<u>Editor's note</u>: 95 I.D. 265; appeal - <u>dismissed</u>, <u>settled</u>, <u>IBLA</u> <u>decision</u> <u>vacated</u> <u>as</u> <u>part</u> <u>of</u> <u>settlement</u> Civ.No. A89-064 (D.Alaska Feb. 9, 1990)

MARATHON OIL CO.

v.

MINERALS MANAGEMENT SERVICE

IBLA 86-1240 Decided December 14, 1988\

Appeal from a decision of Administrative Law Judge Joseph E. McGuire affirming issuance by Minerals Management Service of a Notice of Noncompliance/Penalty Notice and the civil penalty assessment proposed for knowingly and willfully failing to comply with royalty payment orders.

Affirmed as modified.

1. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

   Assessment of a civil penalty pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 for knowingly or willfully failing to timely make a royalty payment as specified in an administrative order will be affirmed on appeal after a hearing where it is established that the party either knew or showed reckless disregard of whether its actions violated the order.

2. Alaska: Oil and Gas Leases--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third Party Interests--Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

Conveyances of public lands to Alaska Native corporations pursuant to sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. | 1613 (1982), are subject to valid existing rights including any outstanding Federal oil and gas leases. While the Native corporation succeeds to the rights of the United States as lessor in any such lease, the Department retains the statutory right to administer the lease unless it is waived. Where it appears from the record that the right to administer the lease has not been waived, the provi-
sions of the Federal Oil and Gas Royalty Management Act of 1982 are properly applied to the administration of such a lease.

3. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

Assessment of a civil penalty for knowingly and willfully failing to comply with a final royalty payment order pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 pending judicial review of the propriety of that order will be affirmed as not violating constitutional due process restrictions by impairing the right to judicial review where the lessee assessed has failed to avail itself of the opportunity to obtain a stay of the royalty payment order conditioned upon the tender of acceptable security for the obligation at issue.

4. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

The exercise of the Secretary's discretion to set the amount of a civil penalty assessed pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management

Act of 1982 after a hearing properly requires the exercise of reasoned discretion on a case-by-case basis. Factors properly considered in deciding the amount of the penalty include the good or bad faith of appellant in violating the order, the injury to the public resulting from the violation, the benefit derived by appellant from the violation, the ability of appellant to pay a penalty, and the need to deter such conduct and to uphold the authority of the Minerals Management Service.

APPEARANCES: Patricia L. Brown, Esq., Washington, D.C., for Marathon Oil Company; Peter Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for Minerals Management Service; and William D. Temko, Esq., Los Angeles, California, for Cook Inlet Region, Inc., amicus curiae.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Marathon Oil Company (Marathon) has brought this appeal from an April 23, 1986, decision of Administrative Law Judge Joseph E. McGuire, rendered after a hearing, upholding the issuance by the Minerals Management Service (MMS) of a Notice of Noncompliance/Penalty Notice dated September 29, 1984. The decision also upheld the civil penalty assessment proposed therein in the amount of $70,000 per day for "knowingly or willfully" failing to pay royalty on certain oil and gas leases in accordance with the requirements of royalty payment orders issued by MMS. The assessment of the penalty was upheld for the period from July 13, 1984, through April 30, 1985, in the cumulative amount of $20,440,000.

The statutory authority pursuant to which the civil penalty was assessed is found at section 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. | 1719(c) (1982). Subsequent to receipt of the civil penalty notice, Marathon filed a timely request for a hearing in accordance with section 109(e) of FOGRMA. The hearing was held before Judge McGuire on June 3 and 5, 1985.

An understanding of the issues in this case is aided by a review of the somewhat complex factual background. The leases at issue in this controversy were issued by the United States Government for public lands in Alaska and are designated A-028055, A-028056, A-028103, A-028140, A-028142, and A-028143 (Joint Statement of Material Facts Not In Controversy (hereinafter Joint Statement) at 1). From October 1955 to November 1958 Marathon acquired interests in the subject leases which would become part of the Kenai Field with the result that Marathon and Union Oil Company of California (Union) each own a working interest of approximately 50 percent of Kenai Field production (Id. at 2). The decision of the Administrative Law Judge relates additional factual background:

> In return for removing oil and/or gas from the leased lands covered by the subject leases, each of which was prepared on that format known as the fourth or fifth edition of BLM Standard Form No. 4-1158, Marathon agreed to pay MMS a 12-1/2 percent royalty on the production which Marathon removed or sold, according to the identically worded provision contained in all of the subject leases (Exh. 14): "Royalty on production. - To pay the lessor 12-1/2 percent royalty on the production removed or sold from the leased lands computed in accordance with the Oil and Gas Operating Regulations (30 CFR Pt. 221) [presently codified at 30 CFR Part 206, Subpart C]."
>
> On the dates the subject leases were entered into the relevant section of the Oil and Gas Operating Regulations, [presently codified at] 30 CFR 206.103, contained these provisions for use in determining the value of production for the purpose of computing Marathon's royalty payments:

| 206.l03 Value basis for computing royalties.

> The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the Associate Director due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price per barrel, thousand cubic feet, or gallon paid or offered at the time of production in a fair and open market for the major portion of like-quality oil, gas, or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value. [Emphasis added.]

In mid-l959, with MMS' approval, the subject leases were unitized with other leases owned or held by Marathon and Union (Exh. 200). As part of that unit agreement, which covered only a portion of the Kenai Unit area, Marathon and Union agreed to share equally the costs of exploration, an endeavor which resulted in the discovery of gas later that year. The initial sales contract for Kenai Field gas was entered into by Marathon and Alaskan Pipeline Company (APL) on May l3, l960 (Exh. 2l at 3) (APL I) and the sale of gas began in l96l, with deliveries to APL, then Marathon's only customer.

Since the supply of gas greatly exceeded demand, Marathon set about creating markets for its excess gas and it was joined in that undertaking by Phillips Petroleum Company (Phillips), which owned nearby gas reserves under leases Phillips had entered into with the State of Alaska involving submerged State lands located in the North Cook Inlet Field. One of those potential markets involved the sale of significant quantities of gas to Japanese utilities under a long term sales agreement. But the remoteness of that market militated against the gas being delivered in its natural, or gaseous, state through a pipeline. Instead, the gas had to be transposed from its wellhead configuration to liquid natural gas (LNG) by a process known as liquefaction and transported to Japan as a liquid in specially designed seagoing cryogenic tankers. Upon delivery in Japan the LNG was apparently regasified and utilized in its natural state (Tr. 139).

The gas liquefaction process does not alter the chemical properties of the wellhead gas nor does it result in a manufactured product. The process, simply stated, involves the dehydration of the gas at the lease and transporting the gas under pressure by pipeline to a specially designed liquefaction plant, which in this case was located some 20 miles distant. At the plant, the gas is treated to remove carbon dioxide and traces of sulphur compounds; scrubbers remove liquid glycol, water, and heavy hydrocarbons; the methane content of the gas is increased to enhance its Btu rating and the gas is sent through a gas treater, dehydrated further, filtered, and cooled to a temper-ature of minus 260 degrees Fahrenheit. Following liquefaction the wellhead gas, in its transformed state, is then loaded onto the tankers for delivery. Through the hearing testimony of John A. Davis, Jr., the manager of Marathon's Natural Gas division, a position which also includes the overall supervision of the LNG operation at issue, it was shown that because of losses of gas product inherent in the liquefaction and tankering processes, some l.23 units of gas are required to be produced at the wellhead in order to deliver l unit of LNG in Japan (Tr. l48). In replying to MMS' first request for admissions, Marathon, at page 2 of its response to those requests for admissions which were filed on March l8, l985, further advised that it takes approximately 600 cubic feet of natural gas to produce one cubic foot of LNG.

On March 6, l967, Marathon and Phillips entered into a LNG sales agreement (Exh. 20) with the Tokyo Electric Power Company, Inc. (Tokyo Electric), and Tokyo Gas Company Limited (Tokyo Gas) which provided for delivery by ship of very substantial amounts of LNG. Approximately 30 percent of the LNG delivered under that sales agreement was to have been furnished by Marathon from natural gas which it produced on the subject leases located in the Kenai Field Unit and 70 percent of the LNG was to have been supplied by Phillips from its leases with the State of Alaska covering wholly owned State submerged lands in the North Cook Inlet Field (Exh. ll9 at 2). By the provisions of that contract, the term of which was June l, l969, to June l, l984, since extended to June l, l989, the LNG was to be delivered by tanker to the dock of Tokyo Gas' Negishi plant site in Yokohama, Japan, at the rate of 50 trillion 570 billion Btu's annually. The hearing testimony of John A. Davis, Jr., also established that for purposes of measuring quantities of gas l million Btu's (MMBtu's) is the equivalent of approximately l,000 cubic feet (Mcf) of that product since the regasified product contains l,0l0 Btu's per l cubic foot, or l,0l0,000 Btu's for each l,000 cubic feet (Mcf) (Tr. l39, l45). Accordingly, the annual delivery rate of LNG to Japan under the sales contract, expressed in l,000 cubic foot units, converts to approximately 50 billion 570 million thousand cubic feet, or 50 billion, 70 million Mcf, less those product losses discussed earlier.

