



WESTERN ENERGY COMPANY

172 IBLA 258

Decided September 12, 2007



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

WESTERN ENERGY COMPANY

IBLA 2005-241

Decided September 12, 2007

Appeal from a decision of the Associate Director, Policy and Management Improvement, Minerals Management Service, determining that additional royalties were due on payments received for the transport of coal from the point of delivery to the purchaser's nearby power plant. MMS-02-0092-COAL; MMS-03-0222-COAL.

Affirmed.

1. Coal Leases and Permits: Royalties

The cost of transporting coal from the mine to the edge of the permit area, where the purchaser's power plant is located, is properly considered to be a cost of the mining operation and not a transportation allowance.

2. Federal Oil and Gas Royalty Management Act of 1982:  
Royalties--Indians: Mineral Resources: Oil and Gas:  
Royalties--Oil and Gas Leases: Royalties: Payments--  
Statute of Limitations

The 6-year statute of limitations for the commencement by the United States of civil actions for money damages, found at 28 U.S.C. § 2415(a) (2000), does not limit administrative actions within the Department. Orders by MMS to recalculate and pay additional royalties due under Indian leases are administrative actions not subject to the statute of limitations.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, for appellant; Triscilla P. Taylor, Esq., and Geoffrey R. Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

## OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Western Energy Company (Western Energy, Western, or WECO) has appealed from a March 28, 2005, decision by the Associate Director for Policy and Management Improvement, Minerals Management Service (MMS), denying in part Western Energy's appeals in MMS-02-0092-COAL and MMS-03-0222-COAL, and determining that Western Energy owed additional royalties on payments received for the transport of coal from the "free on board" (f.o.b.)<sup>1</sup> point of delivery, at the edge of Western Energy's mine permit area, to the purchaser's nearby power plant. For the reasons that follow, we affirm the Associate Director's decision in all respects.

*I. FACTUAL AND PROCEDURAL BACKGROUND*

Western Energy holds several Federal leases associated with the Rosebud Mine near Colstrip, Montana.<sup>2</sup> The Rosebud Mine is a surface mining operation consisting of designated areas A, B, C, D, and E, with each designated area supplying coal to specific units of the adjacent Colstrip Power Plant (Colstrip Plant). The Colstrip Plant is owned by Montana Power Company, Puget Sound Power and Light, Portland General Electric Company, Washington Water Power Company, and PacifiCorp (Colstrip Owners, Plant Owners, or Colstrip 3/4 Participants).

In the late 1970's, the Colstrip Owners entered negotiations with Western Energy for the long-term supply of coal from Area C of the Rosebud Mine for use at Units 3 and 4 of the Colstrip Plant. Units 3 and 4 were not expected by the Colstrip Owners to be operable until 1984 and 1985, respectively. While the Colstrip Owners and Western Energy reached agreement on certain aspects of the coal supply agreement, they reached an impasse with respect to others. Specifically, the Colstrip Owners and Western Energy could not agree upon their respective responsibilities for moving coal from Area C of the Rosebud Mine to Units 3 and 4 of the Colstrip Plant. See Opinion of Arbitration Panel at 11. They executed an arbitration agreement that called for binding arbitration with respect to pricing and point of delivery issues for which they could not reach agreement. *Id.* at 10. By opinion dated July 2, 1980, the Arbitration Panel resolved, *inter alia*, issues related to the respective responsibilities of the Colstrip Owners and Western Energy in moving the coal production from Area C to Units 3 and 4. The parties incorporated the items upon which they reached agreement and the items recommended by the Arbitration Panel into two agreements

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<sup>1</sup> In its decision, MMS refers to "free on board" as meaning that "the seller's delivery is complete (and the risk of loss passes to the buyer) when the goods pass the transporter's rail." Decision at 3, *citing* Black's Law Dictionary 690 (8th ed. 2004).

<sup>2</sup> The subject leases are MTM-073109, MTM-054712, MTM-082186, and MTM-080697.

referred to as the Coal Supply Agreement (CSA) and the Coal Transportation Agreement (CTA).

