MOBIL PRODUCING TEXAS & NEW MEXICO, INC.

IBLA 88-158 Decided June 28, 1990

Appeal from a decision of the Director, Minerals Management Service, upholding in part and setting aside in part findings and conclusions of the Royalty Valuation and Standards Division establishing transportation allowances for conveying carbon dioxide. MMS-87-0194-O&G.

Affirmed as modified in part, set aside and remanded in part.

1. Administrative Procedure: Administrative Procedure Act

Although rulemaking procedures at 5 U.S.C. § 553 (1982) do not apply to interpretive rules, 5 U.S.C. § 552 (1982) requires publication in the Federal Register of statements of general policy and interpretations of general applicability.

2. Administrative Authority: Generally--Administrative Procedure: Administrative Review--Minerals Management Service: Generally

The Conservation Division Manual is an administrative manual which governed the internal operations of the Conservation Division, Geological Survey. It does not have the force of law and its provisions are guidelines rather than rules which are binding on the Board of Land Appeals. Review is not limited to determining whether its provisions were correctly applied and the Board may consider whether application of the provisions is arbitrary, capricious, an abuse of discretion, or contrary to law.

3. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Mineral Leasing Act: Royalties--Oil and Gas Leases: Royalties: Generally

Ordinarily royalty is computed on the value of the gas removed or sold from the lease. Where gas must be transported from the field to the point of first sale, the deduction of reasonable transportation costs is allowed. The Secretary of the Interior's authority to determine the value of production upon which royalty payments are made extends to determining the factors used in computing transportation allowances for royalty purposes.

4. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Mineral Leasing Act: Royalties--Oil and Gas Leases: Royalties: Generally

Operating expenses are a proper component of a transportation allowance for a CO_2 pipeline which is required to transport production to market. A decision limiting operating costs to 10 percent of undepreciated investment when calculating the relevant transportation allowance may be set aside and remanded where the effect is to eliminate a substantial percentage of operating costs and no rational basis for such a limitation is given in the decision or contained in the record.

5. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Mineral Leasing Act: Royalties--Oil and Gas Leases: Royalties: Generally

The allowance of a reasonable rate of return on depreciated assets has been upheld in computing a transportation allowance for production for which there is no market in the field or at the wellhead. Application of a rate of return based on the prime interest rate at the time of the initial period for which the transportation allowance is calculated will be upheld as reasonable.

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OPINION BY ADMINISTRATIVE JUDGE GRANT

Mobil Producing Texas and New Mexico, Inc. (Mobil, MPTM), has appealed a decision of the Director of the Minerals Management Service (MMS) dated October 30, 1987, which upheld in part and set aside and remanded in part a decision of the Royalty Management Program (RMP), Royalty Valuation and Standards Division (RVSD), approving transportation allowances. 1/ The transportation allowances apply to carbon dioxide (CO_2) produced from Federal oil and gas leases and transported by pipeline from the McElmo Dome Unit in Montezuma County, Colorado, to three areas in west Texas where it

1/ The RVSD decision was embraced in a document entitled "Findings and Conclusions on McElmo Dome Unit CO_2 Transportation Allowances" (Findings and Conclusions) attached to a cover letter addressed to appellant.

is used for enhanced oil recovery. 2/ The RVSD established transportation allowances for three segments of the pipeline: (1) the Cortez Pipeline which delivers CO_2 from Colorado to the Allred Station and the Denver Unit, (2) the MPTM Pipeline which transports CO_2 from the Allred Station to the Denver City Delivery Station on the Sheep Mountain Pipeline and which also delivers CO_2 to the Wellman Unit, and (3) the Sheep Mountain Pipeline which conveys CO_2 from the Denver City Delivery Station to the Seminole-San Andreas Unit.

On appeal Mobil challenges five determinations in the RVSD findings and conclusions which affected the calculation of the transportation allowances. Mobil argues that RVSD's decision on these matters was unreasonable, arbitrary, and capricious. Mobil also attacks the decision on the ground it was based on policies and guidelines set forth in the Geological Survey's Conservation Division Manual (CDM). 3/ Mobil argues that "[t]he CDM, which takes the form of a legislative rule having the force of law, is not lawfully in effect since the CDM was not promulgated and published in compliance with Section 552 of the Administrative Procedure Act (the 'APA')" (Statement of Reasons (SOR) at 2).

Mobil argued similarly before the Director that the CDM "which takes the form of a directive and materially modifies existing regulations * * * was not promulgated and published in compliance with 5 U.S.C. § 552 (1982)" and that "the policy guidelines therein, to the extent adverse to Mobil, should be deemed void" (SOR to Director at 2). Among other matters, section 552 requires an agency to publish in the Federal Register "substantive rules of general applicability * * * and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D) (1982). The Director's decision, how-ever, described Mobil's argument as a claim that the CDM "guidelines were not published in accordance with the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 552(a) (1982)" (Decision at 4). This statement failed to distinguish the notice and comment procedure required by section 553 from section 552 which Mobil had cited. 4/

2/ Title to CO_2, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir, has been held to be in the United States by virtue of the reservation of gas in the patent of the land under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982). Robert D. Lanier, 90 IBLA 293, 93 I.D. 66 (1986) (involving title to CO_2 developed under Federal leases in the McElmo Dome field), aff'd, Aulston v. United States, No. 87-F-1144 (D. Colo. Aug. 4, 1988), appeal filed, No. 88-2349 (10th Cir.).

3/ MMS was created by Secretarial Order No. 3071 (Jan. 19, 1982). 47 FR 4751 (Feb. 2, 1982). Matters relating to royalty and mineral revenue management were subsequently transferred to MMS under Secretarial Order No. 3087 (Dec. 3, 1982). 48 FR 8983 (Mar. 2, 1983). The provisions of the CDM at issue in this appeal have subsequently been replaced by regulations. 30 CFR Part 206, Subpart D, 53 FR 1272 (Jan. 15, 1988).

4/ Section 553 requires that "[g]eneral notice of proposed rule making" be published in the Federal Register and that the agency "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral

Stating that "the requirements of the APA pertain only to legislative rules and are inapplicable to interpretive rules," the decision concluded that
"[t]he CDM guidelines * * * are interpretive rules" and, therefore, "the advance notice and comment provisions of the APA (5 U.S.C. § 553, 1982) are inapplicable." Id.

The briefs before the Board do not clarify the matter. Mobil continues to assert that "the CDM was not promulgated and published in compliance with Section 552," but its brief responds to the decision's conclusion that the CDM guidelines are interpretive rules. Mobil argues that, because the CDM was issued exercising a legislatively delegated power and has a substantial impact upon oil and gas producers, "the notice and comment provisions of the APA apply" (SOR at 4-5). Despite this argument, however, appellant concludes that the CDM's policy guidelines "to the extent adverse to Mobil, should be vacated and deemed void" due to failure to comply with section 552 (SOR at 5). Similarly, MMS responds to Mobil's SOR, contending that the CDM is not legislative but rather "its provisions are guidelines, also referred to as interpretive rules, which clarify or construe an existing law or regulation" (Answer at 7-8), but does not discuss section 552. 5/

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fn. 4 (continued)
presentation." 5 U.S.C. § 553 (1982). It excepts from these requirements "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." Following receipt of comments, section 553 requires "consideration of the relevant matter presented" and that the agency "incorporate in the rules adopted a concise general statement of their basis and purpose." It also provides that the "required publication or service of a substantive rule shall be made not less than 30 days before its effective date." Publication of substantive rules in the Federal Register is required by 5 U.S.C. § 552(a)(1)(D) (1982).

5/ MMS relies on Quitman Refining Co., 57 IBLA 53 (1981), as requiring rejection of Mobil's argument. Although the decision concerns an unpublished method for making a calculation, it is not dispositive of issues pertaining to section 552. A notice had been published in the Federal Register for small refiners to apply to purchase royalty oil. Quitman applied and was found ineligible. On appeal the company argued that the 2-month "runs to stills" figures used by Geological Survey for calculating excess refining capacity departed from the requirement of both the notice and the regulation at 30 CFR 225a.6(f) (1979) that applicants submit production figures for 12 months. Id. at 57. The Board found that the notice neither specified the method of calculation nor indicated that the 12-month figures would be used. Id. at 58. By inference, neither did the regulation which was the source of the wording of the notice. See 30 CFR 225a.6(f) (1979). Thus, Quitman's arguments were flawed because they were based on an incorrect assertion that the use of figures for 2 months was a change from the published notice and the regulations.

The decision also noted that the Wyoming District Court had held that the published notice either did not promulgate a new rule or regulation or, if it did, the rule was not substantive requiring compliance with section 553. Id. at 58. Accordingly, the Board rejected Quitman's argument that the method of calculation required rulemaking under section 553.

