

Editor's Note: appeal filed, sub nom. The Hopi Tribe v. U.S., Civ. No. 97-1876 PCT PGR (D. Ariz. Sept. 5, 1997); aff'd (Feb. 17, 1999); appeal filed No. 99-16034 (9th Cir.); aff'd (April 10, 2000)

BHP MINERALS INTERNATIONAL INC. ET AL.

IBLA 95-397, 95-424, 95-425

Decided July 8, 1997

Consolidated appeals from separate decisions of the Acting Deputy Commissioner of Indian Affairs determining the allowability of certain adjustments to value with respect to royalties tendered and due on four coal leases issued under the Indian Mineral Leasing Act. MMS-89-0287-IND, MMS-90-0048-IND.

Decision in IBLA 95-397 reversed; decision in IBLA 95-424 and IBLA 95-425 affirmed.

1. Coal Leases and Permits: Royalties–Indians: Mineral Resources: Oil and Gas: Royalties

Under the express terms of 30 C.F.R. § 206.257(b)(5) (1989), the exclusion for royalty purpose of reimbursements for Black Lung taxes, abandoned mine land fees, and state and local severance taxes was not generally available on Indian leases.

2. Coal Leases and Permits: Royalties–Indians: Mineral Resources: Oil and Gas: Royalties

Notwithstanding the fact that, under 30 C.F.R. § 206.257(b)(5) (1989), the exclusion for royalty purposes of reimbursements for Black Lung taxes, abandoned mine land fees, and state and local severance taxes was generally not available on Indian leases, if the provisions of an existing lease provided otherwise, under 30 C.F.R. § 206.250(b) (1989), the lease provisions would control over the limitations found in 30 C.F.R. § 206.257(b)(5) (1989).

3. Administrative Practice–Regulations: Interpretation–Rules of Practice: Appeals:
Board of Land Appeals

While the Board of Land Appeals will follow the canon of construction which requires that, given two reasonable interpretations of a regulation, the Department will choose the interpretation most favorable to an Indian lessee, this canon does not apply where the regulation at issue can fairly be said to have only one reasonable interpretation.

4. Coal Leases and Permits: Royalties–Indians: Mineral Resources: Oil and Gas:
Royalties

In interpreting lease provisions, the Board attempts to determine and give effect to the intent of the parties to the lease as manifested by the language used therein. Where an amendment to a lease term requires the calculation of coal royalties in the same manner as that used to determine the value of coal for royalty purposes "under the Mineral Lands Leasing Act," this provision will be interpreted as necessarily excluding consideration of the valuation of coal under regulations applicable solely to Indian leases since such interpretation both accords with the clear meaning of the words used in the lease and is consistent with the manifest purpose of the lease amendments, construed as a whole.

5. Coal Leases and Permits: Royalties–Indians: Mineral Resources: Oil and Gas:
Royalties–Regulations: Interpretation

Under the "lease language control" provisions of 30 C.F.R. § 206.250(b) (1989), there was no requirement that a lease provision specifically set forth valuation criteria which would permit computation of royalty independent of any reference to the regulations as a precondition for invocation of section 206.250(b).

6. Administrative Practice–Regulations: Interpretation– Rules of Practice: Appeals:
Board of Land Appeals

There is no generalized rule of adjudication that precludes issuance of a decision adverse to Indian interests, economic or otherwise, merely because the results are adverse.

7. Coal Leases and Permits: Royalties—Indians: Mineral Resources: Oil and Gas: Royalties—Regulations: Interpretation

While the term "gross proceeds" refers to the total money and other consideration accruing to a lessee for the disposition of substances under a Federal lease, application of the "gross proceeds rule" involved a process which recognized that certain adjustments to the "gross proceeds" figures were proper. As explicated in this Board's decision in Peabody Coal Co., 72 IBLA 337 (1983), the lease reference involved therein to "gross realization" encompassed application of the "gross proceeds rule."

8. Coal Leases and Permits: Royalties—Indians: Mineral Resources: Oil and Gas: Royalties

Regardless of whether or not any specific regulation might apply to Indian coal leases, there was and continues to be a well-recognized distinction between "Indian" and "Federal" coal leases, and the use of the term "federal coal lease" must be read as intending a differentiation between the rules used to compute royalties on "Indian" coal leases and those used to compute royalties on "Federal" coal leases.

APPEARANCES: Lawrence G. McBride, Esq., and Serena P. Wiltshire, Esq., Washington, D.C., for BHP Minerals International, Inc.; James R. Bellis, Esq., and Herb Yazzie, Attorney General, Navajo Nation Department of Justice, Window Rock, Arizona, for the Navajo Nation; Scott Canty, Esq., Kykotsmovi, Arizona, General Counsel for the Hopi Tribe; James R. Bird, Esq., Washington, D.C., and Edward L. Sullivan, General Counsel, Western Region, St. Louis, Missouri, for Peabody Coal Company; and Howard W. Chalker, Esq., Division of Energy and Resources, Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service and the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

This decision encompasses three appeals from two separate decisions of the Acting Deputy Commissioner of Indian Affairs (Deputy Commissioner), issued on the same date, determining the allowability of various adjustments to value with respect to royalties tendered by or due from coal lessees under leases issued pursuant to the Indian Mineral Leasing Act of 1938 (IMLA), 52 Stat. 347, as amended, 25 U.S.C. §§ 396a-396g (1994).

In the first of these appeals, IBLA 95-397, BHP Minerals International Inc. (BHP Minerals) appeals from a determination by the Deputy

Commissioner issued on January 17, 1995, affirming a May 17, 1989, Order of the Mineral Management Service's (MMS) Royalty Management Program (RMP), which had disallowed the exclusion by BHP Minerals of certain production-related taxes and fees from the royalty basis for coal produced under Navajo Coal Mining Lease Contract No. 14-20-603-2505 (Lease 2505) during March 1989 and prohibited BHP Minerals from taking similar deductions in future royalty payments. The other docket numbers, IBLA 95-424 and IBLA 95-425, involve appeals by the Navajo Nation and the Hopi Tribe, respectively, from a determination by the Deputy Commissioner, also issued on January 17, 1995, reversing another May 17, 1989, Order of the RMP which had disallowed the exclusion by Peabody Coal Company (Peabody) of certain production-related taxes and fees from the royalty basis for coal produced under Navajo Coal Mining Lease Contract Nos. 14-20-603-8580 (Lease 8580) and 14-20-0603-9910 (Lease 9910), and Hopi Tribe Mining Lease No. 14-20-0450-5743 (Lease 5743). While the outcome of these three appeals will ultimately be controlled by terms specific to each mining lease, they nevertheless share a common historical and legal background. Accordingly, they have been consolidated for the purposes of decisionmaking.

It is useful at the outset to briefly recount the historical context from which these appeals arise. Prior to the adoption of the Act of July 1, 1864, 13 Stat. 343, lands containing deposits of coal were not treated as mineral lands and were subject to disposal under the general agricultural laws. ^{1/} Commencing in 1864, coal lands became subject to purchase at public sales with a minimum purchase price of \$20 per acre. In 1873, Congress adopted a procedure by which individuals or associations could acquire tracts of coal lands, not exceeding 160 acres, for a cost of between \$10 and \$20 per acre, depending upon the parcel's proximity to railroad lines. See Act of March 3, 1873, 17 Stat. 607, as amended, 30 U.S.C. §§ 71-76 (1994). However, under section 4 of the Act, 30 U.S.C. § 74 (1994), each individual was limited to a single entry. See United States v. Keitel, 211 U.S. 370, 389 (1908).

^{1/} See Public Land Law Review Commission (PLLRC) Report, Legal Study of Coal Resources on the Public Lands at 49. Notwithstanding the fact that the 1864 Act described the scope of its provisions as covering "any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and which, as 'mines,' are excluded from the preemption act of eighteen hundred and forty-one, and * * * under past legislation are not liable to ordinary private entry," see 13 Stat. 343, the general practice of the Land Department had been not to treat coal lands or coal mines as mineral lands under prior Congressional enactments. See 1 Lindley on Mines § 140 (1897). Thus, they would not have been excluded from purchase under § 10 of the Act of Sept. 4, 1841 (the 1841 Pre-emption Act), 5 Stat. 455, by the exception covering "known salines or mines." See Mullan v. United States, 118 U.S. 271, 278 (1886). Indeed, it is generally recognized that coal deposits were never subject to location under the mining laws of the United States. See PLLRC Report, Legal Study of the Nonfuel Mineral Resources at 258.

Given the acreage limitations of the 1873 Act, it is not surprising that attempts were soon made to evade these limitations both through the use of dummy entrymen under the 1873 Act as well as the attempted acquisition of coal lands under the agricultural entry acts. In 1906, fearful that such abuses were becoming widespread, President Theodore Roosevelt requested that the Interior Department take steps to stem the misuse of the agricultural and coal entry laws. Pursuant to this request, the Department ultimately withdrew over 66 million acres of land known to contain workable coal. See generally, Paul W. Gates, History of Public Land Law Development (1968) at 724-27.

Beginning in 1909, Congress commenced a policy of allowing agricultural entries on lands known to contain coal, so long as the coal deposits were reserved to the United States. See Act of March 3, 1909, 35 Stat. 844, 30 U.S.C. § 81 (1994). Ultimately, Congress included coal in the group of minerals made subject to leasing by adopting section 2 of the Mineral Lands Leasing Act of 1920 (MLLA), Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. § 201 (1970).

Of particular relevance herein, section 7 of the MLLA, 30 U.S.C. § 207 (1970), provided that leases would be of indeterminate periods conditioned upon diligent development and continued operation of the mine and expressly subject to readjustment of the lease terms after each 20-year period following lease issuance and further required payment both of an annual rental and of a royalty based on production, setting a minimum royalty of 5 cents per short ton, for all preference right leases issued under the MLLA. As early as 1925, coal leases were being issued with a royalty of 10 cents per short ton. See Emmet K. Olsen, A-24801 (Oct. 31, 1941). Through the late 1940's and 1950's, the royalty rate imposed had generally risen to 15 cents per short ton. See Storm King Coal Mining Co., 105 IBLA 126 (1988); Franklin Real Estate Co., 93 IBLA 272 (1986); Ark Land Co., 86 IBLA 153 (1985). By the mid-1960's, the Department had begun to experiment with split-term leasing, *i.e.*, utilizing one royalty rate for an initial period of time and another, higher rate, thereafter. See, e.g., Coastal States Energy Co., 99 IBLA 342 (1987); Gulf Oil Corp., 91 IBLA 93 (1986). Despite this slow escalation of the royalty rate applied to coal leases, concerns continued to mount, throughout the 1960's, both that the United States was not obtaining a fair return on its coal leases and that a large amount of potentially productive coal lands was being acquired not for production but for speculative purposes.

Thus, only a relatively small number of coal leases had been issued in the first 40 years following adoption of the MLLA. See Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., Federal Coal Leasing Policies and Regulations 4-5 (Comm. Print 1978). The 1960's, however, saw a dramatic upsurge both in the number and the acreage covered by prospecting permits, preference lease applications, and leases issued in response thereto. This increase was occurring at the same time that the amount of coal actually produced from Federal leases was stagnant. Concerned

with the increasingly speculative nature of coal leasing activities, the Interior Department instituted an unofficial moratorium on the issuance of coal leases in May 1971, and, on February 13, 1973, Secretary Morton issued Secretarial Order No. 2952, formally suspending the issuance of coal prospecting permits. This was followed 4 days later by the announcement of a Secretarial policy to limit the issuance of new coal leases to those situations in which the coal was needed to maintain an existing operation or would be needed as a reserve for production in the near future. See generally, Atlantic Richfield Co., 112 IBLA 115, 116-17 (1989).

Faced with the administrative moratorium on coal permitting and leasing, Congress responded by adopting the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 90 Stat. 1083, as amended, 30 U.S.C. §§ 201-209 (1994). Among the numerous changes effected by the FCLAA were those in section 7, which replaced the indefinite term of the lease with a term of "twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease," and further provided for a minimum royalty of not less than "12½ per centum of the value of coal as defined by regulation." 2/ 30 U.S.C. § 207(a) (1994).

The initial operating regulations issued pursuant to the FCLAA, see 41 Fed. Reg. 20261 (May 17, 1976), at a point in time during which the U.S. Geological Survey was delegated the responsibility for overseeing royalty payments under the MLLA, defined the value basis for royalty computation as follows:

Where only crushing, storing, and loading are performed prior to the point of sale, the value of the coal for royalty purposes shall be the gross value at the point of sale. However, if additional processing of the coal is performed prior to sale, such as washing to remove waste, bone, or other impurities, the processing cost above the cost of primary crushing, storing, and loading may be deducted from the gross value in determining value for royalty purposes. The Mining Supervisor will allow such deductions only when, in his judgment and subject to his audit, the lessee provides him an accurate account of the costs so incurred.

30 C.F.R. § 211.63(a) (1977) (emphasis supplied). The regulations further provided that the "gross value shall be the sale or contract unit price times the number of units sold," subject to certain qualifications relating to non-arm's-length sale contracts and coal consumed by the lessee or added to inventories. See 30 C.F.R. § 211.63(b) (1977).

2/ While this was the minimum royalty for coal mined by surface techniques, the statute further provided that "the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations."

These royalty functions were redelegated to MMS, by Secretarial Order No. 3071, dated January 19, 1982, and published in the Federal Register on February 2, 1982. See 47 Fed. Reg. 4751. The regulations appearing at 30 C.F.R. § 211.63 (1977) were ultimately redesignated at 43 C.F.R. § 3485.2 (1983). See 48 Fed. Reg. 41589 (Sept. 16, 1983). The part of this regulation involving coal valuation, 43 C.F.R. § 3485.2(f), continued in existence until the regulatory changes promulgated on January 13, 1989, see 54 Fed. Reg. 1492, 1532, which served as the precipitating factor in these appeals and which are discussed in some detail infra.

The early history of mineral leasing of Indian lands discloses much of the conflicting policies which beset Indian policy in general during that period. Thus, leasing of Indian lands (defined in the 1891 Act as lands "occupied by Indians who have bought and paid for the same") ^{3/} for mineral purposes was first authorized by section 3 of the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. § 397 (1994). While prior to 1891, the leasing of Indian lands had been affirmatively prohibited, see Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177 (1994), the 1891 Act allowed the leasing of such lands for mineral purposes, provided the lands were not needed for farming or agricultural purposes and were not desired for individual allotments. Leases were issued under the authority of "the council speaking for such Indians," for a period not to exceed 10 years, under terms and conditions recommended by the "agent in charge of such reservations," subject to the approval of the Secretary of the Interior. 25 U.S.C. § 397 (1994). Under this statute, Indian approval was essential for issuance of any lease. See White Bear v. Barth, 203 P. 517 (Mont. 1921). Similarly, under the Act of March 3, 1909, 35 Stat. 783, as amended, 25 U.S.C. § 396 (1994), allottees of land were granted the authority (subject to certain exceptions) to lease lands with the approval of the Secretary of the Interior, under such rules and regulations as the Secretary deemed appropriate.

A substantially different approach was adopted in section 26 of the Indian Appropriation Act of June 30, 1919 (IAA), 41 Stat. 31, as amended, 25 U.S.C. § 399 (1994). The IAA authorized the Secretary of the Interior to issue certain mineral leases ^{4/} for unallotted mineral lands on Indian reservations located in specified Western States and provided for a royalty

^{3/} The Interior Department historically took the position that this definition of Indian lands did not embrace executive order Indian reservations. Whether or not this interpretation was sustainable is unclear. See, e.g., British-American Oil Producing Co. v. Board of Equalization of Montana, 299 U.S. 159 (1936). In any event, the adoption of the IMLA effectively mooted this question. See Felix S. Cohen's Handbook of Federal Indian Law (1982) at 529 n.5.

^{4/} The only minerals subject to leasing under this statute were "gold, silver, copper, and other valuable metalliferous minerals." It was not until 1926 that the scope of the Act was extended to cover the leasing of all nonmetalliferous minerals except oil and gas. See Act of Dec. 16, 1926, 44 Stat. 922.

of not less "than 5 per centum of the net value of the output of the minerals at the mine." Id.

