to waive any temporary" is corrected to read "may waive any temporary".

35. On page 21029, column 1, § 1.148-11(g), second and fourth lines from the bottom of that paragraph, the reference "149(d)(3)(v)" is corrected to read "149(d)(3)(A)(v)(II)" in both locations.

36. On page 21030, column 2, § 1.148-11(j)(5), line 2, the language "*allocations.* This paragraph (j) does not" is corrected to read "*allocations.* Except for purposes of section 149(d(3)(A)(i), this paragraph (j) does not".

37. On page 21030, column 2, § 1.148-11(j)(5), last line, the language "permit re-allocations of the 1980 issue." is corrected to read "permit allocations of the 1980 issue under section 148.".

§ 1.148-13T [Corrected]

38. On page 21031, column 1, § 1.148-13T(b)(1), last line of that paragraph, the language "date and" is corrected to read "date; and".

39. On page 21031, column 1, immediately before instructional paragraph 10, a new instructional "Par. 9A." is added to read as follows:

"Par. 9A. Section 1.149(d)-1T is removed."

§ 1.149(d)-1 [Corrected]

40. On page 21031, column 2, § 1.149(d)-1(d)(2), second line from the bottom of that paragraph, the language "§ 1.148-0T(b)(2)(ii) for bonds to which" is corrected to read "§ 1.148-0(b)(2)(ii) for bonds to which".

41. On page 21031, column 2, immediately before instructional paragraph 11, instructional "Par. 10A." is added to read as follows:

"Par. 10A. Sections 1.150-0T and 1.150-1T are removed."

§ 602.101 [Corrected]

42. On pages 21632 and 21633, bottom of column 3 and continue on the top of column 1 of the next page, § 602.101(c), the entries in the table are corrected to read as follows:

* * * * *

CFR part or section where identified and described	Current OMB control number
* * * *	*
1.148-1	1545-1098
1.148-2	1545-1098
1.148-3	1545-1098
1.148-4	1545-1098
1.148-5	1545-1098
1.148-6	1545-1098
1.148-7	1545-1098
1.148-8	1545-1098
* * * *	*
1.148-11	1545-1098

CFR part or section where identified and described	Current OMB control number
* * * *	*

Dale D. Goode,

Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 92-23733 Filed 9-29-92; 8:45 am]

BILLING CODE 4830-01-M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 243

RIN 1010-AB13

Revision of Regulation Governing Suspension of Decisions and Orders Pending Appeal

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: The Minerals Management Service (MMS) of the Department of the Interior is amending its regulations governing administrative appeals from decisions and orders issued by its Royalty Management Program (RMP). The changes eliminate unnecessary steps in the process appellants must undertake to obtain a stay of an appealed MMS decision or order; clarify the administrative appeals process; clarify the requirements for securing unpaid amounts owed the Government pending appeal; and establish a wider range of acceptable surety instruments. The intent and effects of the rule are to reduce administrative burden and costs for both industry and the Federal Government while protecting the interests of Federal and Indian mineral lessors during the pendency of an appeal.

EFFECTIVE DATE: September 30, 1992.

ADDRESSES: Information on the types of surety instruments and the format for surety instruments may be obtained from the Chief, Accounts Receivable and Followup Section (ARFUS). The address for courier delivery is Chief, ARFUS, Minerals Management Service, Royalty Management Program, Denver Federal Center, Building 85, room A-212, Denver, Colorado 80225, or for U.S. Postal Service delivery is Chief, ARFUS, Minerals Management Service, Royalty Management Program, P.O. Box 5810, Denver, Colorado 80217. The telephone number is (303) 231-3401, (FTS) 326-3401, or FAX (303) 231-3711.

FOR FURTHER INFORMATION CONTACT: Dennis C. Whitcomb, Chief, Rules and Procedures Branch, Minerals Management Service, Royalty Management Program, Denver Federal Center, Building 85, P.O. Box 25165, Mail Stop 3910, Denver, Colorado 80225, at (303) 231-3432 or (FTS) 326-3432.

SUPPLEMENTARY INFORMATION: The principal author of this rulemaking is Connie G. Bartram of the Royalty Management Program, Fiscal Accounting Division, Lakewood, Colorado.

I. Background

In the Notice of Proposed Rulemaking (55 FR 6401, February 23, 1990), MMS explained how RMP issues decisions and orders that are subject to administrative appeal to the Director, MMS, pursuant to 30 CFR part 290 (1990). These decisions and orders relate to royalties and other payments due on oil and gas, geothermal, coal, and other solid mineral leases on Federal and Indian lands. These decisions and orders include orders for payments of royalty deficiencies, rentals, interest, penalties (other than penalties assessed under the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA)), royalty-in-kind contract payments, or other assessments. Some of these decisions or orders are issued by RMP's Royalty Valuation and Standards Division regarding transportation and processing allowances which may be deducted in determining the royalty value of oil, gas, and other minerals produced under Federal and Indian leases. Other decisions and orders are issued by: Fiscal Accounting Division to collect interest and liquidated damages, and to follow-up on delinquent balances; Production Accounting Division to enforce the reporting of production and royalty amounts; and Royalty Compliance Division to collect royalty and other underpayments and enforce access to records required for audit. All of the decisions and orders are necessary to enforce the regulations. In cases where the Director issues or concurs in RMP decisions or orders, an appeal to the Director is precluded (30 CFR 290.2).