The price of the LNG so delivered in Japan in November l969 was $0.52 per MMBtu's, or approximately $0.52 per Mcf. The price term of the sales agreement was amended on ll occasions between June l, l969, and January l, l980, and those and other price term amendments resulted in the range of the price of the delivered LNG having been between $0.52/MMBtu's/Mcf at the outset of the deliveries in November l969 to its highest price of $6.50/MMBtu's/Mcf on June l, l98l (Exh. 40 at 43, 44), and, according to the testimony of Mr. Davis, at the then current price on the June 5, l985, hearing date of $4.776/Mcf (Tr. l39).

In order to supply the huge quantities of LNG which they had contractually agreed to deliver by the use of two oceangoing LNG tankers, each of which was some 800 feet long, had a loaded draft not in excess of 32-l/2 feet, and had a carrying capacity of 450,000 barrels of LNG (Exh. 20 at 2), Marathon and Phillips found it necessary to construct pipelines and related facilities in order to convey the separately situated wellhead gas supplies to a LNG liquefaction plant which also had to be built, as well as arranging for the construction of the two tankers to be used in delivering the LNG to the agreed upon delivery point, the flange connecting the unloading piping of the LNG tanker with the piping of Tokyo Gas in Yokohama, Japan (Exh. 20 at 2). The sale of the gas took place at that agreed upon delivery point, since the sales agreement further provided that title to the LNG purchased and sold thereunder would pass from Marathon and Phillips to Tokyo Electric and Tokyo Gas at that specific point (Exh. 20 at 3). Loading of the tankers at the LNG plant took l2 hours to 3 days, depending upon conditions, and the elapsed port-to-port shipping time was approximately 8 days.

On March 8, l967, 2 days after Marathon and Phillips had entered into the LNG sales agreement with Tokyo Electric and Tokyo Gas, Marathon and Phillips entered into another written agreement for the construction of a LNG plant in or near Nikiski, Alaska, on land which Marathon owned on the Kenai Peninsula. That liquefaction plant, which included a gas treater and compressors, attendant docking facilities for loading the LNG tankers, and a causeway, became known as the Nikiski LNG plant and was located close by the separately situated sources of natural gas. The dock and causeway which served the LNG plant were located on land which was owned by the State and leased to Marathon. In their March 8, 1967 agreement, Marathon and Phillips agreed that the Nikiski LNG plant would be owned by Kenai LNG Corporation, which was beneficially owned by Marathon and Phillips, and would be leased to Marathon and Phillips, who in turn designated Phillips as the operator of that facility, the role in which Phillips oversaw the construction of the LNG plant and dock. The necessary pipelines and related facilities were constructed by another corporate subsidiary and Marathon and Phillips arranged for the formation of two Liberian corporations, one on April 26, l967, and the other on November 2l, l967, and those firms became the owners of the two newly constructed LNG tankers christened the Polar Alaska and the Arctic Tokyo, which were later placed in service, apparently under Liberian registration, in order to deliver the LNG to Yokohama, Japan (Exh. 40 at 46-5l).

*   *   *   *   *   *   *

Before Marathon began delivering LNG at the initial sales price of $0.52/MMBtu/Mcf in November l969, * * * officials [of Marathon and MMS] met for the purpose of establishing the royalty payments on the Federal share of Marathon's Kenai Field gas being liquified. Royalty payments on gas in fields surrounding the Kenai Field Unit were then being made on the basis of $0.l5/Mcf. MMS proposed that if Marathon paid on the basis of $0.l6/Mcf, a pipeline transportation allowance might be acceptable as a deduction (Exh. 2ll) but Marathon decided to pay royalties on the basis of $0.l6/Mcf for the LNG feedstock gas and did not request a transportation allowance (Exh. ll9 at 2).

That so-called "LNG feedstock gas," or that portion of Marathon's share of the natural gas produced from the subject leases which was delivered by the pipelines constructed by Marathon and Phillips from the Kenai Field to the nearby Nikiski LNG plant, comprises approximately l7 percent of the Kenai Field production and represents some 32 percent of Marathon's share of the gas produced and sold from the subject leases.

From the time gas was first produced in l959 and initially delivered in l96l on the subject leases in the Kenai Field Unit through l974, Marathon continued to pay royalties on the LNG feedstock gas at the rate of $0.l6/Mcf, or l2-l/2 percent of the sales price which Marathon received from APL under APL I, the agreement between Marathon and APL dated May l3, l960, for the sale of other gas which was produced on the subject leases in the Kenai Field Unit. Meanwhile, the price paid for Marathon's LNG in Japan started at $0.52/MMBtu/Mcf on June l, l969, with increases to $0.57/MMBtu/Mcf in May l972, $0.684/MMBtu/Mcf in March l974, and $0.9999/MMBtu/Mcf in October l974 (Exh. 40 at 43, 2l6). Thereafter, the field price for Kenai Field gas escalated and Marathon maintains that it voluntarily increased the amount of its royalty payments to MMS, although the documentary evidence is not instructive on that point.

*   *   *   *   *   *   *

Since the mid-l970's, Marathon and MMS have been involved in a dispute over the value of the Kenai Unit gas which is sold by Marathon in Japan as LNG, or the so-called LNG feedstock gas. MMS has contended that under the provisions of 30 CFR 206.l03, <u>supra</u>, the royalty value of that gas cannot be less than Marathon's gross proceeds, that is, the sales price of the LNG in Japan, since the first sale of that gas did not occur until it was delivered in

Japan, less the costs which Marathon had incurred in the liquefaction and transportation of that gas. Meanwhile, Marathon has continued to maintain that the value of the LNG, for purposes of computing royalty, should be that which reflects the price paid by APL for other gas produced from the subject leases. Moreover, Marathon had continually refused MMS' requests that Marathon furnish the liquefaction and transportation costs for the LNG sold in Japan and Marathon's refusal to supply that data has effectively deprived MMS of the information which it must have had in order to have computed the gross proceeds of the sale of the LNG in Japan.

The origin of that dispute is most likely attributable to the fact that beginning in April l975, the price of LNG delivered in Japan began to escalate beyond the prices which Kenai Field gas brought when sold in Alaska. As a result of that disparity, a dispute arose between Marathon and MMS concerning which method was to be employed in order to calculate the royalty value of the LNG feedstock gas. Resultingly, in letters dated October 2l, l977, and January 9, l979 (Exh. l09), MMS maintained that the royalty value should be based upon the sales price of the LNG in Japan less expenses, using a workback method to arrive at the "gross proceeds" at the wellhead (Exh. l45 at 2).

Marathon objected to that method of determining the value of its Kenai Field LNG feedstock gas production, urging that that method improperly attributed to the wellhead value a portion of Marathon's return on its investment in the LNG plant and transportation facilities. In addition, that method also included incremental values resulting from factors present only in Japan which Marathon felt should not be considered in determining the wellhead value in Alaska. Finally, Marathon argued that the value basis to be utilized in computing royalties should be based on other arm's-length sales of Kenai Field gas, such as its gas sales to APL, the method which Marathon had employed previously in order to determine its royalty payments on the LNG feedstock gas.

On May 4, l977 (43 FR 226l0), MMS issued Notice to Lessees and Operators of Federal and Indian Onshore Oil and Gas Leases (NTL-5) (Exh. 2l2).

Commencing in l977, also, portions of the Federal interest in the subject leases began to be transferred to CIRI [Cook Inlet Region, Inc.], a for-profit Alaska Native regional corporation which had been created pursuant to the provisions of the Alaska Native Claims Settlement Act, supra (Exh. l4). In correspondence from MMS dated April 9, l98l, and August 25, l982 (Exh. l5), Marathon was advised that a portion of six of the seven leases would be transferred to CIRI, but that MMS would continue to administer the leases, the lease records, and all pertinent documents. The entire Federal interest in the seventh of the subject leases, No. A 028l42, was ceded to CIRI. In addition, Marathon makes royalty payments each month to MMS for the Federal Government's interests in the subject leases and at MMS' direction Marathon pays directly to CIRI all royalties due on CIRI's interests in the subject leases (Exh. l5). Marathon also submits monthly production reports directly to CIRI (Exh. 205) and submits reports of sales and royalties within 60 days of production to MMS (Exh. 305; J. Statement at II-7.-l0).

As a result of the transfer of the Federal interests in the subject leases to CIRI, the current royalty ownership of the overall Kenai Field production, based upon February l985 production figures, is approximately as follows: CIRI - 50.3 percent; Federal Government - 3l.4 percent; State of Alaska - l5.5 percent; and private interests - 2.8 percent (Exh. 224).

However, both CIRI and the Federal Government are required to distribute to third parties most of the royalties they receive. CIRI is required to distribute 70 percent of the royalties it receives from the subject leases to the l2 Alaska Native regional corporations created pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. | l606(i) (l982) (J. Statement at II(ll)) and the Federal Government is required to distribute 90 percent of its royalties to the State of Alaska (30 U.S.C. | l9l (l982)), which results in the net Federal interest in the Kenai Field being less than 3 percent.

During the period from April l, l975, through January l, l980, Marathon continued to calculate its royalty payments on
the Kenai Field feedstock gas on the prevailing sales price it was then receiving from APL for Kenai Field gas under its May l3, l960, gas sales contract with APL (APL I). Meanwhile, MMS continued to issue specific directives to Marathon during that same period in which it sought unsuccessfully to have Marathon base its royalty payments instead upon the sales price received by Marathon for the LNG in Japan, less liquefaction and tankering expenses.