The CSA, signed by the parties on July 2, 1980, and amended on July 10, 1981, was considered by MMS to constitute an arm's-length contract as defined at 30 C.F.R. § 206.251 (1995).<sup>3</sup> The CSA provided that the Colstrip Owners would purchase all of their coal requirements for Units 3 and 4 from Western Energy's production from Area C, and that Western Energy agreed to sell its coal production from Area C to the Colstrip Owners beginning July 1, 1983, and continuing through December 31, 2019. With regard to the f.o.b. point of delivery and sale, the CSA provided as follows:

- 4.1 The coal sold hereunder will be delivered to Buyers at the western end of the coal conveyor system to be constructed by Seller for the transportation of coal from Western's mining area known as Area C to Buyer's generating plant. Seller's coal conveyor system will be initially constructed as shown on Exhibit 1 and may be extended westerly in Area C from time to time by Seller. . . .
- 4.2 All coal delivered hereunder shall be weighed by Buyers at the point of delivery as described in subsection 4.1 and these weights shall be used for billing purposes. . . .

The CSA thereby established that the western end of the conveyor would serve as the royalty measurement point and the point at which title of the coal transfers to the Colstrip Owners.

In the CTA, signed by the parties on July 10, 1981, the parties established the terms and conditions related to the movement of coal from the western end of the conveyor system to the Colstrip Plant. Western Energy agreed to "design, construct, own, operate, and maintain a coal conveyor system . . . for the transport of coal sold under the Coal Contract." CTA at ¶ 1.2. The Colstrip Owners agreed to pay Western Energy for transportation of the coal in accordance with Section 5 of the CTA, which provided:

- 5.1 The Base Price to be paid by the Plant Owners for the transportation of coal by Western hereunder shall be the price computed from the sum of (a), (b), and (c), and reduced by (d), in this Subsection:

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<sup>3</sup> This regulation, in relevant part, defines "[a]rm's-length contract" as "a contract or agreement that has been arrived at in the marketplace between independent, nonaffiliated persons with opposing economic interests regarding that contract."

- (a) Fixed Charge--An annual charge for depreciation, reimbursement of property tax and overhead costs associated with the Conveyor;
- (b) Cost Reimbursement Charge--A per ton charge for the actual costs to operate maintain the Conveyor and to transport coal under this Agreement by means other than the Conveyor; and
- (c) Fee--Operating Profit--A per ton charge as an operating profit for the construction, ownership, operation and maintenance of the Conveyor; less
- (d) Revenue Credit--A monthly credit for any revenues received on account of uses of the Conveyor for purposes other than to transport Contract Coal.

CTA at ¶ 5.1. Thus, the CTA established that Western Energy would receive payments for transporting the coal by the conveyor system, and that such payments would be invoiced separately from the coal sales prices.<sup>4</sup>

The State of Montana audited Western Energy's sale of coal from the Rosebud Mine, based upon which MRM issued an Order to Pay Additional Royalties dated September 23, 2002 (2002 Order to Pay). This Order to Pay directed Western Energy to pay additional royalties of \$3,184,724.85 on coal produced and sold from the Rosebud Mine from the period from October 1, 1991, through December 31, 1995. MRM determined that Western Energy had underpaid royalties on payments

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<sup>4</sup> In its Sept. 23, 2002, Order to Pay Additional Royalties (2002 Order to Pay), MMS' Minerals Revenue Management (MRM) provides the following description of the arrangement, established in the CSA and CTA, for transporting the coal to the Colstrip Plant:

WECO loads coal into 160-ton and 200-ton bottom-dump trucks and hauls it to the grizzly at the east edge of Area C. The coal is run through both a primary and secondary crusher and delivered to the overland conveyor. The coal is weighed by belt scale at the grizzly crushing operation located at the head of the overland conveyor and this is the production measurement scale. The coal is also weighed by belt scale at the Power Plant located at the end of the overland conveyor and this is the billing measurement scale. Once the coal is deposited on the overland conveyor, it is transported east by belt approximately 4.5 miles where it is delivered to the Colstrip Power Plant's stockpile. WECO owns and operates the overland conveyor except for the last short usage at the stockpile area, which is owned by the Colstrip Power Plant.