The MMS currently has regulations at 30 CFR 243.2 addressing the effectiveness of RMP decisions or orders pending administrative appeal. These regulations provide:

> Compliance with any orders or decisions issued by the Royalty Management Program after August 12, 1983, including payments of additional royalty, rentals, bonuses, penalties or other assessments, shall not be suspended by reason of an appeal having been taken

unless such suspension is authorized in writing by the Director, MMS (or by the Deputy Assistant Secretary for Indian Affairs when Indian lands are involved), and then only upon a determination, at the discretion of the Director, MMS, or Deputy Associate [sic] Secretary for Indian Affairs, that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

At the time the rule was issued in 1984, it was MMS's interpretation that most decisions and orders would not be suspended pending the administrative appeal requested by the appellant. The term "appellant" covers the lessee, payor, reporter, operator, or other party adversely affected by an order or decision issued by MMS. In other words, lessees, payors, reporters, and operators generally were required to pay disputed amounts pending the administrative appeal process, subject to refund if the appellant prevailed. However, in 1986, the Interior Board of Land Appeals (IBLA) construed 30 CFR 243.2 to mean that unless there were special circumstances resulting in detriment to the lessor, the Director was required to stay effectiveness of decisions and orders pending appeal, provided the appellant posted an adequate surety instrument (*Marathon Oil Company*, 90 IBLA 236 (1986)). The MMS has followed IBLA's interpretation since 1986 and, upon request from appellants, has stayed orders that otherwise would have required payment of hundreds of millions of dollars in royalty and other payments during the appeal process. For fluids (oil, gas, and geothermal) leases, the surety instrument is filed with MMS. When coal or other solid mineral leases are involved, the surety instrument held by the Bureau of Land Management (BLM) is increased to cover unpaid royalties, rents, interest, and other mineral-related revenues. Exceptions to this procedure are when BLM has no surety instrument on the lease, the appellant requests to file a separate surety instrument with MMS, or the appellant is not the lessee of record. In these cases, a surety instrument must be provided to MMS pending the appeal. The purpose of this rulemaking is to clarify the regulations regarding suspension of RMP decisions and orders pending appeal.

II. Comments Received on Proposed Rule

As stated above, MMS published a Notice of Proposed Rulemaking in the **Federal Register** on February 23, 1990 (55 FR 6401). The proposed rule provided for a 60-day public comment period ending on April 24, 1990, which was extended to May 24, 1990, by notice in the **Federal Register** on April 3, 1990 (55 FR 12386). During the comment period, 16 commenters submitted written responses which are addressed in this section. The MMS did not receive comments from State or Indian representatives.

(a) Several commenters declared that the administrative appeals process required by MMS is too long. In this regard, some commenters have suggested that appeals to the Director typically take 6 to 8 months for routine cases and often take 2 to 3 years on complex cases. Also, appeals to IBLA typically take 12 to 18 months for routine cases and as long as 5 years to review some appeals. The commenter concluded that the MMS administrative appeals process is not efficient and is very costly to the appellant because the party is required either to pay the disputed amount and seek a refund without interest if it prevails in the appeal or to pay the cost of a surety instrument that is posted during the appeal process. Consequently, the commenter recommended that MMS amend the existing regulations to provide that if an administrative appeal is brought and not completed in 1 year from the time the lessee's briefing is completed or the parties have jointly agreed to an extension of that time, the appellant can abandon the administrative appeals process without prejudice and seek judicial review.

Response: The administrative appeals process is being evaluated to expedite the appeal through the Department. Any changes to the appeals process would need to be made through separate rulemaking and are not a part of this action. Moreover, MMS cannot dictate the IBLA process in these rules; IBLA would need to issue its own regulations establishing time limits. As a result, MMS cannot establish a time period for the total administrative review and the final Department decision.

(b) Several commenters objected to the proposed provision under 30 CFR 243.2(a) (1990) that states:

> Suspension of an order or decision requiring the payment of a specified amount of money shall be contingent upon the appellant's submission within a time period to be prescribed by MMS of an MMS-specified surety deemed adequate to indemnify the lessor from loss or damage * * *.

One of these commenters argued that the preamble to the proposed rulemaking suggests that the suspension pending appeal aspect of the proposal follows the decision in *Marathon Oil Company*, 90 IBLA 236 (1986), yet the total proposal stops well short of the changes in Agency procedures needed.

The commenter further stated that 5 U.S.C. 704 (the Administrative Procedure Act) permits MMS to require administrative appeals, but with the proviso that the action under review be *inoperative while the appeal is pending.* The commenter maintains that there is no authority that allows MMS to condition administrative appeals by requiring a surety instrument to be posted before an appeal will be considered. The commenter states MMS requires an appellant to take all available administrative appeals but *without having the action in dispute* stayed, unless an MMS-specified surety instrument is posted, and argues that this procedure is not authorized by the Administrative Procedure Act.

In conclusion, the commenter stated the Secretary of the Interior has the authority, subject to certain well-recognized court-imposed limitations, to require that a party exhaust administrative remedies before seeking judicial review of MMS action. However, if the Secretary elects to exercise that authority, the commenter argues that the Secretary lacks any authority to limit the circumstances under which the effectiveness of an action is suspended pending appeal.

Response: The requirement for the appellant to furnish a surety instrument deemed adequate to indemnify the lessor from loss or damage is critical to stay an order or decision requiring payment. The MMS is required to file a quarterly report with the U.S. Department of the Treasury (Treasury) on unpaid accounts receivable amounts and the length of time the amounts have been outstanding. The Treasury reviews the MMS report to determine if MMS' suspended receivables are fully secured, and thereby will indemnify the lessor from loss. The MMS believes the surety instrument procedure does not constitute a final agency action under the Administrative Procedure Act, 5 U.S.C. 704. The commenters provided no legal support for their argument that a requirement to post a surety instrument as a condition to pursuing an administrative appeal makes an intermediate agency action final.