Shortly after the MLLA was adopted, questions arose as to its possible applicability to lands within Indian reservations. ^{5/} In 1922, Secretary Fall asserted that, insofar as executive order reservations were concerned, the MLLA did apply. This matter was then brought to the attention of the Justice Department. In two Opinions, one directed to the President, dated May 12, 1924, and the other, which was virtually a verbatim replication of the first, addressed to the Secretary of the Interior, dated May 27, 1924, Attorney General Harlan Fiske Stone overruled Secretary Fall's interpretation, expressly holding that "the Leasing Act of 1920 does not apply to executive order Indian reservations." See 34 Op. Att'y Gen. 171, 181 (1924) and 34 Op. Att'y Gen. 181, 192 (1924).

A month before these two Attorney General Opinions issued, Congress adopted the Indian Oil Leasing Act of 1924, 43 Stat. 244, as amended, 25 U.S.C. § 398 (1994). This Act provided for the leasing for oil and gas mining of those unallotted lands within Indian reservations which were subject to leasing pursuant to the 1891 Act. Inasmuch as it was the Interior Department's position that the 1891 Act did not cover lands within executive order Indian reservations, see footnote 3, supra, the 1924 Act would also not be operative on executive order Indian reservations. Shortly thereafter, however, Congress adopted the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. §§ 398a-398e (1994), which authorized oil and gas leasing of unallotted lands within executive order Indian reservations.

At the same time that Congress was authorizing these varied and, at times, conflicting methods of leasing Indian lands, there was increasing agitation for a total reformation of existing Indian policy. This pressure came to fruition in the Indian Reorganization Act of 1934 (IRA), Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479 (1994), which, inter alia, ended the allotment system, authorized tribes to establish tribal governments, and invested such governments with authority over the development and exploitation of Indian land and resources. As the Ninth Circuit

^{5/} The genesis of this controversy lay in the fact that, while the MLLA listed a number of exclusions from its scope (e.g., lands within incorporated cities, towns, or villages, lands within national parks or monuments), it was silent as to its applicability to lands reserved for or held by the United States in trust for Indians. See § 1 of the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 181 (1994). This question arose because, in view of the Government's position that the 1891 Act was not applicable to executive order reservations, see note 3, supra, there was no general legislative authorization to lease oil and gas and other nonmetalliferous minerals on such reservations.

Court of Appeals noted in Blackfeet Tribe v. Montana, 729 F.2d 1192, 1196-99 (9th Cir. 1984), aff'd 471 U.S. 759 (1985), the IRA had three primary purposes, "to obtain uniformity with respect to the leasing of tribal lands, give Indians authority in granting or denying leases, and enable the Indians to gain the greatest return from their property." Id. at 1199. See also Federal Indian Law, U.S. Department of the Interior (1958), at 128-32. Adoption of the IRA, with its express purpose of restoring primacy in decisions affecting reservation lands to the Indian tribes, together with the desire to remedy the confusion caused by the proliferation of statutes authorizing leasing on Indian lands, led directly to the enactment 4 years later of the IMLA. See Blackfeet Tribe v. Montana, supra.

Section 1 of the IMLA, 25 U.S.C. § 396a (1994), marked a general departure from past statutory provisions relating to the leasing of unallotted lands within Indian reservations. Whereas the former provisions had normally authorized the Secretary of the Interior to lease such lands, with or without the approval of tribal officials as the case might be, 6/ the IMLA authorized the appropriate tribal organization to enter into such leases as lessor, subject to the approval of the Secretary. See Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 372 (1968). Of importance to the instant appeals, the IMLA did not, by any express terms, provide for any fixed or minimum royalty based on mineral production. 7/ However,

6/ Thus, for example, the 1919 IAA had no provision for obtaining the assent of any relevant tribal organization, see also Act of Sept. 20, 1922, 42 Stat. 857, 25 U.S.C. § 400 (1994), while the Act of Feb. 28, 1891, 25 U.S.C. § 397 (1994), and the Indian Oil Leasing Act of 1924, 25 U.S.C. § 398 (1994), expressly required the authority or consent of "the council speaking for such Indians."

7/ One provision of the IMLA which has at least a tangential bearing to the instant appeals is the language of § 1 which provides that mining leases would be issued "for terms not to exceed ten years and so long thereafter as minerals are produced in paying quantities." 25 U.S.C. § 396a (1994). While such habendum clauses are not unusual in oil and gas leases, see, e.g., § 17(e) of the MLLA, as amended, 30 U.S.C. § 226(e) (1994), they are generally less frequent in hardrock leasing. This provision gave rise to fears that mining leases issued under the IMLA might fix the royalty provisions for the life of the mineral deposit, a particularly undesirable result if a flat dollar-per-ton royalty arrangement was entered into. See Final Report, American Indian Policy Review Commission, reprinted in Monroe E. Price, Robert N. Clinton, Law and the American Indian (1983) at 756. By way of contrast, while the MLLA, as originally enacted, also provided for indefinite term leases, it also made express provision for readjustment of terms at 20-year intervals, thus permitting escalation of the royalty rate as deemed appropriate. See Emmet K. Olsen, supra. Practically, however, several tribal leasing authorities have been able to negotiate new lease royalty terms, as, indeed, was done in the instant cases.

regulations adopted under the IMLA provided that "[f]or coal the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds of mine run, or coal as taken from the mine, including what is commonly called 'slack.'" 25 C.F.R. § 186.15 (1940). While this provision has been periodically redesignated, see, e.g., 25 C.F.R. § 171.15(c) (1970), it has survived essentially intact to the present time. See 25 C.F.R. § 211.15(c) (1995).

The regulatory language, of course, merely established a minimum value and did not prohibit either a greater cents per ton royalty or a royalty assessed on the value of production (so long as the end result was a royalty greater than 10 cents per ton). Nevertheless, it should be noted that, of the five Navajo coal leases consummated between 1957 and 1968, only one employed a percentage of value approach ^{8/} while the other four established fixed royalty rates of between 15 and 37.5 cents per short ton. ^{9/} See Final Report, American Indian Policy Review Commission, reprinted in Monroe E. Price, Robert N. Clinton, Law and the American Indian (1983) at 756. Of a total of 15 coal leases examined by the American Indian Policy Review Commission, only three employed a percentage of value royalty rate. Id. Given this leasing structure, it is not surprising that, until recently, there were no Indian coal leasing regulations dealing with product valuation.

In contrast to the coal leasing approach, the regulations relating to oil and gas leasing under the IMLA have, since immediately following adoption of the IMLA, required the payment of a royalty based on a percentage (12-1/2 percent) of value. See 25 C.F.R. § 186.13 (1940). This regulation, from its very inception, has provided that

'value' for the purposes of the lease may, in the discretion of the Secretary of the Interior, be calculated on the basis of the highest price paid or offered * * * at the time of production for

^{8/} This was presumably Lease 9910 which was entered into between the Navajo Tribe and Sentry Royalty Company on June 6, 1966, and which provided in Article III for a variable royalty rate of either 6.67 percent or 5.33 percent of the monthly gross realization, dependent upon whether the coal was sold and/or utilized off or on the Executive Order Area of Dec. 16, 1882. See Navajo Nation's Appeal of Valuation Determination Statement of Reasons (SOR), Ex. 4, at 4-5. Lease 5743 between Peabody and the Hopi Tribe provided for a royalty rate of 3.335 percent of gross realization. See Peabody Coal Co., 72 IBLA 337, 339 n.2 (1983).

^{9/} Lease 2505, which was approved on Oct. 21, 1957, provided for a flat royalty of 15 cents per ton of coal, see BHP Minerals' SOR, Ex. 1, at 3, while Lease 8580, approved on Aug. 28, 1964, contained provisions for a variable royalty rate of between 20 and 37.5 cents per ton, dependent upon the average monthly gross realization per ton and whether or not the coal was sold and utilized on or off the Navajo Reservation. See Navajo Nation's SOR, Ex. 3, at 4.

the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary of the Interior, be deemed mere evidence of or conclusive evidence of such value.

(Emphasis supplied.) As will be seen below, the sentence emphasized above, with its reference to the "actual amount realized," probably served as a catalyst with respect to part of the issues involved in the instant appeals.

Prior to analyzing the regulatory revisions which were first proposed in 1987, see 52 Fed. Reg. 1840 (Jan. 15, 1987), and ultimately adopted in 1989, see 54 Fed. Reg. 1492 (Jan. 13, 1989), and whose interpretation is at the heart of the present appeals, it is helpful to review both the original leases and the various amendments adopted thereto which serve as the essential backdrop against which the effect of the regulatory revisions must be viewed.

Lease 2505 was originally entered into between the Navajo Tribal Council, acting on behalf of the Navajo Tribe of Indians, and Utah Construction Company (predecessor-in-interest to BHP Minerals) 10/ on July 26, 1957. Under paragraph 3(a), royalty was set at 15 cents per short ton of coal and "10 percent of the sales price F.O.B. lessee's plant, where recovered, less transportation cost, on all related products and by-products (exclusive of uranium and other valuable minerals, royalties for which are hereinbelow specified [11/) that may be recovered from the coal and sold by the lessee" subject to a limitation that this additional royalty would not exceed 10 cents per ton of coal. See BHP Minerals SOR, Ex. 1, at 3. As provided in the IMLA, the term of the lease was for 10 years "and for so long thereafter as the substances produced under this lease are produced in paying quantities." Id. at 2.

Over the ensuing years, a number of amendments were negotiated between BHP Minerals and the Navajo Nation. 12/ In late 1976, negotiations commenced with respect to a new amendment (denominated as Amendment No. 4)

10/ While we recognize that, through much of the period covered by the events which concern us, BHP Minerals was known as Utah International Inc., we will, for sake of consistency, simply refer to BHP Minerals as the lessee even where, under the time frame in question, the acting party was Utah International Inc.

11/ The royalties for the other valuable minerals were set at 10 percent of the sales price f.o.b. lessee's mine. See BHP Minerals' SOR, Ex. 1, at 4.

12/ Thus, amendments to Lease 2505 were negotiated by the parties and ultimately approved by the Bureau of Indian Affairs (BIA) on Oct. 30, 1957, on Jan. 19, 1962, and on Sept. 29, 1965.

which would drastically revise the terms of Lease 2505. Negotiations on this amendment continued until 1985 when an agreement was reached by the parties which was ultimately approved by BIA on September 25, 1985. Both BHP Minerals and the Navajo Nation have submitted extensive records as to the conduct of these negotiations. It is sufficient for the present to note that among the many revisions effectuated by Amendment No. 4 was a total change in the method for computing royalty. This change was accomplished by paragraph 1 of Amendment No. 4, which revised subparagraph 3(a) of the base lease to read as follows:

ROYALTY.

To pay, or cause to be paid, to and for the use and benefit of the Lessor, or directly to the Lessor, at Lessor's option, as royalties on coal mined pursuant to this lease (the "Basic Lease") the sum of money as follows, to wit:

(i) Commencing on the Effective Date, for all coal mined by Lessee from the leased premises by underground methods (including auguring) and sold, except as provided in Subparagraphs 3(a)(v), (vi), (vii) or (viii) below, a royalty for each ton of coal (2,000 pounds not including bone coal or other impurities) equal to the greater of (A) eight percent (8%) of the value of the coal (as hereinafter defined) or (B) such other royalty of general application established by law or regulations of the United States from time to time pursuant to the Mineral Lands Leasing Act (Ch. 85, 41 Stat. 437)(1920), codified in scattered Sections of 30 U.S.C. (the "Mineral Lands Leasing Act"), as amended, and regulations thereunder as the minimum royalty payable for coal mined by underground methods under the Federal coal leases thereafter issued, F.O.B. the mouth of the mine from which such coal is mined.

(ii) Commencing on the Effective Date, for all coal mined from the leased premises by surface mining methods and sold, except as provided in Subparagraph 3(a)(v), (vi), (vii) and (viii) below, a royalty for each ton of coal (2,000 pounds not including bone coal or other impurities) equal to the greater of (A) twelve and one-half percent (12-1/2%) of the value of the coal (as hereinafter defined) or (B) such other royalty of general application established by law or regulation of the United States from time to time pursuant to the Mineral Lands Leasing Act, as amended, and regulations thereunder as the minimum royalty payable for surface minable coal under Federal coal leases thereafter issued, F.O.B. the mouth of the mine from which said coal is mined.

(iii) For purposes of calculating the royalties payable hereunder, the value of the coal shall be determined in the same manner as the value of coal F.O.B. the mouth of the mine for Federal royalty purposes under the Mineral Lands Leasing Act.

as amended, and regulations thereunder, and shall include any Tribal taxes lawfully imposed so long as federal or state taxes are included in determining the value of coal for Federal royalty purposes. That portion of the royalties associated with the imposition of Navajo Tribal taxes shall be held in escrow established pursuant to Section 3(a)(vi) for the term and on the conditions of said escrow. Royalties due as a result of a change in the Federal Royalty rate or a change in the manner of determination of the value of the coal shall become due and payable commencing with coal mined in the month next following the month during which a new Federal royalty rate or a change in the manner of determination of the value of the coal is promulgated by law or regulation in final form.

(Emphasis supplied.)

Lease 8580 between the Navajo Tribe and Sentry Royalty Company (Sentry), predecessor-in-interest to Peabody, had been approved on August 28, 1964. This lease provided for a variable royalty rate of between 20 and 37.5 cents per short ton. See note 9, supra. Lease 9910 between Sentry and the Navajo Tribe and Lease 5743 between Sentry and the Hopi Tribe were approved in July and June 1966, respectively. These last two leases involved lands within the former Navajo-Hopi Joint Use Area. Unlike Lease 8580, these leases contemplated royalty payments based on a percentage of "gross realization," 13/ which was defined as "the gross sales price at the mining site without any deduction therefrom of overhead sales costs or any other business expense." See Navajo Nation's SOR, Ex. 4, at 4-5; see also Peabody Coal Co., 53 IBLA 261, 262 (1981). Negotiations with respect to revisions of these three leases commenced in 1981, covering a wide range of topics. Amendments to the lease royalty provisions were finally approved by Secretary Hodel on December 14, 1987. 14/ See Navajo SOR, Ex. 7. While there were various minor variations in the exact language utilized, the essential text of the amendments agreed to is the same with respect to all three leases. Thus, the royalty rate provision embodied in Article 3 of the 1987 agreement replaced Article IV of Lease 8580 as follows:

13/ See note 8, supra. It should be noted, however, that Lease 8580, unlike Leases 5743 and 9910, provided for readjustment of its terms by the Secretary at 20-year intervals.

14/ This approval was preceded by a memorandum dated Dec. 9, 1987, from Ross O. Swimmer, Assistant Secretary, Indian Affairs, to the Secretary recommending approval of the amendments. See Peabody's Answer, Ex. 3. This memorandum makes express reference to the 5-percent cap/floor to the valuation of coal for royalty purposes provided in the amendments, essentially asserting that this provision was added to lessen any impact based on the proposed valuation regulations. This memorandum is discussed in further detail infra.

In consideration of the foregoing, Lessee hereby agrees to pay or cause to be paid to the Secretary of the Interior or his authorized representative for the use and benefit of the Navajo Tribe, royalties for mining under this Lease as follows:

(a) Commencing upon the effective date of these amendments, twelve and one-half percent (12.5%) of the monthly gross realization for all coal obtained from the premises leased under this Lease as herein amended, computed based on F.O.B. mines in accordance with the method utilized by the United States Government for computing royalties on federal coal leases, as such method may be revised from time to time, except that, (i) in the event the method utilized by the United States Government for computation of royalties on federal coal leases is modified by the United States Government after May 1, 1987, such modification shall be applicable only to coal sold by Lessee after the law or regulation changing such method comes into force; and (ii) in the event of a modification of the method of calculation of gross realization utilized by the United States Government for federal coal leases, the change (upward or downward) in the amount calculated as gross realization hereunder resulting from such modification shall be limited to an amount not to exceed five percent (5%) of gross realization calculated in accordance with the United States Government method applicable to federal coal leases prior to such modification. The parties hereby agree that for the purposes of this subsection, the current method utilized by Lessee in calculating gross realization under Lease No. 14-20-0603-8580 as illustrated in Exhibit A-2 which is attached hereto and incorporated herein by reference, shall be deemed to constitute the current method of calculating gross realization utilized by the United States Government for federal coal leases as of May 1, 1987. Exhibit A-2 also contains a formula and example illustrating the application of the five percent (5%) limitation reference above. Exhibit A-2 shall be revised by Lessor and Lessee as necessary to reflect and account for modification in the United States Government method of calculating gross realization applicable to federal coal leases.