MRM's Sept. 23, 2002, Order to Pay at 2.

for transporting the coal made by the Colstrip Owners to Western Energy, as provided by the CTA. On January 27, 2003, MRM issued a second Order to Pay (2003 Order to Pay), directing Western Energy to pay additional royalties of \$3,830,043.50 on coal produced and sold from the Rosebud Mine from the period from January 1, 1996, through December 31, 2001. Again, MRM determined that the underpayments occurred because Western Energy incorrectly excluded payments it received under the CTA for transporting production from within the Rosebud Mine to the adjacent Colstrip Plant.

In both Orders to Pay, MRM determined that “the consideration accruing to WECO under the CTA is a component of gross proceeds for Federal royalty purposes.” 2002 Order to Pay at 7; 2003 Order to Pay at 10. MRM determined that Western Energy’s failure to pay royalty on payments from the Colstrip Owners for transporting coal production to the Colstrip Plant was contrary to 30 C.F.R. § 206.251 (1995).<sup>5</sup> The rationale for MRM’s determination is central to this matter and is set forth below:

MMS contends that WECO is not entitled to exclude the proceeds associated with the CTA. The conveyor haulage from the edge of Area C to the stockpiles servicing Colstrip Units 3 and 4 is almost entirely on mine property. Therefore, the payments WECO received under the CTA are in fact proceeds associated with the sale of coal to Colstrip Units 3 and 4. WECO improperly considered the CTA to be for the purpose of moving the coal from the mine’s point of sale to buyer’s delivery point and excluded CTA payments from gross proceeds. However, our examination shows that the coal transportation is from a point of sale inside the mine’s boundaries and that the conveyor moves coal across lands contained in the mine to a delivery point, which is a mine mouth power plant. The fact that coal is hauled from the pit to the buyer’s delivery point at the edge of the mine using two forms of haulage (truck and belt conveyance) and with payments under two separate contracts (CSA and CTA) does not create the conditions where payments may be excluded from value for royalty purposes. The fact is

<sup>5</sup> This regulation provides:

*Gross proceeds* (for royalty payment purposes) means the total monies and other consideration accruing to a coal lessee for the production and disposition of the coal produced. Gross proceeds includes, but is not limited to, payments to the lessee for certain services such as crushing, sizing, screening, storing, mixing, loading, treatment with substances including chemicals or oils, and other preparation of the coal to the extent that the lessee is obligated to perform them at no cost to the Federal government. . . .

30 C.F.R. § 206.251 (1995).

that the CTA payments for conveyor operations are gross proceeds related to the sale of the coal; they are not payments for transportation to a point of sale remote from the mine.

2002 Order to Pay at 8-9; 2003 Order to Pay at 11. Western Energy appealed each of MRM's Orders to Pay to the Director, MMS (MMS-02-0092-COAL and MMS-03-0222-COAL, respectively).

## II. THE ASSOCIATE DIRECTOR'S DECISION

In his March 28, 2005, decision, the Associate Director denied Western Energy's appeals on substantive grounds, but rescinded the 2002 Order to Pay to the extent it directed the payment of royalty accruing more than 7 years before the date of the Order.

### A. *The Costs of Transporting the Coal*

The Associate Director rejected Western Energy's contention that the separate payments paid to operate the conveyor are not part of the consideration paid for the coal itself, and that the payments were solely for the transportation of coal delivered in marketable condition beyond the f.o.b. sales point and beyond the point of production and royalty measurement.<sup>6</sup> He was persuaded, rather, by MRM's

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<sup>6</sup> The Associate Director quoted, without discussing, the relevant portions of 30 C.F.R. § 206.257(b) (2001), which provides that "[t]he value of coal that is sold pursuant to an arm's-length contract shall be the gross proceeds accruing to the lessee, except as provided in paragraphs (b)(2), (b)(3), and (b)(5) of this section." Subsection (b)(2) provides as follows:

In conducting reviews and audits, MMS will examine whether the contract reflects the total consideration actually transferred either directly or indirectly from the buyer to the seller for the coal produced. . . . Value may not be based on less than the gross proceeds accruing to the lessee for the coal production, including the additional consideration.