On September l2, l980, MMS advised Marathon by letter that a new formula for determining the value of its LNG feedstock gas had been adopted. That new formula, the so-called "Phillips Formula," would coincide with that which was then being used to establish the price of Phillips' LNG feedstock gas then being furnished to the Nikiski LNG plant and which Phillips was producing under State leases in the North Cook Inlet Field, i.e., 36 percent of the LNG contract price delivered in Japan, less $0.555/MMBtu/Mcf, adjusted for quality, as provided for in NTL-5. * * * MMS felt that the use of the "Phillips Formula" for purposes of determining the wellhead value of gas for purposes of royalty was more reflective of the market conditions then present in Alaska. Marathon agreed to the use of that method of evaluating production in computing royalty amounts due MMS beginning on January l, l980, and further agreed

> to calculate and pay all future royalty payments on its LNG feedstock gas based upon that method. The three-page written agreement, embodying that compromise settlement, was dated February 6, l98l (Exh. l45). Marathon subsequently paid to MMS the sum of $l,834,l60.83 in additional royalties due under the "Phillips Formula" for the period January l, l980, through February l98l.
>
> The February 6, l98l, agreement (Exh. l45) also clearly provided that the "Phillips Formula" method of royalty determination would remain in effect "until such time as changes in market conditions, State or Federal law, or regulations adopted thereunder, or the occurrence of facts such as National Emergency or Act of God, necessitate a revision in the method used to determine the wellhead value."

(Decision of Administrative Law Judge at 4-12).

The events which form the focal point of the controversy in this case commenced with a letter dated January 6, 1983, from MMS to Marathon giving notice of an intent to determine the reasonable value for royalty computation purposes of LNG feedstock gas produced from the leases by a method other than the Phillips formula (Exh. 47). The letter explained that: "The basic net-back valuation theory of this [Phillips] formula is sound, but adjustments to the formula are necessary to reflect changing costs and prices due to economic conditions." A new method of valuation was proposed for use commencing with production in May 1983 involving:

> [D]etermining the ratios of annual costs to total annual sales value and total annual sales volume respectively for the following categories:
>
> (1) Liquifying, storing, and tankering the natural gas, and
>
> (2) Transporting the gas via pipeline from the lease to the inlet of the LNG plant.

> The cost categories will consist of allowable yearly operating costs and yearly capital recovery costs, including a return on capital and development expenditures. [Footnote omitted.]

Exh. 47. Marathon was invited to submit written comments on the proposal to MMS and to appear at public hearing on the matter in Anchorage.

By letter dated February 28, 1983, MMS provided Marathon with further details on the procedures to be used for valuing gas from the leases used for LNG feedstock and notified it the valuation should be applied prospectively commencing with the July 1, 1983, royalty payment (Exh. 47). Appellant's response to the February 1983 letter was to commence court litigation and to cease paying current royalty obligations on the basis of the Phillips formula (Tr. 124).

On April 14, 1983, Marathon filed a suit in the U.S. District Court for the District of Alaska against the United States, CIRI, and the State of Alaska seeking a declaratory judgment regarding its royalty obligations under Kenai Field leases (Exh. 209). John Davis, appellant's manager of LNG, responsible for the LNG project, testified for appellant that, subsequent to the filing of the lawsuit, appellant ceased computation of royalties on the LNG feedstock gas on the basis of the Phillips formula used from January 1980 through April 1983 (Tr. 114-15). After April 1983, royalties were "computed on the basis of the highest arm's-length contract for the majority of the gas sold from the field," the contract with Alaska Pipeline known as APL I (Tr. 115). Davis testified this latter action was predicated on the belief MMS had breached the earlier agreement to compute royalties on the basis of the Phillips formula (Tr. 124). Davis acknowledged that, subsequent to receipt of the February 1983 letter from MMS, Marathon made calculations to project the value of the gas at the well head for royalty computation purposes under the revised net-back formula, and he recollected the figure as being something in excess of $3 per Mcf (Tr. 125, 141, 144). Robert Boldt testified on behalf of MMS that the Phillips formula used between January 1980 and early 1983 produced a valuation for computation of royalty from $1.71 to $1.80 per Mcf, whereas after the rollback Marathon paid on the basis of $0.61 per Mcf up to the time of the hearing (Tr. 38-39). This was essentially confirmed by Davis who acknowledged that, despite a projected valuation for royalty purposes under the revised net-back formula of slightly over $3 per Mcf, Marathon reduced the valuation on which it paid royalties from something over $1.70 per Mcf to $0.61 per Mcf (Tr. 141).

Thereafter, on July 8, 1983, MMS issued a formal order requiring Marathon to calculate its royalty payments using the revised net-back formula as set forth in the January and February 1983 MMS letters (Exh. 8). The order directed Marathon to begin calculating royalties on this basis with the royalty period commencing August 1, 1983. Further, the order notified Marathon of its right to file an administrative appeal to the Director, MMS. The order also advised Marathon that the act of filing an appeal would not suspend the requirement of compliance with the order. A protective administrative appeal was subsequently filed with MMS on August 12, 1983, noting the existence of the pending litigation (Exh. 190). The management at Marathon made a conscious decision not to comply with the July 8, 1983, order (Tr. 127). The decision, recommended by counsel and concurred in by a senior vice president and by the manager of the natural gas division, was based on the fact that the issue was already being litigated in the U.S. District Court and on Marathon's concern that CIRI's obligation to disburse 70 percent of its royalty receipts to other Native corporations presented difficulty in recouping any overpayment should appellant be successful in the litigation (Tr. 127-28).

Subsequently, in an order dated October 5, 1983, MMS noted that Marathon (through its paying agent, Union) had ceased to pay royalty on the basis of the Phillips formula (which was in effect through July 1983), beginning in April 1983, and paid royalty on the basis of a value "less than the minimum value directed by MMS" (Exh. 9). The order billed appellant for additional royalties in the amount of $717,705; ordered the recalculation of royalties from April through July 1983 on the basis of the Phillips formula; and further ordered Union, as agent for Marathon, "to calculate and pay royalty due for periods after July 1983 consistent with the 'Phillips Formula'" (Exh. 9). Marathon filed an administrative appeal of this order on November 7, 1983 (Joint Statement at 6).

Appellant's failure to comply with these orders during the course of the litigation received attention at the highest level of the Department. By order dated June 11, 1984, the Assistant Secretary for Land and Minerals Management, acting on behalf of the Secretary, directed Marathon to comply with the terms of the orders of July 8 and October 5, 1983, and pay the royalties due for the period April through July 1983 as "prescribed in the letter [order] of October 5, 1983," and the royalties due after July 31, 1983, in accordance with the terms of the July 8, 1983, order. Further, Marathon was directed to pay the royalties due thereunder within 30 days or the Department would initiate proceedings in the district court to cancel the subject leases (Exh. 11). The order expressly noted that the requirement to pay royalties is not suspended by an administrative or judicial appeal of the orders.

Thereafter, the Director of MMS issued the September 29, 1984, notice to Marathon of its liability for civil penalties for failure to comply with the orders of July 8, 1983; October 5, 1983; and June 11, 1984 (Exh. 12). The notice explained that:

> Pursuant to section 109(c) of [FOGRMA] and 30 C.F.R. | 241.51(b)(2), MMS has determined that because of Marathon's willful and intentional disregard of the requirement to pay additional royalties as specified in the above-described MMS orders, Marathon is liable for a penalty of $10,000 per day on each of its seven leases, for a total of $70,000 per day.

Id. at 2. The notice further advised appellant that penalties would accrue from July 13, 1984, the date by which Marathon was required to comply with the royalty order of June 11, 1984. Marathon requested a hearing on the civil penalty and now brings this appeal from the decision of Judge McGuire upholding the penalty after the hearing.

Subsequent to issuance of the civil penalty notice and prior to the hearing before the Administrative Law Judge in this case, the U.S. District

Court issued its decision on February 20, 1985, affirming the MMS orders to compute royalties at the well head on the basis of the net-back method and ordered Marathon to comply with the orders. Marathon Oil Co. v. United States, 604 F. Supp. 1375 (D. Alaska 1985), aff'd, 807 F.2d 759 (9th Cir. 1986), cert. denied, _ U.S. __, 107A S. Ct. 1593 (1987). 1/ Testimony at the hearing disclosed that payment was made to MMS of additional royalties due under the MMS orders from April 1983 through June 3, 1985, in the amount of "about $8.1 million plus almost $1 million additional payment for interest" just prior to commencement of the hearing on June 3, 1985 (Tr. 131-33).

In the decision under appeal, the Administrative Law Judge found that the action of Marathon in refusing to comply with the MMS orders was "knowing and willful," regardless of the absence of any specific intent to violate the provisions of FOGRMA, where its conduct is characterized by a reckless disregard of whether its action is prohibited by statute. Judge McGuire further held that the record supports the assessment of the maximum penalty of $10,000 for each day of the violation for each lease over the 292-day period from July 13, 1984, to April 30, 1985, for which the penalty was assessed (See Joint Statement at 6). The Administrative Law Judge also found that the conveyance of part or all of the mineral interest under lease to CIRI did not render the civil penalty provision of FOGRMA inapplicable since the United States had not waived its right to administer the leases under section 14(g) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. | 1613(g) (1982). Finally, the Administrative Law Judge failed to

1/ Since the propriety of the royalty valuation method has been finally resolved between the parties as a consequence of the litigation, the merits of the royalty valuation orders are not before the Board in this case.

find that the record supported the existence of a 90-day extension for compliance with the June 11, 1984, order which would either invalidate the penalty notice or toll the assessment of the penalty for the period thereof.