(Emphasis supplied.) The exhibit referenced in this Article contained detailed examples of how this provision, with its 5-percent limitation in any modification of gross realization from that existing prior to such modification, would work under a variety of circumstances. These examples specifically included a revision in the "Federal Formula" which removed the Surface Mining Control and Reclamation Act of 1977 fees and Black Lung taxes from inclusion in gross realization. See Lease 8580, Ex. A-2, at 2-3.

As noted above, the royalty functions originally exercised by the Conservation Division, Geological Survey, were redelegated to MMS on January 18, 1982. Commencing in February 1986, MMS began proposing revisions in the existing regulations as they related to valuation under various types of leases. Thus, on February 5, 1986, MMS published proposed

valuation rules for oil, see 51 Fed. Reg. 4507, followed a month later by proposed valuation rules for gas. See 51 Fed. Reg. 7811 (Mar. 6, 1986). On January 15, 1987, MMS published proposed rules governing the valuation of coal for royalty purposes. See 52 Fed. Reg. 1840-72.

Insofar as the present controversy is concerned, the preamble to the Proposed Rules noted that among the purposes of the revision was a desire to clarify "that royalty is to be paid on all consideration received by the lessee, less applicable allowances, for production removed or sold from the lease." 52 Fed. Reg. 1840 (Jan. 15, 1987). It was specifically pointed out that "[t]he proposed rules would apply the same valuation standards to coal produced on Indian lands and coal produced on Federal lands." Id. at 1841. The preamble continued:

Except for cents-per-ton leases * * * this is a continuation of the practices under the existing regulations. MMS believes the proposed valuation methods would yield a reasonable and long-term maximum rate of return for both Federal and Indian leases. The basic premise underlying this methodology is that value is best determined by the interaction of competing market forces—the 7/8ths or 4/5ths owner is going to negotiate the best deal he can to further his own interests, advancing those of the royalty owner as well. This would add certainty to the market place and assure maximum, long-term revenues to all parties concerned.

Id. The preamble noted that "[t]he proposed rules would expressly recognize, however, that where the provisions of any Indian lease, or any statute or treaty affecting Indian leases, are inconsistent with the regulations, then the lease, statute, or treaty would govern to the extent of the inconsistency." 15/ Id. It was further noted that the same principle would apply to Federal leases.

In the section by section analysis of the proposed regulations, the preamble adverted to the fact that, under the proposed definition of "gross proceeds," 16/ see Proposed 30 C.F.R. § 206.251(k), 52 Fed. Reg. 1849 (Jan. 15, 1987), MMS was proposing

15/ This principle was codified as Proposed Regulation 30 C.F.R. § 206.250, 52 Fed. Reg. 1849, which provided: "If the specific provisions of any statute or treaty, or any coal lease subject to the requirements of this Part, are inconsistent with any regulation in this Part, then the lease, statute, or treaty provision shall govern to the extent of that inconsistency."

16/ The definition of "gross proceeds" was a critical element in the determination of the royalty value of coal since, under the proposed valuation regulation for "ad valorem" leases, i.e., those leases "which provide for the determination of royalty as a percentage of the value of production," Proposed Rule 30 C.F.R. § 206.259, 52 Fed. Reg. 1851 (Jan. 15, 1987), the value of coal was either the gross proceeds accruing or which

language in brackets to exclude two types of reimbursements which would otherwise be included in the definition of gross proceeds, i.e., reimbursements for Federal black lung [sic] fees and reimbursements for abandoned mine land [AML] fees authorized by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 et seq.

Id. at 1842. This proposal was justified on the grounds that MMS had received several requests to exclude these fees from the definition of "gross proceeds" based on the theory that, because these fees were set by the Federal Government, the Government could effectively raise the royalty it received simply by raising the fees. The regulatory analysis recognized that not only would this exclusion diminish royalty collections, but that other fees, for which coal purchasers reimbursed coal lessees, would continue to be included within the definition of gross proceeds and, thus, might be subject to a similar challenge. Accordingly, MMS requested comments on these issues. Id.

The original 90-day comment period was reopened for an additional 14 days on July 9, 1987. See 52 Fed. Reg. 25887 (July 9, 1987). It was reopened for an additional 60 days on August 12, 1987, in order to solicit comments on an industry proposal to substitute the concepts of "gross royalty value" and "net royalty value," derived from the Internal Revenue Code for the valuation standards originally proposed. 17/ See 52 Fed. Reg. 29868 (Aug. 12, 1987). This Notice also advised that

[d]uring the comment period, MMS also received a comprehensive set of section by section comments from Indian representatives. Although the Indian comments do not include a proposal as significantly different from the MMS proposed rules as the industry

fn. 16 (continued)

could accrue to the lessee under an arm's-length contract, or in the absence of such a contract, the reasonable value of the coal as determined under the regulations. Proposed Rule 30 C.F.R. § 206.259(f) expressly provided that "[n]otwithstanding any other provisions of this section, under no circumstances shall the value for royalty purposes be less than the gross proceeds accruing, or which could accrue, to the lessee, less applicable allowances determined pursuant to §§ 206.260 and 296.262." 52 Fed. Reg. 1852.

17/ As MMS noted, the effect of the revisions proposed by the industry would be to exclude, as an initial matter, "any amounts received for State and local taxes, transportation from the lease to the delivery point, and any beneficiation" from the starting point for royalty valuation in the MMS proposal, i.e., the concept of "gross proceeds." See 52 Fed. Reg. 29868 (Aug. 12, 1987). It was pointed out, however, that, even under the proposed rules, allowances for some of these amounts would be provided.

proposal, the Indian comments nevertheless raise a number of significant issues related to valuation for Indian leases such as the role of the Indian lessor in approving processing and transportation allowances. The MMS specifically requests further public comment on the various matters raised in the Indian comments.

Id.

As indicated above, there was a considerable input from Indian tribes with respect to the substance of the proposed coal valuation regulations. The Attorney General of the Navajo Nation provided a lengthy analysis of the proposed valuation regulations in a submission dated April 14, 1987. See Navajo Nation's SOR, Ex. 12. After first exploring, at some length, the Federal trust responsibilities with respect to Indian tribes, which, the Navajo Nation asserted, required "MMS to seek the highest royalties payable under lease terms and federal regulations," 18/ this submission then addressed a number of specific problems which the Navajo Nation had with the MMS proposal.

As an initial matter, the Navajo Nation explicitly challenged the assumption that Indian and Federal lessees should be treated in the same manner, noting that the Federal Government had trust responsibilities with respect to Indian tribes which might mandate the application of different considerations in selecting valuation standards. See Navajo Nation's SOR, Ex. 12, at 5-6. Continuing in this vein, the Navajo Nation Attorney General noted:

The Navajo Nation respectfully suggests that an additional purpose of the regulations should be to insure that the value of coal for royalty calculation purposes be consistent with the understanding of the parties at the time the leases were negotiated. There should be no change for leases that have been negotiated such that value for royalty purposes would be reduced. For example, the Navajo Nation recently renegotiated two coal mining leases with regard to the amount of royalties and taxes to be paid for past and future production. The parties relied on and negotiated on the basis of current regulations and the interpretations of the Department of the Interior. The Secretary should not now be allowed to change the methodology by which royalties were valued, as such a change would effectively reduce the royalty rate. It is important for MMS to understand that any change in policy and methodology for calculation of royalties

18/ (Navajo Nation's SOR, Ex. 12, at 4.) The submission continued: "The scope of permissible actions in setting valuation guidelines for royalty payment is greatly narrowed and constrained by the obligation to perform as a trustee. The MMS must at that point consider what would generate the highest royalties for the tribe, to the exclusion of other interests." Id.

will have a dramatic effect on existing leases and the royalties that will be paid under those leases. Therefore, regulations should apply prospectively to new leases only, unless the Secretary can demonstrate that the provisions will not reduce the amount of royalties due to tribes under current regulations. The Navajo Nation insists that the Secretary demonstrate that the proposed revisions are "revenue-neutral" or even "revenue-increasing" before any revisions are adopted.

Id. at 6-7.

In his comments with respect to the definition of "gross proceeds" as proposed in the regulations, the Navajo Nation Attorney General vigorously assailed the possible exclusion of reimbursements for Federal Black Lung taxes and AML fees from the scope of that term:

These two reimbursements make up a substantial part of the gross proceeds to lessees. These costs are passed on directly by the lessee to the purchaser of coal and by the power plant operator to the consumer who should rightfully bear the burden of these taxes.

* * * * *

The Navajo Nation estimates that the impact of removal of the Federal reclamation fees on the Tribe over the next 25 years will be 30.1 million dollars while the impact of removal of Black Lung Fee would be 42.9 million dollars. The combined impact of these two significant changes in long standing MMS policy regarding royalty calculation will cost the Navajo Tribe alone in excess of 73 million dollars over the next 25 years. The Tribe simply cannot afford such a reduction in its coal royalties and the Secretary of the Interior, in carrying out his trust responsibilities to the Navajo Nation, cannot justify subjecting the Tribe to such an enormous economic hardship. * * * We submit that the end result of this diverse change in policy is in fact to change the contractual relationship between lessor and lessee for existing leases. Removal of these items from gross proceeds significantly changes the understanding of the parties at the time of the leases and amendments thereto were negotiated and executed.

Id. at 9.

The Attorney General reiterated his concerns with respect to the possible loss of revenues in his comments on the valuation standards proposed for ad valorem leases. Id. at 11. After delineating a number of other areas of concern to the Navajo Nation, the Attorney General concluded:

The Secretary's trust responsibility to Indian tribes requires him to maximize Indian royalties from Indian coal lands.

The proposed revisions to the Coal Product Valuation Regulations would result in a breach of said trust responsibility. No revisions should even be considered until the Secretary can demonstrate that the proposed regulations will have a revenue-neutral or revenue-increasing impact on royalty payments to Indian tribes.

Id. at 15.

It is clear that the opinions expressed by the Navajo Nation Attorney General were widespread throughout the Indian community. Thus, on July 15, 1988, a Further Notice of Proposed Rulemaking was published by MMS. See 53 Fed. Reg. 26942 (July 15, 1988). In this Notice, MMS reported that the definition of gross proceeds had received more comments than any other section of the proposed regulations, with particular attention being focussed on the language exempting reimbursements for Black Lung taxes and AML fees from inclusion therein. It was noted that 39 respondents supported the proposal, 18 respondents opposed it (including 4 Indian organizations), and 52 respondents submitted comments seeking to have the exclusion extended to similar taxes and fees which are normally assessed at the state and local levels. 19/ Id. at 26946-47.

In response to this varied commentary on its proposed definition of gross proceeds, MMS responded:

The MMS has considered both the comments calling for the reinstatement of reimbursements for the Black Lung Excise Tax and AML fees into the value basis for royalty computation, and all comments requesting the further exclusion of all other reimbursements for State and local imposed taxes and fees from the value basis of Federal and Indian coal. The MMS has determined that the definition of gross proceeds is not the place to address issues as to whether certain payments are royalty-bearing. There is no doubt that when the purchaser pays \$10/ton for coal, that is the lessee's gross proceeds. Whether all of that \$10 is royalty-bearing is a separate issue and is addressed in § 206.257.

Id. at 26947. Pursuant to the foregoing rationale, the definition proposed for "gross proceeds" in the 1988 Notice simply omitted the language excepting reimbursements for Black Lung taxes and AML fees. See Proposed Rule 30 C.F.R. § 206.251, 53 Fed. Reg. 26985 (July 25, 1988).

^{19/} This last grouping seemingly included at least 27 individuals or groups who were counted in the first category since, according to this Notice, only a total of 82 comments were received on the entire package. See 53 Fed. Reg. 26942. However, in its promulgation of the Final Rule on Jan. 13, 1989, MMS asserted that a total of 136 comments had been received on its original proposal. See 54 Fed. Reg. 1492.

A review of the MMS discussion of changes it was proposing in the valuation standards for ad valorem leases, see Proposed Rule 30 C.F.R. § 206.257, 53 Fed. Reg. 26960-61 (July 15, 1988), makes it clear that, while MMS no longer sought to include Indian leases in the proposed changes, see discussion infra, it was still committed to consideration of whether or not to end royalty payments on reimbursements for Black Lung taxes and AML fees received by Federal coal lessees. Thus, paragraph b(5) of Proposed Rule 30 C.F.R. § 206.257 provided:

Notwithstanding any other regulations in this subpart, except for Indian leases the value of coal shall be reduced by the amounts of Federal Black Lung excise taxes and abandoned mine lands fees authorized by the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.), applicable to coal production.

Proposed Rule 30 C.F.R. § 206.257(b)(5), 53 Fed. Reg. 26960 (July 15, 1988).

In explaining the approach delineated in paragraph b(5), MMS noted that

if a coal contract provides that the purchaser is to reimburse the lessee for Black Lung and AML fees, those amounts would be part of gross proceeds, but paragraph (b)(5) nevertheless would not require the payment of royalty on those amounts. Similarly, even if a coal contract does not have a separate reimbursement clause, the lessee could reduce the value of coal for royalty purposes by the amount of Black Lung and AML fees the lessee is required to pay for the coal production.

53 Fed. Reg. 26950 (July 15, 1988). 20/

Turning to the question of Indian leases, MMS noted that provisions of paragraph b(5) would not be applicable to Indian tribal and allotted

20/ While MMS recognized that decisions both of this Board and the Federal courts had held that a lessee's gross proceeds include all payments for coal production, including reimbursements received either directly or indirectly by the lessee, see, e.g., Enron Corp., 106 IBLA 394 (1989), aff'd, Enron Oil & Gas Co. v. Lujan, 978 F.2d 212 (5th Cir. 1992), cert. denied, 114 S.Ct. 59 (Oct. 4, 1993); Hoover & Bracken Energies, Inc., 52 IBLA 27 (1981), aff'd, 723 F.2d 1388 (10th Cir. 1983); Knife River Coal Co., 43 IBLA 104 (1979), it again sought to justify the exclusion of reimbursements for Black Lung taxes and AML fees on the theory that, since they were imposed by the Federal Government which was the lessor for the Federal leases, the taxes and fees could be increased by the Federal Government with the effect of also increasing royalty payments to it. See 53 Fed. Reg. 26950 (July 15, 1988).

leases, announcing its intention that "these rules be revenue neutral for Indian leases." This exception for Indian leases was not justified on the ground that imposition of such an exception would violate the Federal Government's trust responsibilities, but rather on the theory that, since the Indian tribes did not impose either the Black Lung tax or the AML fees, the rationale for exclusion of these reimbursements did not apply to production under Indian leases. See note 20, supra.

The publication of these rules elicited further comment from numerous parties. In a letter dated September 13, 1988, the Acting Assistant Attorney General, Navajo Nation, applauded some of the changes made in the proposed regulations while at the same time he reiterated concerns which the Navajo Nation continued to have that the proposed regulations not negatively impact upon its royalty under existing leases. See Navajo Nation's SOR, Ex. 14. After restating his opposition to the exclusion of reimbursements for Black Lung taxes and AML fees from the royalty base, the Acting Assistant Attorney General continued:

As stated above, we are pleased that MMS has exempted Indian leases from deductions attributable to AML and Black Lung fees; however, exemptions for Indian mineral owners may make Indian coal less attractive to mineral developers than federal coal. On the other hand, the proposed revision allows tribes to make their own determination of whether some form of royalty relief is necessary for the financial well-being of their mineral lessees. The previous revision did not give Indian mineral owners that flexibility.

We understand that the Bureau of Indian Affairs may have submitted comments on subsection (b)(5) arguing that exemptions for Indian leases will hurt Indian coal lessors. Existing Indian coal leases commit significant quantities of Indian coal for future mining. These leases will not be affected by this subsection. With respect to future coal leases, the current revision will give Indian coal owners the option of whether Black Lung/AML fees should be excluded from the royalty base. We vehemently reject the BIA position on this matter.