30 C.F.R. § 206.257(b)(2) (2001). The Associate Director noted that the subsection (b)(3) exception describes circumstances not involved with Western Energy where MMS finds misconduct or a breach of the lessee's duty to the lessor. He noted further that the subsection (b)(5) exception allows the lessee to exclude from "[t]he value of production for royalty purposes" those payments received

(continued...)

argument that transporting “coal within the vicinity of the mine and permit area is inherently a part of the obligation assumed by the lessee to produce the coal and operate the mine,” and that “[a]dditional payments it receives to cover mining operations must be included in the total proceeds received for the coal.” Associate Director’s Decision at 6. Given the proximity of the Rosebud Mine and the Colstrip Plant, he concluded that Western Energy’s conveyor costs did not qualify as deductions under 30 C.F.R. § 206.261, which restricts allowances for transportation to a “sales point which is remote from both the lease and mine.” He stated that “[t]he regulations governing transportation allowances at 30 C.F.R. § 206.261 and 30 C.F.R. § 206.262 (1989) prohibit allowances for such costs,” and that, under 30 C.F.R. § 206.261(a)(2), “[i]n-mine transportation costs shall not be included in the transportation allowance.” Citing *Peabody Coal Co.*, 146 IBLA 346 (1998); *Western Fuels-Utah, Inc.*, 130 IBLA 18 (1994); and *ExxonMobil Coal and Minerals Company*, 159 IBLA 106 (2003), he stated further: “On this basis, it is MMS’ longstanding practice to deny a transportation allowance for hauling coal in and about the vicinity of a coal mining operation.”

The Associate Director explained that when MMS adopted the 1989 coal valuation regulations it addressed “in-mine transportation costs”: “Coal movement from the portals to crushing facilities, preparation plants, surge bins, stockpiles, silos or other storage, loading, or sales facilities of the mine is a common trade practice and is considered part of the mining operation.” 54 Fed. Reg. 1503 (Jan. 13, 1989). Further, he noted that in response to comments concerning “in-mine haulage,” MMS stated:

The MMS recognizes that transportation costs resulting from the movement of coal throughout the mine complex can be a significant cost. Transportation costs are, in fact, a large factor in determining whether a coal deposit can be mined.

The lessor has historically not participated in the cost of mining, including the costs of normal mine processing operations and any necessary movement of mined material about the mine area. The lessor has historically shared in the cost of outbound (long-distance) transportation where sales occur at the destination rather than the mine. This existing policy is proposed to be continued with further

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<sup>6</sup> (...continued)

“which the lessee demonstrates, to MMS’s satisfaction, were not part of the total consideration paid for the purchase of coal production.” 30 C.F.R. § 206.257(b)(5) (2001).

clarification to distinguish those situations where the lessor should participate in the cost of transportation.

54 Fed. Reg. at 1496.

Also citing *Western Fuels-Utah, Inc.*, 130 IBLA at 33, in which the Board affirmed MMS' denial of a transportation allowance for the lessee's costs of moving coal by overland conveyor from a preparation plant near the mine portal to an off-lease rail loadout, the Associate Director concluded that "there is no reasonable basis for concluding that the coal is transported by the conveyor to a 'point which is remote from both the lease and mine.'" Associate Director's Decision at 8. "There are no grounds," he stated, "for recognizing these mine operations as outside the responsibilities imposed by the Federal coal leases." *Id.* Thus, he concluded, the costs associated with construction and maintenance of the conveyor, and of transporting the coal production to the adjacent Colstrip Plant, "are the responsibility of the lessee [and] must be included in the royalty value even though they are assumed by the purchaser of the Federal coal." *Id.* at 8-9.