The CDM was prepared by the Geological Survey to provide consistent instructions for its personnel to follow in determining transportation allowances and performing other tasks. Its provisions set forth both general guidelines and detailed procedures. Thus, it is best characterized as an administrative manual governing internal operations. It is possible, of course, that individual provisions overreach the CDM's general function and establish rules which purport to affect substantive rights and are subject to promulgation under section 553 or set forth matters of general policy or interpretations of general applicability subject to publication in the Federal Register. See Nguyen v. United States, 824 F.2d 697, 700 (9th Cir. 1987). On the other hand, individual provisions may be simply "statements of policy and interpretations" which must be made "available for public inspection and copying." 5 U.S.C. § 552(a)(2) (1982); see Capuano v. National Transportation Safety Board, 843 F.2d 56 (1st Cir. 1988).

[1] The Director's decision contains one misstatement regarding the APA which should be rectified. While it correctly states that section 553 does not apply to interpretive rules, see 5 U.S.C. § 553(b)(3)(A) (1982), it incorrectly states that the APA applies only to legislative rules. As quoted above, section 552 requires publication of not only substantive rules but also "statements of general policy or interpretations of general applicability."

We find, however, that no ground for reversal of the MMS decision on the basis of the APA has been shown by appellant. Although Mobil asserted in its appeal to the Director that the CDM materially modifies "existing regulations," it cited neither specific provisions of the CDM nor the regulations which it believed to be modified. Furthermore, although Mobil both argues that the CDM contains "legislative rules" subject to section 553 rulemaking and characterizes the provisions as "policy guidelines" subject to publication under section 552, it fails to provide any analysis based on precedent that specific provisions should be regarded as estab-lishing either rules or policy. Proper application of the APA has been the subject of extensive litigation. Mobil fails to offer any specific basis for the violations of the APA it alleges. 6/ Accordingly, we find appellant has failed to establish reversible error on the basis of violation of the APA.

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fn. 5 (continued)
Finally, the Board upheld the use of the standard because it concluded that use of the 2-month figures to calculate Quitman's excess capacity was neither unfair nor arbitrary because the same method had been used for all applicants. Id. at 59.

6/ We note that Mobil also misstates the consequence of failure to comply with the APA. While compliance with section 553 would be necessary for the provisions of the CDM to have the force and effect of law, the absence of such compliance does not require that we declare it void. Rather, the absence of compliance with section 553 means simply that the provisions do not, as MMS correctly states, have the force of law. See Chrysler Corp. v. Brown, 441 U.S. 281, 301-03 (1979). Similarly, the failure to publish statements of general policy or interpretations of general applicability in the Federal Register as required by section 552 does not make them invalid.

[2] Our basis for reviewing the issues concerning the CDM provisions Mobil has challenged is much simpler. Consistent with the administrative nature of the CDM, MMS states that it "does not contend that the CDM has the force of law" (Answer at 5). Because the CDM is not law, its provisions are not binding on the Board, as regulations would be, and our review is not limited to determining whether they were correctly applied. See Conoco Inc., 110 IBLA 232, 242-43 (1989); Dugan Production Corp., 107 IBLA 91, 94 (1989); Pamela S. Crocker-Davis, 94 IBLA 328, 332 (1986). As characterized by the CDM itself, the provisions are guidelines and, as Mobil contends, they are subject to attack and review as to whether they are arbitrary, capricious, an abuse of discretion, or contrary to law under 5 U.S.C. § 706(2)(A) (1982). See, e.g., Phillips Petroleum Co., 109 IBLA 4, 9 (1989). While MMS correctly asserts that the Secretary possesses considerable discretion in determining the value of production for royalty purposes, its exercise is tempered by the standard of reasonableness. Conoco Inc., supra at 240. Mobil, however, bears the burden of showing error. See Mobil Oil Corp., 108 IBLA 216, 219-20 (1989).

On appeal Mobil also repeats a statement made to the Director that the company "acknowledges that agency decisions are generally entitled to substantial deference," but in this case, due to MMS' failure to consider all relevant factors, its decision "should not be afforded any deference, substantial or otherwise" (SOR at 15-16; SOR to Director at 9). Our review, however, is not concerned with the principle of deference. As correctly stated in the MMS answer, deference "is more appropriate to judicial review of agency decisions than to IBLA's review of MMS decisions" (Answer at 20).

The reason, of course, is that both MMS and this Board are components of the Department of the Interior. In reviewing the decisions of his subordinates, the Director of MMS has no obligation to defer to their determinations. To the contrary, the Secretary has delegated to the Director various responsibilities and duties, as well as the authority to carry them out, and he is obligated to assure himself that the decisions of those he supervises conform to the law and follow proper administrative procedures. Similarly, in reviewing appeals of decisions by the Director of MMS, as well as appeals from decisions by other divisions of the Department, the Board exercises the authority to decide appeals which has been delegated by the Secretary. 43 CFR 4.1. In addition, when deference is accorded by the courts, it is not to the decision of an agency but its interpretation of the laws it administers. See 5 Stein, Mitchell & Mezines, Administrative Law § 51.01[1] (1988).