In its statement of reasons for appeal, Marathon argues that the record fails to establish the existence of a "knowing or willful" violation as required under section 109(c) of FOGRMA to support assessment of a civil penalty. Appellant argues that the proper standard of what constitutes willful conduct for purposes of assessment of a civil penalty is whether there was a reckless disregard of the governing statute, citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). Marathon contends that this standard requires consideration of good faith and reasonableness in determining whether conduct is willful. Appellant asserts its refusal to comply with the MMS orders was reasonable in light of the pending litigation which it had initiated previously in order to determine the extent of its royalty obligation.

Marathon also argues that section 109(c) of FOGRMA authorizes imposition of penalties only for failure to pay royalties, which term is expressly defined to include payments to the United States, Indian tribes, or Indian allottees. Appellant contends that most of the payments at issue are due to CIRI as a result of the conveyance of the mineral interests embraced in the leases to the Native corporation under ANCSA. Hence, Marathon asserts these payments do not qualify as royalty payments.

Further, appellant argues that the MMS royalty payment orders which were issued after the court had assumed jurisdiction of the dispute were ineffective until they were affirmed by the court. Marathon also argues that assessment of a penalty in the circumstances of this case is inconsistent with the purposes of FOGRMA where it was seeking to ascertain the extent of its royalty obligation rather than to evade that obligation. Marathon further notes that its motion for stay of the MMS orders was pending before the court for 107 days of the penalty period during which nearly $7,500,000 in penalties accrued. Appellant contends that payment of the amount assessed by MMS pending administrative and/or judicial review of the amount due has not been held by the courts or this Board to be indispensable to royalty collection activities, citing Placid Oil Co. v. Department of the Interior, 491 F. Supp. 895 (N.D. Texas 1980); Conoco, Inc. v. Watt, 559 F. Supp. 627 (E.D. La. 1982); Marathon Oil Co., 90 IBLA 236, 93 I.D. 6 (1986).

Marathon further argues that the amount of the penalty assessed is not supported by the record. Appellant notes that the amount of the assessment was initially set by MMS at the statutory maximum without explanation and, hence, contends the assessment was arbitrary. Appellant asserts the Department is bound by regulation to base the penalty on the severity of the offense and the violator's history of noncompliance, citing 30 CFR 241.51(c) (1985). Additionally, Marathon contends the assessment improperly fails to consider mitigating factors including its prior history of compliance on these 30-year-old leases, the complexity of calculating the amount due under the net-back orders, and the pending litigation of the issue in court. Further, appellant points out that MMS stipulated in court to the jurisdiction of the court to review the royalty orders in question.

In its answer to appellant's brief, counsel for MMS argues that Marathon knowingly or willfully failed to comply with the MMS royalty payment orders. MMS contends the failure to comply was a considered and deliberate decision. Further, MMS asserts the filing of the lawsuit regarding the royalty determination did not excuse compliance with the MMS orders, noting that no stay of the orders was obtained from the court. MMS argues that appellant acted with a reckless disregard for compliance with the royalty payment orders. Marathon's lack of good faith is asserted by MMS to be manifested by its unilateral rollback of the valuation of the LNG feedstock gas in the face of the royalty orders.

Further, MMS contends that section 109(c) of FOGRMA applies to all of the leases at issue. MMS argues that the United States is still the lessor as to six of the leases for which a partial interest in the mineral estate has been conveyed to CIRI and that, with respect to the lease embracing a mineral estate conveyed in its entirety to CIRI, the Secretary has retained rather than waived the right to administer the lease as authorized by section 14(g) of ANCSA, 43 U.S.C. | 1613(g) (1982).

Counsel for MMS also asserts that the assessment of the penalty at the statutory maximum of $10,000 per day is supported by Marathon's conduct and the severity of its noncompliance. Finally, MMS argues that penalties were properly assessed for the entire period from July 13, 1984, to May 1, 1985.

Accordingly, the critical issues before the Board on review of this appeal are threefold. The first question to be answered is whether appellant "knowingly or willfully" violated the royalty payment orders within the meaning of section 109(c) of FOGRMA. If the first question is resolved in the affirmative, the next issue is whether FOGRMA authorizes assessment of civil penalties for failure to pay royalties due to Alaska Native regional corporations for lands embraced in an oil and gas lease issued by the United States the mineral estate in which was subsequently conveyed to the Native corporation pursuant to ANCSA subject to the existing lease. If both of these questions are answered in the affirmative, the remaining issue is the appropriate amount of the penalty to be assessed based on the record in this case.

[1] Section 109(c) of FOGRMA deals with liability for civil penalties and provides in pertinent part that: "Any person who--(1) knowingly or willfully fails to make any royalty payment by the date as specified by statute, regulation, order or terms of the lease * * * shall be liable for a penalty of up to $10,000 per violation for each day such violation continues." 30 U.S.C. | 1719(c) (1982). The statute has not defined the terms "knowing or willful," but the parties to this appeal have acknowledged the relevance of the recent Supreme Court case of Trans World Airlines, Inc. v. Thurston, supra. In considering whether the conduct violative of the Age Discrimination in Employment Act was "willful" and, thus, subject

to the punitive sanction of double damages under section 7(b) of the Act, 29 U.S.C. | 626(b) (1982), the Court held that the issue was whether the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [Act]." 469 U.S. at 126. The Court declined to uphold an assessment of punitive damages merely on a finding that the charged party knew of the existence of the Act and of its potential applicability to its actions. Id. at 127-28. The Court reversed the punitive damage assessment on the ground the "record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the [Act]." Id. at 129 (citation omitted). We note that in interpreting the word "willful" in the context of the same Act the Court has recently reaffirmed the reckless disregard standard, declining to include therein actions taken without a reasonable basis for believing they were in compliance with the statute. McLaughlin v. Richland Shoe Co., __ U.S. __, 108B S. Ct. 1677 (1988).

Section 109(c) of FOGRMA provides for a civil penalty for any person who knowingly or willfully fails to make a royalty payment by the date specified in an order. As noted above, Marathon was notified by letter of January 6, 1983 (Exh. 47), of the requirement, in light of changed market conditions, to apply a new net-back method of valuation of the LNG feedstock gas to replace the existing Phillips formula. Further details on the new net-back method of computation were provided in the MMS letter of February 28, 1983 (Exh. 47). The testimony reveals that Marathon made calculations of the effect of the new net-back method of valuing the LNG feedstock gas for royalty computation purposes and projected a value of something in excess of $3.00 per Mcf. In response to the MMS letter of February 1983, the testimony reveals that Marathon filed a lawsuit to ascertain its royalty obligation and unilaterally rolled back the valuation for royalty purposes of the LNG feedstock gas from the range of $1.71 to $1.80 per Mcf under the Phillips formula to $0.61 per Mcf.

Thereafter, when MMS issued the July 8, 1983, order formally requiring Marathon to calculate its royalty payments on the basis of the revised net-back method set out in the January and February 1983 letters commencing August 1, 1983, the testimony reveals that Marathon made a conscious decision not to comply with the order. John Davis testified that the decision was made, with the advice and participation of counsel, by the manager of Marathon's Natural Gas Division, the Senior Vice President of Production and Exploration, and himself (Tr. 126-27).

Subsequently, when the Assistant Secretary issued the June 11, 1984, order to Marathon directing it to comply with the July 8, 1983, order (and the October 5, 1983, order regarding Phillips formula royalties for April through July 1983) and pay the royalties due thereunder within 30 days, appellant was faced with another critical decision. Davis testified on behalf of appellant that at this point the participants in the decision included the manager of Marathon's Natural Gas Division, the Senior Vice President of Production and Exploration, the President of Marathon, and himself, along with counsel (Tr. 130). Davis acknowledged that the orders were considered seriously and the failure to pay at the higher rate was not an oversight (Tr. 142). He explained the failure to comply on appellant's belief that the "case was before the Federal Court in Alaska that was the proper forum to adjudicate the question" (Tr. 142).

Notwithstanding appellant's belief that the matter was properly before the district court, and, therefore, it was excused from compliance with the orders, we note that the Assistant Secretary's royalty order of June 11, 1984, explicitly advised Marathon that: "The obligation to pay royalties determined by MMS to be due and owing is not suspended by an administrative or judicial appeal of these orders" (Exh. 11). This statement is supported by the relevant regulation governing compliance with royalty payment orders:

> Compliance with any orders or decisions, issued by the Royalty Management Program after August 12, 1983, including payments of additional royalty, rents, 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, * * * and then only upon a determination, at the discretion of the Director * * * 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.