(c) Many commenters objected to the proposed requirements under 30 CFR 243.2(a) that stated:

> If a decision or order does not require payment of a specific amount of money, but requires recalculation of an obligation followed by payment, suspension of the decision or order is contingent upon the appellant's submission, within the time period prescribed by MMS, of an MMS-

specified surety in an amount MMS determines to reasonably approximate the amount deemed to be owed * * *.

The commenters suggested that in situations where MMS believes some systemic problem exists and does not require payment of a specific amount of money, but requires lessee recalculation of its royalty obligation followed by payment, the regulation should be amended to delete the requirement of a surety instrument altogether. Furthermore, the commenter suggests that because restructured accounting requirements are inherently speculative, the imposition of any surety instrument requirements should be postponed until MMS quantifies the amount in dispute.

Response: The MMS has reconsidered this provision and amended the final regulations to require a surety instrument only when an order or decision requires the payment of a specified amount of money, including an estimated bill which specifies an amount required to be paid.

(d) Several commenters contended that suspension of an order should be automatic at the time an appeal is filed. In this regard, one commenter stated that MMS should take necessary action to determine whether or not it will allow a stay prior to issuing an order and should include such notice in the order to ensure certainty for the appellant. Also, the commenter claims that such a procedure would prevent wasted effort by the appellant in obtaining a surety instrument for an appeal that is denied. Where a stay is denied, the commenter argues that the appellant should be allowed to bypass the administrative appeals process and seek judicial review, without prejudice, in order to expedite resolution and limit the loss of interest, should the appellant ultimately prevail.

Response: The MMS agrees with the comments and has clarified the regulations at 30 CFR 243.2(a), accordingly. The final regulations provide that an order automatically is suspended upon filing the notice of appeal in 30 CFR 290 unless MMS notifies the party at the time of the decision or order that any order will not be suspended. The suspension is conditioned on the provision of an adequate surety instrument, where applicable.

(e) Most of the commenters requested that MMS establish alternate forms of surety instruments under 30 CFR 243.2(b) in addition to those specified in the regulations. The proposed regulations provided:

For purposes of this section, an "MMS-specified surety" means either an MMS-specified "administrative appeal bond" or an MMS-specified "irrevocable letter of credit" * * * The MMS will not accept any other type of surety.

Several commenters believed that MMS should recognize any type of surety instrument that meets the MMS objective of lessor indemnification. Commenters argued that lessees should be given the flexibility to choose a surety instrument type most suitable for their situation. One commenter stated other types of surety instruments are accepted as financial warranties by Government Agencies. For example, the Colorado Board of Reclamation requires for a mining permit any one or more of the following: (1) A surety bond issued by a corporate surety; (2) a letter of credit issued by a bank; (3) a certificate of deposit; (4) a deed of trust as security agreement encumbering real or personal property and creating a lien in favor of the lessor; (5) assurance that a sufficient fund will be created; and (6) a financial statement for the lessee's most recent fiscal year certified by an independent accountant showing evidence of financial stability.

The commenter went on to suggest that other methods could be used where MMS permits an appellant to meet its surety obligation by posting a surety instrument on a case-by-case basis or by posting a single national bond. Also, the commenter believed that the existing lease bonds established by lessees should already be sufficient to cover royalty obligations and no additional surety instrument should be required. As a final recommendation, the commenter urged MMS to extend appellants the flexibility to select from a wider range of surety instrument options.

Response: In the preamble to the proposed regulations, MMS stated that it was studying the use of alternative surety instruments and would like comments on the feasibility of establishing interest-bearing escrow accounts at financial institutions, submitting Treasury bonds or notes to be held by MMS, or any other alternatives. The MMS studied various forms of surety instruments including the alternatives suggested in the public comments. Consideration was given to the relative cost to the appellant in obtaining different forms of surety coverage, the importance of the appellant providing a surety instrument timely, the protection afforded to the lessor, and the burden on MMS in administering various types of surety instruments. For example, one surety form MMS studied was interest-bearing Treasury book-entry bonds and notes deposited with the Federal Reserve Bank. After conferring with Federal Reserve Bank officials, MMS is adding Treasury book-entry bonds and notes to 30 CFR 243.2(b).

A surety instrument type that was recommended in the public comments and found to be a workable alternative to the administrative appeal bond and the irrevocable letter of credit was the certificate of deposit. The MMS will accept the certificate of deposit as a surety instrument on the appeal if it is in book-entry form. This type of surety instrument must be issued by an acceptable financial institution, must be interest-bearing, readily available to the appellant, and must afford acceptable protection to the lessor. Accordingly, MMS is adding this form of surety instrument to 30 CFR 243.2(b). However, if either the letter of credit or the certificate of deposit is not issued by a bank with an acceptable bank rating or confirmed by a bank with an acceptable rating, the appellant must submit another surety instrument.

In response to the comment that MMS should allow the appellant to meet its surety obligation on a case-by-case basis or post a single nationwide bond, MMS believes a separate surety instrument is required for each appeal unless the amount under appeal is properly secured by another posted surety instrument. The appellant may post a single administrative bond or letter of credit that covers multiple bills for collection that are under appeal. The single surety instrument must list in detail all bills with the amount. The single surety instrument will be amended annually to either add new bills under appeal or remove bills that have been adjudicated. The single surety instrument will only be updated once a year to minimize the administrative burden to the appellant and MMS. New bills under appeal during the year would require a separate surety instrument until they could be covered by the single surety instrument.

