (prior to issuance of the field report)

FAX Number: \_\_\_\_\_, or

Chief, MMS Appeals Division (after issuance of field report)

Concurrence: \_\_\_\_\_

Chief, MMS Appeals Division

Forms may be filed by fax with the appropriate Royalty Management Program office (pre-field report) or with the MMS Appeals Division (post-field report, Fax no. 202-219-5565). After concurring, the Appeals Division will fax copies back to the appellant and the appropriate Royalty Management Program official.

Attachment 2

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

February 1997

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1. Lack of timely resolution;
2. Lack of clarity in some orders;
3. The perceived lack of independence and unfairness of the MMS Director level of appeals due to the summary process and possible *ex parte* communication;
4. Policy uncertainty--orders issued without the MMS having clearly decided and explained policy issues;
5. Inability for appellant to know or ascertain exactly what is contained in the administrative record;
6. The conflicting roles of the Solicitor's Office in satisfying institutional needs (assisting in setting policy and overall litigation strategy) and acting as a legal advocate for MMS; (this means that sometimes decisions on individual appeals become secondary to the larger matrix of policy and decision-making); and
7. Duplication of effort within MMS Director review and Interior Board of Land Appeals (IBLA) level review.

### **Events Affecting the Subcommittee's Considerations**

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

### **Recommendations**

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

## Introduction

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

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

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

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

- The entire process including appeals to the MMS Director and to the Interior Board of Land Appeals (IBLA) takes too long and causes strained relations between MMS and industry.
- There is a lack of discipline in the system--parties are allowed to delay providing facts and arguments in support of their positions, and decision-makers are allowed to delay issuing decisions. Thus, relevant facts and legal issues may arise first at the IBLA stage (or in Federal court), after investment of significant time and resources at the MMS appeals stage. Similarly, policy issues that might have been resolved prior to taking the action or early after the appeal was filed are not resolved until much later in some cases. This has resulted in some cases being put on "hold" rather than being resolved in a timely manner.
- There is not a completely independent review in the appeals process because draft decisions are circulated for extensive reviewing and "surnaming" (that is, they are reviewed by various government officials, including the official who issued the order from which the appeal is taken).
- Parties do not meet face-to-face on a consistent basis early in the appeals process to try to resolve factual issues and come to agreement on the appropriate action based on those facts.
- At the MMS appeals stage, the roles of the Director, the Appeals Division, the office that took the action under appeal, and the Office of the Solicitor are unclear. Many Subcommittee members viewed the current MMS appeals process as unfair because of the lack of prohibitions on *ex parte* communications and the "behind the scenes" involvement of parties that had played a role in the initial decision to take the action under appeal (e.g., various divisions in the Royalty Management Program and the Office of the Solicitor). Others felt that these roles were appropriate for an internal review process by the MMS Director, but agreed that they create an appearance of unfairness.
- Due to reluctance on the part of RMP, the Office of Policy and Management Improvement (PMI), the Director's office, and the Solicitor's office (or combinations or all of them) to make hard policy

- to provide parties that disagree with actions taken by MMS staff with a mechanism to obtain timely decisions on the appropriateness of those actions.
- to resolve disputes at an early stage (by appellants complying with MMS's action, by MMS withdrawing or modifying its action, or by ADR), without the need for more expensive litigation.
- to enable senior MMS managers to correct actions taken by subordinates where necessary. This can involve recognition of new facts raised by appellants, review of the legal basis for the initial action, or consideration of whether the action is consistent with existing or developing MMS policy.
- to develop the administrative record for disputes that may proceed to Federal court.
- to provide guidance to MMS staff and appellants on the proper action to take on similar cases in the future.

#### **4. Events Affecting the Subcommittee's Considerations**

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

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

orders that are appealable actions. Thus, the process for handling administrative appeals within the Department of the Interior must take into account this new role likely to be performed by at least some states.

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

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

## **5. Background on the Current Appeals Process**

MMS royalty decisions and orders currently are subject to a two-stage appeals process -- first to the Director, MMS, and then to the IBLA. To appeal to the MMS Director, the appellant must file with the office that issued

## **Recommendations and Rationale**

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

### **Resolution of Policy Issues**

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

### **Encourage Informal Resolution**

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<sup>2</sup> Under FOGRSFA "state concerned" means, "with respect to a lease, a State which receives a portion of royalties or other payments under the mineral leasing laws from such lease."

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

1. How will MMS determine the correct policy to apply when the published regulations and appeals decisions do not give an adequate basis for either a lessee to pay royalties or an auditor to determine whether proper royalties have been paid?
  - a. MMS has two currently constituted bodies with the authority to make determinations concerning policy issues. Most policy issues involve uncertainty concerning valuation. The Royalty Valuation Division (RVD) has been delegated the authority to make value determinations. In addition, the MMS has informally constituted a group of senior managers who jointly decide royalty policy disputes. The Royalty Policy Board (RPB) is constituted of the Deputy Director, the Associate Director for Royalty Management, and the Associate Director for Policy and Management Improvement, with the Assistant Solicitor for Royalty Management as a non-voting legal advisor. The RPB may give advice concerning disputes in the application of lease terms, regulations, statutory law, and the judicial interpretations thereof. In addition, for issues that do not require a decision at the level of the RPB, MMS may develop policy with the involvement of appropriate offices in MMS (including RVD) and with input from states and tribes. MMS may seek legal advice at this stage, from the Solicitor's office and possibly from the staff with legal training in the Appeals Division and the Office of Enforcement.
2. How should the RVD and RPB be used?
  - a. You are encouraged to bring policy questions to the RVD for resolution. If the questions are either of general interest or not related to valuation, RVD will refer the questions to the RPB, or to another appropriate body if one is constituted by the Department of the Interior (Department) or the MMS. If you bring a policy question to the RVD for resolution, MMS will not issue any civil penalties concerning the issue to you as long as the question is pending.
  - b. MMS, state and tribal auditors are encouraged to bring open policy questions to the RVD or RPB for resolution, prior to communicating

- a. You may, at your option, respond within 30 days of receipt of the PFL. If you need additional time, you may request it. We will grant requests for additional time, as long as they do not impact our ability to issue timely orders under the FOGRSFA. If you do not intend to respond, please notify the auditor who issued the PFL, as early as reasonably possible.
  - b. If you respond to the PFL, you will not be limited to the facts and arguments that you present at this stage, if we issue an order or demand. Any facts and arguments you do submit may be incorporated by reference in any subsequent communications and filings.
7. What will be included in an order or demand of the MMS or a delegated state or tribe?
- a. Orders and demands will include citation of specific facts, policy, and law under which the order or demand is issued. Orders and demands may incorporate such citations from the PFL by reference. Prior to issuance, the issuing office should seek review of open policy questions before the RVD or RPB or through other appropriate mechanisms.
  - b. If you are a designee, we will notify all affected lessees who designated you when we issue any demand.
  - c. Orders and demands are appealable to the IBLA. Demands are appealable by both designees and lessees. Orders and demands will include appeal instructions, including the persons to receive copies of all filings. This service list will be used in all subsequent filings by any person. It will include the relevant MMS offices, the states concerned and Indian tribes and BIA area offices.
8. May I continue to discuss the issues in the order or demand with the issuing office after the order or demand has been issued?
- a. You are encouraged to continue to discuss the order or demand with the issuing office even after it has been issued within the time limits specified in the order or demand. However, such discussions do not toll any requirements to file a notice of appeal within the time limits specified in paragraph 11.
9. When can I appeal an action of the Minerals Management Service, or a

- b. If you are a lessor appealing a failure of MMS to issue an order, you first must inform the MMS division with which you have made a request that you intend to appeal their non-action as a denial of your request. The MMS division has 30 days to respond; if it does not respond within those 30 days, you must file the appropriate notice and statements within the 60 days following the end of the 30 days following your filing the intent to appeal notification. You may obtain an extension of time to file the statement, but not the notice of appeal.
12. Does the filing of the notice of appeal have any legal effect?
- a. When IBLA receives the notice of appeal, the Department has 33 months to issue a final decision with respect to orders and demands issued concerning Federal oil and gas leases.<sup>3</sup>
  - b. If the Department does not issue a final decision with respect to orders and demands concerning Federal oil and gas leases within 33 months, the decision shall be deemed:
    - i. To have been issued and granted in favor of the appellant as to any nonmonetary obligation and any monetary obligation the principal amount of which is less than \$10,000; and
    - ii. To have been issued in favor of the Secretary, which decision shall be deemed to affirm those issues for which the agency rendered a decision prior to the end of such period, as to any monetary obligation the principal amount of which is \$10,000 or more. The appellant shall have a right of judicial review of such deemed final decision in accordance with title 5 of the United States Code.
13. What will be MMS's response to the filing of an appeal?
- a. MMS will send you a letter noting our receipt of our copy of the notice of appeal, and will contact you to set up a meeting, more fully described in paragraph 14, either in person or by telephone, to discuss the issues and facts of the appeal and to explore the possibility of settlement.