30 CFR 243.2. 2/ The efficacy of this so-called "pay-pending-appeal" regulation requiring immediate payment pending administrative review in

---

2/ Appellant points out that this regulation was promulgated subsequent to issuance of the royalty payment order of June 11, 1984. 49 FR 37353 (Sept. 21, 1984). Although the effective date of the revised regulations generally was Oct. 22, 1984, 49 FR at 37336, the preamble to the regulatory revision explained the basis for the retroactive effect of the regulation at 30 CFR 243.2:

"This provision is being made retroactive to orders and decisions issued by the Royalty Management Program after August 12, 1983. The retroactive effectiveness is necessary for consistent application of MMS's procedure because on that date 30 CFR Section 221.66, the predecessor to new Section 243.2, was unintentionally removed from MMS's regulations along with other rules which were removed by virtue of the transfer of MMS's the absence of acceptance of a bond adequate to indemnify the lessor from risk of loss and a finding that a suspension will not be detrimental to the lessor was recognized by this Board in Marathon Oil Co., 90 IBLA at 236, 93 I.D. at 6. 3/

Although the June 11, 1984, order of the Assistant Secretary, unlike the July 1983 and October 1983 MMS orders, was a final Departmental decision not subject to further administrative review within the Department, see Blue Star, Inc., 41 IBLA 333 (1979), compliance with the order was not excused pending judicial review. Statutory authority is provided for obtaining relief from an administrative decision pending judicial review:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal

---

fn. 2 (continued)
onshore operational program to the Bureau of Land Management (48 FR 36582, August 12, 1983)." 49 FR at 37344. The former regulation at 30 CFR 221.66 (1982) imposed substantially the same requirements for suspension of an order, i.e., a determination by the Director that suspension would not be detrimental to the lessor and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage. Thus, it appears that even prior to the promulgation of 30 CFR 243.2, a suspension of the effect of the royalty payment order pending an administrative or judicial appeal was required to stay the obligation of payment pending review on appeal. See Atlantic Richfield Co., 21 IBLA 98, 103, 82 I.D. 316, 318 (1975).

3/ In the Marathon case, the Board reversed an MMS decision denying a request to suspend payment of late payment charges on additional royalties pending administrative review of the pending appeals of appellant's liability for the charges. The Board's action was predicated on a finding that, given the statutory obligation of the lessee to pay interest on late royalty payments and the willingness of the appellant to comply with the requirement of filing a bond deemed adequate by MMS to protect against loss, no adequate basis had been shown in the record for finding a suspension would be detrimental to the interest of the lessor. 90 IBLA at 245-48, 93 I.D. at 11-13.

> from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone
> the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. | 705 (1982). The courts have recognized that the institution of
a lawsuit for judicial review of an administrative action does not, by itself, stay the effectiveness of the challenged action in the absence of a stay granted pursuant to this statutory provision. Abbott Laboratories v. Gardner, 387 U.S. 136, 155-56 (1967) (effectiveness of a regulation); Winkler v. Andrus, 614 F.2d 707, 709 (10th Cir. 1980) (decision rejecting appellant's oil and gas lease application).

However, it was not until November 5, 1984, after receipt of the notice of civil penalties at issue here and the Department's counterclaim filed in the district court for cancellation of the leases, that Marathon filed a motion for preliminary injunction in the district court requesting a stay
of the effect of the royalty orders. Subsequently, on February 20, 1985, the district court issued an opinion denying Marathon's motion for a stay, granting MMS' motion for summary judgment, and requiring an accounting. 604 F. Supp. 1390. 4/

In this case, appellant chose to ignore the explicit warning contained in the June 11, 1984, order of the Assistant Secretary that the effect of
the decision was not stayed pending appeal. The testimony established that the failure to comply with this order was a conscious decision made at the

4/ An interim stay of the district court order was allowed pending appeal to the Ninth Circuit.

highest levels of the corporation. In this context we must affirm the finding of the Administrative Law Judge that the failure to comply with the June 11, 1984, royalty payment order was knowing and willful. In view of the warning in the June 11, 1984, order that the requirement for compliance was not stayed pending administrative or judicial review, we have no trouble finding the failure to comply was willful and knowing. Appellant's conduct, at the very least, constituted a reckless disregard of whether compliance with the order was required by law. Any element of good faith in appellant's conduct relating to compliance with the order which might otherwise be argued was totally eviscerated by the unilateral rollback of royalty payments to a level less than that existing prior to the royalty orders and the steadfast refusal to pay further until ordered to do so by the district court.

We must also affirm the finding of the Administrative Law Judge that the record fails to support the existence of a 90-day extension for compliance with the June 11, 1984, order. It is true that the June 11 order was issued pursuant to a Secretarial decision of April 16, 1984, on the question of whether the Department should take further administrative action to collect the unpaid royalties from Marathon pending the outcome of the lawsuit (Exh. 38). This decision called for issuance to Marathon of a notice of lease cancellation with followup contact by the Department for negotiations and to relate conditions of settlement. The Secretarial decision further provided that, if no agreement was reached within 90 days, action would be taken to cancel the leases. The June 11, 1984, order (Exh. 11) was issued to implement this decision.

Hugh V. Schaefer, appellant's general attorney for domestic produc-tion, testified concerning a June 19 telephone conversation with Associate Solicitor Larry Jensen, the Department's chief negotiator in this matter, regarding an extension of time for compliance with the June 11 order (Tr. 156). Schaefer testified that in response to Marathon's concern that negotiations might take longer than 90 days and it did not want the negotiations terminated, Jensen "replied by saying that he had no problem with that; he didn't want to leave things open ended; but, that if progress was being made at the end of 90 days, then he would not be--he would not terminate settlement discussions" (Tr. 156). A meeting was set for July 3 at the Department. On June 29, Jensen called Schaefer to reach an understanding of the topics to be discussed at the July 3 meeting and to set preconditions to the settlement negotiations, i.e., that Marathon would value the natural gas for April 1 through July 31, 1983, under the Phillips formula and from August 1983 forward under the APL 2 contract price (Tr. 163). Schaefer testified that at the July 3 meeting, Jensen further specified the Department's preconditions to negotiation including renegotiation of royalty values on all Kenai field gas; inclusion of CIRI in the discussions; retroactive effect of renegotiated values for other Kenai field gas; and payment of royalties on LNG feedstock gas for the period from April through July 1983 under the "Phillips 1 formula" and thereafter under the "Phillips 2 formula" (Tr. 165). Marathon responded by indicating at the meeting that it would have to "take the list of preconditions back to [Marathon's] management" (Tr. 176). Schaefer acknowledged the July 11 deadline for a response to the preconditions at which point Interior would have to make a decision how to proceed (Tr. 177). Schaefer further testified that at the followup meeting between Marathon management and Interior officials on July 11, appellant advised Interior officials that it could not agree to the preconditions set for further negotiations (Tr. 167).

Jensen acknowledged in his testimony that an extension beyond 30 days to comply with the June 11 order was a possibility "if the negotiations were serious" (Tr. 188). Further, Jensen testified that in his June 29 telephone call he indicated that good faith payment of substantially higher royalties on LNG was a precondition to any negotiation, including extension of the 30-day timeframe for compliance with the June 11 order (Tr. 190-91). Good faith payment of the minimum amount owed was a precondition (Tr. 192). Further Jensen testified that the purpose of the July 11 meeting was to ascertain whether the preconditions for an extension to negotiate had been met (Tr. 193) and that after the meeting of July 11 he perceived that negotiations had broken off (Tr. 204).

It is clear from the factual record that no extension was granted for compliance with the June 11, 1984, order beyond the 30 days expressly provided therein. Although the Department was willing to continue negotiations if Marathon complied with certain conditions including payment of royalty in the interim at a higher rate, appellant was not willing to comply with the conditions. Thus, no extension was granted.

Having affirmed the finding of the Administrative Law Judge that Marathon knowingly and willfully failed to comply with the royalty payment order of June 11, 1984, in violation of section 109(c) of FOGRMA, we are presented with the question of the applicability of FOGRMA to royalties payable to an Alaska Native corporation for interests in oil and gas conveyed under ANCSA. Specifically, the issue is whether the civil penalty provisions of FOGRMA are properly applied to royalty payment obligations under the terms of a United States oil and gas lease where the royalties are payable to an Alaska Native corporation as a consequence of the conveyance (subsequent to lease issuance) of the subsurface estate in lands pursuant to the provisions of ANCSA.

As a threshold matter we recognize that of the seven leases at issue here, all except one (A-028142) still embrace in part public lands for which royalties on oil and gas are owed to the United States. Thus, for purposes of the applicability of the civil penalty provisions of FOGRMA under review here, the issue pertains only to lease A-028142.

Marathon points out that the term "royalty" is defined at section 3(14) of FOGRMA:

> (14) "royalty" means any payment based on the value or volume of production which is due to the United States or an Indian tribe or an Indian allottee on production of oil or gas from the Outer Continental Shelf, Federal, or Indian lands, or any minimum royalty owed to the United States or an Indian tribe or an Indian allottee under any provision of a lease[.]

30 U.S.C. | 1702 (14) (1982). The term "Federal land" is also defined in FOGRMA: "(1) 'Federal land' means all land and interests in land owned by the United States which are subject to the mineral leasing laws, including

mineral resources or mineral estates reserved to the United States in the conveyance of a surface or nonmineral estate[.]" 30 U.S.C. | 1702(1) (1982).

[2] The record establishes that all of the seven oil and gas leases at issue in this royalty dispute were issued by the United States for public domain lands pursuant to the authority of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. || 181-287 (1982). There is no doubt that the rights of the lessee(s) are still governed by the terms of those leases and of the statutes and regulations pursuant to which they were issued, as well as amendments thereof which are not inconsistent with the lease terms. These valid existing rights were explicitly recognized in section 14(g) of ANCSA which provided in pertinent part:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease * * * and the right of the lessee * * * to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the * * * United States as lessor * * * in any such leases * * * covering the estate patented * * *. The administration of such lease * * * shall continue to be by * * * the United States, unless the agency responsible for administration waives administration. [Emphasis added.]