Finally, in response to the comment that existing lease bonds posted by lessees should already be sufficient to cover royalty obligations and no additional surety instrument should be required, the MMS disagrees with the statement for appeal amounts greater than $1,000. The lease bonds for onshore Federal and Indian leases may be insufficient to cover disputed amounts under appeal and may also be used to cover lease reclamation expenses. The Offshore Federal lease bonds are focused on recovery of minimal lease abandonment costs and only nominal amounts of unpaid royalties. Accordingly, the bonds would not be adequate to cover amounts under an

appeal. As a result, MMS has rejected the recommendations to allow existing lease bonds to cover the surety requirement necessary for the appeal, except for minor amounts under appeal of $1,000 or less on fluids (oil, gas, and geothermal) leases. In those cases, MMS, will allow existing lease bonds to cover the surety requirement. For coal and other solid mineral leases, MMS will require that BLM lease surety instruments be increased to cover royalty obligations in accordance with established procedures. In cases where there is no lease surety instrument, or the appellant chooses to provide a separate surety instrument to MMS, or the appellant is not the lessee of record, then an "MMS-specified surety instrument" is required.

(f) One commenter stated that 30 CFR 243.2(c) should be revised to ensure that MMS is required to furnish the amended or updated surety instrument amount to the appellant within a timeframe that would allow the appellant to update the surety instrument. The commenter recommended that MMS should furnish the amended amount to the appellant within 30 days of the expiration date of the surety instrument. This would allow the appellant to complete the administrative processing necessary to meet MMS requirements.

Response: The procedure currently used by MMS to update surety instrument amounts is to notify the appellant 45 days prior to the expiration date of the current surety instrument. MMS' notice is not required by the regulations, and its failure to provide the notice will not relieve the appellant of the duty to update its surety instrument. Also, appellants have suggested that an automatic renewal clause in the posted surety instrument would eliminate the burden on the appellant and MMS to meet deadlines to update surety instruments due to expire. The MMS agrees with this initiative and § 243.2(b)(1) requires an automatic renewal clause in new letters of credit and certificates of deposit.

(g) One commenter objected to the proposed requirement under 30 CFR 243.2(d) that stated:

> An appeal from an order or decision requiring payment of money shall be dismissed by the Director, MMS, or the Assistant Secretary for Indian Affairs, if the appellant fails to make the required payment of fails to submit adequate surety * * *. If an appeal is dismissed pursuant to this paragraph, the decision or order shall be deemed final and any monies owed will be due and payable with no further right of administrative review pursuant to 30 CFR part 290 or 43 CFR part 4.

The commenter believed that there would be factual disputes as to whether a particular party failed to make the required payment or failed what constitutes the required payment or adequate surety instrument under the regulation. To be fair to the appellant, the commenter stated that MMS's dismissal of an appeal for failure to prepay should not be foreclosed and the appellant should have the right to appeal the dismissal. It was recommended that the appeal be limited to the question of whether the appellant had failed to make the required payment or to submit an adequate surety instrument.

Response: The MMS has reconsidered this issue and determined that the Director generally should continue to consider an administrative appeal even if the appellant fails to provide an adequate surety instrument. However, in such an event, for oil and gas leases MMS may pursue a civil in penalty in accordance with section 109 of FOGRMA, 30 U.S.C. 1719, and MMS regulations at 30 CFR 241.20 and 241.51, for failure to either pay or comply with the regulatory requirement to post an adequate surety instrument in order to obtain suspension of an order. The MMS also will take appropriate enforcement action for coal and other leases not covered by FOGRMA.

(h) Concern was expressed with the proposal under 30 CFR 243.2(e) when Indian lands are involved. In particular, many commenters objected to the discussion in the preamble of the proposed rule that stated:

> A situation where MMS might not stay an order to pay is where an Indian lessor would suffer substantial hardship if payments were not made for an extended period of time. The MMS anticipates that these situations would be unusual.

The commenters concluded that even though the preamble to the proposal states that MMS anticipates that the suspension denial situation would be unusual, the proposed rule itself states no grounds for such a denial. As such, the commenters urged MMS to adopt specific language stating that where an appellant has filed a timely appeal, the MMS will deny suspension only to avoid irreparable harm to the lessor.

Response: The MMS agrees with the commenter's recommendation. The final rule in paragraph (d) has been changed to state that MMS or the Deputy Commissioner of Indian Affairs may deny a stay of an order only when an Indian lessor would suffer irreparable harm. The MMS will consult with the BIA, through a mutually agreed-upon process to determine when an Indian lessor would suffer irreparable harm.

(i) Most of the commenters objected to the proposed requirement under 30 CFR 243.2 that stated:

> An MMS order which may be appealed pursuant to 30 CFR part 290 either to the Director, MMS, the Assistant Secretary for Indian Affairs, or the Interior Board of Land Appeals must be appealed in order to exhaust administrative remedies unless the order has been made effective. * * *

One commenter believed that the proposed rule requiring an appellant to exhaust administrative remedies in all circumstances should be eliminated. They argued that it is not the law and has never been the law, and that in *McKart* v. *U.S.* (395 U.S. 194, 89 S. Ct. 1657, 1665 (1969)), the Supreme Court noted that the central purpose of the exhaustion of remedies doctrine is to avoid hindering the judicial review process by failure of the litigant to allow the Agency to make a factual record, or to exercise its discretion or apply its expertise. Furthermore, it argued that courts have refused to require exhaustion of remedies in certain well-established situations, for example: (1) Where the question on appeal is solely one of statutory interpretation; (2) where the administrative process would be futile; (3) where the administrative remedies are inadequate; and (4) where the Agency has had an opportunity to exercise its expertise and has done so.

The commenter recommended that MMS abandon the mandatory exhaustion of remedies portion of the rulemaking and leave administrative appeals a choice wholly up to the appellant. On the other hand, if MMS elects to require the appellant to follow the administrative process before seeking judicial review, MMS should allow certain well-established, court-imposed exceptions.