#### *B. The Statute of Limitations*

The Associate Solicitor rejected Western Energy's argument that MMS is barred from ordering it to pay additional royalties on obligations arising in periods beyond the Federal statute of limitations embodied in 28 U.S.C. § 2415(a) (2000). He stated that "[i]n a long line of cases, the Department has uniformly held that because appeals to the MMS Director and the IBLA are administrative appeals, not court actions, the statutory bar is inapplicable to the administrative proceeding." Associate Director's Decision at 9, citing *Anadarko Petroleum Corp.*, 122 IBLA 141 (1992); *BHP Petroleum (Americas) Inc.*, 124 IBLA 185 (1992). He noted the conflict between the Tenth Circuit's ruling in *OXY USA, Inc. v. Babbitt*, 268 F.3d 1001 (10th Cir. 2001), and the Fifth Circuit's decision in *Phillips Petroleum v. Johnson*, 22 F.3d (5th Cir. 1994), *notice of unpublished decision at 36 F.3d 89, cert. denied*, 514 U.S. 1092 (1995). In *OXY USA, Inc. v. Babbitt*, the Tenth Circuit ruled that an administrative order to pay royalties constitutes an "action" for purposes of 28 U.S.C. § 2415(a) and that such an order seeks "money damages" within the meaning of 28 U.S.C. § 2415(a), while in *Phillips Petroleum Co. v. Johnson* the Fifth Circuit ruled the opposite. The Associate Director was not persuaded that *OXY USA, Inc. v. Babbitt* nullified "the principle that if facts regarding the underpayment are not known and reasonably could not be known by the agency officials responsible to act in the circumstances absent an audit of the lessor's royalty payments, the running of the

limitations period in section 2415(a) is tolled for a reasonable time to conduct an audit.” Associate Director’s Decision at 10.<sup>7</sup>

### III. WESTERN ENERGY’S ARGUMENTS ON APPEAL

Western Energy frames “the umbrella issue . . . to be whether the payments made by the Colstrip 3/4 Participants, as the coal buyers, to Western Energy for transporting the buyer’s coal from the contractual f.o.b. point of delivery to the buyers’ yard constitute ‘gross proceeds’ accruing to Western Energy ‘for the production and disposition of the coal produced’ from the Subject BLM Leases.”

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<sup>7</sup> Western Energy also argued that under the “Director’s 7-Year Policy” MMS is barred from collecting additional royalty under the 2002 Order to Pay (MMS-02-0092-COAL) for the period prior to Sept. 23, 1995, and under the 2003 Order to Pay (MMS-03-0222-COAL) for the period prior to Jan. 27, 1996. The Associate Director acknowledged that section 4 of the Federal Oil and Gas Royalty Simplification and Fairness Act (RSFA), 30 U.S.C. § 1724(b) (2000), enacted a 7-year statute of repose applicable to royalty payments for production from Federal oil and gas leases. Consistent with the legislative intent of section 4 of RSFA, the Director of MMS issued a policy directive, dated Oct. 8, 2002, providing that “MRM . . . will not issue orders to pay or to perform for periods more than 7 years before the date of MMS’s orders absent compelling circumstances that would justify otherwise.”

For Federal leases of minerals other than oil and gas (including coal), the Policy Directive provided:

As a matter of policy, orders to pay or perform for minerals other than oil and gas will be limited to the same period allowed under RSFA (except where circumstances warrant a longer period as described above). Therefore, consistent with the above, MRM will not issue orders to pay or to perform for periods more than 7 years before the date of MMS’s order for minerals other than oil and gas produced from Federal leases. As well, the Director will grant appeals for periods more than 7 years before the date of MMS’s order for minerals other than oil and gas produced from Federal leases.

In applying the Policy Directive to Western Energy’s case, the Associate Director stated that since the Sept. 23, 2002, Order to Pay covered the audit period 1991 through 1995, “the portion of the audit period prior to September 23, 1995, falls outside the MMS’s policy with regard to pursuing Federal royalty claims older than 7 years.” Associate Director’s Decision at 12. However, he determined that the Jan. 27, 2003, Order to Pay “is fully within the 7-year period because the royalties accruing on coal sold in January 1996 were not due until February 1996.” *Id.*

Western Energy does not dispute the Associate Director’s ruling that the Policy Directive does not bar MMS from ordering the payment of royalties for periods within the 7-year period.

Statement of Reasons (SOR) at 13. Western Energy contends that the 2002 and 2003 Orders to Pay, by imposing royalty on the fees paid to Western Energy under the CTA, “(i) are unlawful, (ii) are factually unsupported, and/or (iii) are arbitrary, capricious and an abuse of discretion.” SOR at 14. In Western Energy’s view, MMS’ interpretation of 30 C.F.R. §§ 206.251 and 206.261 amounts to a violation of “the express regulatory mandates of 43 CFR 3471.3-2(a)(2)[<sup>8</sup>]” as well as “the equally express contractual terms of the Subject BLM Leases with respect to the legal characteristics *and* limitation of Western Energy’s ‘obligation’ to pay a production royalty for coal produced from the leased lands.” *Id.*

Western Energy emphasizes that during the audit periods covered by the 2002 and 2003 Orders to Pay, 43 C.F.R. § 3473.3-2(a)(2) (1991-2001) mandated payment of a royalty of not less than 12.5% of the value of the “coal removed” from a surface mine subject to a Federal coal lease. According to Western Energy, such royalty payment “attaches and pertains to the coal which is removed from the leased lands and . . . a direct link must exist between any payment received and the production and disposition of the coal.” SOR at 18. Western Energy contends that the Orders to Pay must be vacated and remanded since they “purport to impose a production royalty on payments which were not received for the removal of the coal from the leased lands . . . .” *Id.* The Orders “impose a production royalty on outsourced Transportation Services, which do not pertain to the production of coal from the leased lands,” and moreover that “the payments made by the Colstrip 3/4 Participants to Western Energy for transporting and for delivering the buyers’ coal from the contractual f.o.b. point of delivery to the buyers’ yard are not royalty bearing.” *Id.* at 21.

Western Energy further disputes the MMS’ interpretation of 30 C.F.R. § 206.257(b) and the exceptions to the “value of coal” standard set forth therein, focusing upon subsection (b)(5), which states that the value of production “shall not include” payments received by the lessee which were not part of the total consideration paid for “the purchase of coal production.” According to Western Energy, payments for the transport of coal to the f.o.b. delivery point are reimbursement and not part of the total consideration by the Colstrip Owners for production delivered from the Rosebud Mine. A related point, Western Energy asserts, is that it has not requested a “transportation allowance” under 30 C.F.R. § 206.261, given its agreement with MMS that such an allowance is only available when the point of delivery is remote from the lease or mine. Rather, Western Energy maintains that the “outsourced Transportation Services provided by Western Energy by and on behalf of the Colstrip 3/4 Participants . . . constitute a SEPARATE AND

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<sup>8</sup> This regulation provides: “A lease shall require payment of a royalty of 8 percent of the value of coal removed from an underground mine.” 43 C.F.R. § 3473.3-2(a)(2).

CONTRACTUAL AND BUSINESS TRANSACTION, separate and apart from the sale of the coal, pursuant to the 1981 Coal Supply Agreement.” SOR at 53. Western Energy concludes that payments made pursuant to this transaction do not constitute a component of the gross proceeds accruing for the production and disposition of coal produced from Area C of the Rosebud Mine. *Id.*

Relying upon the Tenth Circuit rulings in *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 860 7 n.1 (10th Cir. 1993), and *OXY USA, Inc. v. Babbitt*, 268 F.3d 1001 (10<sup>th</sup> Cir. 2001), Western Energy further asserts that MMS is barred by 28 U.S.C. § 2415(a) (2000) from claiming royalties more than 6 years before the dates of the Orders to Pay.<sup>9</sup> Western Energy claims that section 2415(a) bars MMS from seeking royalty on all of the payments covered by the 2002 Order to Pay, and from seeking royalty payments covered by the first 13 months of the 2003 Order to Pay. *See* SOR at 30-31.

#### IV. ANALYSIS

##### A. *Payments to Western Energy for Transporting the Coal Are Subject to Royalty*

[1] As part of its SOR, Western Energy includes a section entitled “Supplemental Statement of Arguments” in which it attempts to distinguish *Peabody Coal Co.*, 146 IBLA 346 (1998); *Western Fuels-Utah, Inc.*, 130 IBLA 18 (1994); and *ExxonMobil Coal and Minerals Company*, 159 IBLA 106 (2003). As noted, MMS cited these cases as representative of “MMS’ longstanding practice to deny a transportation allowance for hauling coal in and about the vicinity of a coal mining operation.” Associate Director’s Decision at 7. Western Energy contends that MMS is wrong to deny, under 30 C.F.R. § 206.261, the payments from the Colstrip Owners for the in-mine transport of the coal, since Western Energy has not requested a transportation allowance pursuant to that section. We are not persuaded by Western Energy’s argument that moving the coal via conveyor across the permit area to the Colstrip Plant “constitute[s] a SEPARATE CONTRACTUAL AND BUSINESS TRANSACTION, separate and apart from the sale of the coal, pursuant to the 1981 Coal Supply Agreement.” SOR at 53. Western Energy’s assertion that the payments for transporting the coal production may be excluded from royalty on the basis that

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<sup>9</sup> That provision specifies that every action for money damages brought by the United States or an official or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later. 28 U.S.C. § 2415(a) (2000).

such payments derive from a “separate contractual and business transaction” leaves us with the plain fact that the CTA was negotiated to resolve issues related to the transportation of the coal across the permit area to the Colstrip Plant. The Colstrip Owners make payments to Western Energy pursuant to a contract for the transportation of the coal production to the f.o.b. transfer of title point at the Colstrip Plant. Western Energy was responsible under the CTA for construction, operation, and maintenance of the conveyor and for moving the coal across the permit area to the Colstrip Plant.

We discern no plausible basis upon which to endorse Western Energy’s position herein. A brief review of the Board’s opinion in *Peabody Coal Co., supra*, a case that Western Energy finds inapposite, will demonstrate the clear validity of the Associate Director’s decision. In *Peabody*, the Board ruled that royalty was due on the cost of hauling coal from Peabody’s Seneca II Mine pit to the Hayden Station about 9.25 miles away. The Hayden Station is about 2.75 miles from the mine entrance. At Hayden, the coal was dumped through a grizzly grid maintained by Peabody into Hayden’s hopper which feeds the primary crushers, owned and maintained by Hayden. Peabody claimed transportation allowances for the cost of truck haulage, and the Associate Director disagreed, holding that “transportation from the pit to Hayden Station constitutes in-mine transportation, for which no allowance is authorized.” 146 IBLA at 348, *quoting* Associate Director’s Decision at 6. The Board agreed, stating:

It appears from the record that the grizzly and primary crusher are located 2.75 miles off the lease at the Hayden Station for efficiency of operation. It is the obligation of the lessee to place the coal in marketable condition. This generally entails placing the coal in a loadout facility where the buyer can readily take possession. The fact that loadout of the coal occurred off lease but in close proximity to the lease in order to maximize efficient coal mining operations does not make the transportation involved here an allowable transportation expense.

146 IBLA at 351, *citing Western Fuels-Utah, Inc.*, 138 IBLA at 31. The Board reached this result under the pre-1989 coal valuation regulations at 30 C.F.R. § 203.200(h) (1987), as well as under the revised coal valuation regulations at 30 C.F.R. §§ 206.251 and 206.261(a) (1989). Quoting the preamble to the revised regulations, the Board concluded that “[c]oal movement from . . . the portals (in the case of an underground mine) to crushing facilities, preparation plants, surge bins, stockpiles, silos or other storage, loading or sales facilities of the mine is common

trade practice and considered part of the mining operation.” 146 IBLA at 352, quoting 54 Fed. Reg. 1503 (Jan. 13, 1989).<sup>10</sup>

We agree with MMS that the payments to Western Energy for the maintenance and operation of the conveyor to the Colstrip Plant are properly considered to be costs of mining subject to royalty. MMS’ analysis is set forth below:

While it is true that WECO did not report a transportation allowance on its royalty reports because it purported to sell the coal at the tailgate of the crusher, WECO effectively claimed a transportation deduction by simply not paying royalty on the proceeds received under the Coal Transportation Agreement. Again, the substance, and not the form, of the Coal Supply Agreement and the Coal Transportation Agreement must control. WECO’s argument that it never requested a transportation allowance is inconsequential because although it did not ask for the allowance, the effect of its nonpayment of royalty on the proceeds it received under the Coal Transportation Agreement was to deduct the costs of moving its coal over the conveyor. WECO cannot be permitted to effectively deduct a transportation allowance when the regulations clearly prohibit such an allowance in these circumstances.

Answer at 12.