We turn next to the specific issues raised by Mobil concerning calculation of the transportation allowances. The formula used by MMS established the allowances for the pipeline segments by dividing the sum of depreciation, operating expenses, and return on investment by the volume of

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fn. 6 (continued)
Rather, the consequence is that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to or be adversely affected by" the policy or interpretation. 5 U.S.C. § 552(a)(1) (1982).

"throughput" (Findings and Conclusions, Attachment 3). Specifically, Mobil challenges: (1) the limitation of operating expenses to the lesser of actual operating costs or 10 percent of the undepreciated capital investment; (2) the rate of return allowed on investment; (3) the disallowance of compression expenses as an operating expense; (4) the limitation of transportation allowances to a maximum of 50 percent of the CO_2's value at the point of sale; and (5) the disallowance of Federal and state income taxes as components of operating expenses.

[3] The Mineral Leasing Act requires the payment of royalty based on the "amount or value of the production removed or sold from the lease." 30 U.S.C. § 226(b) and (c) (1982). The Secretary of the Interior "is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes" of the Act. 30 U.S.C. § 189 (1982). Under these provisions the Secretary has authority to determine the value of production upon which royalty payments are made. Marathon Oil Co. v. United States, 604 F. Supp. 1375, 1378-79 (D. Alaska 1985), aff'd, 807 F.2d 759 (9th Cir. 1986), cert. denied, 480 U.S. 940 (1987); California Co. v. Udall, 296 F.2d 384, 388 (D.C. Cir. 1961); see United States v. Ohio Oil Co., 163 F.2d 633, 638-41 (10th Cir. 1947), cert. denied, 333 U.S. 833, reh'g denied, 333 U.S. 865 (1948). For many years, and at the time of the MMS decision at issue here, Departmental regulations provided:

> 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.

30 CFR 206.103 (1987). 7/

7/ The provision was classified to 30 CFR 221.47 when promulgated in 1942. 7 FR 4132, 4137 (June 2, 1942). After the creation of MMS (47 FR 4751 (Feb. 2, 1982)), minor modifications were made to reflect the change of administrative authority (47 FR 28368 (June 30, 1982)) and the provision was reassigned to 30 CFR 221.110 (47 FR 47758, 47774 (Oct. 27, 1982)). After MMS acquired authority over matters relating to royalty and mineral revenue management (48 FR 8983 (Mar. 2, 1983)), MMS reassigned the provision to 30 CFR 206.103 (48 FR 35639, 35641 (Aug. 5, 1983)). Effective Mar. 1, 1988, it was removed and a detailed approach to royalty valuation established at 30 CFR part 206. 53 FR 1184, 1218 (Jan. 15, 1988). However, the substance of the provision was adopted by Congress as part of the Notice to Lessees Numbered 5 Gas Royalty Act of 1987. 101 Stat. 1719, 1720 (1988).

Normally gas is sold and valued for royalty purposes at the wellhead. When not sold at the wellhead, the common practice is to deduct a transportation allowance from the sales value of the product in order to determine its value at the wellhead. The Department has followed this practice, allowing the deduction of transportation costs when minerals must be transported from the field to the first point of sale. Petro Lewis Corp., 108 IBLA 20, 35-36, 96 I.D. 127, 135 (1989); Kerr-McGee Corp., 22 IBLA 124, 127-28 (1975); see JFD, Inc., 49 IBLA 337 (1980); Shell Oil Co., 70 I.D. 393, 395 n.6 (1963). The Secretary's authority extends to determining the factors used in computing transportation allowances for royalty purposes. Shell Oil Co., 52 IBLA 15, 20, 88 I.D. 1, 4 (1981); Shell Oil Co., 70 I.D. at 396.

Mobil first challenges the determination in the RVSD findings and conclusions limiting operating expense to 10 percent of the undepreciated capital investment. This determination was based on CDM section 647.5A.3B which states in part:

> Operating costs are those nondepreciable expenditures required to operate and maintain the pipeline system and shall be limited to the lesser of the following values: actual operating costs or 10 percent of the undepreciated initial or adjusted investment cost as of the beginning of the year for which the operating costs are being computed.