Response: The MMS believes that the requirement for exhaustion of administrative remedies has resulted in well-considered administrative decision making and has saved substantial time and costs to both Federal courts and litigants in matters which otherwise would have been the subject of extended judicial proceedings. Reversing the longstanding policy on exhaustion of administrative remedies would only burden the courts with many cases which are now resolved at the administrative level. The majority of administrative decisions do not result in actions for judicial review. Therefore, the requirement for exhaustion of administrative remedies will be continued.

The requirement to exhaust administrative remedies has been eliminated already with respect to one royalty-related issue. The Bureau of Land Management (BLM) regulations at 43 CFR 3451.2(e) provide that when BLM gives notice to a coal lessee that its lease terms are being readjusted from a cents-per-ton basis to an ad valorem basis, the readjusted lease terms are effective on the readjustment date even if the lessee appeals the propriety of BLM's readjustment determination through BLM's procedures. Consequently, as of the readjustment date, the lessee is required to pay royalty in accordance with the MMS regulations in 30 CFR part 206 on the value of coal production. If the lessee continues to pay royalty at the cents-per-ton rate and fails to pay royalty in accordance with its readjusted lease terms, and MMS issues an order requiring the lessee to pay the additional royalties, because 43 CFR 3451.2(e) makes the readjustment final, the lessee will not be permitted to appeal or post a surety instrument for the difference in royalties between the cents-per-ton rate and the minimum value required under 30 CFR part 206. However, if the lessee disputes how MMS is calculating value under 30 CFR part 206, it will be permitted to appeal and post a surety instrument with respect to that component of the additional royalty. By way of illustration, assume the cents-per-ton rate was $.50. After readjustment, the lessee fails to pay its additional royalties and MMS orders it to pay its percentage royalty on a value of $16 per ton. The lessee believes the value should only be $15 per ton under 30 CFR part 206. The lessee may appeal to the MMS Director and post a surety instrument only with respect to the dispute between the $15 and $16 value. It must pay the difference between $.50 per ton and the percentage royalty based on a $15 per ton value pending its appeal to the MMS Director. This limitation on what is subject to appeal to the MMS Director is stated in § 243.2(a).

(j) One commenter recommended under 30 CFR 243.3 that the title of Assistant Secretary for Land and Minerals Management be added as an authority that can issue a decision or order which would be a final action for judicial review.

Response: The MMS agrees with the comment and the final rule is amended accordingly.

III. Conclusion

The MMS is amending 30 CFR 243.2 to reflect clearly how RMP decisions and orders will be suspended pending *administrative appeal, provided the* appeal is timely filed and the appellant submits a surety instrument. Also, in those cases where a surety instrument is not filed, the appellant may be subject to civil penalties for failure to either pay or post the required surety instrument to suspend the decision and order pending administrative appeal. The rule provides that decisions and orders issued by RMP, including, but not limited to, orders for payments of additional royalty, rentals, interest, penalties, royalty-in-kind contract payments, or other assessments, will be suspended by reason of an appeal having been taken pursuant to 30 CFR part 290. Unless the Director, or the Director's delegate, notifies the appellant in writing that the decision or order will not be suspended pending appeal at the time RMP issues the decision or order, it is suspended by reason of an appeal having been taken. Under the final rule, MMS would continue its current practice and stay RMP decisions and orders pending appeal unless there are unusual circumstances. A situation where MMS might not stay an order to pay is where an Indian lessor would suffer irreparable harm if payments were not made for an extended period of time. The MMS anticipates that these situations would be unusual.

The final regulation provides further that suspension of a decision or order requiring the payment of a specified amount of money in excess of $1,000 is contingent upon the appellant's submission, within the time period MMS prescribes, of an MMS-specified surety instrument. For example, an order to a lessee to pay a specified amount of underpaid royalties could not be suspended unless the lessee posted an adequate surety instrument. Of course, an appellant also could pay the disputed amount pending appeal, subject to refund without interest in accordance with MMS refund procedures.

The type of surety instrument that is acceptable depends on what type of lease is involved. In paragraph (b) of § 243.2, MMS defines an "MMS-specified surety instrument" for fluids (oil, gas, and geothermal) leases as including an MMS-specified "administrative appeal bond," an MMS-specified irrevocable letter of credit, Treasury book-entry bonds or notes, and bank book-entry certificates of deposit. An "MMS-specified surety instrument" for coal and other solid mineral leases will continue to be the BLM lease surety instrument which must be increased to *cover disputed royalty obligations* which are the subject of the appeal, as necessary. The MMS practice of using *the BLM surety instrument* to suspend MMS decisions and orders pending appeal for other than fluids leases was effective with the December 19, 1988, Memorandum of Understanding between MMS, BLM, and the Bureau of Indian Affairs. The MMS is continuing this practice in the final rule. However, if BLM has no lease surety coverage, or the appellant chooses to provide a separate surety instrument to MMS, or the appellant is not the lessee of record, then an "MMS-specified surety instrument" is required.

The new rule continues the practice of using Form MMS-4326, "administrative appeal bond," as an acceptable surety instrument. The bond must be issued by a qualified surety company approved by the Treasury. Letters of credit are also acceptable. The form used for the letter of credit which is acceptable to MMS may be obtained from the person named in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

Treasury bonds or notes must be book-entry only. The bank book-entry certificate of deposit must be issued by a financial institution acceptable to MMS.

The MMS has millions of dollars of existing surety instruments. These surety instruments will be accepted until their expiration date at which time they must be updated to comply with the new requirements.

