Written Testimony of Jonathon Travis
Principal, Severance Tax / Royalty
Ryan, LLC

Before the House Committee on Natural Resources
Subcommittee on Energy and Mineral Resources

Re: H.R. 10005, the Expedited Appeals Review Act

November 19, 2024

Introduction:

Chairman Stauber, Ranking Member Ocasio-Cortez, and members of the subcommittee:

Thank you for the opportunity to testify in support of H.R. 10005, the Expedited Appeals Review Act (Act). The Act is a positive piece of legislation that benefits all stakeholders utilizing federal lands and waters. I commend Rep. Hageman for introducing this legislation and I thank the Committee for taking up this important matter this session. I sincerely hope that it will move forward through the legislative process.

My name is Jonathon Travis, and I am a principal for the severance tax and royalty practice at Ryan, LLC. Ryan is the world's largest firm dedicated to providing tax consulting services. With headquarters in Dallas, Texas, we perform tax services in every state and in nearly 70 countries. From the calculation of property taxes at the local level to assisting taxpayers in obtaining historical tax credits, Ryan provides a wide array of tax services and interacts with various taxing authorities daily. We help our clients get to fair answers faster, which benefits both the taxpayer and the taxing authority. And perhaps more specifically, our job is to ensure our clients pay only the tax they owe—not a penny more, and not a penny less.

Our severance tax and royalty practice, based in Houston, Texas, focuses exclusively on calculating taxes or royalties owed to the government for the production of oil and gas. From the Bakken to the deepest waters of the Gulf, Ryan's wide array of oil and gas clients account for the majority of production throughout the United States. This provides us with a unique perspective on identifying best practices for the collection of taxes and royalties and firsthand experience with the issues the Act aims to govern.

It is with this perspective that I approach my testimony on the Expedited Appeals Review Act. This important piece of legislation will allow for efficiency in the processing of appeals pending before the Department of the Interior by giving appellants a mechanism to ensure their issues are heard on the merits, with a full record and through a truly independent appeals process—the absence of this mechanism today hampers the efficient collection of taxes and royalties.

I'll quickly explain the current process and proposed changes so you can see why this legislation is so critical to appellants.

Overview of the Interior Board of Land Appeals:

The Interior Board of Land Appeals (IBLA) is an administrative court within the Department of the Interior's Office of Hearing and Appeals. The IBLA oversees appeals of agency actions, including those from the Bureau of Land Management, Bureau of Ocean Energy Management, Bureau of Safety and Environmental Enforcement, Office of Natural Resources Revenue, and Office of Surface Mining Reclamation and Enforcement.[1] The mission of the IBLA is "to provide an impartial forum within the Department of the Interior for the fair resolution of disputes involving public lands and natural resources under the Department's jurisdiction."[2] The IBLA is not statutorily defined; rather, the entire court is regulatorily constructed.

Organizationally, the IBLA is headed by a chief judge, with a varying number of supporting administrative judges. Currently, there are eight judges in total, three of whom were appointed in the last seven months.[3] There is no set minimum or maximum to the number of judges that may serve on the IBLA, nor are the lengths of service defined.[4]

Annually, the IBLA receives an average of 290 appeals.[5] The majority of these appeals pertain to Bureau of Land Management matters (64% in 2023). On average, the IBLA resolves 270 appeals per year. However, this apparent level of processing is misleading. Per the IBLA, 80% of the cases resolved are resolved on jurisdictional or procedural grounds (such as untimely appeals filed or a failure to state the grounds of the appeal). For those cases decided on the actual merits, of which there were only 34 in FY 2023, only 2 were decided in favor of the appellant. That is a 94% loss rate.

As of the end of October, there were over 600 pending appeals before the IBLA—with the oldest dating back to 2014. The statuses of these cases vary. While some are suspended, meaning the parties are attempting to settle the case, many of the oldest cases are "awaiting action." These 229 cases are the most concerning, as it means the parties have completed briefing on the issues, but the IBLA has yet to assign a staff attorney or administrative judge to the case. The "awaiting action" backlog dates to 2018.

These statistics demonstrate that the number of unresolved cases will continue to grow annually.

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[1] 43 C.F.R. § 4.1(b)(2).
[2] U.S. Dep't of the Interior, Annual Report of the Interior Board of Land Appeals Fiscal Year 2023, at 3, available at: https://www.doi.gov/media/document/ibla-annual-report-fy23.
[3] See About the Interior Board of Land Appeals, U.S. DEP'T OF THE INTERIOR, Nov. 7, 2024, https://www.doi.gov/oha/about-interior-board-land-appeals.
[4] See 43 C.F.R. § 4.2
[5] U.S. Dep't of the Interior, Annual Report of the Interior Board of Land Appeals Fiscal Year 2023, at 6, available at: https://www.doi.gov/media/document/ibla-annual-report-fy23.

Practice Problems Before the Interior Board of Land Appeals:

In addition to the ever-growing backlog, further issues stem from the actual practice before the IBLA, most notably with the presentation of the administrative record.

The administrative record is comprised of the documents that were "compiled during the officer's consideration of the matter leading to the decision being appealed."[6] It is the fundamental justification for how the agency arrived at its determination. The IBLA views this record as the factual basis for which they will decide the case, and while "parties may supplement the record to correct an inadvertent omission," such supplementation is not permitted when "the agency did not consider [the supplemented information] when it made the decision on appeal."[7] That said, the IBLA may "accept newly submitted information and, to the extent it is deemed reliable and relevant," "consider that information during the [IBLA's] review of the appeal."[8]

Thus, the IBLA's approach to the administrative record assumes the following decision-making process occurred:

1. The agency requests all relevant information from the party seeking a decision.
2. The agency reviews all relevant statutes and regulations on the matter.
3. The agency considers this body of information and then arrives at the decision.

This approach may, at first glance, appear appropriate. However, there are two fundamental flaws with the IBLA's dependence on the agency-curated administrative record. First, these records are solely within the control of the agency; the agency determines what information is included and excluded. Second, even if the record has been properly compiled, much of it will be withheld from the appellant for "deliberative process" purposes.

At Ryan, we have seen firsthand the consequence of these flaws: *post-hoc* rationalization of decisions, and incomplete administrative records. Agencies within the Department of Interior—contrary to the IBLA's regulations—are compiling administrative records *after* an officer's consideration of an appealed matter and excising otherwise exculpatory documents from the record.

And yes, we have examples. We have obtained records demonstrating that senior agency officials at the Office of Natural Resources Revenue directed employees to force royalty payors

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[6] 43 C.F.R. § 4.411(d)(3).

[7] U.S. Dep't of the Interior, Interior Board of Land Appeals: Procedures and Practice Manual, at 4, available at: https://www.doi.gov/sites/doi.gov/files/ibla-procedures-and-practices-manual-apr-2023.pdf.

[8] Id.

into the appeals process rather than obtain relevant information prior to a decision being made. Echoing these emails, senior auditors directed staff to "delete emails" and to avoid filing relevant documentation into the administrative record. Moreover, once an appeal is underway before the IBLA, we have found thousands of pages of records where evidence refuting the agency's pre-determined outcome was intentionally removed from the record. These actions demonstrate how the agencies are undermining the impartiality of the IBLA by providing only records that support their decisions.

And while we've certainly seen ONRR's current Director take steps to address this type of improper behavior going forward, which I commend, the fact remains that the appeals process itself is structurally and procedurally flawed, making the cost of such bad acts more severe than is reasonable, both in legal fees and in lost time.

Unique Issues with Federal Royalty Matters:

Given the backlog, numerous administrative record issues, and the complexity of federal royalty valuation arguments, properly addressing federal royalty cases frequently requires more resources from the appellant and the IBLA. Put simply, federal royalty cases are challenging. However, unlike other matters that come before the IBLA, federal royalty appeals have a provision that uniquely benefits the Office of Natural Resources Revenue.

Under the Royalty Simplification and Fairness Act of 1996, Congress imposed a 33-month period on the consideration of royalty appeals. Once this period expires, the appealed decision is deemed final and found in the Agency's favor if the underlying amount of the appeal is greater than or equal to $10,000.[9] While this allows the appellant an opportunity to seek judicial review, the standard of review for the decision is not *de novo*; rather, the standard for overturning this deemed decision is whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[10] Moreover, the administrative record is set once it arrives at the District Court, full of the problematic omissions I discuss above and with few opportunities to supplement the record. In 2023 and 2024, the IBLA has lost jurisdiction due to the expiration of the 33-month period in seven cases, whereas zero federal royalty cases have been decided on the merits during that time period.

In matters that we have witnessed before the IBLA, this appeals process has permitted the Office of Natural Resources Revenue to continue into the District Court with faulty administrative records. Indeed, when Ryan presented the IBLA judges with evidence of ONRR curating the administrative record, the IBLA found that the Office of Natural Resources Revenue acted in bad faith and with bias in the compilation of the administrative record. Similarly, the IBLA has chastised the agency for failing to provide the administrative record. Here is a short excerpt from that decision:

[9] 30 U.S.C. § 1724(h).
[10] 5 U.S.C. § 706(2).

> ONRR[] . . . must also address why the Board should not summarily set aside the decision for violating ONRR's regulation at 30 C.F.R. § 1290.105(f), which states that '[t]he ONRR Director will review the record and render a decision in the case.' Without the record the Director purportedly reviewed, the Board has no basis to confirm that the regulation has been followed. If we cannot confirm that the ONRR Director 'review[ed] the record,' as required by ONRR's regulation, then the Director's decision must be set aside.'[11]

Despite these findings by the IBLA, ONRR exploits the existing backlog of cases to receive *de facto* "wins" at the IBLA simply as a result of the IBLA not ruling on the merits of the matters under appeal. To add insult to injury, this mode of loss also serves to ensure that the agency's delayed and faulty decision will be given deference in the District Court.

Thus, after waiting nearly three years for a decision, appellants are then faced with an often insurmountable hurdle when appealing royalty cases to the IBLA. The existing process stacks the deck against appellants and unreasonably delays justice for all parties.

The Effect of the Expedited Appeals Review Act:

While the Expedited Appeals Review Act would not resolve ALL the issues I have outlined, at its heart the bill aims to restore fairness to the IBLA process by addressing the timeliness and evidence issues plaguing the IBLA and those it governs. No longer will appellants be forced to endure an indefinite process before the IBLA, in which the appellants must confront an administrative record that has been curated to support the agency's underlying decision.

First, the Act allows for the imposition of a timeline on how long the IBLA has to decide a matter. At a minimum, the Act allows the IBLA eighteen months to decide a matter. Notably, this does not mandate every appellant exercise this right—if an appellant would prefer to pursue the regular IBLA process or to attempt settlement with the agency, it is within their discretion. If an appellant does exercise their right to expedited review, then it triggers a six-month clock for the IBLA to make a determination. There is no time limit for an appellant to file the notice for expedited review; an appellant may file the notice on day one or on the 60th month. Thus, by extending this right to the appellant, it may better allow for the IBLA to prioritize those 221 cases that are "awaiting action."

Second, the bill better ensures that the final decision will be issued by a neutral arbiter. As previously noted, the IBLA prides itself on its impartiality. If it is able to make a substantive determination within six-months, then the appeal to the District Court would proceed as it currently does: with deference attaching to the agency decision and with the appellant having limited opportunities to correct the record at the District Court. Failing this, however, the Act sets up an opportunity for impartiality at the District Court level. If the IBLA does not make a decision within six months, while the pending decision is still deemed to be ruled in the agency's favor, deference does not attach to this decision, allowing the District Court that oversees the

[11] Record on file.

appeal to review the matter "*de novo*." This better ensures fairness and a complete record. It gives an appellant the opportunity to supplement the administrative record, and to ensure its arguments are heard at the same level as the department's.

The Act will improve certainty and fairness to a process that currently lacks those attributes for various interests, including renewable energy, oil and gas, grazing, recreation and, yes, environmental sectors. Justice delayed is justice denied, and this bill makes significant strides towards timely justice and greater government efficiency for all parties.

Conclusion:

Thank you for hearing this testimony on why the Expedited Appeals Review Act is much-needed for the appeals process before the IBLA. This Act will ensure timely resolution of appeals of agency actions for every industry with interests attached to federal lands and waters.

Ryan commends the introduction of this legislation and supports its passage and consideration this session.