*B. Section 2415(a) Does Not Apply to MMS Orders to Pay Royalty*

[2] We also reject Western Energy’s argument that MMS is barred by 28 U.S.C. § 2415(a) (2000) from ordering it to pay additional royalties on coal delivered f.o.b. at the Colstrip Plant more than 6 years before the Orders to pay. In *Union Oil Company of California (Unocal)*, 167 IBLA 263, 276-77 (2005), the Board reviewed the disagreement between the Fifth, Tenth, and D.C. Circuits as to whether

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<sup>10</sup> In *Western Fuels-Utah, Inc.*, 130 IBLA at 29-32, which Western Fuels also finds inapposite, the Board addressed transportation allowances under the pre-1989 coal valuation regulations. At issue in *Western Fuels-Utah, Inc.*, was MMS’ denial of a transportation allowance for costs applicable to a conveyor belt used to transport the coal to the rail load-out that was located off-lease. In upholding MMS’ denial, the Board referred to the transport of the coal as “in-mine haulage,” stating: “[W]e find the expenses of the overland conveyor and the loadout facilities are properly considered to be costs of mining rather than an allowable transportation expense.” *Id.* at 32. The Board concluded that “MMS was correct in denying the transportation allowance because the conveyor belt was part of Western Fuels’ in-mine transportation system, even though the load-out was located 1.2 miles off the lease.” *Id.*

the statute of limitations in section 2415(a) governs an MMS order directing the payment of royalties. The Board noted that the Tenth Circuit's en banc decision in *OXY USA, Inc. v. Babbitt*, *supra*, directly conflicts with the decision of the Fifth Circuit in *Phillips Petroleum Co. v. Johnson*, *supra*, which had ruled that an administrative order to pay royalties does not constitute an "action" for purposes of section 2415(a), and that such an order does not seek "money damages" within the meaning of that section. However, the Board noted that during the pendency of *Unocal*, the U.S. Court of Appeals for the District of Columbia issued *Amoco Production Co. v. Watson*, 410 F.3d 722, 734-35 (D.C. Cir. 2005), expressly joining the Fifth Circuit "in concluding that the statute of limitations in subsection 2415(a) does not apply to bar an administrative order demanding payment owed pursuant to the MLA [the Mineral Leasing Act, 30 U.S.C. § 226(b)(1)(a) (2000),] and its regulations." In *Unocal*, the Board stated that it would decline to follow *OXY USA, Inc. v. Babbitt* and would instead follow the D.C. and Fifth Circuits in holding that the statute of limitations in section 2415(a) does not apply to MMS orders to calculate and pay royalty.<sup>11</sup>

While Western Energy's appeal was pending before this Board, the U.S. Supreme Court granted certiorari in order to resolve the conflict between the D.C. Circuit's opinion in *Amoco Production Co. v. Watson* and the Tenth's Circuit's ruling in *OXY USA, Inc. v. Babbitt*. In *BP America Production Co. v. Burton*, 127 S. Ct. 638 (2006), the Supreme Court affirmed *Amoco Production Co. v. Watson*. In construing the phrase "action for money damages," the Supreme Court reviewed the well-defined arguments of the lessees and the Government and concluded that "[n]othing in the language of § 2415(a) suggests that Congress intended these terms to apply more broadly to administrative proceedings." 127 S. Ct. at 644. Accordingly, we reject Western Energy's argument that section 2415(a) applies to its case.

## V. CONCLUSION

We conclude that payments to Western Energy for the transport of coal from the edge of the Rosebud Mine to the Colstrip Plant are properly included in gross proceeds and that section 2415(a) does not apply to the subject Orders to Pay.

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<sup>11</sup> The Board observed that its own precedent agreed with the D.C. and Fifth Circuits. See *Marathon Oil Co.*, 149 IBLA 287, 291 (1999), in which the Board expressly declined to follow the Tenth Circuit's decision in *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858 (10th Cir. 1993), ruling instead that "[a] demand for the recalculation of royalties for Indian oil and gas leases using dual accounting is not a judicial action for money damages brought by the United States, but is an administrative action not subject to the statute of limitations."

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 appealed from is affirmed.

\_\_\_\_\_/s/  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_/s/  
R. Bryan McDaniel  
Administrative Judge