Under the new rules, MMS will accept a single surety instrument that covers multiple amounts under appeal. The surety instrument must be amended annually to either add new amounts or remove amounts that have been adjudicated. New amounts under appeal during each year would require a separate surety instrument until covered by the single surety instrument at the annual amendment.

The "MMS-specified surety instrument" for RMP is subject to approval by the bond-approving officer. The designated bond-approving officer for RMP is the Associate Director for Royalty Management or delegated officials. The MMS will provide the appellants in writing with information and standard forms on "MMS-specified surety instrument" requirements.

To evaluate the adequacy of bank instruments and the financial security provided, MMS has established a procedure to use a bankrating service. The RMP currently uses the Keefe Bankwatch rating service. Acceptable minimum ratings are: "C" for any bank used for surety instruments under $1 *million, a "B/C" rating for surety* instruments between $1 million and $10

million, and a "B" rating for surety instruments over $10 million. If the bank issuing the surety instrument either does not meet the bankrating level or falls below the rating for the amount of the required coverage, the bank may have an acceptable bank confirm the surety instrument. The appellant may also choose to submit another surety type that is acceptable to MMS. A satisfactory replacement surety instrument must be submitted to MMS after written notice to avoid collection on the existing surety instrument. The MMS will publish a notice in the Federal Register when there is a change in the bankrating service used by RMP.

Paragraph § 243.2(c) provides that the bond, letter of credit, Treasury book-entry bond or note, or bank book-entry certificate of deposit must be adequate to cover the amount owed plus interest accrued to date, as well as the estimated interest that will accrue for 1 additional year. The Treasury book-entry bond or note must be for an amount equal to 120 percent of the required surety amount to allow for market fluctuations. If the administrative appeal process continues more than 1 year, then the appellant would be required to increase the amount of the existing surety instrument, extend the surety period, or submit a new surety instrument, as necessary to cover estimated interest that will accrue for 1 additional year. This procedure continues existing MMS practice for appeals applicable to fluids (oil, gas, and geothermal) leases. As explained above, MMS will use existing BLM lease surety instruments for appeals applicable to coal and other solid mineral leases increased to cover royalty obligations, as necessary. These surety instruments must also be increased annually to cover additional interest.

These regulations reaffirm the Department's intent that, in the usual case, a lessee, payor, reporter, operator, or other party receiving an RMP decision or order is required to pursue an administrative appeal before seeking judicial review. Under the Department's rules in 43 CFR 4.21 (1990), RMP decisions or orders on appeal to IBLA are suspended pending review of the matter by IBLA unless other regulations provide otherwise. Paragraph § 243.2(e) provides that generally RMP decisions and orders continue to be suspended pending IBLA review provided the appellant maintains adequate surety coverage. This paragraph applies the surety coverage requirements of § 243.2 to appeals to IBLA. In some situations, as discussed above, the Director could deny a stay pending IBLA administrative review provided that the Director so notifies the appellant in writing. Under paragraph § 243.2(d), if the Director makes a decision or order immediately effective, then the appellant's rights to such further administrative review or judicial review are provided in 43 CFR part 4.

The final rule also adds two new §§ 243.2(e) and 243.2(f) for purposes of clarification and procedural efficiency. The new § 243.2(e) provides that final actions of the Department of the Interior with respect to MMS orders will be suspended pending judicial review under 5 U.S.C. 705 if the plaintiff seeking review submits or maintains a surety instrument in accordance with § 243.2. Thus, the same surety instruments submitted as security pending administrative appeal may be continued in effect for purposes of a suspension pending judicial review. Final actions of the Department within the meaning of this subsection include decisions of the IBLA, decisions of the Assistant Secretary for Land and Minerals Management or the Assistant Secretary for Indian Affairs (which are not appealable to the IBLA), decisions of the Director of the Office of Hearings and Appeals or the Secretary, or MMS decisions or orders which have been made effective pending further administrative appeal under § 243.2(a) where the appellant chooses to seek immediate judicial review rather than to pursue further administrative appeal.

An exception exists for any particular case where the Department may, in view of unusual circumstances, seek to make particular action effective pending judicial review, in which case the Government will notify the court that it will not agree to suspension of the effectiveness of the decision pending judicial review. In that event, the court will determine whether the particular decision will be effective pending review, or be suspended on such conditions as the court may find appropriate.

The new § 243.2(f) sets forth the circumstances under which MMS will seek to collect against the surety instrument. This largely reflects and clarifies existing law. If the MMS Director decides an administrative appeal adversely to the appellant, and the appellant neither pays the amount due nor pursues an appeal to the IBLA (and maintains an adequate surety instrument pending that appeal), the agency will collect against the surety instrument. Similarly, if the IBLA, the Director of the Office of Hearings and Appeals, an Assistant Secretary, or the Secretary decides a case in MMS' favor, and the appellant neither pays the amount due nor seeks judicial review and maintains an adequate surety instrument in effect, the MMS will collect against the surety instrument. Likewise, if a court on judicial review rules in the Department's favor (in a final nonappealable decision) and the appellant/plaintiff fails to pay the amount due, MMS will collect against the surety instrument. Finally, if an appellant fails to increase the amount of the surety instrument as required under § 243.2(c), or otherwise fails to maintain an adequate surety instrument in effect as required by this rule, the agency will collect against the surety instrument.

The MMS is also adding a new 30 CFR 243.3 to restate that recipients of orders generally must exhaust their administrative remedies before seeking judicial review of MMS orders. If the Director pursuant to § 243.2, or if IBLA pursuant to 43 CFR 4.21, denies a suspension of an order pending appeal, then the recipient may seek either further administrative review or immediate judicial review of that order. No further exhaustion of administrative remedies is required. Because orders approved by Secretarial officers also are final actions for the Department, as discussed above, they too are subject to immediate judicial review. However, § 243.3 clarifies that if an MMS order is not a final action, then that order must be appealed administratively before seeking judicial review. This is in accordance with well-established case law and corresponds with IBLA's rules at 43 CFR 4.21(b) (see *McKart* v. *United States*, 395 U.S. 185 (1969)).

IV. Other Issues

(a) Decisions by the Director or Secretarial Officers

While most RMP decisions and orders are subject to review by the Director and then IBLA, there are exceptions. The regulations at 30 CFR part 290 provide that if the Director issues or expressly approves an RMP decision or order, then the matter is not subject to appeal to the Director and must go to IBLA for administrative review. In those situations, paragraph § 243.2(d)(1) establishes the applicable criteria for suspension of the decision or order pending IBLA review. In those instances where the Director of the Office of Hearings and Appeals or the Secretary takes jurisdiction of an appeal pursuant to 43 CFR 4.5, and grants a further suspension of the effectiveness of the decision or order under review, paragraph (d)(2) establishes the criteria for surety coverage.

Some RMP decisions or orders may be issued or approved by a Secretarial officer such as an Assistant Secretary. In those situations, the decision or order is final for the Department and not subject to administrative review within the Department (*Blue Star, Inc.*, 41 IBLA 333 (1979); *Marathon Oil Co.*, 108 IBLA 177 (1989)). If a lessee or other payor seeks judicial review of such a decision or order, then the stay issue is governed by the Administrative Procedure Act, 5 U.S.C. 704 and 705.

(b) Indian Leases

Under the existing rules in § 243.2, suspensions of decisions and orders involving Indian leases are issued by the Deputy Commissioner of Indian Affairs. Because suspensions are now routinely issued, the final rule provides for MMS to suspend decisions or orders involving Indian leases. As noted above, MMS may deny suspension in appropriate circumstances for Indian leases and will continue to consult with the Deputy Commissioner of Indian Affairs on matters involving Indian leases.

V. Effective Date

Pursuant to the provisions of 5 U.S.C. 553(d), the Department finds that there is good cause to make this final rule effective on the date of publication. The MMS expects to issue many orders before September 30, 1992, and it will benefit persons who appeal such orders if they can take advantage of the expanded surety instrument provisions of these rules. Also, the new rules will reduce the burdens on appellants by eliminating the requirement to provide surety instruments for appeals of small amounts and eliminating the requirement to provide surety instruments for appeals of certain orders to perform restructured accountings.

VI. Procedural Matters

Executive Order No. 12291 and Regulatory Flexibility Act

The Department has determined that this document is not a major rule under Executive Order 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The changes included in this rulemaking are clarifying amendments only and not substantive changes. There would be no additional reporting or other requirements from industry because the requirement currently exists in MMS regulations.

Executive Order No. 12630

The Department certifies that the rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus, a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, "Government Action and Interference with Constitutionally Protected Property Rights."

Executive Order 12778

The Department has certified to the Office of Management and Budget that these final regulations meet the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order 12778.

Paperwork Reduction Act of 1980

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 et seq.

National Environmental Policy Act of 1969

The Department has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, an environmental impact statement is not required under the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

List of Subjects in 30 CFR Part 243

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

Dated: November 8, 1991.

Richard Roldan,

Deputy Assistant Secretary, Land and Minerals Management.

For the reasons set out in the preamble, 30 CFR part 243 is amended as set forth below:

PART 243—APPEALS, ROYALTY MANAGEMENT PROGRAM

Subpart A—General Provisions

1. The authority citation for part 243 is revised to read as follows:

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

2. Section 243.2 is revised to read as follows:

§ 243.2 Suspension of orders or decisions pending appeal.

(a) Compliance with any orders or decisions issued by the Royalty Management Program (RMP) of the Minerals Management Service (MMS), including orders for payments of royalty deficiencies (other than orders to pay additional royalties for the difference between a cents-per-ton royalty clause and an ad volorem royalty clause pursuant to the terms of coal leases following readjustment by the Bureau of Land Management (BLM)), rentals, interest, penalties (other than civil penalties provided for under section 109 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1719, and implemented in 30 CFR 241.51), royalty-in-kind contract payments, or other assessments, shall be suspended by reason of an appeal having been taken pursuant to 30 CFR part 290 unless the Director, MMS, notifies the appellant in writing that the decision or order shall not be suspended pending appeal. Unless the amount under appeal is $1,000 or less, suspension of an order or decision requiring the payment of a specified amount of money shall be contingent upon the appellant's submission within a time period prescribed by MMS of an MMS-specified surety instrument deemed adequate to indemnify the lessor from loss or damage. Nothing in this paragraph shall be construed to prohibit an appellant from paying any demanded amount pending appeal. If the appeal is granted in whole or in part, the appellant will be entitled to a refund of the amount paid, without interest, in accordance with MMS refund procedures.

(b)(1) For purposes of this section, an "MMS-specified surety instrument" for fluids (oil, gas, and geothermal) leases means either: An MMS-specified administrative appeal bond; an MMS-specified irrevocable letter of credit; Treasury book-entry bond or note; or financial institution book-entry certificate of deposit. The "MMS-specified surety instrument" shall be in a form specified by MMS instructions or approved by MMS. A bond must be issued by a qualified surety company which has been approved by the Department of the Treasury. An irrevocable letter of credit or a certificate of deposit must be from a financial institution acceptable to MMS with a minimum 1-year period of coverage subject to automatic renewal up to 5 years. The MMS will use a bankrating service to determine whether a financial institution has an acceptable rating to provide a surety instrument

deemed adequate to indemnify the lessor from loss or damage. The MMS will accept only an "MMS-specified surety instrument" as qualified in this paragraph and in paragraph (c) of this section. The MMS will accept a single surety instrument that covers multiple amounts under appeal. The single surety instrument must be amended annually to either add new amounts or remove amounts that have been adjudicated. New amounts under appeal each year require a separate surety instrument until covered by the single surety instrument during the annual amendment.