43 U.S.C. | 1613(g) (1982). The relevant regulation implementing this statutory provision provides in part:

> Leases * * * granted prior to the issuance of any conveyance under this authority shall continue to be administered by the

> * * * United States after the conveyance has been issued, unless the responsible agency waives administration. Where the responsible agency is an agency of the Department of the Interior, administration shall be waived when the conveyance covers all the land embraced within a lease * * * unless there is a finding by the Secretary that the interest of the United States requires continuation of the administration by the United States. In the latter event, the Secretary shall not renegotiate or modify any lease * * * or waive any right or benefit belonging to the grantee until he has notified the grantee and allowed him an opportunity to present his views.

43 CFR 2650.4-3.

In the absence of a waiver of administration of an oil and gas lease embracing lands conveyed under section 14(g) of ANCSA, the United States retains the right to administer the lease based on a finding it is in the interests of the United States to do so. In this context, the provisions of FOGRMA are properly applied to the lessee's royalty obligations under the lease. The royalty payment under this oil and gas lease issued by the United States pursuant to the Mineral Leasing Act of 1920, is still due to the United States as lessor, notwithstanding the subsequent conveyance of the mineral interest and assignment of the lessor's rights to CIRI. The fact the royalty payments were made directly to CIRI on the instructions of MMS does not alter this result. It is clear from the record that Marathon accounted for all production and royalty due thereon to MMS as well as to CIRI (Tr. 50). The continuing administrative responsibility of MMS over this lease was the basis for assessment of a civil penalty for failure to comply with the June 11, 1984, royalty payment order (Tr. 50, 55, and 58).

Appellant asserts, however, that administration of this lease was waived by the Department. Decisions to waive the administration of rights-of-way and airport leases under this regulation on lands conveyed to Native corporations have been upheld by this Board in the absence of a finding that the interests of the United States dictate retention of administration. Ahtna, Inc., 103 IBLA 71 (1988) (power line right-of-way); Kuitsarak, Inc., 102 IBLA 200 (1988) (airport lease).

Reference to the voluminous record amassed in this case file discloses no compelling evidence that the Department waived its statutory right under section 14(g) of ANCSA to continue to administer lease A-028142. The only document in the record which might suggest that conclusion is a copy of a letter of August 25, 1982, from the accounting operations division of MMS to Union, appellant's agent for royalty payment on the subject leases at the time. The subject of that letter was identified as "Federal Gas Leases Transferred in Part or in Whole to Cook Inlet Region, Inc., (CIRI), Oil and Gas Leases A-028047, A-028142, and A-028143." With respect to A-028142, the letter advised at page two that all of the lands embraced in the lease had been conveyed to CIRI on July 20, 1982, pursuant to Patent No. 50-82-0088 and interim conveyance No. 519. With respect to the latter lease the letter further related:

> Lease A-028142 has been transferred in its entirety to the Cook Inlet Region Inc. Section 14(g) of the Alaska Natives Claims Settlement Act states that, upon issuance of patent, the patentee shall succeed and become entitled to any and all interest[s] of the United States as lessor, subject to the right of the lessee to the complete enjoyment of all rights, privileges, and benefits granted him under the lease. This section further provides that

> the United States may waive administration of a lease containing lands which have been conveyed in their entirety.
>
> Pursuant to the above, your case file will be transferred effective the first day of the month following receipt of this notice to [CIRI].

(Exh. 15).

Other evidence, however, indicates the Department did not waive administration of this lease. The testimony of the MMS Associate Director for Royalty Management noted the continuing administrative responsibility of MMS for this lease (Tr. 50, 55, and 58). The January and February 1983 letters to Marathon detailing the net-back method of valuation for royalty purposes, as well as the implementing order of July 1983, clearly related to all the LNG feedstock leases, although the lease numbers were not specified (Exhs. 8, 47). The attachments to the royalty payment order of October 5, 1983, regarding payment of additional royalties under the Phillips formula from the time of Marathon's unilateral rollback to the effective date of the new net-back method of calculation specifically referred to additional royalty owed for lease A-028142 (Exh. 9).

In the Memorandum of Understanding Between Minerals Management Service & Cook Inlet Region, Inc. (MOU I), signed January 3, 1983, by the Associate Director for Royalty Management, MMS, it was expressly recited that: "Administration of CIRI's interest as lessor in the leases [including A-028142] was reserved in the Secretary, now acting through MMS, in the conveyance to CIRI under ANCSA" (Exh. 17). In MOU I the Secretary made a "partial waiver," pursuant to 43 U.S.C. | 1613(g) (1982), of the authority to administer the leases at issue here for the purpose of allowing CIRI to negotiate royalty valuation issues concerning the leases for the period from April 1, 1975, to January 15, 1983 (Exh. 17). This agreement was followed by MOU II dated August 9, 1983 (Exh. 18). This latter agreement explained in some detail the responsibilities assumed by MMS in administering the subject leases. In MOU II it was again recited that the right to administer these leases was retained by the United States and MMS under section 14(g) of ANCSA. Thus, it becomes clear upon review of the entire record that the Secretary has not waived administration of the subject oil and gas leases. 5/

The remaining critical issue which this appeal poses is the amount of the civil penalty assessed for violating section 109(c)(1) of FOGRMA. That section provides that any person who "knowingly or willfully" fails to make any royalty payment by the required date as specified in an order "shall be liable for a penalty of up to $10,000 per violation for each day such violation continues." 30 U.S.C. | 1719(c) (1982). The civil penalty provision of FOGRMA further provides that "the Secretary may compromise or reduce civil penalties under this section" on a "case-by-case basis." 30 U.S.C. | 1719(g) (1982). Finally, the statute provides that: "In determining the amount of such penalty, or whether it should be remitted or reduced, and in

5/ We reach this conclusion on the basis of the record before us. While this same conclusion was reached by the district court in the litigation over the extent of Marathon's royalty obligation, 604 F. Supp. at 1390, we note that the court of appeals held the district court did not need to decide the waiver issue because Marathon did not properly preserve the question at the administrative decision level. 807 F.2d at 762. Hence, appellant may also be collaterally estopped to argue administration of the leases was waived.

what amount, the Secretary shall state on the record the reasons for his determinations." 30 U.S.C. | 1719(i) (1982).

The essence of appellant's argument regarding the amount of the pen-alty assessed is threefold. Marathon argues that the assessment of cumulative penalties in this case on a daily basis pending judicial review of the royalty payment orders violates constitutional due process restraints by inhibiting the exercise of the right to judicial review. Further, appellant asserts that both the statute and the regulations require the exercise of discretion in setting the amount of any penalty, and that the amount of the penalty was arbitrarily assessed at the statutory maximum amount without any analysis of mitigating factors. Marathon also contends the penalty levied is inconsistent with the Department's enforcement policy on civil penalties under FOGRMA approved by the Director, MMS, on April 1, 1986 (App. C to appellant's brief).

[3] The due process argument of Marathon has its foundation in the principle established initially in Ex Parte Young, 209 U.S. 123 (1908). In reviewing a challenge to the validity of a statute setting railroad rates and establishing substantial civil and criminal penalties for overcharging, the Court noted that if the penalties for disobedience of the rates are so "severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U.S. at 147. The Court found that to condition the right to judicial review of the validity of a rate

upon the risk of substantial fines and imprisonment is effectively "to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts [are valid]" in holding the acts unconstitutional. 209 U.S. at 148. The doctrine was explained cogently by the court in United States v. Reilly Tar & Chemical Corp., 606 F. Supp. 412 (D. Minn. 1985):

> The decisions of the Supreme Court in Ex Parte Young and its progeny clearly establish that a person has a due process right to challenge the validity of an administrative order affecting his affairs without being forced to pay exorbitant penalties if the challenge is unsuccessful. Ex Parte Young, 109 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115 (2d Cir. 1975). The rationale of Ex Parte Young and its progeny is that the imposition of severe penalties effectively denies a person subject to the penalties the right to a judicial review of the validity of an order and that such a denial of judicial review is a violation of due process. However, Ex Parte Young and its progeny also establish that a statute imposing penalties for noncompliance with an administrative order will be constitutional if it is a defense to the imposition of penalties that the party disobeying the administrative order interposed a good faith defense to the validity of the order. It follows that a person will not be intimidated into not seeking judicial review if he knows that good faith is a defense to the imposition of penalties.

606 F.Supp. at 418. The Reilly Tar case involved a challenge to the constitutionality of the punitive damages provision of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. | 9607(c)(3) (1982). In 1980 the United States had instituted suit seeking an injunction to force Reilly to take action to abate soil and groundwater contamination. During the pendency of the litigation in which Reilly contested the necessity of the expensive remedy sought, an administrative order was issued by the Environmental Protection Agency (EPA)

requiring Reilly to construct and maintain a water treatment system for water withdrawn from local wells. The order subjected Reilly to treble damages for failure to comply without sufficient cause. In ruling on the motion of Reilly for a preliminary injunction to prevent the accrual of penalties pending judicial review of the propriety of the relief ordered, the court denied the motion on the ground that a good faith defense to the validity of an EPA cleanup order is sufficient to avoid imposition of punitive damages and, thus, upheld the punitive damages provision of CERCLA against the due process challenge. After noting that the "central teaching of the Ex Parte Young line of due process decisions is that a person has a right to challenge the validity of an agency order affecting his affairs without being forced to pay exorbitant penalties," the court found that a good faith defense to the validity of the EPA order is sufficient to avoid imposition of punitive damages. 606 F. Supp. at 421.