MMS has requested comment as to whether the proposed exclusion language will be sufficient to ensure that the Black Lung/AML deductions provided by paragraph (b)(5) will not be applicable to existing Indian leases. Our understanding is that these fees will not be deducted from the royalty base for existing Navajo coal leases. If there is any question whether this language is sufficient to exempt all existing Indian leases, MMS should, pursuant to its trust responsibility, affirmatively solicit a statement of understanding from all Indian coal lessors and lessees. If there is any divergence of understanding on this point, the promulgation of these regulations should be deferred pending resolution of any differences.

(Navajo Nation's SOR, Ex. 14, at 3-4) (emphasis supplied). The Acting Assistant Attorney General also criticized any exclusion of state taxes from the royalty base or further adjustments thereto based on the theory propounded in the industry proposal that MMS was assessing royalty on royalty. Id. at 4-5.

Comments on the 1988 proposals were also filed by both Peabody and BHP Minerals. In comments dated September 12, 1988, Peabody noted general problems it had with the regulatory structure as proposed, including use of the concept of gross proceeds as the starting point for determining royalty due. See generally Navajo Nation's SOR, Ex. 13. After advising of its support for the exclusion of state severance and ad valorem taxes from the royalty base as well as its support for royalty adjustments to address the so-called "royalty on royalty" problem, Peabody directly addressed the question of the inclusion of reimbursements for Black Lung taxes and AML fees in the royalty base on Indian leases:

The proposed regulations indicate that while MMS would propose to exclude the AML and Black Lung fees from the calculation of royalties on federal lands, it would not grant similar relief to royalty payments on Indian lands. As the largest producer of coal from Indian leases in the United States, Peabody must strenuously object to this concept. We must urge that the AML and Black Lung fees also be excluded from the calculation of royalties on Indian lands. To do otherwise would be to create and maintain a competitive pricing handicap on Indian lease production which is neither justified nor required under federal law.

Id. at 8.

In its comments, BHP Minerals also addressed the MMS proposal to except Indian leases from the Black Lung tax and AML fees exclusion otherwise applicable in determining the value for royalty computational purposes:

BHP-Utah pays a royalty to the Navajo Nation based on value of coal produced under a mining lease which incorporates the regulatory definition of value adopted for Federal royalty purposes pursuant to the Mineral Lands Leasing Act. Nonetheless, we see no reason to adopt different rules for Indian leases than those applicable to Federal leases. Contrary to MMS' assertion, the rationale for the deductions for Black Lung and AML fees proposed in respect of federal coal applies equally to Indian coal - those increments of the coal price are not valid determinants of the value of coal produced.

(BHP Minerals' SOR, Ex. 10, at 3) (emphasis in original).

Unlike the Peabody response to the 1988 proposals, a fair reading of the response tendered by BHP should have alerted MMS to the fact that

there might be problems with its ability to assure that the proposed changes would be revenue-neutral for Indian leases under its proposed regulations. It seems clear that BHP Minerals was asserting that, because its lease adopted the Federal royalty standards under the MLLA, it was not affected by the Indian exception language. ^{21/} Yet, despite the fact that the Navajo Nation had expressly requested that, if any question as to the exclusion of its outstanding leases from the scope of paragraph (b)(5) arose, MMS should either elicit a formal statement of understanding or refrain from promulgating the regulations, MMS, in effect, ignored this clear indication of possible problems and, on January 13, 1989, promulgated the regulatory changes which are at the heart of the instant appeals.

The preamble to the Final Rule noted that 51 individuals and groups had responded to its July 1988 Notice. At the outset, the preamble advised that, while the new regulations largely continued past practice for coal valuation, ^{22/} there were two areas in which this was not true:

Under these rules, lessees may deduct from gross proceeds their costs of Federal Black Lung excise taxes, abandoned mine lands fees, and severance taxes. However, these deductions are only available to Federal lessees and are not available to lessees of Indian tribal or allotted lands. Secondly, Indian cents-per-ton royalty provisions are included in these rules.

54 Fed. Reg. 1493 (Jan. 13, 1989) (emphasis supplied).

In the section-by-section analysis of 30 C.F.R. § 206.257, the Department noted that, while the basic valuation approach being adopted followed the July 1988 proposal, there were some significant differences. See 54 Fed. Reg. 1510 (Jan. 13, 1989). The most significant difference as it

^{21/} Indeed, BHP Minerals' use of the parenthetical "nonetheless" following its reference to the fact that, under its lease provisions, the rules relating to Federal leases under the MLLA would apply, clearly underscored BHP Minerals' position. ^{22/} This, in itself, was a questionable assertion given that, as reviewed earlier in the text of this decision, prior to the adoption of FCLAA in 1976, both Federal and Indian coal leases were, with only a few exceptions, issued on a cents-per-ton royalty basis and there were no general valuation regulations relating to coal royalties until 1976. Moreover, the initial regulations adopted pursuant to FCLAA did not refer to "gross proceeds," but rather to "gross value." See 30 C.F.R. § 211.63(a) (1977). Indeed, MMS expressly recognized this fact in its section by section analysis of the Final Rule, and actually used this as a basis for discounting a prior Board decision, Knife River Coal Co., 29 IBLA 26 (1977), in its attempt to justify the addition of state severance taxes to the list of reimbursements excluded for royalty valuation purposes. See 54 Fed. Reg. 1505, 1512 (Jan. 13, 1989). But see Meadowlark, Inc., 133 IBLA 5 (1995); 55 Fed. Reg. 5025 (Feb. 13, 1990).

relates to this appeal was a change in paragraph (b)(5) to include reimbursements of state and local severance taxes among the items excluded from value for royalty purposes. This change was justified on the grounds that

[i]t is the Department's conclusion from the large number of comments it received that consideration of the interaction of the market place supports excluding severance taxes from the value of coal for royalty purposes. As noted above, coal buyers, and sellers commented that taxes are not part of the coal's value. Many of the comments point that even the states which impose a severance tax recognize that there is a determinable value for coal before the tax is assessed because the assessment is based on the value of the coal net of any amount representing the tax. Thus, for coal, the Department has concluded that severance taxes increase the cost of the resource but not its value. [23/] Consequently, the Department is excluding the severance taxes from the value of coal for Federal royalty purposes.

Id. at 1513.

As adopted, 30 C.F.R. § 206.257(b)(5) (1989) provided, in relevant part:

Notwithstanding any other regulations in this subpart, except for Indian leases, the value of coal for royalty purposes shall not include amounts of Federal Black Lung excise taxes authorized by the Black Lung Benefits Revenue Act of 1977

23/ While this enhancement of value approach as a basis for excluding reimbursements in royalty valuation had been mentioned in previous notices as a theory advanced by industry representatives, see 53 Fed. Reg. 26946 (July 15, 1988), it had not previously been embraced as the rationale for determining exclusions from value. In the Final Rule, however, this rationale was not only used to justify the exclusion of state and local severance taxes, it was also employed as the justification for the exclusion of reimbursements of Black Lung taxes and AML fees from the value for royalty purposes. See 54 Fed. Reg. 1512 (Jan. 13, 1989) ("The MMS has adopted the provision that amounts for AML fees and Black Lung taxes are excluded from royalty value. The MMS agrees that these fees do not add to the value of the coal.") This represented a significantly different justification for exclusion from that previously advanced by MMS. See text accompanying note 16, supra, and 53 Fed. Reg. 26951 (July 15, 1988) ("[S]ince the Indian lessor does not impose the AML and Black Lung taxes, the above-stated rationale for excluding these fees from royalty value (i.e., that the lessor can increase royalties by imposing or increasing these taxes) does not apply to Indian leases.")

(26 U.S.C. 4121), abandoned mine lands fees authorized by the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(a)), and severance taxes.

Additionally, it must be noted that, while it had grown in detail since it was originally proposed, section 206.250(b) had not been substantively altered since it was first proposed in 1987. As adopted, it provided that

[i]f the specific provisions of any statute, treaty, or settlement agreement between the United States (or Indian lessor) and a lessee resulting from administrative or judicial litigation, or any coal lease subject to the requirements of this subpart, are inconsistent with any regulation in this subpart, then the statute, treaty, lease provision, or settlement shall govern to the extent of that inconsistency.

No sooner had these regulations become effective on March 1, 1989, than the present controversy erupted.

It is clear that MMS had some forewarning of the problem since, on April 21, 1989, the Associate Director for Royalty Management issued a "Dear Payor" letter advising coal lessees that MMS "considers the coal product valuation regulations as applied to all Indian leases to prohibit the lessees from excluding the costs of Black Lung excise taxes, abandoned mine land fees, and severance taxes from the value of coal for royalty determination purposes." On May 17, 1989, the Chief, Royalty Valuation and Standards Division (RVSD), RMP, individually informed both BHP Minerals and Peabody that they had inappropriately excluded the costs of the Black Lung excise taxes, AML fees, ^{24/} and state severance taxes in computing royalty due for coal sales during March 1989. BHP Minerals and Peabody were both instructed to recompute their March royalty payments without the above exclusions and to compute future payments without taking such deductions. They were also informed that, upon receipt of past-due royalties MMS would assess late-payment interest in accordance with 30 C.F.R. § 218.202. As indicated above, both BHP Minerals and Peabody appealed this directive to the Director, MMS, pursuant to 30 C.F.R. Part 290.

The basis of both appeals was essentially the same. Thus, both BHP Minerals and Peabody recognized that, by its terms, 30 C.F.R. § 206.257(b)(5) (1989) excepted Indian leases from its purview. However,

^{24/} Only Peabody had actually deducted reimbursements for AML fees from its royalty base. As the RVSD letter noted, while BHP Minerals intended to take such a deduction, uncertainty caused by conflicting "Dear Payor" letters relating to whether or not the deduction should be taken on a sales matching or cash basis had led to a delay by BHP Minerals in deducting these reimbursements.

both asserted that, under the terms of their respective leases, they were authorized to exclude from the royalty base any exclusion made available to Federal lessees with respect to leases issued under the MLLA. Since 30 C.F.R. § 206.257(b)(5) (1989) clearly authorized Federal lessees to exclude Black Lung taxes, AML fees, and state and local severance taxes from the royalty base, BHP Minerals and Peabody argued that these exclusions were also available to them. To the extent that there might be any conflict between their lease terms and the language of 30 C.F.R. § 206.257(b)(5) (1989) excepting Indian leases from the exclusions to value, both argued that, pursuant to 30 C.F.R. § 206.250(b) (1989), the lease language controlled to the extent of the conflict and, therefore, the exclusions from value, which would otherwise not be available to Indian lessees, were available to them.

Up to this point in our analysis, we have considered the appeals of BHP Minerals and Peabody in tandem since they arose out of the same general historical framework and involved the application of the same regulations. As we have seen, however, the gravamen of both appeals is that, under the express terms of their respective leases, each was authorized to make adjustments to the royalty base which would otherwise be improper absent the lease terms. Since, however, the lease terms on which BHP Minerals and Peabody attempt to rely are substantially different, it will be necessary to consider each lease separately to determine whether or not the terms of the lease permit the exclusions from value at issue herein.

Prior to doing so, however, it is useful to note that, while both of these appeals were pending before the Director, MMS, the Department reconsidered its decision to allow exclusions from value for royalty purposes under 30 C.F.R. § 206.257(b)(5) (1989), in light of both its impact on Federal and state revenues as well as its possible impact on Indian revenue. On February 13, 1990, the Department announced that, because of these concerns, 25/ as well as continuing questions as to the validity of its initial justifications for allowing the exclusions from value, it was proposing to eliminate the exclusions. See 55 Fed. Reg. 5025.

25/ The Department noted that, in a 6-month period subsequent to the implementation of the new regulation, Federal revenues were estimated to have declined 16.6 million dollars over what they would have been under the prior valuation rules, a decline which was passed on to the Federal coal-producing states through a proportionate diminution in Federal payments under § 35 of the MLLA, as amended, 30 U.S.C. § 191 (1994). See 55 Fed. Reg. 5027 (Feb. 13, 1990). Moreover, the Department noted that, notwithstanding its intention that the exclusions not apply to Indian leases, the Navajo Nation and the Hopi Tribe had experienced a reduction in revenue of approximately 2 million dollars in the period between March 1989 and August 1989, based on the claims of its lessees that specific lease terms allowed them to deduct the excluded items from royalty value. Id. at 5027-28.

On August 30, 1990, the Department published a Final Rule, effective October 1, 1990, repealing the exclusion from royalty value of reimbursements received by lessees for Black Lung taxes, AML fees, and state and local severance taxes, based on the conclusion that MMS should return to its historical approach of requiring royalties to be paid on any reimbursements received by a lessee for taxes and fees. See 55 Fed. Reg. 35427 (August 30, 1990). Thus, the controversy before the Board deals with the allowability of the three exclusions for the period from March 1989 through September 1990, since there is no question presented that such exclusions were proper either before or after this time-frame. 26/ See generally Meadowlark, Inc., 133 IBLA 5 (1995); Black Butte Coal Co., 103 IBLA 145 (1988).

BHP Minerals argued in its appeal below that, under the terms of its lease (Lease 2505), it was permitted to take whatever adjustments to value were available to Federal lessees under the MLLA. Indeed, the determination of the Deputy Commissioner of Indian Affairs posed the issue before her as follows:

The question presented here is whether the exclusions authorized for Federal coal leases during the period March 1989 to October 1990 apply to an Indian lease that provides that the royalty value of the coal shall be determined in the same manner as the value of coal for Federal royalty purposes.

See Decision at 4. As noted above, the Deputy Commissioner answered this question in the negative.

At the outset, the Deputy Commissioner noted that, though the negotiated lease amendment provided that "the value of the coal shall be determined in the same manner as the value of coal * * * for Federal royalty purposes under the Mineral Lands Leasing Act, as amended, and regulations thereunder," the record before her failed to include any evidence of the intent of the parties as it related to the amendment. Id.

The Deputy Commissioner recounted that, while BHP Minerals asserted that the meaning of the amendment was that, for purposes of coal valuation, its lease should be treated as if it were a Federal rather than Indian lease, and therefore, it was permitted to take the exclusions from value available to Federal lessees, both the RVSD and the Navajo Nation asserted that the exclusions from gross proceeds authorized by 30 C.F.R.

26/ We note, however, that, even though the period during which the actual exclusions could occur has long since run, the impact to Navajo and Hopi revenues continues because of the 5-percent limitation to revenue adjustments contained in their leases with Peabody. See Navajo Nation's SOR at 1 n.1.

§ 206.257(b)(5) were not available to BHP Minerals since the lease amendment necessarily incorporated the regulatory exception for Indian leases. The Deputy Commissioner continued:

The Navajo Nation also asserted that the lease language simply directs that the lease shall be subject to the body of applicable Federal valuation regulations and should not be read to mean that the Indian lease is to be governed as if it were a Federal lease. Because the referenced valuation regulations by their terms apply equally to Indian and Federal leases, the lease terms mean only that the royalty values should be determined in the same manner as prescribed by regulations which are applicable to both Indian and Federal coal.

Id. at 5.

After pointing out that the regulations at issue had been promulgated not only under the MLLA and the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1994), but under the IMLA as well, the Deputy Commissioner noted that it had already been held by this Board (in Peabody Coal Co., 72 IBLA 337 (1983)), that the general coal valuation regulations set forth at 30 C.F.R. § 211.63(b) (1982), applied equally to Federal and to Indian ad valorem leases. The Deputy Director asserted that the general applicability of the coal valuation regulations was confirmed in the original notice of proposed rulemaking, wherein "MMS gave notice that the new rules would apply the same valuation standards, with the exception at issue here, [27/] to coal produced on Indian lands and coal produced on Federal lands and stated that this was a continuation of the practices under existing regulations." (Decision at 6-7.)

While recognizing that, in line with the stated intent of the Department that the regulations be revenue-neutral with respect to Indian leases, the valuation regulation had expressly provided that the authorized exclusions from value would not be available on Indian leases, the Deputy Commissioner agreed that "to the extent that any clear inconsistency may exist between the regulations and the provisions of an Indian lease, the lease terms would take precedence." Id. at 7. The Deputy Commissioner then proceeded to analyze the lease terms to determine if such a "clear inconsistency" existed. She concluded that it did not:

The renegotiated coal lease at issue here contains no express provisions or language regarding the deductibility of

27/ Contrary to the clear implication of the Deputy Commissioner's declaration, the original proposed rules made no exceptions for Indian leases. Under the definition of "gross proceeds" in the proposal, the exclusion for reimbursements for Black Lung taxes and AML fees would have applied to both Federal and Indian leases. See Proposed Rule 30 C.F.R. § 206.251(k), 52 Fed. Reg. 1849 (Jan. 15, 1987).

Black Lung excise taxes, abandoned mine lands fees, or severance taxes. Furthermore, the record contains no persuasive evidence indicating that the parties interpreted the coal valuation provision in the revised lease in such a way as to allow these costs to be deducted from the value of coal mined under this lease in the event that such costs became deductible for Federal leases. The regulations at 30 CFR 206.257(b)(5) expressly state that the new exclusions are not applicable to Indian leases. Thus, there is no direct conflict between the Appellant's lease and the regulations. There is, at most, a latent ambiguity which arises from the interaction of the amended regulations and the reference in the amended lease to determining the value of the coal in the same manner as is used "for Federal royalty purposes."

The Assistant Attorney General, Navajo Nation Department of Justice, in its filing dated August 15, 1990, (p.3) in this appeal, suggests that the parties' reference in the lease to the manner of determining the value of coal "for federal royalty purposes" should be read as a reference to the Federal regulations applicable to coal mined on Federal lands including Federal lands held in trust for Indian tribes.

This reading of the lease term commits the parties to using the manner prescribed by specific Federal regulation (30 CFR 203.200(f) and (g) (1985)) applicable to both Indian and Federal leases and does not command that the Indian lease shall be treated as a Federal lease; as explained above, it has been argued that the term "Federal royalty purposes" does not equate with the term "federal coal lease." Accepting this contention, [28/] it follows that the regulatory exception provided for Indian leases falls within the amendments to the referenced regulatory authority and should be recognized under the lease terms negotiated by the parties.

Id. at 7-8.

Having essentially determined the outcome of the appeal before her, the Deputy Commissioner then sought to bolster her conclusion by advertng to "the Department's trust responsibilities on behalf of its beneficiaries in interpreting ambiguities in Indian lease provisions." Id. Noting that "a reasonable interpretation of the lease provision is that the provision

28/ It is unfortunate that, while this "contention" was central to the outcome of the appeal, there was no independent analysis of its viability in the Deputy Commissioner's decision. Rather, its correctness was simply "accepted." Yet, as we show infra, it is on precisely this point that the decision below is most fatally flawed.

encompasses the coal valuation regulations applicable to both Federal and Indian leases," the Deputy Commissioner concluded that "[a]s the Tribe's fiduciary in this matter, we are constrained to choose a reasonable interpretation that is most beneficial to the Indian lessor." Id. at 9. Accordingly, the Deputy Commissioner rejected BHP Minerals' appeal. BHP Minerals thereupon sought review before this Board.

In arguing that the determination of the Deputy Commissioner should be reversed, BHP Minerals assails the assertion of the Deputy Commissioner that, at best, merely a latent ambiguity existed growing out of the interplay of the lease provisions and 30 C.F.R. § 206.257(b)(5) (1989). On the contrary, BHP Minerals asserts that the lease provisions at issue clearly establish that "valuation of production for royalty purposes is to employ the regulations governing federal coal leases, that is, rules and coal leases issued under the Mineral Lands Leasing Act" (BHP Minerals' SOR at 8-9.) BHP Minerals alleges that the Deputy Commissioner's decision took the phrase "Federal royalty purposes" out of context, "ignoring the immediately following words in the same sentence that define the phrase, and thus turns the contract provisions into something they are not." Id. at 10.

In support of its argument that the rejection of its appeal was contrary to the express provisions of its lease, BHP Minerals has submitted an extensive recapitulation of the lease amendment negotiations which ultimately resulted in the adoption of Amendment No. 4. See BHP Minerals' SOR, Exs. 3 and 4. BHP Minerals notes that, since the commencement of mining under Lease 2505 at the Navajo Mine, all production from the lease had been sold and delivered to the Four Corners Power Plant (Four Corners). Because of provisions of the fuel supply agreement between BHP Minerals and the Four Corners participants, most notably the Arizona Public Service Company (APS), which operated the power plant on its own behalf and on behalf of the other participants, 29/ BHP Minerals could not agree to any revision in the royalty formula with respect to coal committed to Four Corners without the participants' approval. As a result, the negotiations expanded so as not only to include the APS, on behalf of the Four Corners participants, but to embrace issues relating to the Four Corners lease of Navajo land for its plant site. See BHP Minerals' SOR at 18.

BHP Minerals has submitted affidavits from John F. Atkins, Vice President and General Manager of Western U.S. Operations, who was responsible for conducting the amendment negotiations for BHP Minerals, and Thomas E. Parrish, Senior Attorney, APS, who was responsible for conducting the negotiations on behalf of APS. See BHP Minerals' SOR, Exs. 3 and

29/ In addition to APS, the participants in the Four Corners Power Plant were the Southern California Edison Company, Tucson Electric Power Company, Salt River Project Agricultural Improvement and Power District, Public Service Company of New Mexico, and the El Paso Electric Company.

4. The affidavit of Atkins notes that, in an offer submitted to the parties by letter dated July 29, 1980, BHP advanced a proposal requiring the value of the coal for royalty purposes to be determined by reference to 30 C.F.R. § 211.63, but expressly allowing the deduction from value for royalty purposes of any reimbursements for Black Lung taxes, AML fees, taxes paid either to the Federal or state governments or to the Navajo Nation, and other similar governmental levies. See BHP Minerals' SOR, Ex. 3-A at 2-3. When the Navajo Nation objected to these exclusions, Atkins states that

[BHP] and APS pointed out that U.S. Geological Survey was then considering whether to allow exclusion of certain production taxes from the value basis for federal lease royalty calculation. To resolve the Navajo Nation's continuing objection to an explicit provision excluding the production taxes from the value basis under any and all circumstances, [BHP] and APS offered to drop the express exclusions and instead to use whatever valuation formula was in effect and applicable to the valuation of coal produced from federal leases issued under the Mineral Leasing Act.

(BHP Minerals' SOR, Ex. 3, at 6.) According to Atkins, this position was again communicated to the Navajo Nation's representatives in a meeting held on January 11, 1982. See BHP Minerals' SOR, Ex. 3, at 6-7, and Ex. 3-C. Atkins relates that negotiations became bogged down over a number of issues in the fall of 1983 and that both BHP and APS informed the Navajo Nation that they were terminating discussions.

Negotiations resumed in November when the Navajo Nation explicitly agreed to accepting a royalty rate of 12-1/2 percent. The counterproposal from the Navajo Nation included a provision which defined the "gross sale value" as "the delivered price at the mine without any deductions therefrom for any overhead cost included but not limited to business expenses, regulatory expenses, taxations and royalty." (BHP Minerals' SOR, Ex. 3-F at 1-2.) Atkins' affidavit notes that at a subsequent meeting on November 17, 1983, BHP and APS "reiterated that they could agree to the use of the federal royalty valuation formula, as it might be amended by any subsequent changes by the government." He asserts that "[t]he Navajo Nation's representatives agreed to the use of the federal formula of 12½%, and to any subsequent changes by the government to the formula." 30/ (BHP Minerals' SOR, Ex. 3, at 8-9.)

30/ At this point, it is important to focus on the fact that the "federal formula" could refer to two discrete concepts. On the one hand, it could refer to the royalty rate. Under FCLAA, the royalty rate for coal was set at a minimum of 12-1/2 percent of its value, though a lesser rate could be set by the Secretary for coal mined by underground means. See 30 U.S.C. § 207(a) (1994). It should be noted that the Navajo Nation had originally

Atkins asserts that a similar approach was subsequently taken with respect to the question of the inclusion of tribal taxes in the royalty base. Atkins' affidavit recounts that "the Navajo Nation's representatives explained that the inclusion of Tribal taxes in the royalty valuation base was meant to apply to the extent that production taxes generally were included in the royalty value base for federal lease royalty calculation." (BHP Minerals' SOR, Ex. 3, at 10.) Based on the foregoing, Atkins argues that the clear intention of the parties to Amendment No. 4 was that, under its terms, both the royalty rate and the determination of value for royalty purposes was to be made pursuant to regulations which the Department of the Interior adopted with respect to Federal leases issued under the MLLA. 31/

In response to the arguments proffered by BHP Minerals, the Navajo Nation takes issue with both the interpretation of the lease language urged by BHP Minerals as well as with its assertion that the negotiating history is supportive of the view that the parties to Amendment No. 4 intended that subsequent changes in the regulations dealing with the determination of value for royalty purposes of coal leased under the auspices of the MLLA would be applicable to Lease 2505. Moreover, the Navajo Nation asserts that, in any event, the provisions of Amendment No. 4 are ultimately irrelevant since the 1989 regulations, properly interpreted, clearly prohibit the deductions from value at issue herein.

Thus, the Navajo Nation places great store on the express intent of the regulations to be "revenue neutral" insofar as Indian leases were concerned. In its answer to BHP Minerals' SOR, the Navajo Nation reviews in

fn. 30 (continued)

sought a royalty rate in excess of 12-1/2 percent of value, see BHP Minerals' SOR, Ex. 3, at 6, at one point seeking a royalty rate as high as 19 percent, see BHP Minerals' SOR, Ex. 4, at 6. Thus, the Navajo Nation's willingness to accept the "federal formula" might be seen merely as an agreement to accept the Federal royalty rate and not implicate the concept of valuation, i.e., the method of determining the value upon which the royalty rate would be applied. There is some support for this interpretation in the attachments to Parrish's affidavit recounting the Nov. 17, 1983, meeting where the notes of the meeting recount that "after a short caucus, the Tribal negotiating team agreed to * * * The Federal formula of 12½%, and to any subsequent changes by the government to this formula. They did not agree to Hulse's suggestion for stepping into the 12½%." (BHP Minerals' SOR, Ex. 4-C at 2.)

On the other hand, the term "federal formula" could, as it is suggested by BHP Minerals, embrace not only the percentage rate at which royalty would be fixed but also the question of the Federal methods for determining the value against which the rate would be applied.

31/ The Parrish affidavit generally corroborates the assertions found in the Atkins affidavit.

detail the regulatory history preceding the adoption of the 1989 regulations, pointing out that the Indian tribes specifically objected to the initial proposal to exclude reimbursements for Black Lung taxes and AML fees from the definition of "gross proceeds," and, after that proposal was scrapped in favor of one which allowed specific exclusions of value for royalty purposes but which expressly excluded Indian leases from taking such exclusions, the Indian tribes, particularly the Navajo Nation, pressed MMS to obtain assurances that all parties were in agreement that the exclusions from value would not be obtainable with respect to outstanding coal leases entered into by the Navajo Nation. See Navajo Nation's Response at 9-18. The Navajo Nation argues that, given the clear intent of the regulations, BHP Minerals' attempt to claim the exclusions from value should be summarily rejected.

The Navajo Nation also assails BHP Minerals' contention that the "lease language controls" provision of 30 C.F.R. § 206.250(b) (1989) is applicable in this appeal. The Navajo Nation argues that a two-prong test must be met before the language of the lease can be deemed to take precedence over the clear language of 30 C.F.R. § 206.257(b)(5) (1989), which excepted Indian leases from the exclusions of value otherwise authorized. The Navajo Nation suggests that, in order to trigger the "lease language controls" language, two questions must be answered in the affirmative:

1. Does the lease set out specific valuation criteria internally in the lease document which exist independent of regulation?
2. Can royalty be calculated in a lease document without reference to regulation?

(Navajo Nation's Response at 21.) 32/ The Navajo Nation argues that, inasmuch as the royalty provisions are controlled by factors extrinsic (regulations) to the lease terms, there is no basis for recourse to the provisions of 30 C.F.R. § 206.250(b) (1989) to override the clear exception of Indian leases from the ambit of 30 C.F.R. § 206.257(b)(5) (1989). Id.

The Navajo Nation also attacks the theoretical basis of BHP Minerals' entire analysis as dependent on the assumption that "the 1989 Regulations are, in fact, a mish-mash of severable regulations independently attributable to individual statutes." Id. at 22. To the contrary, the Navajo Nation argues that, as the Deputy Commissioner's decision noted, "the revised 1989 rules apply to both Indian and non-Indian federal leases, and * * * the regulations were promulgated under the authority of all applicable statutes, thus making it clear that one cannot simply pull out a piece of a regulation and say which statute the regulation is promulgated under."

32/ This argument was based on a discussion appearing in the preamble to the 1988 proposed regulations, in which it was stated with reference both to the general regulatory scheme and more specifically with respect to the proposed 30 C.F.R. § 206.250(b) that "[i]t is MMS's intent that absent specific valuation criteria, the proposed rules, when final, would govern the valuation of coal from Federal and Indian leases." See 53 Fed. Reg. 26945 (July 15, 1988).

Id. Pointing out that BHP Minerals has provided no support for its assertion that the regulations are, in effect, severable on the basis of the statutory authority under which they were presumably promulgated, the Navajo Nation opines that "[i]t may have been BHP's gross misfortune that MMS chose to promulgate a unified set of rules under all acts, but that in fact is what occurred, and BHP cannot now force MMS to 'unwind' the regulations to suit BHP's fancy." Id. at 24.

The Navajo Nation draws additional support for its interpretation of Amendment No. 4 from the fact that Lease 2505 had issued under the IMLA and that, given that one of the express purposes of the IMLA was to maximize tribal revenues, the Secretary could not have assented to the provisions found in that amendment if their effect was, as argued by BHP Minerals, to ultimately result in a drastic diminution of those revenues. Id. at 25-28. Therefore, the Navajo Nation contends that the proper interpretation of the phrase "for federal royalty purposes" is one which does not have the effects sought by BHP Minerals. 33/

While the Navajo Nation makes a whole series of other points critical of positions advanced by BHP Minerals, 34/ there is one area in which the two sides are in agreement, viz., that the decision rendered by the Deputy Commissioner in the appeal filed by BHP Minerals is irreconcilable with that rendered in the Peabody case. But, whereas BHP Minerals argues this point as a basis for reversing the decision in its appeal, the Navajo Nation offers this as a reason for reversing the Peabody decision.

BHP Minerals subsequently filed a reply to the Navajo Nation's Response, generally reiterating the positions previously taken in its original SOR. Pursuant to a Call Order issued by the United States Court of Federal Claims, the Board has expedited consideration of this appeal. See Navajo Nation v. United States, No. 95-136L (Cl. Ct. filed Feb. 5, 1997). Accordingly, the matters presented in IBLA 95-397 are now ripe for decision.

[1] As an initial matter, we note that there is absolutely no question but that, limited to its own terms, the exclusion for royalty purposes of reimbursements for Black Lung taxes, AML fees, and state and

33/ The Navajo Nation suggests that the interpretation advanced by the Deputy Commissioner that the phrase simply referred to the entire body of Federal regulations which applied to coal mined on Federal lands, including Federal lands held in trust for Indian tribes, is one such interpretation. Id. at 28.

34/ Among these arguments was an attack on the parol evidence tendered by BHP Minerals based on the assertion that the Deputy Commissioner had found that there was no ambiguity in the lease terms, as well as a reference to the deference which the Navajo Nation felt was properly owed to MMS, particularly the RVSD, in interpreting its own regulations.

local severance taxes authorized by 30 C.F.R. § 206.257(b)(5) (1989) was not available on Indian leases. The first issue to be decided is whether, as a theoretical proposition, it is possible, because of the language of 30 C.F.R. § 206.250(b) (1989), for the provisions of a lease to override the limiting language of section 206.257(b)(5) (1989) with the result that the lessee of Indian lands leased under the IMLA may take the exclusions from value for royalty purposes which would otherwise not be available to it. We think the answer to this question is clearly in the affirmative.