(2) For purposes of this section, an "MMS-specified surety instrument" for other than fluids (oil, gas, and geothermal) leases, is the BLM lease surety instrument which must be increased at the request of MMS to cover royalty and interest obligations. However, if BLM has no lease surety instrument coverage, or the appellant chooses to provide a separate surety instrument to MMS, or the appellant is not the lessee of record, then an "MMS-specified surety instrument" in accordance with paragraph (b)(1) of this section is required.

(3) The "MMS-specified surety instrument" for RMP is subject to approval by a bond-approving officer. The designated bond-approving officer for RMP is the Associate Director for Royalty Management or delegated officials. The MMS will provide in writing to the appellant information and standard forms on "MMS-specified surety instrument" requirements.

(c)(1) The amount of the bond, letter of credit, Treasury book-entry bond or note, or financial institution book-entry certificate of deposit will be determined by MMS and will include the principal amount owed plus any accrued interest owed and projected interest for a 1-year period. In the case of Treasury book-entry bonds or notes, the amount must be equal to 120 percent of the required surety amount.

(2) If a decision on the appeal is not made within 1 year from the date the appeal is filed, appellants who submitted a bond shall amend the bond amount to cover additional estimated interest for another 1-year period. Appellants who submitted a letter of credit, a Treasury book-entry bond or note, or a financial institution book-entry certificate of deposit shall submit, at least 10 calendar days prior to the expiration date, a new surety instrument or an amendment to the existing surety instrument for an additional 1-year period of time with an increase in the amount to cover estimated interest for a 1-year period. In all cases, MMS will determine the additional estimated interest and amended surety instrument amount. If a surety instrument is not amended to include the additional interest coverage at least 10 calendar days prior to the expiration date of the surety instrument, MMS may make a demand against and collect from the surety. The collection against the surety will include the principal amount owed plus accrued interest.

(d)(1) An MMS decision or order that is appealed to the Interior Board of Land Appeals pursuant to 30 CFR part 290 and 43 CFR part 4, shall be suspended pending appeal if the appellant submits or maintains a surety instrument in accordance with the provisions of this section, unless the Director or the Deputy Commissioner of Indian Affairs (when Indian lands are involved) notifies the appellant in writing at the time the decision or order is issued that it will not be suspended pending appeal. The Director or the Deputy Commissioner of Indian Affairs may deny suspension of an appeal to avoid irreparable harm to the lessor.

(2) In any case where the Director of the Office of Hearings and Appeals or the Secretary takes jurisdiction of an administrative appeal involving a Royalty Management Program decision or order pursuant to 43 CFR part 4.5 and grants a suspension of effectiveness of the decision or order subject to the submission of an adequate surety instrument, the appellant must maintain that surety instrument in accordance with the requirements of this section.

(e) An Interior Board of Land Appeals decision, other final action of the Department of the Interior regarding a Royalty Management Program decision or order, or a Royalty Management Program decision or order which is made effective pending appeal under paragraph (a), which is the subject of an action for judicial review in a United States District Court of competent jurisdiction will be suspended pending judicial review pursuant to 5 U.S.C. 705 if the plaintiff seeking review submits or maintains a surety instrument in accordance with the provisions of this section, unless the Government notifies the court that it will not agree to a suspension of the effectiveness of the decision or order pending judicial review.

(f) The MMS may initiate collection against a surety instrument if: (1) The MMS Director decides an administrative appeal adversely to the appellant, and the appellant fails either to pay the disputed amount or pursue a further administrative appeal and maintain an adequate surety instrument pending such appeal;

(2) The Interior Board of Land Appeals, the Director of the Office of Hearings and Appeals, an Assistant Secretary, or the Secretary decides an administrative appeal adversely to the appellant, and the appellant fails either to pay the disputed amount or pursue judicial review and maintain an adequate surety instrument pending such judicial review, in accordance with paragraph (e);

(3) A court of competent jurisdiction issues a final nonappealable decision adverse to the appellant/plaintiff and the appellant/plaintiff fails to pay the disputed amount; or

(4) The appellant fails to increase the amount of the surety instrument as required under paragraph (c) or otherwise fails to maintain an adequate surety instrument in effect.

3. A new § 243.3 is added under subpart A to read as follows:

§ 243.3 Exhaustion of administrative remedies.

In order to exhaust administrative remedies, a decision or order of MMS' Royalty Management Program must be appealed pursuant to 30 CFR part 290 to the Director (or the Deputy Commissioner of Indian Affairs when Indian lands are involved), and subsequently to the Interior Board of Land Appeals under 30 CFR part 290.7 and 43 CFR part 4 unless the order has been made effective by the Director, or by the Assistant Secretary for Land and Minerals Management, or by the Assistant Secretary for Indian Affairs, or by the Interior Board of Land Appeals pursuant to 43 CFR part 4, as applicable.

[FR Doc. 92-23635 Filed 9-29-92; 8:45 am]
BILLING CODE 4310-MR-M

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 211

RIN 1510-AA33

Delivery of Checks and Warrants to Addresses Outside the United States, Its Territories and Possessions

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Final rule; revision.

SUMMARY: This final rule revises the regulations governing the delivery of checks outside the United States by removing the reference to the former People's Republic of Albania. With the resumption of diplomatic relations, there is reasonable assurance that payees