However, due process attacks on a civil penalty provision have generally been rejected by the courts where the appellant seeking judicial review has failed to avail itself of the opportunity to obtain a stay of the effect of the administrative order. In St. Louis, Iron Mountain & Southern Ry. Co. v. Williams, 251 U.S. 63 (1919), an early case applying the principle of Ex Parte Young, the Court was faced with a challenge to the constitutionality of an Arkansas statute regulating railroad rates based in part on the ground that it violated due process by imposing a penalty so severe as to preclude the railroad from exercising its right to judicial review in order to challenge the validity of the rate as confiscatory. The Court rejected the due process claim on the ground that if the railroad regarded the rate as confiscatory "the way was open to secure a determination of that question by a suit in equity against the Railroad Commission of the State, during the pendency of which the operation of the penalty provision could have been suspended by injunction." 251 U.S. at 65 (citations omitted). In Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937), the Court rejected a due process challenge by a pipeline company to a state administrative order on the ground of potential liability for cumulative penalties pending judicial review noting the company had failed to request a stay of the order:

> As the Act imposes penalties of from $500 to $2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process, Ex Parte Young, 209 U.S. 123, 147 * * * , but no reason appears why appellant could not have asked the commission to postpone the date of operation of the order pending application to the commission for modification. Refusal of postponement would have been the occasion for recourse to the courts. But appellant did not ask postponement. [Citations omitted.]

302 U.S. at 310. The Court noted that a temporary injunction was not necessary to protect the appellant from penalties pending final resolution of the suit, as the commission agreed (subsequent to commencement of litigation) not to enforce the order before issuance of the decision of the lower court on the application for injunction, and because the administrative order had been further stayed by process of the courts pending the decision on appeal.

The Court had further occasion to rule on the effect of due process limitations on the imposition of civil penalties for noncompliance with an administrative order pending judicial review of the order in St. Regis Paper Co. v. United States, 368 U.S. 208 (1961). Noting that after entry of the notices of default by the Commission the petitioner might have sought relief itself before the penalties began to accrue, the Court held:

> As was said in United States v. Morton Salt Co., 338 U.S. 632, 654 (1950), "we are not prepared to say that courts would be powerless" to act where such orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity. There the record did not present and the Court did not determine "whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order." Similarly, as this matter comes here now, the petitioner has pursued none of these remedies, and we could not therefore say that it had "no chance" to prevent the running of the forfeiture pending a test of the validity of the orders. Cf. United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 37 (1952); Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 310 (1937).

368 U.S. at 226-27.

Other courts have also recognized the availability of equitable relief. In Floersheim v. Engman, 494 F.2d 949 (D.C. Cir. 1973), a case cited by appellant in support of its due process objection, the court noted:

> It is by now settled doctrine that a person may have relief in equity to avoid invalid official action where the risk of penalties, if he is remitted to defense of enforcement actions, is so coercive as to be a denial of due process. Ex Parte Young, [supra]. Equitable doctrine has been advanced with the presumptions of reviewability in the Administrative Procedure Act as to

> agency regulations or orders that have presently compulsive and coercive effects. Abbott Laboratories v. Gardner, [supra.]

494 F.2d at 954.

Applying these principles, we must reject the contention that assessment of a civil penalty for failure to comply with the royalty payment order of June 11, 1984, would be violative of due process where appellant has failed to do that which is necessary to obtain a stay of the decision pending judicial review. Prior to entry of the final Departmental order of June 11, 1984, the earlier orders of July and October 1983 were subject to administrative review within the Department. See 30 CFR Part 290. As noted above, such an order may be suspended pending appeal upon the written authorization of the Director, MMS, based on a finding that such a suspension will not be detrimental to the interests of the United States and the submission and acceptance of a bond deemed adequate to protect the United States from loss. 30 CFR 243.2 (formerly codified at 30 CFR 221.66 (see note 2, supra)). In a different case involving this same appellant, this Board reversed a denial of a request for a stay of a payment order under 30 CFR 243.2 in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raised a bona fide legal issue, lessee was faced with the threat of irreparable injury if the stay was not granted, it appeared the threatened injury to the lessee outweighed any potential harm the stay might cause the lessor, and it did not appear from the record that a stay was contrary to the public interest. Marathon Oil Co., supra. The Board decision was predicated in significant part on a of any "reason apparent from the record in this case why an adequate indemnity bond will not suffice to protect the interest of the United States in guaranteeing payment." 90 IBLA at 247, 93 I.D. at 12 (footnote omitted). In support of its holding, the Board noted that under the Administrative Procedure Act, 5 U.S.C. | 704 (1982), and Departmental regulations, 43 CFR 4.21, the failure to stay the order requiring payment would make it a final Departmental decision subject to immediate judicial review and concluded that the public interest is not generally served by short-circuiting the administrative review process within the Department. 90 IBLA at 248, 93 I.D. at 13. 6/

Although issuance of the final Departmental decision by the Assistant Secretary on June 11, 1984, precluded further administrative review, this not only verified that the case was then ripe for judicial review, but also allowed appellant to avail itself of the remedy of a judicial stay pending review by the court pursuant to 5 U.S.C. | 705 (1982). 7/ Pursuit of this remedy would have allowed the Department to argue before the court the need to enforce the decision pending appeal. Further, it would have placed the court in a position to evaluate the need for a stay pending judicial review in view of the appellant's likelihood of success on the merits, the threat

6/ It appears from the record appellant sought an administrative stay subsequent to the October 1983 order, but not the July 1983 order. Apparently no decision was issued in response to the stay request. Since the civil penalty assessment did not commence until 30 days after the final Departmental decision of June 11, 1984, which was not subject to further administrative review, we need not consider the applicability of civil penalties during the pendency of an administrative stay request.

7/ The remedy of a judicial stay was apparently available to appellant from Dec. 6, 1983, when Marathon and the Department stipulated in the district court suit that Marathon need not further exhaust any available administrative remedies regarding the royalty valuation orders.

of irreparable injury to appellant, the potential harm to the nonmoving parties, and the public interest. See Placid Oil Co. v. United States Department of the Interior, 491 F. Supp. at 905. In light of the availability of a stay pursuant to the provision of 5 U.S.C. | 705 (1982) pending judicial review, we are unable to afford relief from the assessment of civil penalties on the basis of appellant's due process objection where appellant has failed to avail itself of this remedy.

We recognize that a motion for preliminary injunction and for a judicial stay of administrative action was filed with the district court on November 5, 1984. Although appellant asserted therein it was "prepared to post a bond with this Court sufficient to secure the payment of the total amount of royalties being sought by the Federal Defendants in this action together with interest thereon," there is no indication in the record that an indemnity bond was ever filed to protect the royalty interest holders against loss of royalty and interest on late payments. This lack of a tender of payment, either in the form of a bond or an escrow deposit, is a critical element distinguishing this case from two of the three cases cited by appellant for the principle that payment of the amount assessed by MMS has not always been held to be indispensable by the Board or the courts.

In Marathon, as noted above, the Board reversed a refusal to consider an acceptable bond in the absence of apparent risk of damage to the lessor's interest if an acceptable bond is provided. Similarly, the temporary restraining order issued by the court in Conoco, Inc. v. Watt, supra, was predicated in part on a finding that deposit of the funds into the court would adequately protect the Department's interest in collection of the amount of penalty due. 559 F. Supp. at 630.

In this case, the critical interest at risk and unprotected was that of the United States and the Native corporations in receipt of the royalties to which they were entitled on gas sold from the Kenai leases. This interest was unprotected from the time of appellant's rollback of the royalty payments in April 1983 to the late payment of the additional royalty owed on the day of the hearing in June 1985. Had appellant timely pursued a temporary restraining order before the district court, the court could have considered a stay of the royalty payment order to the extent deemed appropriate by the court conditioned upon protection of the royalty interest through provision of a bond or escrow deposit. See 5 U.S.C. | 705 (1982); Fed. Rules Civ. Proc. Rule 65. In this regard, we note that Rule 65(c) provides in pertinent part that:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

In the absence of evidence of a tender by Marathon of some type of acceptable security for the payment of the royalty obligation in support of its motion for preliminary injunction, we are unable to conclude that application of the civil penalty provisions of FOGRMA offends due process limitations. This follows from the availability of a stay pending administrative review under 30 CFR 243.2 upon the posting of an acceptable bond and the further availability of a stay after a final administrative decision pending judicial review under statutory authority such as that provided by 5 U.S.C. | 705 (1982), conditioned upon providing such security as the court may deem adequate. The availability of this relief means that a party need not be intimidated from pursuing its right to judicial review by the threat of a burdensome cumulative penalty.

The implementing regulation provides scant guidance regarding the amount of any penalty to be assessed: "The penalty amount shall be determined by MMS taking into account the severity of the violation and the person's history of noncompliance." 30 CFR 241.51(c). There is no indication in the record that any discretion was exercised in setting the proposed penalty amount at the statutory maximum in the September 29, 1984, civil penalty notice (Exh. 12). Indeed, at this stage of the process prior to a hearing, it may be difficult for MMS to ascertain many of the facts relevant to the amount of any penalty to be imposed.

[4] Appellant asserts that the provisions of section 109(c) of FOGRMA require the Department to make a rational determination of the penalty amount apart from its finding that the violation was willful. We agree that this conclusion is supported by the requirement that the Secretary shall state on the record the reasons for his finding as to the amount of the penalty and as to whether and to what extent the penalty should be remitted or reduced. 30 U.S.C. | 1719(i) (1982).

As a threshold matter, we must reject appellant's contention that the determination of the amount of the civil penalty is controlled by the Department's enforcement policy on civil penalties under FOGRMA approved April 1, 1986. Review of the terms of the policy make it clear that it pertains to civil penalties levied under 30 CFR 241.51(a) rather than the separate provisions for civil penalties for intentional violations set forth at 30 CFR 241.51(b). It is the latter regulation involving knowing and willful violations under section 109(c)(1) of FOGRMA which is at issue in this case.

Judicial precedents under other statutes authorizing cumulative civil penalties for violation of administrative orders offer significant guidance in exercising the discretion required in determining the amount of the civil penalty. In United States v. Louisiana-Pacific Corp., 554 F. Supp. 504 (D. Ore. 1982), 8/ a civil penalty action brought by the United States for violation of a Federal Trade Commission (FTC) divestiture order involving a potential civil penalty of $10,000 per day, the court recognized five factors in setting the penalty amount: the good or bad faith of the appellant in violating the order, the injury to the public resulting from the violation, the benefit derived by appellant from the violation, the ability of appellant to pay a penalty, and the need to deter similar behavior and vindicate the FTC and the integrity of its orders. 554 F. Supp. at 507. 9/ These same factors have been utilized by other courts as well in assessing

8/ Rev'd in part and vacated in part on other grounds, 754 F.2d 1445 (9th Cir. 1986).

9/ On appeal, the civil penalty assessment was vacated on the ground the FTC had improperly rejected summarily appellant's petition for modification of the order. 754 F.2d at 1445.

civil penalties. See United States v. Phelps Dodge Industries, Inc., 589 F. Supp. 1340, 1362 (S.D.N.Y. 1984).

Applying these factors to the context of the present appeal, we first examine whether Marathon's response to the June 1984 royalty payment order manifested good faith. In April 1983 after receipt of the letters explaining the net-back method of valuation to be used for LNG feedstock gas, appellant simultaneously filed suit to obtain a court determination of the amount of its royalty obligation and unilaterally rolled back its royalty valuation to a level approximately one-third of the valuation under the Phillips formula previously used. This was done with the knowledge that the valuation under the newly ordered net-back formula would be something in excess of $3 per Mcf, a valuation approximately five times that used after the rollback. Subsequently, when the July 1983 MMS royalty order directing use of the net-back method of valuation effective August 1 was received, no effort was made to comply with the order and appellant adhered to the rolled back valuation. The testimony reveals this was a decision reached by high level corporate officials which was based in part on the belief the issue was now within the jurisdiction of the court and in part over concern for the ability to recoup any royalty overpayment from CIRI. Although a protective administrative appeal was filed noting the pending litigation (Exh. 190), it does not appear that a stay of the effect of the order was requested.

Thereafter, upon receipt of the Assistant Secretary's royalty order of June 11, 1984, Marathon again refused to comply notwithstanding the admonition therein that the obligation to pay royalties determined by MMS to be due and owing is not suspended by an administrative or judicial appeal of the order. Settlement negotiations with Departmental officials broke down due in large part to the attitude of Marathon officials that compliance with the royalty valuation orders was excused pending an ultimate decision from the court. However comforting this erroneous perception was, it was not until after the Department issued the civil penalty notice on September 29, 1984, and filed its counterclaim in the district court for cancellation of the subject leases that Marathon filed a motion for preliminary injunction in the court requesting a stay of the royalty orders. Further, there is no evidence that any bond or other security to protect the royalty interest holders for the value of the LNG feedstock gas removed from the leases and sold was ever filed, and the royalty order was never stayed.

We wish to make it clear that the filing of suit for judicial review of a final Departmental decision regarding royalty valuation does not constitute bad faith. However, the failure to comply with a royalty payment order in the absence of a stay on administrative appeal pursuant to the regulations at 30 CFR 243.2 or, on appeal from a final Departmental decision to the courts, in the absence of a court-ordered stay of the effect of the administrative decision pending judicial review, pursuant to 5 U.S.C. | 705 (1982) or other authority, may properly be construed as an absence of good faith. This conduct may be construed as bad faith where, as occurred in this case, the failure to comply is coupled with both a failure to obtain a stay of the administrative decision and a unilateral rollback of the royalty valuation to a substantially reduced level.

With respect to the injury to the public resulting from the violation, we must conclude that evidence of actual injury was not established by the record at the hearing. 10/ Under section 111(a) of FOGRMA the Secretary is required to charge interest on payments not received on the date due. 30 U.S.C. | 1721(a) (1982); see 30 CFR 218.102. Specifically, section 111(a) provides that interest shall be charged on such payments at the rate applicable under section 6621 of the Internal Revenue Code of 1954. An explanation of the basis for charging interest at this rate is offered in the legislative history:

> This section established interest penalties for late pay-ments in the cases where royalty payments are not received by the Secretary on the date that such payments are due and when the Secretary fails to make payment to a State or Indian tribe on the date required. The interest penalty so charged is at the rate applicable under section 6621 of the Internal Revenue code of 1954, a rate based in part but higher than the prime interest rate. Such interest penalties are deemed part of royalty payments. Imposition of such high penalties against those owing money to the United States is to remove the incentives such persons may have to hold the money owned and invest it rather than pay it on time to the MMS. Also, the high penalty required of the United States should be a strong incentive to the MMS to disburse moneys under the mineral leasing laws of 1920 promptly.

H.R. Rep. No. 859, 97th Cong., 2d Sess. 36, reprinted in 1982 U.S. Code Cong. & Admin. News 4268, 4290. Thus, as a result of the delay in payment, the public has been compensated by the payment of interest on the unpaid

10/ We note, however, that CIRI has asserted in its amicus curiae brief that 70 percent of the royalties owed to CIRI were subject to sharing with the other Native regional corporations and, in turn, with Native village corporations within each region. CIRI contends in its brief that the royalty "revenue stream may be critical to the survival of many of the ANCSA Native Corporations, and, thus, to the ultimate success of ANCSA."

funds at a substantial rate higher than the prime rate of interest on borrowed funds. Hence, we cannot conclude that injury to the public has been established on the record in this case. For the same reason, we are unable to find that Marathon benefitted significantly from its delay in payment of the royalty obligation.

With respect to the question of the ability of Marathon to pay a penalty, we find the record to be inconclusive except for the evidence recognized by the Administrative Law Judge that the LNG gas project was substantially profitable.

An additional factor we find appropriate in determining the amount of the civil penalty to be assessed is the need to deter similar behavior and to uphold the authority of MMS and the integrity of its royalty payment orders. This objective is consistent with the purposes of Congress in enacting FOGRMA. Thus, section 2(b) of FOGRMA provides, in pertinent part, that:

> (b) It is the purpose of this Act--
>
> * * * * * * *
>
> (2) to clarify, reaffirm, expand and define the authorities and responsibilities of the Secretary of the Interior to implement and maintain a royalty management system for oil and gas leases on Federal lands * * *;
>
> (3) to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States * * *.

30 U.S.C. | 1701(b)(2) (1982). Although Marathon was seeking judicial review of the royalty valuation orders issued by the Department, it not only failed to comply with those orders, but flaunted them by rolling back the royalty valuation to a value approximately one-third of that used prior to the orders. The absence of discernible damage to the public interest on the record in this case in view of the subsequent payment with interest does not negate the substantial risk of loss attendant upon the failure to pay royalty timely on the full value of oil and gas removed from the ground. Unforeseen circumstances, e.g., bankruptcy, a not unheard of event in the oil and gas industry in recent years, threaten the public interest in recovery of full royalty value. In the absence of the tender of an acceptable bond in support of an application for a stay, either before the Department or the courts, there is no opportunity for either the Department or the courts to ensure the public interest is protected pending completion of administrative and/or judicial review. Allowing a payor to unilaterally determine the level of royalty payment pending final resolution of a royalty dispute as happened here is clearly unacceptable. Consequently, we find a substantial need to uphold the authority of MMS and the integrity of its orders, as well as to deter conduct such as that engaged in by Marathon in the present case.

Accordingly, we hold that the absence of apparent injury to the public interest coupled with the lack of any apparent benefit to Marathon from the failure to timely comply with the royalty payment orders are mitigating factors which tend to support a reduction in the amount of the civil penalty. On the other hand, the lack of good faith manifested by appellant militates

in favor of a substantial penalty. Further, the need to uphold the authority of MMS to require timely payment of royalty on oil and gas production
in accordance with its value determination, in the absence of approval of a stay, and the corresponding need to deter noncompliance tend to support a substantial penalty.

Balancing these factors, we find that the amount of the civil penalty in this case is properly assessed at 50 percent of the proposed amount (the statutory maximum) or the sum of $10,220,000.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed as to the finding of a knowing and willful failure to comply with the order; affirmed as to the finding of the applicability of the provisions of FOGRMA; and, affirmed as modified as to the amount of the civil penalty assessed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge