Nos. 21-8047 & 21-8048

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MERIT ENERGY COMPANY, LLC, and MERIT ENERGY OPERATIONS I, LLC,

Plaintiffs/Appellants – Cross Appellees,

vs.

DEBRA HAALAND, in her official capacity as Secretary of the Interior, U.S. Department of the Interior, and the U.S. OFFICE OF NATURAL RESOURCES REVENUE,

Defendants/Appellees – Cross Appellants.

Appeal from the United States District Court for the District of Wyoming
Hon. Scott W. Skavdahl, U.S. District Court Judge
District Court Case No. 20-CV-32-SWS-DB

APPELLANTS' REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

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The Brief for Appellees/Cross-Appellants (hereinafter the "Secretary") does not differentiate between arguments responding to Merit's appeal and arguments relating to the Secretary's cross-appeal. Merit addresses the Secretary's arguments in the context of the respective appeals.

REPLY IN SUPPORT OF MERIT'S APPEAL

I. Under the APA, No Deference Is Given to Legal Conclusions.

The Secretary maintains that judicial review of her actions in forcing Merit to pay royalty based on IBMP prices is subject to a "highly deferential" standard of review, and this Court cannot "substitute its judgment" for that of the Secretary. Secretary's Brief ("Sec. Br.") at 20–21. The dispositive question in Merit's appeal, however, is a legal one: whether the Secretary's IBMP regulations are "inconsistent with" the contractual terms of Merit's leases concerning calculation of a "major portion" price. *See* Merit's Opening Brief ("Op. Br.") at 23–24; Sec. Br. at 35. Under the Administrative Procedure Act ("APA"), review of legal conclusions is subject to the "not in accordance with law" standard and no deference is given to the Secretary. 5 U.S.C. § 706; *Gardner-Cook v. Sec'y of HHS*, 59 Fed. Cl. 38, 44 (2003) ("review of legal conclusions is not a question of weighing the evidence and deference is not at issue").

II. The IBMP Regulations Are Inconsistent with Merit's Lease Terms.

The Secretary's position that the IBMP regulations are consistent with Merit's lease terms boils down to the following: (1) the lease terms themselves are not defined and therefore pose no limitation on the IBMP regulations (Sec. Br. at 36); and (2) because the IBMP regulations were the product of a "Negotiated Rule," it follows that the regulations are consistent with the leases (Sec. Br. at 40). Neither argument has merit.

First, it does not matter that most of the terms in the major portion provision of the leases are not separately defined.[1] Those terms have a plain and unambiguous meaning; no further definition is needed. *See* Op. Br. at 26–27. Under the leases, the Secretary has the discretion to require Merit to pay royalty based on "the highest price paid or offered . . . at the time of production for the major portion of the oil of the same quality and gravity . . . produced, sold, and saved from the area where the Leased Premises are situated." Aplt. App. Vol. III at A-607; Vol. IV at A-651. While the Secretary has discretion to require Merit to pay royalty based on the "major portion" price as determined by this contractual language, she does not have discretion to impose a royalty value that is based on

[1] The Secretary mistakenly states (at 36) that none of the relevant terms are defined in the leases. The leases define the "Leased Premises" as specific "tracts of land in the Reservation." Aplt. App. Vol. III at A-603; Vol. IV at A-647. The Leased Premises needed to be defined, but the other terms did not.

prices for a different kind of crude oil sold at Cushing, Oklahoma, with adjustments that do not reflect or replicate "*the highest price paid or offered*" for oil of same type produced on the Reservation "*at the time of production*."

Courts routinely interpret terms in contracts that are not separately defined. Where those terms are not ambiguous, courts apply their plain meaning. *See*, *e.g.*, *Citizen Potawatomi Nation v. Okla.*, 881 F.3d 1226, 1239 (10th Cir. 2018) ("if the terms of a contract are not ambiguous, this court determines the parties' intent from the language of the agreement itself"). Where the terms are ambiguous, courts determine the mutual intent of the parties. *See Atl. Richfield Co. v. Farm Credit Bank*, 226 F.3d 1138, 1151 (10th Cir. 2000) (where contract is ambiguous, courts "determine the mutual intent of the parties at the time of contracting") (internal citations omitted).

But courts do not allow one party to a contract to define the terms any way they want, just because the terms are not separately defined. *See*, *e.g.*, *Woodcock v. Chem. Bank, NYSHESC (In re Woodcock)*, 45 F.3d 363, 367 (10th Cir. 1995) ("A party cannot . . . unilaterally modify . . . provisions of a contract."); *see also Hamilton Sec. Advisory Servs. v. United States*, 2004 U.S. Claims LEXIS 147, at *9 (Fed. Cl. June 14, 2004) ("The Government fails to appreciate, or in this case declines to recognize, that the court may not substitute words in the contract with those suggested by one of the litigating parties in order to provide an alternative

meaning to that which the plain language dictates."). And even where contractual terms are ambiguous (which is not this case), courts will rely on the parties' prior construction of the contract as compelling evidence of their mutual intent. *See*, *e.g.*, *Baum v. Great W. Cities, Inc.*, 703 F.2d 1197, 1205 (10th Cir. 1983) (where contract is ambiguous, "extrinsic evidence involving actions and conduct of parties" is used to ascertain parties' intent). Here, the Secretary previously interpreted and applied the major portion provision in Merit's leases for some 20 years in complete accordance with Merit's position in this litigation. *See* Op. Br. at 4–5.

The *Pawnee* case discussed in Merit's opening brief (at 24–25) and the Secretary's brief (at 39) demonstrates that the unambiguous terms of the leases govern calculation of the major portion price. *See Pawnee v. United States*, 830 F.2d 187, 191–92 (Fed. Cir. 1987). There the Indian Tribes insisted that the Secretary calculate the major portion price based on the highest prices paid in the county, not the area where the leased premises were located. *Id.* at 191. In that case, the Secretary stuck to the language of the leases and refused to do so. *Id*. The court upheld the Secretary. *Id.* at 192. The Secretary tries to turn this case against Merit, arguing that Merit's position is similar to the Tribes' position rejected in *Pawnee*. The Secretary has it backwards. Unlike in *Pawnee*, here the

Secretary is trying to deviate from the language of the leases. The point of *Pawnee* is that the lease language controls calculation of a major portion price.[2]

Second, the fact that the IBMP regulations were adopted as a "Negotiated Rule" does not aid the Secretary's position. Regardless of how the IBMP regulations were adopted, or who served on a committee to develop them, the regulations cannot legally apply to Merit's leases where they are inconsistent with the terms of the leases. Op. Br. at 23–24. As provided in the APA, "A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures." 5 U.S.C. § 570; *see also Fort Peck Hous. Auth. v. United States HUD*, 367 F. App'x 884, 895 n. 14 (10th Cir. 2010) (citing 5 U.S.C. § 570) ("[A] rule developed through negotiated rulemaking shall not be 'accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.'"); *United Keetoowah Band of Cherokee Indians of Okla. v. United States HUD*, 567 F.3d 1235, 1246 (10th Cir. 2009) (noting "courts are to set aside agency actions that are 'not in accordance with law'" and "[t]he fact that

[2] *Pawnee* refers to the "governing regulation and the terms of the leases." 830 F.2d at 191. When *Pawnee* was decided, the Secretary's major portion regulations dovetailed with the language of the leases. *See* Op. Br. at 4–5.

the regulatory scheme was developed through a negotiated rulemaking procedure is of no relevance to this determination").

Regarding the 2015 rulemaking, the Secretary takes issue with Merit's statement that she did not consider the potential disconnect between NYMEX prices and WCS prices for asphaltic crude oil. Sec. Br. at 40–43. The Secretary's quotations from the rulemaking record do not mention the WCS index or asphaltic sour crude oil. Nor do they address potential divergences between the NYMEX and WCS indices and how the IBMP formula would account for such divergences to produce a representative market price. In any event, however one construes the rulemaking record, it fails to address the question for this Court: whether the IBMP regulations are consistent with the terms of Merit's leases.

III. Three-Month-Old Sales Prices Are Not Prices "At the Time of Production."

Even apart from whether the Secretary can use a formula to calculate major portion prices for asphaltic sour crude oil in Wyoming starting with NYMEX prices for sweet crude in Cushing, Oklahoma, to be consistent with the leases, the formula must make LCTD adjustments to the NYMEX price using prices "at the time of production." Op. Br. at 38–41. The Secretary admits that her IBMP formula makes adjustments based on prices *three months before the month of*

production. Sec. Br. at 37.[3] She defends the use of sales prices three months old as being the most "up-to-date pricing data available" for the month in which the oil is being produced. *Id*. The Secretary claims that using the most up-to-date pricing data available is consistent with the lease requirement to use prices "at the time of production."

The phrase "at the time of production" in the leases can only mean the month of production, not three months before. Op. Br. at 26–27. This is particularly true in the oil industry, when "market prices can shift dramatically from month-to-month[,]" Aplt. App. Vol. I at A-211, and when the NYMEX prices for sweet crude oil can move very differently from WCS prices for asphaltic sour crude oil. Aplt. App. Vol. IV at A-811–15. Calculating an IBMP price for asphaltic sour crude oil to be applied in the month of production and sales, based on market prices that existed three months before, ignores both commercial reality and the lease terms.

The only justification offered by the Secretary for this approach is that this is the best she can do in order to publish an IBMP price by the time production occurs. This is not a valid justification to ignore or override Merit's lease terms.

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[3] According to the Secretary, ONRR receives sales prices two months after the oil is produced and sold, and then uses those prices to calculate the IBMP for the next month. Sec. Br. at 37. For example, to calculate an IBMP for April 2020, ONRR would use sales prices for January 2020.

See Op. Br. at 40–41. There is no requirement in the leases to publish a major portion price by the time of production. For decades, the Secretary published major portion oil prices after the month in which the royalty was paid, and the lessees retroactively adjusted their royalty payments where necessary. *See* Aplt. App. Vol. II at A-300 (historically, before IBMP formula was implemented, lessees made "prior-period adjustments"). Indeed, the Secretary admits that, for natural gas produced on these same Indian leases, she publishes a major portion price after the fact and lessees adjust their royalty payments accordingly. Sec. Br. at 8. There is no reason why the Secretary cannot continue this approach for asphaltic sour crude oil on the Wind River Reservation.

Finally, except for months where sales prices exceed the IBMP, the Secretary does not even use prices from three months before the time of production to recalculate an IBMP. That is because the Secretary requires lessees to report and pay royalty on the higher of the IBMP or actual sales prices, and where the IBMP is higher, the lessee cannot even report its sales price. Op. Br. at 36 (citing 30 C.F.R. § 1206.54(b)). The result is that the Secretary does not know *any* sales prices for a month in which the IBMP is higher, and therefore cannot use those prices to recalculate an IBMP. The Secretary is left to make her 10% monthly adjustments to the Location and Crude Type Differential ("LCTD")—*without*

regard to any sales prices. This approach cannot be reconciled with the plain language of Merit's leases.

RESPONSE TO SECRETARY'S CROSS-APPEAL

The Secretary appeals two rulings by the district court: (1) that the case was ripe for judicial review, and (2) that the 10% cap on monthly adjustments to the LCTD was arbitrary, capricious, and not consistent with the terms of Merit's leases. The Court should affirm the district court's decision on both counts.

SUMMARY OF THE ARGUMENT

Ripeness: Merit is not challenging "an abstract and hypothetical potential future application" of the regulation. It is challenging the Secretary's past decision, reflected in her own regulations, to require Merit to pay royalty based on the IBMP regulations since January 2020. This decision has had a concrete and significant effect on Merit, forcing it to pay an additional $1.1 million in royalty for the first five months of 2020; the Secretary's position continues to require Merit to pay more in royalty than its leases provide.

Nor will judicial review interfere with the Secretary's resolution of Merit's pending administrative appeal of an Order for the period April 2017–December 2019. Merit's appeal to the ONRR Director has been pending for two years with no action. If and when the ONRR Director rules, Merit then will have to pursue a second administrative appeal to the Interior Board of Land Appeals ("IBLA"), an

appeal that will take several more years. Since (1) the Secretary has made her position abundantly clear in this litigation, (2) the ONRR Director and the IBLA are both subservient to the Secretary, and (3) the question presented is a legal one, there is nothing to be gained by forcing Merit to wait out years of a preordained process before obtaining judicial review.

The 10% Cap on Monthly LCTD Adjustments: The district court correctly concluded that the Secretary's use of a 10% cap on the monthly LCTD adjustment is arbitrary, capricious, and inconsistent with Merit's lease terms. The leases require a major portion price based on prices "at the time of production"; limiting the adjustments necessary to reflect those prices does not comport with the leases. The Secretary rationalizes the cap as a way to prevent volatility in royalty payments. But as the district court held, "the desire to avoid volatility is insufficient justification for ignoring inconsistent lease provisions." Aplt. App. Vol. I at A-212. Furthermore, by requiring royalty on the higher of Merit's sale proceeds or the IBMP price, the regulations do not prevent volatility in a rising market. They only prevent volatility in a declining market, which forces Merit to pay royalty on a price far higher than it can receive in the market.

I. The District Court Correctly Held That the Case Was Ripe.

The district court carefully applied this Court's test to determine whether an agency's decision is ripe for judicial review. *See* Aplt. App. Vol. I at A-200–06

(discussing *Mobil Expl. & Producing U.S., Inc. v. Dep't of Interior*, 180 F.3d 1192, 1197–99 (10th Cir. 1999), and *Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir. 2017)). The Secretary's appeal does not claim that the district court applied the wrong standard or ignored any important factors; it just disagrees with the ultimate finding of ripeness. This Court reviews the district court's conclusion de novo. *See Leathers v. Leathers,* 856 F.3d 729, 754 (10th Cir. 2017).

As the district court explained, in determining whether an agency action is ripe for judicial review, a court considers various factors. *See* Aplt. App. Vol. I at A-201–02. These factors include (1) whether the issues are purely legal, (2) whether the action is "final" within the meaning of the APA, (3) whether the action has or will have a direct and immediate impact on the plaintiff, and (4) whether judicial resolution of the issues will promote effective enforcement and administration by the agency. *Mobil*, 180 F.3d at 1197. Finding that several of the factors "weigh in Merit's favor," the district court focused its attention on whether the agency decision was "final" and whether "judicial intervention would inappropriately interfere with further administrative action." Aplt. App. Vol. I at A-201 & n.7.

As this Court stated in *Mobil*, "the finality of an administrative action depends on whether the action imposes an obligation, denies a right or fixes some legal relationship as a consummation of the administrative process." *Mobil*, 180

F.3d at 1197 (internal brackets and quotations omitted). Thus, the test for finality has two conditions: "First, the action must mark the 'consummation' of the agency's decisionmaking process . . . . And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). Courts take a "pragmatic" approach to finality. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016).

The Secretary's action forcing Merit to pay royalty on Wyoming asphaltic sour crude oil based on IBMP prices satisfies both conditions. In addition, Merit has no other adequate remedy and pursuing further administrative proceedings would be futile.

A. The Secretary's Imposition of the IBMP Formula Marks Consummation of the Decisionmaking Process.

An action of "a merely tentative or interlocutory nature" does not mark the consummation of an agency action. *Mobil*, 180 F.3d at 1198. Rather, when "a definitive agency position" becomes known and has immediate "legal force or practical effect," it may be considered a final consummation of the agency's decisionmaking. *Id.* (citing *FTC v. Std. Oil Co. of Cal.*, 449 U.S. 232 (1980)).

In *Mobil*, the court addressed whether a document request letter and administrative subpoena issued to an oil and gas lessee were final and subject to judicial review. 180 F.3d at 1195. The court held that the letter did not

consummate the agency's decisionmaking process because it "merely asked [the lessee] to keep its records for the audit period . . . and notified [the lessee] that the MMS [the Minerals Management Service, ONRR's predecessor agency] intended to initiate an audit." *Id.* at 1198. The court reasoned that "[a]t best, the letter served only to initiate further proceedings by which the MMS could determine whether Plaintiffs owed royalties." *Id.* By contrast, the court explained that, "[u]nder FOGRMA [the Federal Oil and Gas Royalty Management Act], we think such definitive decisionmaking processes would include, for example, enforcing an order or subpoena for records or determining royalties owed as a result of an audit and requiring [the lessee] to pay such royalties[.]" *Id.* at 1199.

The Secretary's action here falls within the type of action that this Court recognized in *Mobil* would constitute definitive decisionmaking—requiring the lessee to pay additional royalty. First, the 2015 IBMP regulations are final and were signed by the Deputy Assistant Secretary of the Interior. *See* 80 Fed. Reg. 24,794, 24,805 (May 1, 2015). They provide that Merit "*must* submit a monthly Form ONRR-2014 using the higher of the IBMP value determined under this section or [its] gross proceeds[.]" 30 C.F.R. § 1206.54(b) (emphasis added). It is well-established that Departmental regulations "are binding upon all Departmental officials, including the Secretary[,] and may not be waived." *Wexpro Co.*, 122 IBLA 1, 4–5 (1991); *see also Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959). In this

appeal, the Secretary does not dispute the effect of her regulations mandating that Merit pay royalty on the IBMP formula. Thus, in connection with any administrative appeal within the Department of the Interior—whether before the ONRR Director or the IBLA—Merit will not be able to obtain any relief from this regulation.

Second, in May 2019, ONRR instructed Merit that, if its leases contain a major portion provision, it "*must*" pay royalty on the higher of its gross proceeds or the IBMP price. Aplt. App. Vol. I at A-230 (emphasis added). This notice stated that it was not an appealable decision and only if ONRR issued an Order, Notice of Noncompliance, or a Civil Penalty Notice, could Merit file an appeal. *Id*. There is no procedure available to seek a stay of the requirement to pay royalty based on the IBMP price, except through appeal of an order. *See* 30 C.F.R. Parts 1243 and 1290. And as the district court found, ONRR's accounting system rejects any royalty payments that are less than the IBMP. Aplt. App. Vol. I at A-198, 203. Therefore, being forced to pay royalty on the IBMP, Merit is unable to trigger an administrative appeal absent complete non-payment, which would subject Merit to tens of thousands of dollars per day in civil penalties. *Id*. at 204. The Secretary does not dispute the district court's findings.

Third, in February 2020, ONRR did issue an Order to Merit, but the Order only covers past payments for the period between April 2017 and December 2019.

Aplt. App. Vol. III at A-572, 576–79. Merit has appealed this Order and posted a bond as provided by 30 C.F.R. § 1243.4 to suspend compliance with the Order. However, as the district court stated, the suspension only extends to the *historical* requirement to pay additional royalty for the period April 2017-December 2019; it does not apply to the *ongoing monthly* requirement to pay *current and future* royalty based on the greater of IBMP and gross proceeds received beginning in January 2020 and continuing thereafter. Aplt. App. Vol. I at A-204. Again, the Secretary does not question this analysis by the district court.

Fourth, as the district court concluded, "the Secretary has made the Department's position patently clear in this litigation, maintaining that applying the IBMP formula to Merit's leases is consistent with the lease terms. Thus, the agency's position is definitive and known." *Id*. at A-203. Indeed, in the district court, the Secretary unequivocally stated in her response brief: "Because the Negotiated Rule reasonably interprets the lease term Merit relies on here, *there is no basis for Merit's contention that the two irreconcilably conflict*." Aplt. App. Vol. III at A-459 (emphasis added). The Secretary also opposed Merit's motion for preliminary injunction, stating that Merit was "not likely to succeed on the merits" and Merit's arguments are "incorrect." Aplt. App. Vol. I at A-78–79, 84.

The Secretary does not dispute the district court's conclusion that she made her position "patently clear" in this litigation, namely, that Merit must pay royalty

on the IBMP price regardless of the lease terms. She does, however, make an argument at odds with her position below. Even though the Secretary told the district court that Merit's position should be rejected on the merits, she now contends that an administrative appeal could in fact find in favor of Merit, and therefore such an appeal would not be futile. Sec. Br. at 25–26, 32. The Secretary cannot now reverse course and take a diametrically opposed position to overturn the district court's decision on ripeness grounds. *Jones v. State Farm Mut. Auto. Ins. Co.*, 653 F. App'x 598, 610 (10th Cir. 2016) (appellate claim waived where a party "argued the opposite position before the district court").

Furthermore, not even the Secretary argues that an appeal to the ONRR Director will be anything but futile. Sec. Br. at 25. Instead, she points to the second level of appeal to the IBLA, which she suggests could lead to a result in Merit's favor because the IBLA is "independent" of ONRR. *Id*. Whether the IBLA might be independent of ONRR is beside the point. The problem is that the IBLA is not independent of *the Secretary*. The IBLA is subservient to the Secretary, acting as the Secretary's representative to decide matters for the Department. 43 C.F.R. § 4.1. At any stage, before or after an IBLA decision, the Secretary can step in and make whatever decision she wants. *Id*. § 4.5. Given the Secretary's "patently clear" position in the district court, it is inconceivable that the

IBLA could contradict the Secretary and rule in Merit's favor, or if it did, that the Secretary would not intervene to change the decision.

B. The Secretary's Action Has Immediate Legal Consequences.

The Secretary's action also carries legal obligations and consequences. *See Bennett*, 520 U.S. at 177; *Hawkes*, 136 S. Ct. at 1813. As the district court found, the regulations and ONRR's notice of May 2019 "require Merit to pay royalties on current and future production based on the greater of IBMP and gross proceeds received." Aplt. App. Vol. I at A-203–04. Merit's only alternative is not to pay royalty and be subject to substantial penalties and other severe consequences. *Id.* at A-204, citing 30 C.F.R. § 1241.60(b) (authorizing penalty of up to $27,384 per day with no prior notice or opportunity to correct, for failure to pay royalty). And as the Secretary effectively concedes, there is no ability for Merit to obtain a suspension of the obligation to comply with the IBMP formula for current and future production. As such, Merit's petition is ripe for review. *See Farrell-Cooper Mining Co. v. U.S. Dep't of Interior*, 864 F.3d 1105, 1110–17 (10th Cir. 2017) (agencies may avoid the finality of an initial decision only by providing that the initial decision would be inoperative pending appeal).

The district court properly concluded that the legal consequences of not paying the IBMP price meet the ripeness test for judicial review. Aplt. App. Vol. I at A-204–05, citing *Frozen Food Exp. v. United States*, 351 U.S. 40, 44 (1956)

(although the Interstate Commerce Commission's order would have effect only if and when a particular action was brought against a particular carrier, it was nonetheless immediately reviewable because it "warn[ed] every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties"); and *Hawkes,* 136 S. Ct. at 1815 (finding Army Corps' jurisdictional determination that deprived mining companies of five-year safe harbor and "warn[ed] that if they discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties" was final and appealable).

The Secretary's brief does not question, let alone refute, any of these legal consequences. Instead, the Secretary dismisses these consequences as merely "hypothetical" or "abstract" or in the "future." Sec. Br. at 19, 23–24, 29, 34.

Contrary to the Secretary's assertion, Merit is not challenging hypothetical, abstract or future actions that are unripe for judicial review. Rather, Merit is challenging the *past* final decision—set forth in the regulations themselves—to require Merit to pay royalties on Wind River asphaltic sour crude based on the IBMP price formula. That ONRR's *past* decision continues to have prospective effect—applying in January 2020 and in time periods after Merit filed this action in February 2020—does not defeat finality. *See Sierra Club v. Yeutter*, 911 F.2d 1405, 1417 (10th Cir. 1990) ("An administrative decision is final . . . when it has a

'direct and immediate . . . effect on the day-to-day business' of the parties, and when it has 'the status of law' and requires immediate compliance.") (citations omitted)); *see also United States v. Storer Broad. Co.*, 351 U.S. 192, 198–200 (1956) (Federal Communications Commission regulation announcing that it would not issue a television license to an applicant already owning five such licenses, even though no specific license application was before the Commission, was a final agency action ripe for review); *Bennett*, 520 U.S. at 178 (a final agency action is one from which "legal consequences *will* flow") (citation omitted; emphasis added).

Since January 2020—for over two years now—Merit has been paying royalty based on the IBMP formula because it has no other option. When the IBMP is higher than the gross proceeds received from sale, Merit must pay royalty using the IBMP price or not pay royalty at all. There is nothing hypothetical or abstract about having to pay millions of dollars in additional royalty, or else running the risk of penalties and other sanctions for not paying royalty at all. The district court correctly rejected the Secretary's argument that the case is not ripe because the IBMP regulation has supposedly not been applied. Aplt. App. Vol. I at A-205 ("the regulation has been applied in that Merit must either pay royalties on the published IBMP price on Wind River asphaltic crude or not pay royalties at all. And the only way Merit can trigger an administrative appeal (and request

suspension of an order) is by failing to pay royalties, thus potentially exposing itself to substantial penalties.").

C. There Are No Adequate Alternative Remedies.

Judicial review is also appropriate because Merit lacks adequate alternatives and pursuing further administrative proceedings would be futile. *Hawkes*, 136 S. Ct. at 1815 (the test for judicial review under APA is not whether alternatives exist, but whether such alternatives are "adequate"); *Randolph–Sheppard Vendors of Am. v. Weinberger,*795 F.2d 90, 105 (D.C. Cir. 1986) ("Resort to the administrative process is *futile* if the agency will almost certainly deny any relief . . . because it has a preconceived position on . . . the matter.").

As noted above, the Secretary's appeal procedures do not enable Merit to obtain a stay of the regulations requiring payment on current production based on the IBMP. In fact, they do not even allow Merit to file an administrative appeal unless ONRR issues an Order, a Notice of Noncompliance or a Civil Penalty Notice. The only way Merit can trigger an administrative appeal (and request suspension of the Order) is by failing to pay royalty, thus potentially exposing itself to draconian penalties. And with respect to Merit's pending administrative appeal of the Order for April 2017-December 2019, that appeal process will take years to complete. It includes two levels of administrative appeal, the first to the ONRR Director and the second to the IBLA. *See* 30 C.F.R. § 1290.105(a).

Nothing has happened on the administrative appeal Merit filed with the ONRR Director since Merit filed it in March 2020. The time to obtain an IBLA decision will be several more years.[4] There is no time limit for ONRR or the IBLA to act on Merit's administrative appeal for the 2017-19 period. The district court observed that this administrative appeals process "will likely take years to complete[,]" Aplt. App. Vol. I at A-206; the Secretary does not indicate otherwise in her brief.

An "arduous, expensive, and long" process that will last many years and lacks the likelihood of addressing Merit's requested remedy is not adequate. *See Hawkes*, 136 S. Ct. at 1815; *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1977) (parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious civil penalties); *Moncrief v. United States,* 43 Fed. Cl. 276, 285 (1999) (administrative exhaustion not required "when there is an indefinite time period for agency action or when the plaintiff needs immediate consideration of a claim"); *Gibson v. Berryhill*, 411 U.S. 564, 575, n.14 (1973) (administrative remedy deemed inadequate "[m]ost often . . . because of delay by the agency").

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[4] The district court noted that the IBLA's docket shows royalty cases "under review" that were filed in 2016. Aplt. App. Vol. I at A-206 n.8.

Particularly in these circumstances, where the Secretary has made the Department's position clear, there is no reason to defer judicial review. *See* Aplt. App. Vol. I at A-206, citing *S.F. Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 579 (9th Cir. 2019) (final agency action not meant "to require regulated parties to keep knocking at the agency's door when the agency has already made its position clear").

D. Withholding Judicial Review Would Cause Significant Hardship to Merit.

In determining whether a case is fit for review, courts also consider "the hardship to the parties of withholding court consideration." *Zinke*, 871 F.3d at 1141. "[A] party seeking judicial review suffers adverse effects if, absent judicial review and while the appeal is pending, *it would need to comply with the challenged agency regulation*." *Id.* at 1143 (citation omitted; emphasis added). In evaluating hardship, courts "look for a 'direct and immediate dilemma' caused by . . . withholding review." *Id.* (citing *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012)). They consider "significant costs, financial or otherwise" that plaintiffs would have to bear and whether the defendant has "taken some concrete action that threatened to impair—or had already impaired—the plaintiffs' interests." *Id.* (citation omitted).

Because ONRR's accounting system will not accept Merit's current and future royalty payments if they are less than the IBMP price, Merit *must* comply

with the Secretary's regulation or not pay royalty at all, which could subject Merit to severe civil penalties or other consequences. *See* Aplt. App. Vol. I at A-203–05, 230; 30 C.F.R. § 1241.60(b). Thus, Merit faces the "direct and immediate dilemma" that the *Zinke* court recognized would render a case fit for review under the prudential ripeness doctrine. 871 F.3d at 1143.

The Secretary nonetheless contends that Merit will incur no "significant hardship" from paying royalty based on the IBMP because nothing has "yet happened." Sec. Br. at 33–34. The Secretary ignores her own regulations requiring Merit to pay royalty on the IBMP whenever that "price" is higher than Merit's gross proceeds of sale. The Secretary also ignores the evidence Merit submitted in the district court showing that, for the first five months of 2020, paying royalty based on the IBMP forced it to pay an extra $1,123,442 in royalty. Aplt. App. Vol. III at A-393–94, 423–24 ¶¶ 17–18.[5] The Secretary never disputed that figure in the district court and does not do so here.

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[5] While the Secretary says "[t]he record in this case necessarily ends where Merit's challenge begins—January 2020" (Sec. Br. at 31), courts may look beyond the administrative record to resolve judicial issues such as ripeness. *See*, *e.g.*, *Yeutter*, 911 F.2d at 1421 ("district court may hold an evidentiary hearing . . . to evaluate its jurisdiction"); *S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 729 (10th Cir. 1997) (documents outside record considered to determine mootness); *Union of Concerned Scientists v. Pruitt*, 2018 U.S. Dist. LEXIS 84020, at *2 (D. Mass. May 18, 2018) ("administrative record is not normally necessary to resolve issues of standing, ripeness, finality, or justiciability").

While at the same time contending that nothing has happened to Merit, the Secretary acknowledges that Merit has to pay royalty based on the IBMP pending any administrative decision on the issue. Sec. Br. at 33–34. This has been the case since January 2020. She contends this should be no hardship because, if Merit eventually prevails in its administrative appeal or on subsequent judicial review, it can recoup the overpaid royalty. *Id*. at 34. The potential for Merit to recoup unlawfully collected royalty many years from now does not ameliorate the hardship imposed in paying millions of dollars of additional royalty in the interim. Merit would also not be allowed to recover any interest on the amount recouped. Aplt. App. Vol. I at A-35, A-47 ¶ 21.

E. The District Court Did Not Abuse Its Discretion in Denying the Secretary's Rule 60(b) Motion.

After the district court issued its Order on Merit's Petition, concluding that the action was ripe, the Secretary filed a motion under Rule 60(b). Pointing to one Merit spot sales contract for the month of September 2020 that did not specifically reference the WCS index, the Secretary argued that the case should be remanded for further factual development. Aplt. App. Vol. III at A-513–40. Merit responded to the motion and explained why the Secretary's suppositions about that contract (and allegations about a "misrepresentation") were baseless. *Id*. at A-541–64. The district court denied the Secretary's motion. Aplt. App. Vol. I at A-218, 227.

Much of the Secretary's appeal concerning ripeness is rooted in her Rule 60(b) motion. However, as this Court has held, Rule 60(b) relief "may only be granted in exceptional circumstances." *Servants v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000) (internal citations omitted). The sum total of the Secretary's support for her Rule 60(b) motion was a copy of one contract (for which the Secretary ignored the sales delivery point) and a footnote where counsel stated that the Secretary had made a "preliminary" comparison of the contract price with the WCS differential for surrounding months. Aplt. App. Vol. III at A-519 n.4, 536–38. In response, Merit provided a declaration explaining how the price for that contract was in fact based on the WCS differential for that month. *Id*. at A-557–64. The Secretary's preliminary and undisclosed comparison, described only in a footnote, does not come close to providing the exceptional circumstances required by Rule 60(b).

The Secretary nonetheless seeks to leverage her speculation concerning one contract for one month into an argument that this case is not ripe and more "factual development" should occur within the agency. Sec. Br. at 18, 26. This argument is based on far too slender a reed to overturn the district court's decision and delay judicial review indefinitely.

First, the district court did not abuse its discretion in denying the Secretary's Rule 60(b) motion, and the Secretary's appeal brief does not show otherwise.

Second, the arguments in the Rule 60(b) motion have no effect on the district court's conclusion that the case is ripe. Significantly, the Secretary's arguments do not alter the facts conclusively found by the district court, and unchallenged by the Secretary on appeal, that (1) the Secretary's position is "definitive and known," (2) the Secretary's regulations require Merit to pay royalties on the IBMP formula without exceptions, (3) Merit has no way to appeal the Secretary's position, and (4) there is no procedure available for Merit to seek a stay of the Secretary's mandate. *See* Aplt. App. Vol. I at A-203–06. The Secretary's Rule 60(b) arguments also do not affect the legal analysis of whether her IBMP prices, based on sales prices three months before the month of production (to the extent any sales prices were used) and adjusted with an arbitrary 10% cap, are inconsistent with the lease language requiring such prices to be at the "time of production."

Third, the Secretary surmises that an investigation might find that Merit could have sold all of its asphaltic sour crude oil by reference to NYMEX prices instead of the WCS, and thus avoided the disconnect between the NYMEX and WCS indexes. Sec. Br. at 27–29. There is nothing to support this unfounded theory. In April 2019, when ONRR reviewed the disconnect between NYMEX and WCS prices for sales of asphaltic crude oil on the Wind River Reservation, it did not suggest that producers like Merit could avoid the disconnect by simply

using NYMEX for its sales contracts. Aplt. App. Vol. IV at A-811–15. To the contrary, ONRR recognized that "Asphaltic crude is priced closely to Western Canada Select (WCS) . . . ." *Id*. at A-814. The declarations of Mr. Brister filed in the district court describe how asphaltic sour crude oil is sold by reference to the WCS index. Aplt. App. Vol. III at A-420 ¶ 5 and A-558–63 ¶¶ 5–15.

Finally, no further factual development is needed for the Court to determine, as a matter of law, that the Secretary's IBMP prices fail to adhere to the "time of production" language of the leases. Even if the Secretary were to initiate the investigation she describes—which she has yet to do in the nearly one year since filing the Rule 60(b) motion—it would have no effect on the outcome of the legal issues raised in this case. *See Zinke*, 871 F.3d at 1141 (in determining ripeness, court considers whether further factual development would "*significantly* advance [its] ability to deal with the legal issues presented") (citation omitted; emphasis added); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978) (judicial review appropriate where future event would not significantly advance court's ability to deal with legal issues presented but "delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees").

II. The District Court Correctly Held That the 10% Cap on LCTD Adjustments Is Contrary to Merit's Leases.

The district court correctly held that the Secretary's use of a 10% cap on the monthly LCTD adjustment is arbitrary, capricious, and inconsistent with Merit's leases, and that Merit cannot be required to pay royalty on the resulting IBMP prices. Aplt. App. Vol. I at A-210–13. The obvious effect of the 10% cap is to restrict adjustments to the LCTD that would be necessary to reflect a price "at the time of production." In other words, the 10% cap (along with the Secretary's reliance on stale prices, *see supra* at 6–9) prevents the Secretary from calculating a major portion price that could represent market prices.

As the district court acknowledged, the Secretary's use of the "IBMP formula is, in itself, incapable of replicating market prices for Wyoming asphaltic sour crude oil at the time of production, thus necessitating the LCTD adjustment." Aplt. App. Vol. I at A-211. But even making the LCTD adjustment to the NYMEX prices does not adequately address the requirement that the major portion price be a price "at the time of production." *Id.* Since market prices can "shift dramatically" from month-to-month, the court held that the "10 percent cap is arbitrary and inconsistent with the lease requirement that value be based on prices *at the time of production*." *Id.* (emphasis in order).

In defense of the cap's legality, the Secretary repeats the same arguments presented to the district court: the cap "was the product of an extensive negotiation

by [the Rulemaking] Committee that included representatives from . . . the oil and gas industry" and "intended to capture market shifts." Sec. Br. at 38. After thoroughly examining the record, including the parties' declarations, the district court appropriately rejected these arguments because the cap artificially and arbitrarily limits the LCTD adjustment to the NYMEX price. *See* Aplt. App. Vol. I at A-210–11. For several reasons, this Court should affirm the district court's ruling on this issue.

First, the composition of the Rulemaking Committee has no bearing on whether the 10% cap is consistent with the terms of Merit's leases. *See supra* at 5–6.

Second, the Secretary admits that the 10% cap actually prevents calculation of representative prices *at the time of production*. In fact, that appears to be the very purpose of it. The Secretary emphasizes that the cap is meant "to ensure that the [LCTD] is steadily adjusted *until* it captures the major portion price." Sec. Br. at 37 (emphasis added). As the district court found, this rarely happens: "[T]he IBMP is often a poor substitute for actual prices, in part a function of the arbitrary 10% cap on adjustments . . . . [I]n *most months* the IBMP is *too high or too low by a significant amount*." Aplt. App. Vol. I at A-212 (emphases added). Imposing a 10% cap on monthly LCTD adjustments—so that IBMP prices move gradually one way or the other until (hopefully but fleetingly) they "capture[] the major portion

price"—necessarily fails to produce a true major portion price at the time of production *for most months*. The Secretary even concedes that the 10% cap is not "intended to capture dramatic, temporary fluctuations in the prices" (Sec. Br. at 38), thereby admitting that the IBMP formula does not and cannot reflect prices "at the time of production."

Third, the Secretary rationalizes the 10% cap as appropriate to avoid volatility in royalty payments for Indian mineral owners. Sec. Br. at 13, 38–39. But as the district court concluded, "the desire to avoid volatility is insufficient justification for ignoring inconsistent lease provisions." Aplt. App. Vol. I at A-212. Nothing in the leases allows the Secretary to take such an approach to calculation of a major portion price, nor can it be excused by the Secretary's fiduciary duty to Indian Tribes. *Id*.

Fourth, as the district court found, despite the Secretary's argument that Merit benefits from the 10% cap, the benefit is a "one-way street." *Id.* When market prices for Wind River asphaltic sour crude oil fall in relation to NYMEX Index prices, Merit must pay royalty on a higher-than-market price to reduce volatility in royalty payments to ONRR. *Id.* But when market prices for Wind River asphaltic crude rise in relation to NYMEX Index prices, Merit must pay royalty on the higher sales prices. *Id.* That is because Merit must pay royalty on the higher of the IBMP price or its sale proceeds. 30 C.F.R. § 1206.54(b). In other

words, Merit receives no compensating benefit when the IBMP lags behind market prices.

Because of the 10% cap, for many months Merit owes royalty on an amount greater—sometimes far greater—than it (or any other producer) can obtain selling the asphaltic sour crude oil. *See* Aplt. App. Vol. III at A-423–24 ¶¶ 17-18; Vol. IV at A-811–15. This result is inconsistent with the major portion provisions of Merit's leases.

CONCLUSION

The Court should grant Merit's appeal and deny the Secretary's cross-appeal.

Dated this 1st day of March, 2022.

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Pursuant to Fed. R. App. P. 32(g), I hereby certify as follows:

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Date: March 1, 2022

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Date: March 1, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2022, I electronically filed the foregoing Appellants' Reply Brief and Response to Cross-Appeal using the court's CM/ECF system which will send notification of such filing to the following:

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