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

the appeal to the IBLA.

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

- a. The Office of Enforcement will organize the record development meeting (see paragraph 19.b) and the settlement conference (see paragraph 20.a).
- b. The Office of Enforcement will organize any subsequent settlement discussions in exchange for an extension of the 33-month statutory appeals period.
- c. The Office of Enforcement may participate in internal discussions to determine whether MMS will support, modify or reject the order.

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

- a. The Appeals Division will organize the determination of whether to recommend to the Director whether the order should be rescinded, modified, or supported.
- b. The Appeals Division will assure that the record is developed and transmitted to the IBLA with copies to all parties on the case service list (see paragraphs 10.a and 10.b).
- c. The Appeals Division may assist the Solicitor in drafting briefs to the IBLA, with copies to all interested parties.
- d. The Appeals Division will keep track of deadlines and the overall time limitation.

19. How will the record be developed?

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

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

- b. The purpose of the meeting will be to discuss the issues candidly to see whether the differences between MMS (and/or the delegated state) and the appellant can be narrowed. If they can be narrowed enough, it may be worthwhile to resolve them through Alternative Dispute Resolution: negotiation, mediation, fact-finding, or non-binding arbitration.
  - c. This meeting must take place within 120 days of the filing of the notice of appeal unless extended by mutual consent.
  - d. This meeting will take place after the record has been certified as complete, in paragraph 19.g.
21. If we cannot come to a settlement agreement, will the MMS Director make a determination in my case?
- a. The Appeals Division will meet informally with the division or state or tribe that issued the order or that performed the audit, other relevant MMS divisions (Valuation, Enforcement, Policy, etc.), states in which the leases are located, and affected Indian tribes, to determine the proper application of MMS rules and policy to the facts of the case.
  - b. The Appeals Division will then recommend whether the order should be upheld, modified or rescinded, or in the case of an order issued by a delegated state or Indian tribe, whether to recommend that the Solicitor not defend the order. This recommendation will be shared with interested MMS offices, states and tribes, within 30 days of the conclusion of the settlement conference. This memo is not a part of the administrative record, but is rather in the form of a privileged attorney-client communication.
  - c. If the Appeals Division decides to modify or rescind an MMS order, that modified order will be issued by the Appeals Division, after consultation with the originating division. The Appeals Division will request a

- d. No answer is required. MMS or the Solicitor must notify the IBLA and the appellant when no answer will be filed.
  - e. All answers and amicus briefs will be filed within 60 days of the date the statement of reasons is filed (see paragraph 22.b) and must be served on all parties served with the statement of reasons (see paragraphs 10.a and 10.b).
24. May I file a reply and may MMS respond?
- a. Additional briefs may be filed at the discretion of the IBLA. The IBLA may condition its leave to file additional briefs upon agreement to extend the 33-month time limit.
25. Are all interested parties who were eligible to participate in the record development meeting limited to the issues and facts in the record certified in paragraph 19.d?
- a. Yes, unless the party seeking to add new information can show good cause why it was not raised at an earlier stage. If new facts, evidence or issues are raised by any party, the IBLA may decide on the admissibility thereof, after consideration of all pertinent circumstances. If the IBLA determines that a party withheld evidence or failed to raise an issue in violation of the good faith certification of the record, it may decide to exclude those facts, evidence or issues. The IBLA may admit the evidence, or permit the party to raise an additional issue, if it is material to the determination of the case. If the evidence or issue is presented by an appellant, the IBLA may condition its admissibility on the appellant's consent to extend the 33-month time limit.
26. How will the IBLA decide my case?
- a. The IBLA may affirm, reverse, vacate, set aside, or modify the order. This includes any combination of these types of orders.
  - b. If the IBLA believes that the parties have not fully briefed any issue that the IBLA believes is necessary to a final Secretarial determination, it may require additional briefings and evidentiary supplementation, as needed. Supplementary briefings and evidence are to be used in lieu of remands of the case to the issuing office.
  - c. The IBLA will decide your case within 30 months of the date you filed your appeal, except to the extent the 33-month time limit was extended

settlement and other forms of ADR at any time. MMS also will seek to resolve disputes through ADR.

30. May an Assistant Secretary decide a case with final agency action effect under the provisions of *Blue Star*?
  - a. An Assistant Secretary may petition the IBLA to relinquish jurisdiction. If the IBLA grants the request, the Assistant Secretary may make a decision in the case, which constitutes final agency action.
  - b. Prior to the filing of a notice of appeal, an Assistant Secretary may issue an order constituting final agency action.

## Appendix A

### Membership Roster

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Voting Member

## Appendix B

### Description of Current MMS Appeals Process

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

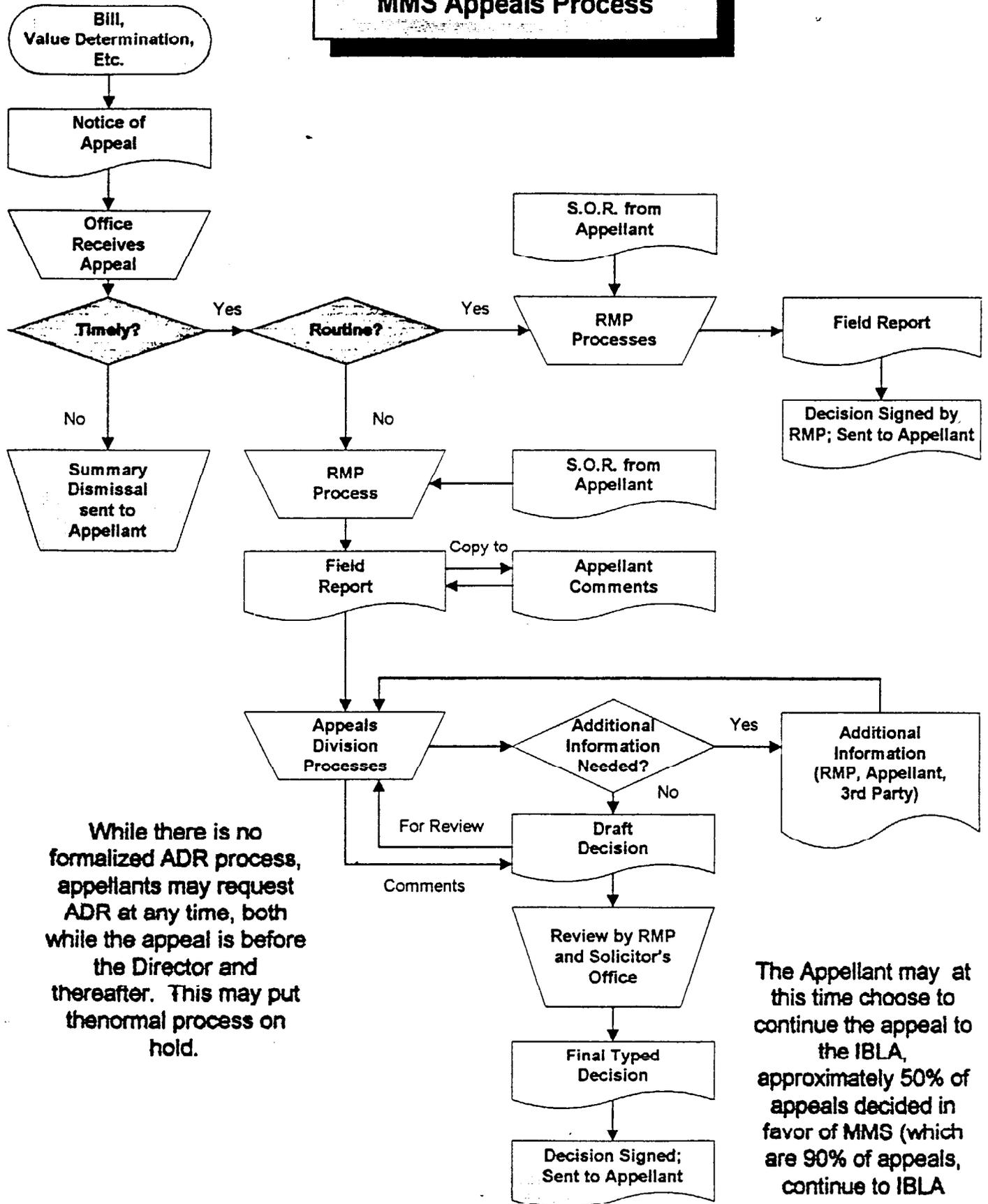
- who may appeal: "any party adversely affected by a final order or decision . . . unless the decision was approved by the Secretary or the Director prior to promulgation." Section 290.2.
- notice of appeal: filed with the office of the official who issued the original order or decision within 30 days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

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

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

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

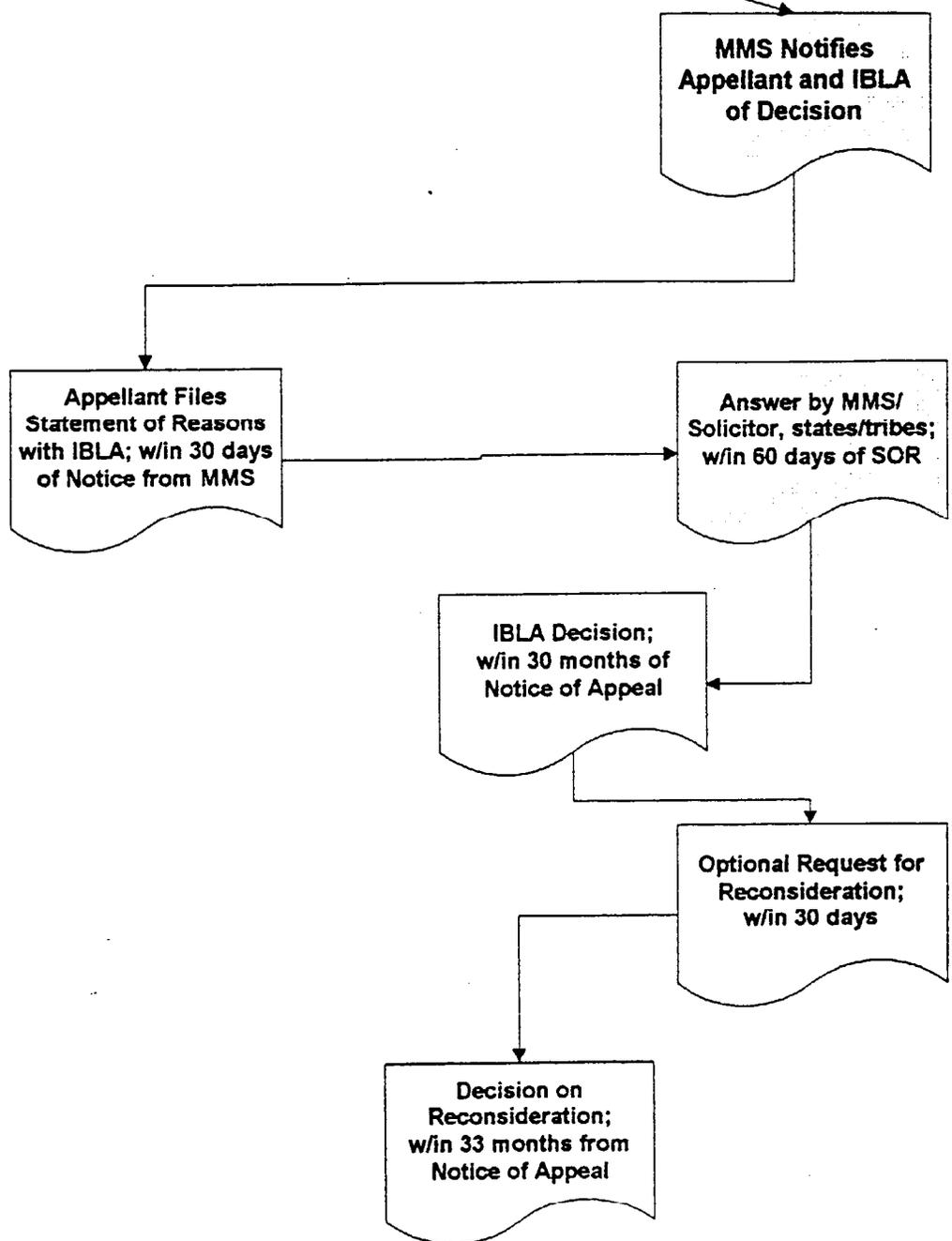
# Flowchart of MMS Appeals Process



While there is no formalized ADR process, appellants may request ADR at any time, both while the appeal is before the Director and thereafter. This may put the normal process on hold.

The Appellant may at this time choose to continue the appeal to the IBLA, approximately 50% of appeals decided in favor of MMS (which are 90% of appeals, continue to IBLA)

**Appendix C  
Proposed Redesign of MMS  
Appeals Process  
Continued**



Attachment 3

Critical Events  
in Implementing the  
Federal Oil and Gas Royalty Simplification & Fairness Act of 1996

Near Term Focus				
Critical Event RSFA Section	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
Report and Pay/Credit Interest on Overpayments §§6(a),6(b), 6E	Payment of Interest Milt Dial Draft Regulation to D.C.: 3/15/97	Yes 1/14/97 - contractor completed project plan for system development Phase I (4/97 target date) - paying interest on overpayments; Phase II (9/97 target date) - payors reporting interest on 2014 2/20 - Testing, Phase I, began	Meetings Held: 10/21-22/96 and 11/18/96 Dear Payor Letter to be mailed by 3/31/97 - To explain RSFA interest requirements, and MMS implementation phases, etc. Letter to State & Industry representatives on how bill will look - To be mailed shortly following above Dear Payor letter Open Issues: How will interest be reported to IRS on 1099?	Dale Petersen (303) 231-3608
Accept Interest Payments and Reporting from "Designees" on Underpayments §5(a)				
Issue Enforceable Demands (Orders to Pay) to Operating Rights Owner Related to Production Occurring After 8/31/96	Data Base for Designated Payors Linked with their Operating Rights Owners and Lessees Vern Ingraham Draft Regulation to D.C.: TBD	Ongoing until 6/97 - Internal meetings on PIF design driven by RSFA 1/02/97 - completed design of new lessee designated database to accept info from payors about operating rights owners and designee info Internal analysis begun on how to structure and maintain the database. Outreach TBA on this issue.	Meetings Held: 10/21-22/96 and 11/18-19/96. Dear Payor Letters: Paperless reporting format letter sent 1/3/97; letter for paper reporting format signed 1/9/97. Many major payors are beginning to request data submission extensions. Open issues - Written Designations: Can written designations be submitted electronically? Should the PIF be used for the written designations? Should there be one form, or two different forms; one for the designee (telling us who the lessees are), and one for the lessee (telling us who the designee is)? If there are two different forms, the information can be cross-checked to determine if it matches. Does the designee need an acknowledgment that they are the designee? Does designation need to be recorded at product code level?	Larry Gratz (Populating the Payor/Lessee Database) (303) 231-3421  Boh Walker (Database Reg)(303) 231-3457
§6(E)	Liability Rules Ken Vogel Draft Regulation: TBD		What does MMS have to do to ensure revenues are protected, including the periods covered by audit 5 to 7 years after the fact to issue audit finding demands to lessees within the Statute of Limitations?	Cecelia Williams (Liability Reg) (303) 231-3036

Critical Events  
in Implementing the  
Federal Oil and Gas Royalty Simplification & Fairness Act of 1996

Near Term Focus					
RSFA Section	Critical Event	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
§8(b)	Implement the Repeal of Section 10 OCSLA	Section 10 and Refunds Post-9/96 Milt Dial Draft Regulation to D.C.: 3/15/97	No	Meeting Held: 10/21-22/96 and 11/18/96 Dear Payor Letter mailed 11/25/96 Open Issues: Does Section 10 apply to overpayments made up to 8/13/96, or to overpayments related to production prior to 9/96? Can written refund request requirements be streamlined for overpayments still subject to OCSLA Section 10?	James Alexander (303) 231-3027
§4(f)	Provide for Self Bonding for Appeals Relating to Underpayments of Production After 9/1/96	Bonding Ken Vogel Draft Regulation to D.C.: 4/15/97	No	Meeting: 12/5/97 Followup Meeting: Royalty Policy Committee meeting, 3/21/97 Open Issues: How will MMS handle sureties for obligations related to production prior to 9/1/96 until regulations are finalized? How should MMS define financial solvency?	Jim Sheets (303) 231-3401
§3	Implement Section 205 Amendments of RSFA in Consultation With States	State Delegation Jim Dellefs Goal is to publish proposed rule by early April	Yes	Meetings Held: 10/2, 10/10-11 and 10/23-24, and 12/2/96. States Outreach: Week of December 9 in Kenner, LA, Lakewood, CO, and Oakland, CA Industry Outreach: Week of January 6 in Houston, TX, Albuquerque, NM, Denver, CO, and Casper, WY Future outreach planned on standards. Date TBA. Open Issues: How will standards be defined and developed?	Jim Dellefs (303) 275-7472
§6(e)	Implement Reporting Requirements on Takes/Entitlements Basis	Paying on Takes or Entitlements & Exception to Takes Reporting for Marginal Properties Clare Onstadt Draft Regulation to D.C.: TBD	Yes	Meetings Held: 10/30-31, 11/19, and 12/06/96. Outreach sessions held with reporters in Roswell (1/14/97) and Farmington (1/15/97) NM Dear payor Letter mailed 2/4/97 Open Issues: none	Roman Geissel (303) 231-3226
§6(d)	Implement Marginal Properties Exception to RSFA Takes/Entitlements Reporting Requirements			Meetings Held: 10/30-31, 11/19, and 12/06/96. Open Issues: Marginal Property Exception letter to be mailed later.	Roman Geissel (303) 231-3226

Critical Events  
in Implementing the  
Federal Oil and Gas Royalty Simplification & Fairness Act of 1996

Near Term Focus				
Critical Event RSFA Section	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
Provide Accounting, Reporting, and Auditing Relief for Marginal Properties  §§7(a), 7(c)	Accounting Relief for Marginal Properties Debbie Gibbs Tschudy  Draft Regulation to D.C.: 3/31/97	Yes	Meetings Held: 10/30-31/96 and 1/23/97 Planned Pilot Date: May 1997 Dear Payor Letter drafted to solicit volunteers for pilot Open Issues: How will MMS define criteria for relief, type of relief, etc? To what extent will direction be provided in regulations versus MMS-issued guidelines? At what level should a marginal property be defined (i.e., agreement, lease, well, or working interest)? MMS must coordinate with each state individually on this.	Nick Fadely (303) 275-7244
Allow for Prepayments of Future Revenue Streams: Under \$500/month - 09/98; & Over \$500/month - 09/99  §§ 7(a), 7(b)	Prepayment of Future Royalties Debbie Gibbs Tschudy  Draft Regulation to D.C.: 8/1/97	Yes	Meetings Held: 10/30-31/96 and 1/23/97. Followup Meeting Date: State & Tribal Royalty Audit Committee (STRAC) meeting, Houston, 3/5-6/97 Planned Pilot Date: May 1997 Dear Payor Letter drafted to solicit volunteers for pilot Open Issues: How will MMS process lessee requests involving MMS/States/BLM/OMM? How will MMS accept and monitor reporting for prepayments? At what level should a marginal property be defined (i.e., agreement, lease, well, or working interest)? MMS must coordinate with each state individually on this.	Mike Deberard (303) 275-7235
Process All Appeals Within 33 Months  §4(h)	Administrative Appeals Process Hugh Illiard  10/28/96 - MMS published proposed rule in <u>Federal Register</u> . 12/23/96 <u>Federal Register</u> Notice - Comment period extended to 3/27/97.  Settlements: No rule	Yes  MMS Appeals Tracking	Appeals Activity: Developed internal plan to complete appeals within 33 months and a process for tolling appeals. Dear Payor letter advising of new extension procedures: Mailed 2/21/97  Royalty Policy Committee (RPC) Appeals Sub-committee recommendations will be considered as MMS finalizes rule. RPC appeals subcommittee met 1/21-22/97. Subcommittee report distributed 2/19/97. RPC to meet again 3/21/97.  Settlements: Royalty Policy Committee Appeal Sub-committee to address this topic. Open Issues: How will MMS implement the settlement consultation process? For the settlement consultation requirement, does "dispute" mean "appeal"?	Hugh Illiard (Appeals) (202) 208-3398  Ken Vogel (Settlements) (303) 231-3749

Critical Events  
in Implementing the  
Federal Oil and Gas Royalty Simplification & Fairness Act of 1996

Near Term Focus				
Critical Event RSFA Section	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
Address Cost/Benefit Provision of the Act §4(g)	---	No	Activity: None to date Open Issue: What is the best alternative (e.g., continue to evaluate benefits of processes, annual evaluation as part of net receipts sharing, etc.)?	Mike Miller (303) 231-3413
Longer Term Focus				
Critical Event RSFA Section	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
BLM/OMM Issue Approval of Unit/Communitization Agreements Within 120 Days §6(e)	---	No	BLM Activity: issued an instructional memorandum to all state offices. The Indian Minerals Steering Committee's Federal Technical Subcommittee (FTS), which has representatives from MMS, BLM, & BIA, met week of 11/4/96. FTS can probably facilitate BLM coordination. BLM is working on a process to determine when an application is complete and the 120 day clock starts. A proposed rule is due out on unit/pa approvals which will mitigate this issue. OMM Activity: MMS discussed at 11/20-21 OMM Steering Team meeting. Open Issue: How can MMS best coordinate/advise with BLM and OMM on processes and impacts?	Mary Williams (BLM) (303) 231-3403  Bob Walker (OMM) (303) 231-3457
Monitor Adjustments Beyond the "6-year Adjustment Period" or Closed Audit Periods for Production After 9/1/96 §5(a)	Limitation on Adjustments Pre-9/96 and Post-9/96 Clare Onstad/Ken Vogel  Draft Regulation to D.C.: 7/97	Yes  11/14/96 Met with contractor - preliminary discussions/analysis on R/C net reporting recommendations	Activity: Drafting regulation  Open Issue: How will MMS monitor/bill adjustments made after the 6-year adjustment period?	Ken Vogel (Pre) (303) 231-3749  Joe Walchuk (Post) (303) 231-3352
Assess for Chronic Erroneous Reporting §6(f)	Chronic Erroneous Reporting Vern Ingraham  Draft Regulation to D.C.: 9/1/97	Yes	Activity: Internal MMS team held first meeting 2/4/97. Team continues to meet weekly to develop framework. Detailed Plan of Action created in 12/96 Open Issues: How will MMS define "chronic" and "erroneous reporting"? Is fee or charge shareable with state? Can the assessment be applicable to missing reports?	Mary Williams (303) 231-3403

**Critical Events  
in Implementing the  
Federal Oil and Gas Royalty Simplification & Fairness Act of 1996**

Longer Term Focus				
Critical Event RSFA Section	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
Resolve and Bill, if Appropriate, Existing Takes/Entitlements Issues as of Date of Enactment Within 2 Years §6(d)	—	No	Activity: Implementing plan to identify Takes vs. Entitlements cases and to work them in priority order. Dispute defined as AFS/PAAS exception. 10 additional employees hired to achieve this requirement.	Roman Geissel (303) 231-3226
Implement 7 Year Statute of Limitations For MMS' Processes §4(b)	Statute of Limitations Ken Vogel/Ken Moyers  Draft Regulation: ~2000	No	Activity: Royalty Reengineering team is addressing  Open Issue: What changes must MMS make to current processes (e.g., tolling, subpoena, record retention, order to perform, etc.)?	Milt Dial (303) 231-3634

Completed Items				
Critical Event RSFA Section	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
Process Written Refund Requests Within 120 Days of Receipt. §5(a)	No rulemaking required	Yes Tracking system is in place	Dear Payor letter: mailed 11/25/96  Open Issues: None	John Gansert (303) 231-3334



Critical Events  
in Implementing the  
Federal Oil and Gas Royalty Simplification & Fairness Act of 1996

Near Term Focus					
RSFA Section	Critical Event	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
§§6(a), 6(b), 6(c)	Report and Pay/Credit Interest on Overpayments	Payment of Interest Draft Regulation: 12/1/96	Milt Dial Yes 10/9 - tasked contractor to begin impact analysis Mid-November followup	Meeting Held 10/21-22/96 Minutes published & distributed. Followup Meeting November 18, 1996 Open Issues How and when will lessees/designees report interest associated with adjustments? How will FOGIRMA interest rates be applied? How will MMS define hardship? How will interest be reported to IRS on 10/99? Will there be a bill threshold and how will it be applied?	Dale Petersen (303) 231-3608
	Accept Interest Payments and Reporting from "Designees" on Underpayments				
§6(g)	Issue Enforceable Demands (Orders to Pay) to Operating Rights Owner Related to Production Occurring After 8/31/96	Data Base/Payor Information Form Connie Hartram Draft Regulation: 12/15/96	Yes 11/96 - Internal meetings on PIF design	Meeting Held 10/21-22/96 Minutes published & distributed. Followup Meeting November 18, 1996 Open Issues The "Dear Payor" letter approach, discussed at 10/22/meeting, is good for initializing the "lessee"/"designee" data base, but how will future maintenance be accomplished? Written Designations --Can written designations be submitted electronically? Should the PIF be used for the written designations? Should there be one form, or two different forms, one for the designee (telling us who the lessees are), and one for the lessee (telling us who the designee is)? If there are two different forms, the information can be cross-checked to determine if it matches. Does the designee need an acknowledgment that they are the designee? Does designation need to be recorded at product code level?	Larry Gratz (Dbase/PIF) (303) 231-3427
	Implement the Repeal of Section 10 OCSLA	Section 10 and Refunds Post-9/96 Draft Regulation 12/1/96	Ken Vogel Outreach planned in December to discuss regulation. After this meeting a date will be set for a draft regulation (if a reg is required).	Meeting Held 10/21-22/96 Minutes published & distributed. Followup Meeting November 18, 1996 Dear Payor Letter by 11/30/96 Open Issues Does Section 10 apply to overpayments made up to 8/13/96, or to overpayments related to production prior to 9/96? Can written refund request requirements be streamlined for overpayments still subject to OCSLA Section 10?	Cecelia Williams (Liability) (303) 231-3036
§6(b)			No		James Alexander (303) 231-3027

Critical Events  
in Implementing the  
Federal Oil and Gas Royalty Simplification & Fairness Act of 1996

Near Term Focus				
Critical Event RSFA Section	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
Provide for Self Bonding for Appeals Relating to Underpayments of Production After 9/1/96 §4(f)	Bonding Draft Regulation Soon after 11/18/96 meeting Ken Vogel	No	Meeting on 10/21-22/96, but time did not allow for discussion of this topic Followup Meeting November 18, 1996 Open Issues How will MMS handle sureties for obligations related to production prior to 9/1/96 until regulations are finalized? How should MMS define financial solvency?	Jim Sheets (303) 231-3401
Implement Section 205 Amendments of RSFA in Consultation With States §3	State Delegation Draft Regulation: 1/14/97 Associate Director forward draft reg to D.C. Jim Shaw	Yes	Meetings Held: 10/2/96, 10/10-11/96 and 10/23-24/96. Minutes published & distributed Followup Meeting: Teleconference 12/2/96 Outreach Planned: Week of December 9, times and places to be decided Open Issues What specific functions are delegable? How will standards be defined and developed? How will the outreach/reg development/implementation team coordinate with industry?	Jim Delleis (303) 275-7472
Implement Reporting Requirements on Takes/Entitlements Basis §6(e)	Paying on Takes or Entitlements & Exception to Takes Reporting for Marginal Properties Milt Dial Draft Regulation 1/31/97	Yes	Meeting Held: 10/30-31/96. Minutes to be published & distributed Followup Meeting: TBD Open Issues: How will MMS define reporting terms/requirements? Does the law expand a lessee's liability to include the volume of product taken on 100% Federal properties? What should be included in a request for alternate reporting for agreements?	Roman Geissel (303) 231-3226
Implement Marginal Properties Exception to RSFA Takes/Entitlements Reporting Requirements §6(d)			Meeting Held: 10/30-31/96. Minutes to be published & distributed Followup Meeting: TBD Open Issues: Can MMS use one definition of a marginal property nationwide, onshore and offshore (would require collaboration among states)? How often will MMS evaluate marginal property status? At what level should a marginal property be defined (i.e., agreement, lease, or working interest)? MMS must coordinate with each state individually on this	Roman Geissel (303) 231-3226

Critical Events  
in Implementing the  
Federal Oil and Gas Royalty Simplification & Fairness Act of 1996

Near Term Focus				
Critical Event RSFA Section	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
Provide Accounting, Reporting, and Auditing Relief for Marginal Properties	Accounting Relief for Marginal Properties Debbie Gibbs Tschudy Draft Regulation: 2/8/97	Yes	Meeting Held 10/30-31/96. Minutes will be published & distributed Followup Meeting Date: TBD Planned Pilot Date: TBD Open Issues How will MMS define criteria for relief, type of relief, etc.? Will the same general criteria under which a property qualifies for prepayment apply? At what level should a marginal property be defined (i.e. agreement, lease, well, or working interest)? MMS must coordinate with each state individually on this	Nick Fiedly (303) 275-7244
§§ 7(c), 7(b)	Prepayment of Future Royalties Debbie Gibbs Tschudy Draft Regulation: 6/1/97	Yes	Meeting Held 10/30-31/96. Minutes will be published and distributed Followup Meeting Date: TBD Planned Pilot Date: TBD Open Issues How will MMS process lessee requests involving MMS/States/BLM/CMM? How will MMS accept and monitor reporting for prepayments? At what level should a marginal property be defined (i.e. agreement, lease, well, or working interest)? MMS must coordinate with each state individually on this	Mike Teberard (303) 275-7235
Process All Appeals Within 33 Months	Administrative Appeals Process Hugh Hilliard 10/28/96 - MMS published proposed rule in Federal Register	Yes MMS Appeals Tracking	Appeals Activity Developed internal plan to complete appeals within 33 months and a process for tolling appeals Dear Payor letter advising of new extension procedures: by 11/30/96 Royalty Policy Committee (RPC) Appeals Sub-committee recommendations will be considered as MMS finalizes rule Settlements Royalty Policy Committee Appeals Sub-committee will address this topic Open Issues How will MMS implement the settlement consultation process? For the settlement consultation requirement, does "dispute" mean "appeal"?	Hugh Hilliard (Appeals) (202) 108-3398  Ken Vogel (Settlements) (303) 331-3749
§4(h) Process Written Refund Requests Within 120 Days of Receipt §5(a)	Refund Requests Vern Ingraham Decision on regulation pending	Yes Tracking system	Dear Payor letter by 11/30/96 Open Issues: None	John Gansert (303) 331-3334
Address Cost/Benefit Provision of the Act §4(g)	---	No	Activity: None to date Open Issue: What is the best alternative (e.g. continue to evaluate benefits of processes, annual evaluation as part of net receipts sharing, etc.)?	Mike Miller (303) 331-3413

Critical Events  
in Implementing the  
Federal Oil and Gas Royalty Simplification & Fairness Act of 1996

Longer Term Focus					
RSFA Section	Critical Event	Regulations/MMS Sponsor	System Implications/Actions	Activity and Open Issues	MMS Contact
BLM/OMM Issue Approval of Unit/Communitization Agreements Within 120 Days		----	No	BLM Activity: issued an instructional memorandum to all state offices. Federal Technical Subcommittee (FTS), which has representatives from MMS, BLM, & BIA, met week of 11/4/96. FTS can probably facilitate BLM coordination. OMM Activity: MMS will discuss at 11/20-21 OMM Steering Team meeting. Open Issue: How can MMS best coordinate/advise with BLM and OMM on processes and impacts?	Mary Williams (BLM) (303) 231-3403 Bob Walker (OMM) (303) 231-3457
§6(e)	Monitor Adjustments Beyond the "6-year Adjustment Period" or Closed Audit Periods for Production After 9/1/96	Limitation on Adjustments Pre-9/96 Final rule - 1/97 Ken Vogel Limitation on Adjustments Post-9/96 Draft Regulation - 3/1/97 Milt Dial	Yes 11/4/96 Meet with contractor - preliminary discussions/analysis on RPC net reporting recommendations	Activity (Pre) Draft final rule is done. Activity (Post) None to date. Open Issue: How will MMS monitor/bill adjustments made after the 6-year adjustment period?	Ken Vogel (Pre) (303) 231-3749 Joe Watchuk (Post) (303) 231-3352
§5(a)	Assess for Chronic Erroneous Reporting	Chronic Erroneous Reporting Draft Regulation: 9/1/97 Vern Ingraham	Yes	Activity: None to date Detailed Plan: Available in December Open Issue: How will MMS define "chronic" and "erroneous reporting"?	Mary Williams (303) 231-3403
§6(f)	Resolve and Bill, if Appropriate, Existing Takes/Entitlements Issues as of Date of Enactment Within 2 Years	----	No	Activity: None to date Outreach meeting date TBD Open Issue: What is the definition of a dispute?	Roman Geissel (303) 231-3226
§6(d)	Implement 7 Year Statute of Limitations For MMS' Processes	Statute of Limitations Draft Regulation: ~2000 Ken Vogel/Ken Moyers	No	Activity: None to date Open Issue: What changes must MMS make to current processes (e.g., tolling, subpoena, record retention, order to perform, etc.)?	Milt Dial (303) 231-3634

Attachment 4



3032513362 T-017 P.02/05 Job-212

THE SECRETARY OF THE INTERIOR  
WASHINGTON

SEP 22 1997

Mr. David Blackmon  
Vice Chairman, Royalty Policy  
Committee  
Burlington Resources  
801 Cherry Street  
Fort Worth, Texas 76102

Dear Mr. Blackmon:

Thank you for the Royalty Policy Committee's letter of March 27, 1997, transmitting to me the Committee's report and recommendations concerning Appeals and Alternative Dispute Resolution. We appreciate the significant time, thought, and hard work that the members of the Committee, and particularly the Appeals and Alternative Dispute Resolution Subcommittee, put into this report.

The various parts of the Department of the Interior affected by this proposal have considered it carefully over the past several months. As a result, I am able to report back to you today that we largely agree with the report's recommendations and therefore plan to move forward to implement the recommendations with some changes and clarifications. Our specific response to each of the report's recommendations and the implementation schedule are enclosed.

We plan immediate efforts to implement those parts of the Royalty Policy Committee's recommendations that do not require changes in our regulations and to prepare revised proposed regulations that would enable us to implement the remaining items. Of course, the public will have the opportunity to comment on the proposed regulations, which may change, before they become final.

Thank you once again for the fine work of your Committee.

Sincerely,

A handwritten signature in black ink, appearing to be "B. B. B.", written in a cursive style.

Enclosures

Royalty Policy Committee Recommendations on Appeals and ADR  
and Interior Department Response

1. Resolve royalty policy issues prior to audits. We agree.

Although we will never be able to foresee every policy dispute that may arise, we will try to identify possible sources of dispute at the earliest possible time and to resolve them before we conduct audits and issue bills for additional royalty. We have already begun to resolve policy issues earlier through our Royalty Policy Board (created in 1995) which is made up of the MMS Associate Directors for Royalty Management and Policy and Management Improvement, chaired by the MMS Deputy Director, and advised by the Associate Solicitor for Mineral Resources.

2. Encourage informal resolution of disputes. We agree.

For those disputes involving Federal oil and gas leases, the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 requires that we hold at least one settlement conference. We plan to extend this practice to all of our appeals. Holding such conferences at an early stage and involving the people most knowledgeable about the dispute will lead to resolution of many cases. We also plan to include people who are less personally involved with the disputed issues to try to facilitate an accommodation.

3. Clarification of standing of Indian lessors and States. We agree that the standing of these entities must be clarified in such a way that provides them with full involvement, though in a slightly different way than recommended by the Committee.

In order to promote consistency in administration of royalty collections, the Minerals Management Service (working with the Bureau of Indian Affairs (BIA) for any orders that may eventually be issued by tribes) should have the authority to modify or rescind royalty related orders issued by States or tribes. If the MMS or BIA modifies or rescinds an order affecting tribal lands or Federal lands within a State, any affected State or Indian lessor should have the opportunity to argue their point of view before the Interior Board of Land Appeals (IBLA). Thus, they should have standing to file an appeal with IBLA opposing any MMS/BIA action to modify or rescind an order that they issued or that would directly affect their revenues. They also should have the right to file briefs *amicus curie* with IBLA in cases where they support the MMS position or where the case indirectly affects their revenues.

4. Proposed structure of a new appeals process. We agree with most aspects of the appeals process proposed by the Committee. In particular, we support the emphasis on early policy resolution, settlement discussions, time limitations for all appeals, and joint development of the record. We also agree that IBLA is the appropriate forum to obtain

an independent review of legal issues within the Department. However, as listed below, there are a few aspects of the process that we would clarify or modify:

- a. We would clarify that the preliminary statement of issues that appellants are required to file with their notice of appeal must specifically identify their legal and factual disagreements with the MMS action. However, consistent with the Royalty Policy Committee recommendation, it should not be a legal brief, providing detailed analysis and citations. This clarification will help to ensure productive, well-informed record development and settlement efforts.
- b. Rather than preparing an internal recommendation memorandum (shared with appropriate tribes and States) as proposed by the Committee, MMS (BIA for Indian issues) will issue a memorandum/letter decision to the appellant (with copies to appropriate Indian lessors and States). As recommended by the Royalty Policy Committee, these decisions would be made collegially within the Department of the Interior (including input from involved State and tribal auditors), using the preliminary statement by the appellant and the record developed during the first 120 days of the appeal. These decisions would be much shorter and faster than traditional MMS appeals decisions; discussion of legal issues would not take place at this point but rather would be reserved for the IBLA after a full briefing. The purpose of these decisions would be to ensure that actions conform to MMS/BIA policy before defending them for legal sufficiency at IBLA.
- c. Before the appellant is required to file its brief to the IBLA, the Assistant Secretary for Land and Minerals Management or the Assistant Secretary for Indian Affairs could take jurisdiction over the case. In this event, the briefing process would proceed much as it would before IBLA, but the decision maker would be the Assistant Secretary instead. The timeframes would be the same as if the case were before IBLA. These decisions would be designed for general publication and to establish precedent on new issues.

With the modifications listed above, we believe that we can achieve the goals of the Royalty Policy Committee while protecting taxpayers' and Indian lessors' interests and recognizing constraints to the Department's budget. In particular, we think that this approach will lead to faster and less costly resolution of disputes, better development of the factual record, and improved participation by affected States and tribes in the process.

**Implementation Schedule for  
Royalty Policy Committee Recommendations on Appeals/ADR**

Letter to RPC approving recommendations	September 1997
Form implementation and rule writing teams (MMS, IBLA, and Solicitor's office members)	September 1997
Dear Payor letter announcing changes that can be made under existing regulations	December 1997
Proposed changes to MMS/IBLA rules published in Federal Register	January 1998
Comments on proposal due	March 1998
Final rule published	July 1998
Effective date of new rule	August 1998

Attachment 5



# United States Department of the Interior

MINERALS MANAGEMENT SERVICE

Washington, DC 20240

MMS-RVD-SM:96-0490

Mail Stop 3153

SEP 23 1997

## Memorandum

To: Quality Steering Committee  
Royalty Management Program

From: Lucy Querques Denett *Lucy Querques Denett*  
Associate Director for Royalty Management

Subject: Policies Regarding Application of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (RSFA) to Federal Leasable Solid Minerals and Geothermal Production

### Introduction

On August 13, 1996, RSFA was enacted. This law amends the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), the Outer Continental Shelf Lands Act of 1953 (OCSLA), as amended, and the Mineral Leasing Act of 1920 (MLA), as amended. Most of the legislative provisions of RSFA apply only to Federal oil and gas production. However, in an effort to improve efficiency and maintain uniform regulatory treatment when appropriate, Minerals Management Service (MMS) will apply policies consistent with certain provisions of RSFA to Federal solid minerals and geothermal production. Below I have identified some present policies with regard to solid minerals and geothermal resources, and the policy change, if any, resulting from the application to Federal solid mineral or geothermal leases of policies like those applied to oil and gas leases. Policy changes contained in this memorandum will not be applied to Indian leases.

### Royalty Underpayment Liabilities

#### Provisions of RSFA

RSFA designates the operating rights owner as the party that is primarily liable for royalty underpayments, and the record title holder, if different from the operating rights owner, as

secondarily liable. The major change created by this provision is that MMS must now notify all lease operating rights owners, not just the payor of record, of their royalty liabilities in order to toll the statute of limitations and before pursuing recourse to the record title holder(s). RSFA reverses MMS's planned course of action to prescribe rules (proposed rulemaking, 60 F.R. 30492, June 9, 1995) that would have clarified that the person who files a Payor Information Form (PIF) (Form MMS-4025 for oil, gas, and geothermal resources, and Form MMS-4030 for solid minerals) becomes liable for any underpaid or unpaid royalties on the volumes the payor reported or should have reported.<sup>1</sup> This requirement of RSFA creates a significant work load for MMS, both in notification procedures and recordation of all operating rights owner for each valid Federal oil and gas lease. In the case of solid minerals, the operator, payor, and lessee are usually the same entity and therefore the notification of the payor usually addresses all operating rights owners.

#### Existing Provisions and Policy for Solid Minerals and Geothermal Resources

MMS's policy on payor liability for royalty underpayments prior to the enactment of RSFA was consistent between oil and gas, solid minerals, and geothermal resources--in either case the payor was assumed to have liability for unpaid or underpaid royalties. This consistency was demonstrated by the proposed payor liability rule (60 F.R. 30492), which would have been applicable to both oil and gas, solid minerals, and geothermal resources.

#### New Policy

The solid minerals or geothermal payor continues to be liable for underpaid or unpaid royalties. It is not advantageous for MMS to burden itself with additional notification procedures for solid mineral and geothermal resources. In the future, MMS will review the formerly proposed payor liability rule and determine whether that rule should be modified and repropoed for solid minerals and geothermal resources.

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<sup>1</sup> MMS had always considered the person who filed a PIF to be liable for underpaid royalties. However, in Mesa Operating Limited Partnership, 125 IBLA 29 (1992) the Interior Board of Land Appeals (IBLA) concluded that the filing of a PIF did not demonstrate the payor's acceptance of a royalty payment responsibility. MMS issued a proposed rule in the Federal Register on June 9, 1995, at 60 F.R. 30492 to clarify that the filing of a PIF with MMS did create a royalty payment responsibility and that the payor would be liable for unpaid or underpaid royalties on lease production that the payor sold or otherwise disposed of for the benefit of the operating rights owner.

## Statute of Limitations

### Provisions of the Act

RSFA addresses statute of limitations issues as follows:

*Establishment of a 7 year period:* The RSFA specifies that any action such as a demand for payment must be initiated within 7 years after the month following the month of production.

### Existing Provisions and Policy for Solid Minerals

MMS's policy, as stated in the July 14, 1995, Minerals Management Service Director's memorandum, is that reviews and audits of royalty payments, including the issuance of enforcement documents, will, with limited exceptions, be completed within 6 years of the royalty payment due date.

### Existing Provisions and Policy for Geothermal Resources

On July 14, 1995, MMS issued guidance regarding the timing of its audits.

### New Policy

In the absence of enabling legislation, MMS does not have authority to impose a mandatory statute of limitations on solid mineral leases. However, MMS and the States and tribes with delegated audit authority will continue to adhere to the July 14, 1995, guidance and the Contemporaneous Audit Initiative.

## Appeals

### Provisions of RSFA

The RSFA amends the administrative appeals procedure as follows:

- 1. 33-month limitation:* Appeals must be decided within 33 months, including IBLA proceedings. This requirement applies to all oil and gas appeals in process on the date of enactment.
- 2. Default provisions for Failure to Issue Decision Timely:* If the Secretary of the Interior fails to issue a decision timely and the monetary amount is under \$10,000, the decision defaults in favor of the appellant. If the appeal amount is over \$10,000, the order is upheld if no decision is issued by the Secretary. The appellant may then go to Federal District Court. An appeal also stays payment without posting a bond subject to demonstration of financial solvency.

### Existing Provisions and Policy for Solid Minerals and Geothermal Resources

The current administrative appeals procedure for solid minerals and geothermal resources is the same as for oil and gas leases.

### New Policy

MMS intends to publish a final rule applying the 33-month limitations provision of RSFA to all Federal mineral resources and commodities currently under MMS's jurisdiction. At that time the policy on solid minerals and geothermal resources will be decided. MMS can only apply the 33-month limitation provisions administratively. It is important to note that if the 33-month limit is not met, the default provisions of RSFA cannot be applied until such time that current statutes pertaining to solid minerals and geothermal resources are amended or additional legislation is enacted specifically addressing this issue.

### Settlement Consultation

#### Provisions of RSFA

RSFA, in order to expedite collections relating to disputed royalty obligations within the 7-year statute of limitations imposed by this legislation, mandates that not less than one settlement consultation take place. The purpose of this consultation is to compromise when appropriate and settle the disputed obligation. Tools for such a settlement may include waiving or reducing interest and allowing offsetting of obligations among leases.

### Existing Provisions and Policy for Solid Minerals and Geothermal Resources

MMS instituted an Alternative Dispute Resolution (ADR) program in 1994. This program has been effective in resolving a large number of disputed royalty obligations. The program's objectives include:

1. Resolve disputes in the best interest of the United States and Indian lessors by maximizing the collection of royalty and other payments net of costs;
2. Reduce costs associated with litigation and appeals;
3. Reduce the length of time necessary to resolve disputes;
4. Create opportunities for a wider range of creative solutions and options in dispute resolution; and
5. Improve relationships and communications through openness and inclusiveness with all constituents.

### New Policy

MMS plans to administratively apply the mandatory settlement conference provision of RSFA to solid mineral and geothermal resources. MMS will not be legally held to any of the statutory deadlines. Furthermore, the responsibility for holding the settlement conference will be delegated to the office that issued the original order.

### Self Bonding

#### Provisions of RSFA

RSFA allows anyone who files an appeal of a royalty obligation to stay payment without posting a bond. Prior to the stay of payment without a bond, the appellant must demonstrate financial solvency or in other words, the ability to fulfill the obligations if the appeal is denied. This financial solvency must be reviewed periodically in order to protect the Government's position.

#### Existing Provisions and Policy for Solid Minerals and Geothermal Resources

Currently, a lessee must provide a bond or letter of credit sufficient to cover the outstanding obligation as specified by the provisions of 30 CFR § 243.2(b)(1) (1996) for geothermal resources and 30 CFR § 243.2(2) (1996) for solid minerals.

### New Policy

MMS has proposed to amend its regulations in regard to self bonding. MMS's current position is that self bonding can be applied to solid minerals and geothermal resources as well as oil and gas as mandated by RSFA. Self bonding would promote consistent treatment of all production dates on the various lease types, streamlining of the administrative appeal process, simplification of record keeping, and would reduce costs for both industry and the Government.

### Adjustments and Refunds

#### Provisions of RSFA

RSFA limits the time period to 6 years for adjustments to past royalty reports. Adjustments and refunds made after the original 6-year period can only be made with written notification to and approval from the Secretary. Requests for refunds must be in writing and the Department of the Interior has 120 days to pay or deny the refund.

#### Existing Provisions and Policy for Solid Minerals

Under the current regulatory requirements for reporting at 30 CFR § 210.204 (1996) and instructions in Chapter 5 of the Pavor Handbook-Solid Minerals, titled *Error Correction and*

*Recoupments*, no time limitations exist for recouping royalty overpayments on solid mineral leases.

### Existing Provisions and Policy for Geothermal Resources

Geothermal royalties are reported on the Report of Sales and Royalty Remittance, Form MMS-2014, the same as for oil and gas. Reporting instructions are given in the Oil and Gas Payor Handbook. There are no statutory time limits for recouping royalty overpayments on geothermal royalties.

### New Policy

Since the statutory provisions on adjustments and refunds under RSFA apply only to Federal oil and gas, MMS will continue to review and grant lessee requests for overpayment refunds and will continue to allow recoupment for periods in excess of 6 years, providing the lessee can satisfactorily document that an overpayment exists. This issue will be specifically addressed with a future rulemaking.

## Interest Calculations

### Provisions of RSFA

RSFA provides for interest to be paid on overpayments at a rate of 1 percent less than the rate used to determine late-payment interest for the same time period. Payors will be eligible to recoup interest on overpayments 6 months after this act became law. RSFA also directs lessees to calculate and report late-payment interest when they make an adjustment.

### Existing Provisions and Policy for Solid Minerals and Geothermal Resources

It is well established that interest does not accrue on a claim against the United States Government in the absence of express provision in a statute or under the terms of a contract. United States v. Whirl, 281 U.S. 339, 50 S.Ct. 291, 74 L.Ed. 887 (1930); Gray v. Dukedom Bank, 217 F.2d. 108 (6<sup>th</sup> Cir. 1954); Gold v. U.S., 301 F.2d. 557 (D.C. Cir. 1962); U.S. v. Newton Livestock Auction, 336 F.2d. 673 (10<sup>th</sup> Cir. 1964).

### New Policy

No change. The provisions of RSFA are specifically for Federal oil and gas. Absent enabling legislation authorizing payment of interest on overpayments for solid minerals and geothermal resources, interest cannot accrue on Federal solid mineral overpayments. There can be no overpayment interest offset against accrued interest on underpayments and only the principal amount of the overpayment will be refunded or credited to the lessee.

## Royalty Reporting Requirements

### Provisions of RSFA

*Prepayments:* The RSFA authorizes the prepayment of royalty for the remainder of the lease term for leases having marginal production, providing certain terms and conditions are met.

*Alternative Accounting and Auditing Requirements:* The RSFA provides for accounting, reporting, and auditing relief for leases having marginal production.

### Existing Provisions and Policy for Solid Minerals and Geothermal Resources

There are no current provisions or policy in these areas for solid mineral or geothermal leases.

### New Policy

The prepayment provisions of RSFA will not apply to Federal solid minerals and geothermal resources.

The alternative accounting and auditing requirements of RSFA will not apply to Federal solid minerals and geothermal resources. However, I am directing the Royalty Management Program (RMP) to examine ways to improve solid mineral and geothermal reporting. Currently underway is a Business Process Reengineering project of the solid minerals reporting and valuation processes, which if successful, will greatly simplify and enhance the current program. That reengineering effort is examining ways to provide accounting and reporting relief recognizing that not all solid minerals and geothermal resources are the same.

## Assessments

### Provisions of RSFA

Beginning 18 months after RSFA's enactment, the Department can assess penalties only for chronic erroneous reporting.

\$100 to 1015

### Existing Provisions and Policy for Solid Minerals and Geothermal Resources

Historically, MMS has had a consistent policy for reporting violations for oil and gas, solid minerals, and geothermal resources. The same assessments were applied to late or incorrect reports regardless of whether the report was oil and gas or solid minerals.

### New Policy

As rules are developed to implement the chronic erroneous reporting provisions of RSFA, RMP

will consider amending assessments for solid mineral and geothermal reporters along the same guidelines Congress set forth for oil and gas. RSFA does not offer statutory authority for solid minerals or geothermal resources but the Secretary does have broad authority under MLA to establish assessments for solids reporters in a manner consistent with oil and gas reporters. Similarly, the Geothermal Steam Act (the Act) does not address assessments for erroneous reporting, it does give the Secretary broad discretion in prescribing rules to implement the Act.

### Cost Benefit Provisions

#### Provisions of RSFA

RSFA states that accounting, reporting, or audit activities should not be performed if the expected amount to be collected does not exceed the expense of performing the activity. Also, interest on underpayments may be waived if it expedites the collection of the underpayment on which the interest was assessed.

#### Existing Provisions and Policy for Solid Minerals

Regulations found at 30 CFR § 218.202 (1996) require the payment of late-payment interest on underpayments. RSFA does not apply to Federal solid minerals.

#### Existing Provisions and Policy for Geothermal Resources

Regulations covering late-payment and underpayment charges for geothermal resources appear at 30 CFR § 218.302 (1996). The language is identical to the solid mineral language in 30 CFR § 218.202.

#### New Policy

None. Federal solid mineral and geothermal leases will continue to be administered in a cost effective manner but RMP will not waive late-payment interest.

### Section 10 OCSLA

#### Provisions of RSFA

Section 10 of OCSLA is repealed effective August 13, 1996. (Section 10 requires the lessee to request refunds on production from Outer Continental Shelf (OCS) leases within 2 years after making payments to MMS.) RSFA requires refund requests to be in writing and paid or denied within 120 days of the request. All requests are subject to audit.

### Existing Provisions and Policy for Solid Minerals

Currently, only one active solid mineral operation exists on the OCS--the Main Pass 299 sulfur lease (M92-009372-0). Although the lease is not an oil and gas lease, it is, nevertheless, subject to the statutory provisions of OCSLA, including section 10.

### New Policy

The elimination of section 10 affects all minerals leased under the authority of OCSLA.

### Delegation of Functions

#### Provisions of RSFA

RSFA expands FOGRMA's delegation of RMP functions concerning:

1. Processing reports and correcting errors;
2. Performing exception processing; and
3. Issuing orders, subpoenas, and orders to perform.

### Existing Provisions and Policy for Solid Minerals and Geothermal Resources

Delegated audit authority for Federal solid minerals and geothermal resources derives from legislation passed in 1992, which applied the FOGRMA audit delegation provisions to solid mineral and geothermal leases.

### New Policy

In a memorandum dated August 6, 1997, the Associate Solicitor responded to the Director's request for a legal opinion on whether MMS has the authority to delegate royalty management functions to the States for Federal solid mineral, geothermal and offshore leases subject to Section 8(g) of the OCSL Act of 1953, under RSFA. The Office of the Solicitor determined that MMS does not have that authority.