[2] Nothing in the language of 30 C.F.R. § 206.250(b) (1989) evidences any intent that its scope was to be limited to non-Indian leases. On the contrary, the reference to specific provisions of any "treaty" in the text of the regulations was clearly drafted with Indian lessors in mind. See 52 Fed. Reg. 1841 (Jan. 15, 1987). Moreover, it is clear that the Navajo Nation was of the view that this provision would apply, at least prospectively, to Indian leases. Thus, in his letter dated September 13, 1988, the Acting Assistant Attorney General, Navajo Nation, made specific reference to the authority granted by this provision to allow "tribes to make their own determination of whether some form of royalty relief is necessary for the financial well-being of their mineral lessees." (Navajo Nation's SOR, Ex. 14, at 3.) This understanding was underlined in a June 5, 1989, letter from the Assistant Attorney General of the Navajo Nation to MMS, sent after the present controversy arose, in which it was noted that, although the Navajo Nation continued to oppose allowing exclusions from the royalty base with respect to Federal as well as Indian leases:

[W]hen faced with the option [of] allowing deductions for all cases versus exempting Indian leases, we will support the exemption for Indian leases. Indian mineral owners should retain the option to offer these deductions to industry as concessions which may be necessary to encourage future coal development; however, the flexibility to make such concessions should be retained by the mineral owner and not mandated by these regulations.

See BHP Minerals' SOR, Ex. 8, at 2.

We are aware that the Navajo Nation has suggested that it was not the intent of this paragraph to allow the provisions of those Indian leases already in existence to override any of the royalty valuation terms being adopted as part of the regulatory package. This, of course, would include the exception provided for Indian leases to the exclusions from value authorized by 30 C.F.R. § 206.257(b)(5) (1989). The Navajo Nation also suggests that, given the Department's recognized fiduciary duty towards Native Americans, it is required to interpret this provision in such a way that it does not adversely impact upon Indian revenues.

The basic flaw in this argument, however, is that there is simply no language appearing in 30 C.F.R. § 206.250(b) (1989) which is fairly amenable to such a circumscribed reading. By its terms, it applies both to existing treaties and future treaties, both to existing leases and future leases. Given the grammatical structure of this provision, a reading which would limit its scope to only future lease provisions would, necessarily, restrict its protection to only future treaty provisions. This most clearly is not what the drafters of this provision intended. To the extent, however, that we must interpret the regulation so as to embrace existing treaty provisions, so, too, must we interpret the regulation as including existing lease provisions within its scope. We therefore conclude that, insofar as the language of the regulation is concerned, there is simply no basis for holding that the provisions of 30 C.F.R. § 206.250(b) (1989) did not apply to leases in existence at the time the regulations were promulgated.

[3] The Navajo Nation, relying on the fiduciary relationship which exists between the U.S. Government and the Indian peoples, suggests that this Board is, nonetheless, required to interpret the regulation as limited only to future lease provisions since a contrary interpretation would adversely impact upon its revenues. We cannot agree. Certainly, language could have been included in the regulation which effectuated such a result. ^{35/} Our task, however, is not to determine how the regulation writers might have successfully limited the scope of 30 C.F.R. § 206.250(b) (1989) so that its end result was, in fact, revenue neutral with respect to Indian leases, but rather to determine whether this result was accomplished by the language which was used. And, in performing this duty, we are required to interpret the regulations as we find them, not as they might have been written.

We recognize that in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (1986), the Tenth Circuit Court of Appeals, sitting en banc, adopted, with minor modifications, the dissenting opinion which Judge Seymour had filed to the original panel decision reported at 728 F.2d 1555 (1984). Judge Seymour had argued that, given two reasonable interpretations of an oil and gas valuation regulation, the Department was required, under its trust responsibilities, to choose that interpretation which would maximize the Tribe's royalties. See 728 F.2d at 1566-69. In its 1986 decision, the Tenth Circuit embraced Judge Seymour's analysis.

^{35/} We note, for example, that, in his June 5, 1989, letter, the Assistant Attorney General suggested amending 30 C.F.R. § 206.250(b) (1989) by adding an exception at the end of the regulatory language directing that the language of any lease, treaty, or statute inconsistent with the provisions of the regulations shall govern to the extent of any inconsistency "except with respect to the valuation standards for Indian leases in effect as of the effective date of these regulations, subsection 206.257(b)(5) will be binding irrespective of the lease provisions." See BHP Minerals' SOR, Ex. 8, at 3.

The difficulty with applying that holding herein lies in the fact that, as indicated above, there are not two conflicting "reasonable" interpretations of the regulations from which to choose. By its terms, 30 C.F.R. § 206.257(b)(5) (1989) clearly authorized certain exclusions from royalty value and clearly excepted from this authorization Indian leases. By its terms, 30 C.F.R. § 206.250(b) (1989) clearly provided that, to the extent that a provision in a lease, treaty, statute, or Court stipulation conflicted with any regulation in Subpart 206, the lease, treaty, statute, or stipulation provision would control over the regulation. Both of these regulations are clear, and neither admits of more than one "reasonable" interpretation. Thus, the line of analysis followed in Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855, is not implicated.

Far more on point, given the regulations at issue, is the decision rendered in Pawnee v. United States, 830 F.2d 187 (Fed. Cir. 1987). In Pawnee, the United States Court of Appeals for the Federal Circuit, while recognizing a general fiduciary duty with respect to oil and gas leases on restricted Indian land, nevertheless rejected an assertion that the Secretary of the Interior was required to take action contrary to and beyond that provided by a regulation, in order to obtain a higher royalty value for the lessee, on the ground that such an allegation was insufficient to state a proper claim for breach of trust absent a direct challenge to the regulation. ^{36/} See also Coosewoon v. Meridian Oil Co., 25 F.3d 920, 929-30 (10th Cir. 1994). Here, too, while the arguments pressed on appeal may ultimately result in a claim that the promulgation of the regulations constituted a violation of the obligations of the trust relationship, the issue before us is simply whether or not, under the regulations which were adopted, BHP Minerals could avail itself of the exclusions from royalty value authorized by 30 C.F.R. § 206.257(b)(5) (1989).

As a matter of regulatory interpretation, we must conclude that provisions in existing leases could, under 30 C.F.R. § 206.250(b) (1989), override the Indian lease exception to the exclusions from royalty provided by 30 C.F.R. § 206.257(b)(5) (1989) with the result that reimbursements for Black Lung taxes, AML fees, and state and local severance taxes could properly be excluded for the purposes of computing the royalty value of coal produced from Indian leases. Whether or not the lease provisions at issue with respect to BHP Minerals, viz., paragraph 1 of Amendment No. 4, were sufficient to do so is the question to which we now turn.

[4] Insofar as the issue of lease interpretation is concerned, we have noted that the task of the Board when faced with the construction and

^{36/} Judge Seymour had also noted, in his original dissent, that there was no challenge presented in Jicarilla that the Secretary had violated his fiduciary obligations in promulgating the regulations. Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d at 1566.

interpretation of contracts is to determine and give effect to the intent of the parties to the contract as manifested by the language used therein, construing the document as a whole. See, e.g., Alaska Pipeline Co., 38 IBLA 1, 15 (1978). We have also noted that "[a] central tenet of contract construction provides that '[i]ntent is to be determined by the words of the contract, when these are clear and explicit and lead to no absurd consequences.'" Exxon Company, U.S.A., 118 IBLA 30, 36 (1991), citing Henry v. Ballard & Cordell Corp., 401 So.2d 600, 605 (La. App. 1981). While the Navajo Nation has objected to the submission by BHP Minerals of affidavits and contemporary memoranda relating to the negotiations which ultimately led to Amendment No. 4, we agree with BHP Minerals that, even if the parol evidence rule might bar the proffer of extrinsic evidence of negotiations where the intent of the proffer is to vary or contradict unambiguous terms in a contract, it is not preclusive of the submission of evidence which either supports the plain meaning of the terms used in an agreement or clarifies the meaning of terms deemed ambiguous. 37/

What, then, is the meaning of paragraph 1 of Amendment No. 4. The critical language with respect to the issues involved herein appears in the amendment to subparagraph 3(a)(iii) of the base lease: "For purposes of calculating the royalties payable hereunder, the value of the coal shall be determined in the same manner as the value of coal F.O.B. the mouth of the mine for Federal royalty purposes under the Mineral Lands Leasing Act, as amended, and regulations thereunder * * *." In her decision, the Deputy Commissioner essentially agreed with the position taken both by the Navajo Nation and the RVSD that the lease terms merely "commits the parties to using the manner prescribed by specific Federal regulation (30 CFR 203.200(f) and (g) (1985)) applicable to both Indian and Federal leases and does not command that the Indian lease shall be treated as a Federal lease" and specifically accepted the contention that "the term 'Federal royalty purposes' does not equate with the term 'federal coal lease.'" (Decision at 7.) For reasons provided below, we cannot agree with these statements of the Deputy Commissioner and must, on the contrary, conclude that the clear meaning of the lease language was that, to the extent that non-Indian Federal leases were granted exclusions from value for royalty purposes, these exclusions would be granted to BHP Minerals.

The fundamental flaw in the Deputy Commissioner's analysis is her failure to adequately consider the qualifying phrase "under the Mineral Lands Leasing Act" in interpreting the meaning of "Federal royalty purposes." As our initial review of the historical development of coal leasing both of Federal domain and Indian lands makes clear, coal leases

37/ Moreover, in the instant case we would permit BHP Minerals' introduction of the negotiating history if for no other reason than to dispel any negative inference which might be drawn from the Deputy Commissioner's direct reference in her decision to the lack of information on the negotiating history. See Deputy Director's Decision at 4.

for Indian lands cannot be issued under the aegis of the MLLA. ^{38/} Thus, the reference to a requirement that the value of the coal be determined in the same manner as the value of coal "for Federal royalty purposes under the Mineral Lands Leasing Act" necessarily means that the value of the coal produced under Lease 2505 is to be ascertained in the same manner as that provided by the regulations for determining value with respect to non-Indian Federal leases.

Not only does the negotiating history submitted by BHP Minerals support this interpretation, BHP Minerals' subsequent actions during the rulemaking which led to 30 C.F.R. § 206.257(b)(5) (1989) further corroborates at least its understanding of the import of the lease language. As we noted earlier, BHP Minerals expressly advised MMS that, notwithstanding the fact that it paid "a royalty to the Navajo Nation based on value of coal produced under a mining lease which incorporates the regulatory definition of value adopted for Federal royalty purposes pursuant to the Mineral Lands Leasing Act," it still challenged the theoretical justification for adopting "different rules for Indian leases than those applicable to Federal leases." (BHP Minerals' SOR, Ex. 10, at 3.) At a minimum, this shows that even prior to the formal adoption of 30 C.F.R. § 206.257(b)(5) (1989), BHP Minerals was clearly announcing to MMS, the BHP Minerals interpretation that, under its existing lease with the Navajo Nation, BHP Minerals would be able to deduct reimbursements for Black Lung taxes, AML fees, and state and local severance taxes from Lease 2505. ^{39/} BHP Minerals' post-amendment actions are, thus, entirely consistent with the interpretation of the lease terms which it urges herein.

The Navajo Nation suggests that, even if the lease terms are read to incorporate the coal valuation regulations adopted for Federal leases pursuant to the MLLA, BHP Minerals' appeal should still be rejected since the Indian lease exception is part of the Federal rules referenced

^{38/} This is a point implicitly recognized by the Navajo Nation in its answer, where it points out that "because the lease in question was actually entered into under the terms of the 1938 Indian Mineral Leasing Act, not the Nation, not BHP, and not the Secretary of the Interior (who must consent to the terms of all leases entered into the IMLA pursuant to 25 U.S.C. §§ 396a, 396b) had the authority to take the Navajo Mine Lease outside the scope of the IMLA." (Navajo Nation's Response at 26.) While we might agree that neither the parties to the lease nor the Secretary would have the authority to agree to or authorize terms in direct conflict with the provisions of the IMLA, there are no explicit provisions in the IMLA concerning the methodology of valuation of coal produced under leases issued thereunder. Thus, paragraph 1 of Amendment No. 4 does not, by its terms, conflict in any manner with the IMLA.

^{39/} Whether MMS understood the import of what it heard is certainly open to debate.

in Amendment No. 4. And, on this point, it echoes the argument advanced by the Deputy Commissioner that, inasmuch as the regulations were expressly promulgated under the aegis of, *inter alia*, both the MLLA and the IMLA, there was no basis for bifurcating the applicability of 30 C.F.R. § 206.257(b)(5) (1989). As the Navajo Nation notes, "BHP cannot now force MMS to 'unwind' the regulations to suit BHP's fancy." (Navajo Nation's Response at 24.) In other words, to the extent that Amendment No. 4 was the conduit which permitted the application of the language excluding certain reimbursements from value for royalty purposes to BHP's lease, it must have, at the same time, incorporated the Indian lease exception and effectively prohibited application of the exclusion to Lease 2505. Both parts of 30 C.F.R. § 206.257(b)(5) (1989), the Navajo Nation argues, were inextricably intertwined and one part could not be severed from the other on some fanciful assertion as to what statute each individual part was promulgated pursuant to.

It is, of course, true that the 1989 regulations were adopted under the authority of a variety of statutes. Thus, in addition to both the MLLA and the IMLA, the statutes cited as providing authority for the regulations included, *inter alia*, the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1994), the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701-1757 (1994), and the Outer Continental Shelf Lands Act Amendments of 1982, 43 U.S.C. §§ 1801-1866 (1994). *See* 54 Fed. Reg. 1522 (Jan. 13, 1989). And certainly, it is also correct that, insofar as some provisions are concerned (such as those relating to definitions, *see* 30 C.F.R. § 206.251 (1989)), it would be impossible to discern which of the many possible statutory sources of authority were exercised in the adoption of the regulations.

That does not mean, however, that it is not possible with respect to particular provisions to determine that a specific statutory authority provided no basis for the regulation. Thus, for example, to the extent that the regulations covered royalty on acquired lands, it is absolutely clear that these provisions were not promulgated under the authority of the MLLA since that statute is inapplicable to acquired lands. *See Wallis v. Pan American Corp.*, 384 U.S. 63, 65 (1966). The issue before us is whether or not the provisions of 30 C.F.R. § 206.257(b)(5) (1989) are written in such a fashion so as to permit a determination of what may have been and what clearly was not promulgated under the MLLA, since any provision which clearly was not promulgated under the MLLA would not, under Amendment No. 4, be applicable to the valuation of coal produced under the lease between BHP Minerals and the Navajo Nation.

This question is best approached initially by assuming, for the sake of analysis, that the sole source of authority for the promulgation of 30 C.F.R. § 206.257(b)(5) (1989) was the MLLA. In this scenario, the exception for Indian leases would, at best, be a redundancy since, as explained above, the MLLA was never applicable to Indian lands. If, on the other hand, we were to assume that the regulation was promulgated

only under the IMLA, the exception for Indian leases provided in the regulation would render the entire exclusion nugatory. The only way that the regulatory language can be read with any coherency is to conclude that the language excluding reimbursements of Black Lung taxes, AML fees, and state and local taxes from gross value for purposes of royalty calculation was adopted under the authority of both the IMLA and the MLLA. If this were not the case, there would have been no need for excepting Indian leases from the scope of the exclusion since, absent the authority of the IMLA, Indian leases would not have been covered and, absent the authority of the MLLA, the Indian exception would have voided the entire provision.

But, while the exclusion language must have proceeded under both statutes, the Indian lease exception language could only be derived from authority of the IMLA or other Indian leasing statutes because only those statutes could make the exclusion language effective on Indian leases in the first instance. The Indian lease exception was not, therefore, adopted under the MLLA. Since the lease provision at issue provides for valuation of the coal "in the same manner as * * * for Federal royalty purposes under the Mineral Lands Leasing Act, as amended, and regulations thereunder," and the regulations under the MLLA do not include the "Indian lease exception" because this provision was issued under the IMLA and other Indian leasing authorities, the Indian Lease exception does not constitute part of the applicable regulations for purposes of implementing the lease provisions and computing the royalty due under the lease.

[5] The Navajo Nation also argues that the language of subparagraph 3(a)(iii), as revised by Amendment No. 4, lacked the specificity necessary under 30 C.F.R. § 206.250(b) (1989) to override the Indian lease exception. It argues that the "lease language controls" provision would only override the valuation provisions if the lease specifically set out valuation criteria which would permit the computation of royalty independent of any reference to the regulations. Since the lease language clearly does not do so, the Navajo Nation argues that 30 C.F.R. § 206.250(b) (1989) was inapplicable and the Indian lease exception provided by 30 C.F.R. § 206.257(b)(5) (1989) properly applied.

This argument is based on language appearing in the preamble in the 1988 Proposed Rulemaking, wherein MMS opined that "[i]t is MMS's intent that absent specific valuation criteria, the proposed rules, when final, would govern the valuation of coal from Federal and Indian leases." See 53 Fed. Reg. 26945 (July 15, 1988). There are, however, two problems with the Navajo Nation's argument.

First of all, there is no language in the actual text of 30 C.F.R. § 206.250(b) (1989) that can fairly be said to require "specific valuation criteria" as a precondition for the application of the "lease language controls" provision. This Board has noted in the past with respect to other regulations that "intent is not always coincidental with legal draftsmanship." W. W. Priest, 55 IBLA 398, 400 (1981); Ross L. Kinnaman,

48 IBLA 239, 242 (1980). With respect to the lease language controls regulation, even if MMS may have intended that such a limitation apply, it failed to adopt such a limitation in the text of the regulation. Where there is a conflict between "intent" as expressed in a preamble and as ultimately explicated in the actual language of the regulation, it is the language of the regulation which is determinative.

Secondly, even if specificity in the lease provision were required as a precondition to invocation of the "lease language controls" rule, the language used in the lease was, we believe, more than sufficiently specific to satisfy such a standard. The Navajo Nation's assertion that the required specificity could be achieved only if the valuation criteria set forth in the lease would permit the computation of royalty without reference to the regulations seeks to impose a qualification which is not replicated in MMS comments in any of the various preambles involved herein. This is not to say that MMS might not have written a regulation with such an express limitation. Rather, we merely note that, not only did MMS fail to write such a regulation, but there is no indication that it intended to draft so restricted a provision.

[6] Finally, the Navajo Nation argues that this Board should reject any interpretation of Amendment No. 4 which would result in a diminution of Indian revenues since, to the extent that such interpretation diminished tribal revenues, the Secretary's approval 40/ of Amendment No. 4 would constitute a violation of his fiduciary duties to the Navajo Nation. We disagree with this argument on a number of bases.

As an initial matter, we reject the implicit assumption that underlines this argument that, in the context of its adjudicatory obligations, this Board operates in a fiduciary capacity with respect to the Indian peoples. On the contrary, in deciding appeals brought before this Board, all parties, including the Department and the Indian tribes, stand on essentially even footing. This does not, of course, mean that this Board can or does ignore those principles of adjudication which come into play when Indian tribes are parties to a case. Thus, as we have noted in past decisions, ambiguities in grants to Indians should be resolved on the Indian's behalf, Alaska Public Fisheries v. United States, 248 U.S. 78, 89 (1918), and uncertain language in treaties between Indian tribes and the United States should be interpreted as the Indians would have understood them, Antoine v. Washington, 420 U.S. 194, 197 (1974); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). See, e.g., State of Alaska, 127 IBLA 1 (1993). But there is no generalized rule of adjudication that precludes issuance of a decision adverse to Indian interests, economic or otherwise, merely because the results are adverse.

40/ While the discussion in the text following is couched in terms of "Secretarial" approval because that is what the IMLA provides, in point of fact, Amendment No. 4 was approved by the Area Director, Navajo Area, on Sept. 25, 1985, under re delegated authority.

It is also important to remember that, notwithstanding the fact that Secretarial approval was statutorily required, Amendment No. 4 is essentially a contract between BHP Minerals and the Navajo Nation. The Secretary's interpretation of what the valuation language in the amendment meant at the time that he approved it is essentially irrelevant in determining the intent of the parties, unless he communicated his interpretation to the parties at that time. In other words, if the Secretary were to expressly manifest his understanding of any ambiguous language when providing his concurrence, the failure of any contracting party to object would properly give rise to a presumption that the Secretary's statement accurately reflected the intent of the parties. Where, however, as herein, the Secretary merely appends his concurrence to a document negotiated by the lessor and lessee, his subjective view of the impact of any provision is essentially irrelevant to the determination of the intent of the parties to the contract since there is no indication that he ever communicated any understanding to any of the other signatories.

Finally, there is an implicit assumption in this argument that any decision which results in lower tribal revenues constitutes a per se violation of fiduciary responsibilities. This is simply not correct. Thus, while maximization of tribal revenues was clearly one purpose behind the adoption of the IRA and the IMLA, it was not the sole rationale behind their adoption. Equally important was the desire to give Indians a greater say in the use and disposition of the resources found on Indian lands. See generally Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 177-80 (1989). Once the Secretary was assured that Indian negotiators had been fully apprised of the possible consequences of provisions to which they had freely assented, any refusal on his part to concur in such an agreement based on the Secretary's subjective judgment of what was the best for the Indian community might itself be viewed as action contrary to the animating rationale of the IMLA. 41/

More to the point, the IMLA was aimed, inter alia, at assuring that Indians received "the greatest return from their property." Montana v. Blackfeet Tribe, supra, at 767 n.5. This concept, however, encompasses more than merely achieving the highest dollar amount per unit sold. Thus, as the Navajo Nation itself ultimately recognized in its negotiations with BHP Minerals, obtaining a royalty rate substantially higher than that obtained for Federal non-Indian leases might actually result in less rather than more Indian income if it resulted in making Indian coal noncompetitive

41/ This is not to say that, in this case, the Secretary, or his delegate, necessarily undertook such an analysis. The point of the text is merely that not all diminishments in immediate cash flow are automatically violations of fiduciary duties. We express no view as to whether, under the facts disclosed in the instant appeal, the Secretary's actions could be deemed an adequate discharge of his fiduciary responsibilities.

and, therefore, essentially unmarketable. ^{42/} And it was recognition of this same principle which led the Navajo Nation to insist that it be provided the option, if it desired, of offering similar deductions to coal lessees where necessary to encourage future coal development. See BHP Minerals' SOR, Ex. 8, at 2. Where the marketplace for a product is competitive, the dollar-return-per-unit is not necessarily the only or even the most rational way of assessing the economic consequences of an agreement in order to determine whether or not the "greatest return" has been achieved.

We conclude, for all of the foregoing reasons, that the effect of Amendment No. 4 was to permit BHP Minerals to exclude Black Lung taxes, AML fees, and state and local severance taxes from the royalty base of the coal which it produced from Lease 2505, from March 1, 1989, through September 30, 1990. Accordingly, we hereby reverse the contrary determination of the Deputy Commissioner issued on January 17, 1995.

We turn now to the appeal by the Navajo Nation and the Hopi Tribe with respect to the determination of the Deputy Commissioner which allowed Peabody to exclude Black Lung taxes, AML fees, and state and local severance taxes from the value of the coal it produced from Leases 8580, 9910, and 5743, covering the Black Mesa and Kayenta mines. As we indicated above, Peabody's attempt to avail itself of these exclusions ^{43/} was originally rebuffed by the RMP on May 17, 1989. Peabody pursued an appeal from this determination, which covered all three of these leases, pursuant to 30 C.F.R. Part 290.

In its appeal before the Deputy Commissioner, Peabody argued that the decision of the Chief, RVSD, was in error because it ignored the express provisions of the lease terms, negotiated to successful completion in 1987, which established that "any changes in the rules governing coal valuation under federal coal leases shall be reflected in the computation of value under Peabody's Leases, subject to certain limitations" relating to the 5-percent cap. (Peabody's Notice of Appeal, dated June 15, 1989, at 1.) Peabody pointed out that the negotiations were completed after MMS had already proposed amending the valuation regulations to exclude Black Lung

^{42/} In fact, Lease 8580 had been readjusted, see note 13, *supra*, in 1984 to provide for a 20-percent royalty rate. Peabody promptly appealed this readjusted rate to the Assistant Secretary for Indian Affairs. No decision on this matter ever issued. The matter was finally resolved in the context of the negotiations which led to the 1987 amendments to Lease 8580. See Navajo Nation's SOR, Ex. 7 at 1.

^{43/} It should be noted, in this regard, that Peabody did not attempt to immediately reduce the royalty due by the full amount of the exclusions. Rather, it limited its reductions as provided by the 5-percent limitation in changes to gross realization set forth in Article IV(a)(ii) of the amended leases.

taxes and AML fees from the royalty basis and that the terms of the agreement had been reached in full contemplation of this possibility by the parties. Id. at 1-2. Indeed, Peabody noted that calculations showing how the exclusion of Black Lung taxes and AML fees would be handled were actually included as exhibits to the amended leases. Id. Peabody contended that MMS was attempting, in effect, to deprive Peabody of the benefit of its bargain.

All of these points were expanded upon in a supplemental pleading filed on August 18, 1989. Submissions were also made by the Navajo Nation and the Hopi Tribe as well as responses to these submissions by Peabody. In their pleadings, both the Navajo Nation and the Hopi Tribe emphasized the fact that, under the terms of their respective leases, royalties were to be paid on "gross realization" and not on the value of "Federal leases" for royalty purposes. In particular, the Hopi Tribe argued that 30 C.F.R. § 206.257(b)(5) (1989) was not even applicable since that regulation concerned ad valorem leases and the leases involved herein were "gross realization" leases, not ad valorem leases. See Hopi Tribe's Comments, dated Aug. 16, 1990, at 1-2. In her January 17, 1995, determination, the Deputy Commissioner essentially sided with the arguments presented by Peabody.

As framed by the Deputy Commissioner, the issue was whether "the exclusions authorized for Federal coal leases during the period March 1989 to October 1990 apply to Indian leases having royalty provisions that specifically adopt the method for determining royalties on coal produced from Federal leases." See Decision at 5. The critical language, of course, was found in amended Article IV, which provided for a royalty rate of 12.5 percent ^{44/} "of the monthly gross realization for all coal obtained from the premises * * * computed based on F.O.B. mines in accordance with the method utilized by the United States for computing royalties on federal coal leases, as such method may be revised from time to time."

The Deputy Commissioner found that the language used in the amendments was "clear and straightforward." Id. at 7. Thus, she noted:

They provide that royalties are to be calculated with direct reference to the method utilized for computing royalties on Federal coal leases. They show that the parties anticipated that the Federal method might be changed, and they prescribe how any regulatory changes affecting the taxes and fees would be made.

Id. Moreover, she pointed out that the negotiations had been ongoing at the same time that the regulatory proposals to exclude Black Lung taxes and AML fees were being considered and placed considerable store on a

^{44/} It should be noted that Leases 5743 and 9910, both of which covered the former Navajo-Hopi Joint Use Area, provided for an individual royalty rate of 6.25 percent payable to the Hopi Tribe and the Navajo Nation, respectively, for production from that area.

December 9, 1987, memorandum from Ross O. Swimmer, Assistant Secretary for Indian Affairs, recommending that the Secretary approve the proposed amendments, since this memorandum expressly referenced the possibility of adverse effects on Indian revenues caused by future exclusions from value and noted that the 5-percent limitation on individual increases or decreases in value caused by regulatory changes had been crafted to prevent any drastic effects on revenue flow. See Peabody's Answer, Ex. 3, at 1.

The Deputy Commissioner recognized that the RVSD, the Navajo Nation, and the Hopi Tribe all contended that royalties under the lease terms were controlled by "gross realization" (a lease term which they argued was the equivalent of the regulatory term "gross proceeds") and not by "the value of coal" produced from Federal leases as determined under 30 C.F.R. § 206.257(b)(5) (1989), and that, during the period in question, "gross proceeds" expressly included taxes and fees. She rejected this argument as premised on an unsustainable distinction between "gross realization" and "value," relying on both the terms of the amendments and this Board's decision in Peabody Coal Co., *supra*, as undercutting any critical distinction between the two concepts. See Decision at 7-8.

Finally, the Deputy Commissioner rebuffed the argument that, by incorporating the Federal regulations for the purpose of determining royalties, the parties necessarily incorporated the Indian exception to the exclusions from value found at 30 C.F.R. § 206.257(b)(5) (1989). Reading such a limitation into the lease terms would, she argued, effectively contravene the express intent of the parties as reflected in the amendments and, relying on the "lease language control" provisions of 30 C.F.R. § 206.250(b) (1989), she held that the lease provisions must be deemed to supercede the Indian exception. She concluded that "[i]n accordance with its lease contracts, Peabody was therefore entitled to exclude the taxes and fees during the period March 1989 to October 1990." Id. at 9. As noted above, both the Navajo Nation and the Hopi Tribe have appealed this determination to the Board.

Before this Board, while the Navajo Nation and the Hopi Tribe make passing reference to some of the arguments considered above in relation to the BHP Minerals appeal, the essential focus of both appeals is on the language of the lease amendments, particularly on the term "gross realization." ^{45/} Their argument proceeds as follows: The key component in

^{45/} While no party directly addresses this question, it seems reasonable that the term "gross realization" was adopted in the original versions of Leases 9910 and 5743 rather than the term "gross proceeds," because the regulations issued under the IMLA with reference to oil and gas leasing had, as we indicated above in the text, always provided the Secretary with the option of electing to treat "the actual amount realized" as conclusive evidence of value. See 25 C.F.R. § 211.13(a).

determining value under the 1987 lease amendments is the term "gross realization." What the contract provisions require is not, as the Deputy Commissioner held, the determination of "value" based on the methodology used by the United States Government for computing royalties on Federal coal leases ^{46/} but the determination of "gross realization" based on such methodology. This is an important distinction, they continue, because, notwithstanding the fact that the determination of value for Federal leases may have been changed by 30 C.F.R. § 206.257(b)(5) (1989), not only did the 1989 regulations fail to change the definition of "gross proceeds" (a term they equate with "gross realization"), but, in fact, the authors of the regulations affirmatively rejected an earlier version of the regulations which would have altered the definition to provide for the exclusion from value of Black Lung taxes and AML fees, see Proposed Rule 30 C.F.R. § 206.251(k), 52 Fed. Reg. 1849 (Jan. 15, 1987), precisely to avoid the adverse impacts on Indian revenues reflected in the decision issued by the Deputy Commissioner.

The Navajo Nation and the Hopi Tribe observe that, inasmuch as the concept of "gross realization" was not altered by the 1989 regulations, there is no conflict between application of the lease terms and invocation of the Indian lease exception to the exclusions of value authorized by 30 C.F.R. § 206.257(b)(5) (1989) such as would bring the "lease language controls" provisions of 30 C.F.R. § 206.250(b) (1989) into play. In short, they contend that, while a change in the method of determining "gross realization" along the lines originally proposed by MMS in 1987 might well have had the result of permitting Peabody to invoke the provisions of the leases authorizing adjustments based on regulatory changes applicable to Federal coal leases, this change never ultimately occurred. ^{47/} Thus, the Navajo Nation and the Hopi Tribe conclude, the decision of the Deputy Commissioner was clearly in error. See generally Navajo Nation's SOR at 21-29; Hopi Tribe's SOR at 7-16.

Central to the foregoing argument is the assertion that there is an equivalency between the term "gross proceeds" used in the regulations and "gross realization" used in the lease terms. The Navajo Nation argues that the parties to the contract negotiations chose the term "gross realization" because it was a term whose meaning had been fleshed out in adjudications before the Board, referencing, in particular, our decision in Peabody Coal Co., 72 IBLA 337 (1983). As the Navajo Nation puts it, it was a term "which had been bought and paid for through litigation, and which, from 1983 on, did provide an objective valuation standard." See Navajo Nation's SOR at 23.

^{46/} The Navajo Nation's challenge to the purported distinction between "Federal" leases and "Indian" leases is discussed below.

^{47/} As the Navajo Nation puts it: "Peabody gambled that it, along with the rest of the coal industry, could convince MMS to give away part of the Indian royalty base by changing the definition of gross proceeds, and Peabody lost." (Navajo Nation's SOR at 27.)

In making its argument that "gross proceeds" is equivalent to "gross realization," the Navajo Nation relies upon the following analysis contained in the MMS Field Report:

The lease terms clearly equate the term "gross realization" with the Federal regulation's term "gross value" in effect when the leases were amended. At the time of the amendments, gross value for royalty purposes was defined as the unit sale or contract price times the number of units sold (30 CFR § 203.200(g) (1987)). At that time, gross value was considered to include all compensation received by the lessee for the disposition of leased coal, including reimbursements for production taxes and fees, and royalty. [Citations omitted.] The exhibits to the leases also leave no doubt that "gross realization" by definition was equivalent to the Federal definition of "gross value." (For example, see Exhibit A-2, p. 1 of Lease No. 14-20-0603-9910).

The term "gross value" was replaced by the term "gross proceeds" for regulatory consistency by the Final Rule. The preamble of the Final Rule states in part at 54 F.R. 1505:

The Regulations in effect since 1976 have required royalty to be based on "gross value." Although the "gross proceeds" term herein is new, it is not forwarding a new concept. The selection of the term is to assure regulatory consistency within MMS and is an exercise of discretion provided by statute.

Based on these facts, there can be no dispute that the definition of "gross realization" as used in the lease terms is the equivalent of "gross proceeds" as defined in the Final Rule of January 13, 1989.

See Navajo Nation's SOR, Ex. 10, at 8-9.

For its part, Peabody attacks the fundamental equivalency of the two expressions "gross realization" and "gross proceeds," arguing that they do not mean the same thing and did not when the lease terms were being negotiated. Peabody argues first that the equivalency argument ignores the fact that "gross realization" is effectively defined in the lease amendments since the lease specifies that "gross realization" is to be "computed based on F.O.B. mines in accordance with the method utilized by the United States Government for computing royalty on federal coal leases." (Peabody's Answer at 35.)

Peabody additionally notes that the "gross proceeds" language first appeared in the 1987 Proposed Rule, see 52 Fed. Reg. 1849 (Jan. 15, 1987), almost a year before the lease amendments were finalized. Peabody argues that "[i]f the parties were intent on simply incorporating the term 'gross

proceeds' from the regulations, then they would have used that term rather than using the term 'gross realization' in the lease and providing their own definition of it." (Peabody's Answer at 38.)

Finally, Peabody points out that the interpretation urged by the Navajo Nation and the Hopi Tribe could ultimately have far-reaching unintended consequences, many of which would be adverse to Indian interests. Thus, Peabody notes that the essence of the interpretation being advanced is that royalty payments under the lease terms (which would, pursuant to 30 C.F.R. § 206.250(b) (1989), control over any contrary regulatory language) are fixed solely by the application of the percentage royalty rate to the "gross realization"/"gross proceeds" figure and that the valuation provisions of 30 C.F.R. § 206.257 (1989) were not germane to this determination. This, however, would represent a radical alteration in how the concept of "gross proceeds" has worked in the past and was designed to work under the regulations at issue.

As Peabody explains, the "gross proceeds" rule has traditionally represented a "floor" concept for royalty valuation within the Department. This traditional Departmental approach was reflected in the 1989 regulations where, at 30 C.F.R. § 206.257(b)(3) (1989), it was expressly noted that, even though the coal had been sold pursuant to an arm's-length contract, MMS could, under specified circumstances, still determine that "the gross proceeds accruing to the lessee * * * do not reflect the reasonable value of the production" and require a determination of value in excess of the gross proceeds accruing to the lessee. In effect, Peabody argues, the position of the Navajo Nation and the Hopi Tribe changes the status of the "gross proceeds" rule from a floor below which royalty valuation will not descend to a fixed basis from which no decrease or increase would be permitted. In the long run, Peabody suggests, this is a change which will prove far more detrimental to Indian interests than any short-term gain that may be realized by adopting the interpretation which the Navajo Nation and Hopi Tribe urge in the instant controversy. ^{48/}

As is clear from the above, the decision with respect to the Peabody leases will ultimately be controlled by the interpretation of the phrase "gross realization" both with respect to its meaning in the leases and to

^{48/} Moreover, if Peabody's analysis of the theoretical basis of the Navajo Nation's and Hopi Tribe's position is correct, any non-Indian Federal lessee whose lease employed the same language in its lease terms, viz., a royalty rate based on the monthly gross realization or proceeds, would also be barred from taking any of the exclusions authorized by 30 C.F.R. § 206.257(b)(5) (1989), since recourse to these exclusions would be contrary to the lease terms, and those terms would control under 30 C.F.R. § 206.250(b) (1989).

its equivalency with the expression "gross proceeds" as used in the regulations. Before turning to these questions, however, it is useful to briefly reiterate the conclusions reached in our analysis of the BHP Minerals appeal which have application to our consideration of the Peabody leases: (1) insofar as application of the regulations adopted in 1989 was concerned, the exclusion for royalty valuation purposes of reimbursements for Black Lung taxes, AML fees, and state and local severance taxes, found at 30 C.F.R. § 206.257(b)(5) (1989), was generally not available on Indian leases; (2) notwithstanding the foregoing, under 30 C.F.R. § 206.250(b) (1989), provisions in existing leases could override the Indian exception language of 30 C.F.R. § 206.257(b)(5) (1989) so that the exclusion of reimbursements otherwise not available on Indian leases would apply; (3) in determining whether or not a lease term overrode the Indian lease exception, the Board is required to ascertain the intent of the parties and, in doing so, is properly guided by recognized canons of construction that intent is to be derived from the words of the contract, when they are clear and explicit and lead to no absurd results; and (4) the fact that an interpretation of a lease term might result in the diminution of Indian revenues does not, of itself, invalidate such an interpretation where the record establishes that this interpretation accords with the intent of the parties as manifested in the language used in the lease provision.

[7] As suggested in our discussion of the arguments of the Navajo Nation and the Hopi Tribe, one essential linchpin of their assault on the Deputy Commissioner's determination is the assertion that there is an equivalency of meaning between "gross realization" and "gross proceeds" since, unless these terms encompass the same concept, the regulatory history surrounding the promulgation of the definition of "gross proceeds" loses its potency as a basis for finding that the 1989 regulatory changes were without any effect on Leases 8580, 9910, and 5743, insofar as the exclusion of taxes and fees from the royalty valuation is concerned. However, as we show below, there is an even more critical premise implicit in this argument. This is the assumption that there is also an equivalency between the term "gross proceeds" and the "gross proceeds rule."

In the preamble to the 1989 Rulemaking, MMS noted that while the term "gross proceeds" represented a change from the previous coal valuation expression "gross value," it was not intended to change the concept involved. Rather, it was a change being implemented to foster "regulatory consistency within MMS." See 54 Fed. Reg. 1505 (Jan. 13, 1989). The MMS reference to regulatory consistency was occasioned by the fact that, though the term "gross proceeds" had not previously been used in the context of coal leasing, it had been used for years in the calculation of royalties due from oil and gas production on the public domain.

As we noted in our recent decision in Viersen & Cochran, 134 IBLA 155, 164 (1995), the "gross proceeds" rule finds its genesis in the original regulations adopted to implement the Mineral Leasing Act. See 47 L.D. 552, 555." However, while the concept implicit in the "gross proceeds" rule was

clearly implicated in the 1920 rules, ^{49/} the actual term "gross proceeds" first appeared in the 1936 operating rules, entitled Oil and Gas Operating Regulations Applicable to Lands of the United States and to All Restricted Tribal and Allotted Indian Land (Except Osage Indian Reservation), ^{50/} adopted by Secretary Ickes on October 30, 1936. See 1 Fed. Reg. 1996 (Nov. 20, 1936). Section 3(e) of those regulations contained the phrase which has persisted virtually unvaried in the oil and gas operating regulations since that time: "[U]nder no conditions shall the value of any of said substances for the purpose of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than such reasonable minimum price as shall be determined by said Secretary." Id. at 2000. When the regulations were revised in 1942, see 7 Fed. Reg. 4132 (June 2, 1942), the "gross proceeds rule," with minor editorial changes, was codified at 30 C.F.R. § 221.47 (1949). This regulation continued through 1987 virtually unchanged. See 30 C.F.R. § 206.103 (1987). While the oil and gas valuation regulations were thereafter substantially modified, none of those changes affected the principle that gross proceeds served as an effective floor for the purposes of valuing production. ^{51/}

As might be expected, the concept of "gross proceeds" has been the subject of numerous decisions both by this Board and the Department. What a review of some of those decisions makes clear, however, is that it is necessary to distinguish between two related yet distinct elements: the definition of the term "gross proceeds," and an understanding of the "gross proceeds rule." While the meaning of the term "gross proceeds" has only recently been codified in the regulations, see 30 C.F.R. §§ 206.51, 206.101, 206.151, 206.171, its meaning has always been relatively clear. ^{52/} "Gross proceeds" simply means the total money and other

^{49/} Thus, the 1920 rules provided that for the purpose of computing royalties the value of all casing-head gas produced would be considered to be one-third the value of the marketable casing-head gasoline extracted from such gas unless a lessee received more money for the casing-head gas, in which case the value would be deemed the actual amounts received. Id.

^{50/} These rules were cited in our decision in Utah Chapter of the Sierra Club, 121 IBLA 1, 5 (1991).

^{51/} Without going into any great detail, the subsequent changes have generally bifurcated treatment of sales contracts into arm's-length and non-arm's-length categories. With respect to the former category, gross proceeds generally (though not always) serve as the primary basis for valuation determinations whereas, with respect to the latter category, a more detailed objective analysis of value is called for. See generally 30 C.F.R. Part 206.

^{52/} The major controversy with respect to the scope of the term "gross proceeds" has historically arisen around questions related to payments directly made by a purchaser of obligations ultimately deemed to be those of the Federal lessee. See, e.g., Hoover & Bracken Energies, Inc., 52 IBLA 27 (1981), aff'd, 723 F.2d 1488 (10th Cir. 1983), cert. denied, 469 U.S. 821 (1984).

consideration accruing to a lessee for the disposition of substances under a Federal lease. The "gross proceeds rule," however, requires a significantly more detailed analysis.

As Peabody argues in response to the position of the Navajo Nation and the Hopi Tribe, the "gross proceeds rule" was, traditionally, a mechanism for establishing a floor below which royalty valuation would not go. See, e.g., Transco Exploration Co., 110 IBLA 282, 320-21 (1989). The critical difference between the term "gross proceeds" and the application of the "gross proceeds rule," however, lay in the fact that while "gross proceeds" was generally viewed as encompassing the total amount of compensation actually received or otherwise accruing to the Federal lessee, the "gross proceeds rule" in practice always recognized that certain adjustments to these figures were proper.

The most common of these adjustments was the allowance of transportation costs absorbed in transporting a product from the immediate lease site to a distant market. See, e.g., Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (1990); Shell Oil Co., 52 IBLA 15 (1981); Kerr-McGee Corporation, 22 IBLA 124 (1975). As we expressly recognized in Viersen & Cochran, supra, "the Department has consistently authorized the deduction of a transportation allowance from the market value of the gas to reflect the costs incurred in transporting the gas from the leasehold to the first available market, notwithstanding the fact that this could lower the basis for valuing the production below the proceeds actually received by the lessee." Id. at 164-65. Allowances were also granted with respect to processing costs related to natural gas liquid products. See generally Cities Service Oil and Gas Corp., 117 IBLA 17 (1990). The recognition of allowances for these costs, even though the effect was to permit the royalty valuation of a product below the amount actually obtained (the "gross proceeds") by the lessee, was never seen as a violation of the "gross proceeds rule."

The foregoing highlights the basic fallacy of the argument pressed by the Navajo Nation and the Hopi Tribe. Their argument is premised on an equation of "gross realization" with the definition of the term "gross proceeds," whereas the real equivalency is between "gross realization" and application of the "gross proceeds rule." This is made absolutely clear in the Board's decision in Peabody Coal Co., 72 IBLA 337 (1983). Thus, when the Board discussed the computation of "gross realization," the Board was not concerned solely with the elements of value which Peabody obtained. On the contrary, the lists of both additions and subtractions to the "base mine price" covers almost two full pages, at the end of which, the decision notes, "substituting the subformulas for computing these adjustments, as described above and in the footnotes, will yield the gross realization." Id. at 346-47. As defined in Peabody, the term "gross realization" did not merely relate to the computation of the proceeds accruing to the lessee but rather embraced the entire process, i.e., the "gross proceeds rule," by which value for royalty purposes was ascertained.

Since the term "gross realization," as used in the lease, describes a process rather than merely a definitional concept, the failure of the regulatory definition of "gross proceeds" to permit the exclusion from value of certain elements (in this case Black Lung taxes, AML fees, or state and local severance taxes) did not mean the allowance of these exclusions elsewhere in the regulations was not available under the lease terms. In other words, if we assume that an Indian or a non-Indian Federal lease used the exact same lease provisions, the failure of the regulations to expressly authorize the exclusion provided by 30 C.F.R. § 206.257(b)(5) (1989) in the regulations' definitional section would not preclude the lessee from availing itself of the exclusion.

[8] The Navajo Nation suggests that, even if the Board concludes that the exclusion from value provided by 30 C.F.R. § 206.257(b)(5) (1989) applies to the lease, that the Indian lease exception language is also applicable since there is nothing in the lease terms which would override its application. In this regard, the Navajo Nation asserts that there is no workable dichotomy, or, as it puts it, "there were no practical distinctions," between the terms "Federal coal lease" and "Indian coal lease" when the lease amendments were finalized in 1987, and that "Indian" leases are necessarily "Federal" leases. See Navajo Nation's SOR at 24-25. As a result, the Navajo Nation concludes, the lease requirement that gross realization be computed based on the method utilized for computing royalties on "federal coal leases" is not inconsistent with application of the Indian lease exception to the exclusions from value.

We do not believe the basic premise of this position can be sustained, since the distinction between "Federal" and "Indian" leases was, as shown by our initial analysis of the legislative history of mineral leasing on Indian and Federal lands, well-established long before the negotiations with respect to these amended leases. As one example, except to the extent that 25 C.F.R. Chapter I expressly provided otherwise, the 1976 coal leasing regulations did not "apply to operations for the discovery, testing, development, mining, preparation, and handling of coal in tribal and allotted Indian lands under leases and permits issued under the regulations in 25 CFR Parts 171, 172, and 174." 25 C.F.R. § 211.1(a) (1977). Moreover, recognition of a distinction between "Federal" and "Indian" leases is implicit in the language of the 1989 regulations as well, since 30 C.F.R. § 206.257(a) (1989) provided that "[t]his section is applicable to coal leases on Federal, Indian Tribal, and allotted Indian lands." If there were no recognized distinction, the regulation would merely have provided that "[t]his section is applicable to Federal coal leases." Regardless of whether or not any specific regulation might apply to Indian coal leases, there was and continues to be a well-recognized distinction between "Indian" and "Federal" coal leases and the use of the term "federal coal lease" in the revised Article IV was clearly intended to differentiate between the rules used to compute royalties on "Indian" coal leases and those used to compute royalties on "Federal" coal leases.

The points which the Deputy Commissioner made with respect to the intention of the parties as disclosed by the actual terms used in the 1987 lease amendments, particularly the exhibits attached thereto, are of some cogency. Certainly, it cannot seriously be suggested that any of the parties to this agreement failed to appreciate the possibility that reimbursements for Black Lung taxes, AML fees, and state and local severance taxes might be excluded from the value basis for computing royalties due, since this possibility was explicitly dealt with in exhibit A-2 of the lease amendments. Moreover, the history of the approval process with respect to these amendments, particularly as disclosed in the December 9, 1987, Swimmer memorandum, supports this conclusion.

Admittedly, the comments which Peabody submitted with respect to the proposed 1988 regulations are at some variance with its present views as to the scope of its agreements with the Navajo Nation and the Hopi Tribe. But, however disingenuous those comments may seem in hindsight, an analysis of the terms of the 1987 amendments, in light of the regulations adopted in 1989, must ineluctably lead to the conclusion that, so long as 30 C.F.R. § 206.257(b)(5) (1989) was in effect, Peabody was within its contractual rights to exclude from its royalty valuation reimbursements for Black Lung taxes, AML fees, and state and local severance taxes. The decision of the Deputy Commissioner with respect to Leases 8580, 9910, and 5743 must be affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision in IBLA 95-397 is reversed and the decision in IBLA 95-424 and 95-425 is affirmed for the reasons stated above.

James L. Burski
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