Mobil argues that the 10-percent limitation is discriminatory because it does not apply to arm's-length transactions by producers who are not owners of CO_2 pipelines (SOR at 6). 8/ Mobil also objects to including ad valorem taxes as an operating cost because they are not "required to operate and maintain the pipeline system" as described in the CDM provision and contends that they should be deductible as a separate expense because they are neither established nor controlled by Mobil (SOR at 7). MMS argues that Mobil fails to show error in the method of calculation and fails to show how the inclusion of ad valorem taxes as an operating expense, which was intended to benefit producers, works to its detriment (Answer at 11-12). 9/

Review of the RVSD findings and conclusions discloses that the detriment does not arise directly from inclusion of the tax in operating expenses, but indirectly from application of the 10 percent cap to all operating expenses including ad valorem taxes. Thus, Mobil's operation and maintenance expenses, including overhead, were not in excess of the 10-percent limit, but the addition of the ad valorem tax caused Mobil's total operating expenses to exceed the limit. The ad valorem tax by itself exceeds not only the operation and maintenance expenses, including overhead,

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8/ Section 647.5A of the CDM expressly applies to calculation of transportation expenses when the pipeline is owned by the producer.

9/ It should be noted that many taxes such as production or severance taxes, reclamation fees, and black lung taxes are properly considered to be a cost of production and may not be subtracted from gross value for computation of the Federal royalty. See Black Butte Coal Co., 103 IBLA 145, 95 I.D. 89 (1988).

but also the 10-percent limitation. Thus, while treatment of the ad valorem tax as an operating expense can be viewed as providing Mobil a partial benefit (the difference between the other expenses and the 10-percent limit), its inclusion can also be viewed as excluding from allowable transportation costs a substantial component of the costs of actually operating and maintaining the pipeline.

The real issue is not whether ad valorem taxes paid by the pipeline operator are allowed as a separate expense, but rather whether operating expenses including ad valorem taxes are properly limited to 10 percent of the undepreciated capital investment at the beginning of the year for which the transportation allowance is computed. The Director's decision and the MMS brief on appeal describe the 10-percent limitation as a longstanding policy but do not explain the rationale for the limitation.

[4] A transportation allowance recognizes that the price received for a product at a distance from the point of production is not the value of the product at the point of production because the costs incurred in transporting the product have added value to it. In Kerr-McGee Corp., supra, the Board set aside a decision denying a transportation allowance for costs associated with a pipeline conveying oil from the leasehold to the point of the first available market. In reaching this result we noted that if the Government took its royalty in kind (as it had a right to do), rather than in value, it would bear the expense of transporting the oil to market. We found it would produce "an anomalous result if the Government royalty interest was, in effect, chargeable with transportation when taken in kind, but not when taken in value." 22 IBLA at 128. We think the same principle is applicable in this case. Review of the RVSD Findings and Conclusions at Attachment 2 discloses that limiting operating expenses to 10 percent of undepreciated investment has the effect of restricting appellant's deduction for 1985 to approximately 50 percent of actual operating expenses incurred. Whichever way the numbers are viewed, it is clear that either the operating expenses must be unusual, so as not to reflect the value added by transporting the product, or the 10-percent limitation does not reasonably represent the value transportation adds to the product and its application defeats the reason for giving a transportation allowance. 10/

We are unable to determine on the basis of the record before us which is the case. The record does not contain the information as to expenses Mobil submitted to MMS. The inclusion of ad valorem taxes as an operating expense within the 10-percent limitation suggests that such taxes are normally a relatively small portion of total operating expenses. In this case the tax is not and we are unable to ascertain why. The amount is equal to more than 10 percent of Mobil's capital investment in the pipeline, indicating that it may be unusually large. There is, however, no information in the record as to the nature or origin of the tax or whether the

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10/ In reviewing the reasonableness of the limitation of operating costs to 10 percent of undepreciated investment, we note that over the 20-year depreciation schedule the undepreciated investment is reduced to zero (Findings and Conclusions, Attachment 1).

amount includes one or several taxes paid by Mobil. If compression costs are included in operating expenses, the percentage of actual operation and maintenance costs Mobil is allowed under the 10-percent limitation will be further reduced, making it even less likely that the limit reasonably represents the cost of transportation to the market. The CDM itself suggests one reason it may not. Consistent with the scope of Part 647 of the CDM, the 10-percent limitation appears to have been developed by the Geological Survey in relation to pipelines conveying oil and hydrocarbon gas, the more commonly marketed components of Federal oil and gas production. It may have accurately represented a reasonable maximum amount which the costs of transportation added to the value of those substances, but the same may not be true for the transportation of CO_2 produced from Federal oil and gas leases. 11/ If it is not, the 10-percent limitation would not be improper per se but its application to a CO_2 pipeline would be unreasonable and arbitrary.

Because the record is inadequate to establish a rationale basis for this aspect of the decision, we set aside the MMS determination limiting operating expenses to 10 percent of the undepreciated capital investment and remand the matter to MMS for review of the reasonableness of the costs reported by Mobil and, based on its review, a determination of the appropriate operating expenses to be included in calculating the transportation allowances.

The second issue raised by Mobil concerns the rate of return on investment. The RVSD Findings and Conclusions established the rate based on section 647.5A.3A of the CDM which states in part that "[u]nless otherwise justified, the prime interest rate in effect at the time of initial allowance approval should be used as a rate of allowable return on the depreciated investment." The Findings and Conclusions further stated that MMS' policy is "to use the prime interest rate, as published in the Wall Street Journal, in effect at the beginning of the year for which the initial allowance is granted." Following this procedure, the RVSD determined that the rate on January 8, 1985, was 10.75 percent.

On appeal to the Director, Mobil argued that if MMS policy had been followed, the rate published in the Wall Street Journal on January 2, 1985, should have been used. This rate, Mobil stated, was 11.25 percent. Mobil also argued that the standard was improper because the prime interest rate "reflects the short-term cost of money to the bank's most favored customers and can fluctuate greatly within a year" (SOR to Director at 5). RVSD's response disagreed with Mobil as to both the date of publication to be used and the rate. The RVSD contended that the rate published on January 2, 1985, was 10.75 percent rather than 11.25 percent but that this was not the proper date to use because it was the rate in effect for December 31, 1984.

11/ A right-of-way for a pipeline to transport CO_2 produced from Federal oil and gas leases is properly issued pursuant to the pipeline right-of-way provisions of section 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982). Exxon Corp., 97 IBLA 45, 94 I.D. 139 (1987), aff'd, Exxon Corp. v. Lujan, 730 F. Supp. 1535 (D. Wyo. 1990).

The rate in effect on January 2, 1985, the RVSD stated, was published on January 3, 1985. This rate, however, was also asserted by RVSD to be 10.75 percent. 12/

The Director's decision noted that the CDM calls for using the prime rate in effect at the time of the initial allowance approval and concluded that "[s]ince Mobil's transportation allowance was approved on December 31, 1986, it appears that RVSD erred in using the prime rate in effect on January 1, 1985" (Decision at 10). The decision remanded the matter to the RVSD for recalculation of the rate of return. It also rejected Mobil's arguments as to the method for establishing the rate because Mobil had not "provided a convincing factual basis which would support a finding that the 10.75 percent rate utilized by RMP was or is unreasonable or that a different rate would be more reasonable." Id.

On appeal Mobil argues that the Director's decision is contrary to the statement in the RVSD decision that MMS policy is to use the prime interest rate in effect at the beginning of the year for which the initial allowance is granted. Mobil also argues that using the rate in effect on the date a transportation allowance is granted allows MMS to delay approval awaiting a reduction in the rate. Mobil renews its argument that use of the prime rate is unreasonable, arbitrary, and capricious because it represents the short-term cost of money to a bank's most favored customers, can fluctuate greatly within a year, and does not reflect the risks of constructing a CO_2 transportation facility (SOR at 8). It proposes an alternative method for establishing a rate.

Subsequent to the filing of this appeal, MMS has submitted a copy of a memorandum dated May 5, 1988, from the Associate Director for Royalty Management to the Director of MMS which addresses the decision on appeal. It states:

> It has always been our policy to use the prime interest rate in effect at the beginning of the period for which the allowance will apply to calculate the allowance rate. The date of actual approval, which may occur after the period for which the allowance will apply, should not be a consideration in determining the appropriate rate of return to use in calculating an allowance.
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> With this memorandum I am requesting that you approve our historic [sic] practice of using the prime interest rate in effect on the first day of the first deduction period, which is defined as any 12-month period for which the allowance will be effective. The CDM may be somewhat ambiguous, but this has been our

12/ Photocopies of relevant pages of the Wall Street Journal published on Jan. 2, 1985 (rate effective Dec. 31, 1984) and Jan. 3, 1985 (rate effective Jan. 2, 1985) appear in the case file and verify a prime rate of 10.75 percent.

> consistent policy in determining transportation and processing allowances for the period prior to March 1, 1988, * * *.

The memorandum states that "the rate of return at the beginning of the allowance period was 10.75 percent." The memorandum was approved by the Acting Director of MMS. In its Answer, MMS indicates that the appropriate rate is the one described in the memorandum and requests that the Board modify the Director's decision to allow a rate of return of 10.75 percent as "the prime rate in effect on January 1, 1985, the first day of the deduction period for which the allowance has been approved" (Answer at 15).

[5] When there is no market for production at the wellhead or in the field where production is obtained, the net-back or net-realization method of valuation for royalty purposes has been used to compute value at the point of production. Allowance of a return on capital investment has been recognized as an element of costs to be considered in using this method. United States v. General Petroleum Corp. of California, 73 F. Supp. 225, 247 (S.D. Cal.), aff'd, Continental Oil Co. v. United States, 184 F.2d 802 (9th Cir. 1950). In General Petroleum Corp., the Department had allowed depreciation on capital investment in addition to the actual cost of operating the gathering system, but had refused to allow any return on capital investment, asserting that it was not allowable under the net-realization analysis. The court held that a "return on the lessees' depreciated investment in the wet-gas gathering system at Kettleman Hills should have been allowed." 73 F. Supp. at 257. Consistent with its finding that the rate of interest prevailing in the community for amounts involved in the judgment at the time in question was approximately 4 percent and that interest at that rate established "just compensation," the court allowed a 4-percent rate of return on capital investment. 73 F. Supp. at 264.

This Board has previously had occasion to examine the issue of the reasonableness of a rate of return on depreciated assets in computing an allowance for transportation costs. In Shell Oil Co., 52 IBLA 15, 88 I.D. 1 (1981), a case involving a transportation allowance for offshore production, we found that "a fair rate of return depends greatly on the economic conditions and other circumstances of the case at the time involved." 52 IBLA at 26, 88 I.D. at 6. In that case we upheld an allowance based on a 6-percent rate of return. In Black Butte Coal Co., 111 IBLA 275 (1989), involving an allowance for transportation and processing of coal produced under a Federal lease, the Board affirmed a transportation allowance in which the deduction for return on undepreciated investment was based on the prime rate of interest. 13/ Although there may be other measures of

13/ In Phillips Petroleum Co., 109 IBLA 4 (1989), the Board remanded a case involving a transportation allowance calculated on the prime interest rate in effect on Jan. 1, 1975, for an audit period from 1976 through 1982. We specifically noted that the prime rate chosen was in effect at a time other than the relevant time and found compelling the emphasis in Shell Oil Co., supra, on the economic conditions at the time involved. Phillips Petroleum Co., supra at 15. We find Phillips to be distinguishable because the prime interest rate at issue here was the rate in effect for the initial period of the transportation allowance.

interest rate prevailing in the community at the relevant time, 14/ the prime rate of interest is clearly one reasonable measure of prevailing interest rates at the relevant time. Accordingly, we find no error has been established by appellant in use of the prime interest rate to compute return on undepreciated investment. Hence, the decision of the Director is affirmed as modified to allow a rate of return at the prime rate in effect on the first day of the deduction period for which the allowance has been approved.

The third issue raised by Mobil concerns compression expenses, which the RVSD did not allow Mobil to include in its operating expenses (Findings and Conclusions at 6). On appeal to the Director, Mobil argued that compression expenses should be allowed because no market exists for the CO_2 at the field and compression is necessary to transport it (SOR to Director at 6). Mobil also argued that disallowing compression expenses was unreasonable because they comprised 80 percent of the actual operating expenses and, under the circumstances, would be recognized as part of the costs of production under standard accounting practices. Id. The Director's decision upheld the RVSD determination based on the obligation of operators to put production into marketable condition, citing the decisions in Placid Oil Co., 70 I.D. 438 (1963); The California Co., 66 I.D. 54 (1954), aff'd sub nom. California Co. v. Seaton, 187 F. Supp. 445 (D.C.D.C. 1960), aff'd sub nom. California Co. v. Udall, 296 F.2d 384 (D.C. Cir. 1961); and The Texas Co., 64 I.D. 76 (1957).

Mobil's SOR renews its arguments and analyzes the cases cited by the Director to show that they support Mobil's position. After Mobil filed its SOR, MMS requested and received several extensions of time to file an answer. Subsequently MMS requested and received a 6-month stay because discussions had been initiated between the parties. Upon further requests the stay was extended for an additional 6 months.

In its answer MMS states:

> During the period of the stay granted by this Board in this appeal, MMS reconsidered its decision regarding compression costs. It has concluded that the costs of compression may be allowed as a deduction when computing royalty value when those costs are shown to be related to the cost of transporting the CO_2 from the field to the nearest available market. This position is consistent with the IBLA [Departmental] decisions cited above as MMS continues the policy of disallowing deductions for the costs

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14/ The new Federal gas valuation regulations at 43 CFR Subpart D, 53 FR 1272 (Jan. 15, 1988), provide with respect to transportation allowances that the "rate of return shall be the industrial rate associated with Standard and Poor's BBB rating. The rate of return shall be the monthly average rate as published in Standard and Poor's Bond Guide for the first month of the reporting period for which the allowance is applicable and shall be effective during the reporting period." 30 CFR 206.157(b)(2)(v), 53 FR 1280.

of compression when those are costs of marketing the production, rather than costs of transporting it.

(Answer at 16). The answer further states that "MMS intends to allow Mobil's costs of compression which it can show are costs of transportation" and requests that the Board remand the issue to MMS to determine which costs are attributable to transportation (Answer at 17).

We grant the MMS request and set aside and remand that portion of the decision. Cf. Phillips Petroleum Co., 109 IBLA 4, 10-13 (1989) (expenses of moving wet gas from the field to the processing plant in order to extract natural gas liquid products and, thereafter, market the production allowable as a transportation cost).

We next consider the 50-percent transportation allowance limitation. The RVSD decision stated: "The 1985 allowances which MPTM may deduct will be the lesser of the approved allowance (the sum of the approved trans-portation allowances for the pipeline segments to each delivery point) or 50 percent of the value of the CO_2 at the sales point." (Emphasis in original.) This determination was based on CDM section 647.5.3E which states: "Under no circumstances should transported costs exceed 50 percent of the product's fair market value at the market competitive sales point."

On appeal Mobil argues, as it did before the Director, that the 50-percent limitation was established in 1974 at a time when product prices were high and has subsequently become unreasonable, arbitrary, and capricious due to a considerable decline in the price of CO_2 at a time when operating costs have increased (SOR at 14). Mobil contends that, due to the distance between the McElmo Dome field and the Texas units, transportation costs are likely to be more than 50 percent of the sales price. MMS defends the limitation as a proper exercise of the Secretary's authority and argues that Mobil has failed to show it is unreasonable. MMS further notes that the Director's decision stated that Mobil could seek relief from the limitation by submitting a request with the RVSD but that Mobil has not done so.

We do not decide the issue because it is not ripe for review. Neither the value of the CO_2 sold nor the amount of deductible operating expenses have been established. The RVSD Findings and Conclusions states that MMS had requested Mobil "to submit a proposed valuation procedure for the establishment of value(s) for royalty purposes, of CO_2 disposed under any contracts" and that MMS will establish a royalty valuation procedure for the CO_2 pending receipt of Mobil's proposed procedure (Findings and Conclusions at 1). Absent a valuation of the CO_2, the question whether Mobil's expenses will exceed 50 percent of its value is speculative and the issue whether the limitation is reasonable and appropriate is hypothetical. Likewise, the amount of the deductible operating expense has not been established and, until it has, it is speculative whether it will exceed 50 percent of the value of the CO_2.

Until these facts have been determined, it is not clear that appellant has been adversely affected by a decision on this issue. Until such a decision has been made there is no case or controversy for us to decide and any ruling we might make would be advisory. The Board does not issue advisory opinions. Tennessee Consolidated Coal Co. v. OSMRE, 99 IBLA 274 (1987); State of Alaska, 85 IBLA 170, 172 (1985); see also Conoco, Inc., 96 IBLA 384 (1987); Fred D. Zerfoss, 81 IBLA 14 (1984); Soderberg Rawhide Ranch Co., 63 IBLA 260 (1982). Accordingly, we conclude this issue is not properly before us at the present time. We note, however, that as the announced willingness of MMS to consider a waiver of the 50-percent limitation suggests, any decision on remand applying such a limitation to operating costs must establish a rational basis therefor.

The final issue raised by Mobil concerns RVSD's acceptance of the tariff submitted for the Cortez Pipeline as the basis for its transportation allowance except for the inclusion of state and Federal income taxes (Findings and Conclusions at 2, 6). In its appeal to the Director, Mobil submitted and relied upon an SOR which had been filed by Shell Western Exploration & Producing, Inc. (SWEPI), in a related appeal (IBLA 87-47). A decision on that appeal has been recently issued. Shell Western E & P, Inc., 112 IBLA 394 (1990). It is clear that the decision on appeal in that case was based on the same policy and rationale as in the present case. See CDM § 647.5A.3B(5) (allowable transportation costs for producer-owned pipelines include taxes other than income taxes). For reasons stated in the opinion, we found that the "denial of a transportation allowance for income taxes * * * solely on the basis that SWEPI is an affiliate of the pipeline operator was improper." Id. at 400. The decision is controlling in this case. Accordingly, we set aside the decision as to this matter and remand it to MMS.

Accordingly, 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 Director, Minerals Management Service, dated October 30, 1987, is affirmed in part as modified and set aside and remanded in part.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge