<u>Editor's note</u>: Motion to vacate prior decision denied -- 124 IBLA 144 (Sept. 30, 1992)

LONE STAR STEEL CO.

IBLA 87-346 Decided December 3, 1990

Appeal from a decision of the Director, Minerals Management Service, affirming a Royalty Management Program order requiring payment of additional royalties for coal mined from readjusted coal leases NM-059992 and BLM-C-018820. MMS 85-0111-MIN.

Affirmed.

1. Coal Leases and Permits: Royalties -- Mineral Leasing Act: Royalties

The Minerals Management Service has been delegated the royalty management functions of the Secretary including the authority to audit a lessee's records to determine royalty liability.

2. Coal Leases and Permits: Royalties -- Mineral Leasing Act: Royalties

The authority of the Minerals Management Service to conduct an audit of a coal lessee's records to determine royalty liability is properly distinguished from the authority of the Minerals Management Service under 30 CFR 217.200 to require a lessee to retain an independent certified public accountant to conduct a self-audit.

3. Coal Leases and Permits: Royalties -- Mineral Leasing Act: Royalties

A royalty valuation decision will be affirmed on appeal where the record establishes a reasonable basis for the valuation using one or more of the factors enumerated in the regulation. The fact that another regulatory factor was not used as a basis for valuation will not justify a remand of the case in the absence of a showing that the failure to use that factor was arbitrary and capricious.

APPEARANCES: Virgil D. Medlin, Esq., Oklahoma City, Oklahoma, for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., Howard W. Chalker, Esq., Office of the Solicitor, United States Department of the Interior, Washington, D.C., for the Minerals Management Service.

IBLA 87-346

OPINION BY ADMINISTRATIVE JUDGE GRANT

Lone Star Steel Company (Lone Star) appeals from a December 23, 1986, decision of the Director, Minerals Management Service (MMS), denying Lone Star's appeal from a Royalty Management Program (RMP) order of May 15, 1985, directing Lone Star to pay an additional $348,495.81 in royalty for coal mined from readjusted coal leases NM-059992 and BLM-C-018820. The appeal before the Director was docketed as MMS-85-0111-MIN.

The decision under appeal in this case arises from the failure of appellant to pay royalty in accordance with the readjusted terms of the two coal leases involved over the period from April 1981 through October 1982. Pursuant to applicable provisions of law, the terms of Federal coal lease NM-059992 were readjusted effective April 1, 1981, after advance notice issued by the Department to the lessee. One of the readjusted terms provided for payment of production royalty at a rate of 12-1/2 percent of the value of the coal removed from the lease. The record 1/ indicates that appellant continued to pay royalty at a rate of $0.15 per ton of coal produced (the rate under the original 20-year term of the lease prior to readjustment) while pursuing appeals of the readjusted lease terms. The decision requiring adherence to the readjusted lease terms, including the 12-1/2 percent rate of royalty on production, as a condition of further operations under the lease was affirmed by this Board in a decision cited as Lone Star Steel Co., 65 IBLA 147 (1982).

The record further discloses that Federal coal lease BLM-C-018820 OK was modified effective July 1, 1981, by mutual agreement of the appellant and the lessor as indicated by their respective signatures on the modified lease to include certain additional lands not previously leased (designated as Tract 2). The modified lease provided for a production royalty of 12-1/2 percent of the value of coal produced by strip or auger mining methods from Tract 2 from the effective date of the modified lease. 2/ Further, coal lease BLM-C-018820 OK was readjusted as to the lands embraced in the original lease (Tract 1) effective June 1, 1982. Again, the royalty provision called for a production royalty of 12-1/2 percent on coal produced by strip or auger mining methods. This readjustment was also the subject of an appeal to the Board which affirmed the readjusted royalty term in a decision cited as Lone Star Steel Co., 71 IBLA 92 (1983). 3/ The Board

1/ Memorandum of Oct. 5, 1982, from Ernest Achterberg, District Mining Supervisor, MMS, Tulsa, Oklahoma.
2/ The Board has upheld the revision of lease terms prior to the expiration of the 20-year adjustment period where the lessor and lessee have agreed to enter into a modified coal lease embracing new acreage. Spring Creek Coal Co., 83 IBLA 159 (1984).
3/ A subsequent appeal endeavoring to renew appellant's challenge to the readjusted lease terms was dismissed by the Board. Lone Star Steel Co., 77 IBLA 96 (1983).

decisions affirming the readjustment of the lease terms including the royalty rate for both leases were upheld on judicial review. 4/

By demand letter dated May 15, 1985, the Manager, Tulsa Regional Compliance Office, MMS, informed appellant that MMS had completed an audit of royalty payments on the leases at issue in this case to determine if royalties were paid in accordance with the terms of the lease modification and lease readjustments. The demand letter informed appellant that the value of the coal produced had been determined to be $49.50 per ton. The demand letter further required payment of $348,495.81 in additional royalty, representing the difference between the royalty paid on a cents-per-ton basis and the royalty calculated on the basis of 12-1/2 percent of the value of the coal for certain months from April 1981 through October 1982 for the leases at issue.

On appeal to the Board, appellant challenges the regulatory authority of MMS to make a value determination of the coal produced under the leases on two grounds. First, it argues that the regulations at 30 CFR 203.200 cited in a May 22, 1986, MMS memorandum in support of the valuation are codified in 30 CFR Part 203 of the regulations, which is titled "relief or reduction in royalty rates." Appellant argues this regulation does not provide authority for valuation of coal production for royalty purposes. Further, appellant contends that the authority for valuation of coal production for royalty purposes is conferred by the regulations at 43 CFR 3485.2 upon officials of BLM rather than MMS. Additionally, appellant argues that MMS erred in conducting the audit in this case by failing to utilize an independent certified public accountant as provided in 30 CFR 217.200. Appellant also asserts that the value of the coal for royalty purposes should exclude various taxes and fees including black-lung taxes and reclamation fees.

Finally, appellant argues that the standard provided by the relevant royalty valuation regulation was not properly applied to determine the value of the coal produced from appellant's leases. Specifically, appellant asserts the methodology applied by MMS was erroneous in that it failed to consider either mining costs plus reasonable profit margin or prices reported to a public utility commission and/or the Federal Energy Regulatory Commission (FERC). See 30 CFR 203.200(g)(2)(iv) and (v) (1983). 5/

4/ Lone Star Steel Co. v. Clark, No. 84-583-C (E.D. Ok. June 30, 1986), aff'd, Lone Star Steel Co. v. Clark, Civ No. 86-2146 (10th Cir., Nov. 23, 1988), cert. denied sub nom. East Texas Steel Facilities, Inc. v. Lujan, 58 U.S.L.W. 3213 (U.S. Oct. 2, 1989).

5/ These same factors were first enumerated in the regulation at 30 CFR 211.63(g)(2)(iv) and (v), 47 FR 33192 (July 30, 1982), effective Aug. 30, 1982, prior to redesignation of this regulation to 43 CFR 3485.2, 48 FR 41589 (Sept. 16, 1983), and also to 30 CFR 203.200(g)(2)(iv) and (v), effective Aug. 5, 1983. 48 FR 35639 (Aug. 5, 1983). The placement of these regulations in both 30 CFR 203.200 and 43 CFR 3485.2 was intended to reflect the joint responsibility of MMS and BLM in matters governed

In support of its contention, appellant cites to portions of the transcript of the deposition of Ernest Achterberg, the MMS District Mining Supervisor who recommended the royalty valuation of $49.50 per ton. Lone Star cites portions of the deposition taken in the litigation before the district court in which Achterberg acknowledged he did not check prices reported to public utility commissions or FERC and, further, that he did not calculate certain factors which might affect the lessee's profit margin. 6/

An answer to the statement of reasons was filed by MMS. In its answer, MMS states that 30 CFR 211.63 (1982) was the applicable regulation for coal valuation determinations during the period in question. MMS explains that this valuation regulation was redesignated after MMS was formed as 30 CFR 203.200 and also 43 CFR 3485.2 to recognize the joint responsibility of BLM and MMS in implementing these regulations. 7/

In response to the allegation that MMS had no authority to calculate the value of the coal removed, MMS points out that the responsibility for royalty and mineral revenue management is lodged with MMS. It cites Secretary of the Interior Order No. 3087, Amendment No. 1 (February 7, 1983), as the basis for this delegation of authority. MMS contends that the reference to 30 CFR 203.200 (1983) in the May 15, 1985, demand letter and the

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thereby. 48 FR 35640 (Aug. 5, 1983). The administrative authority of MMS over all functions relating to "royalty and mineral revenue management" is clear. Secretarial Order No. 3087 and Amendment No. 1, 48 FR 8983 (Mar. 2, 1983).

6/ Appellant also challenged the propriety of assessing the additional royalty while judicial review of the decision readjusting the leases and the royalty terms thereof is still pending. Conclusion of the litigation upholding the lease readjustment decisions renders this issue moot. However, we note that compliance with a decision is not automatically stayed pending completion of judicial review.

Statutory authority is provided for obtaining relief from an administrative decision pending judicial review:

"When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705 (1988). The courts have recognized that the institution of a lawsuit for judicial review of an administrative action does not, by itself, stay the effectiveness of the challenged action in the absence of a stay granted pursuant to this statutory provision. Abbott Laboratories v. Gardner, 387 U.S. 136, 155-56 (1967) (effectiveness of a regulation); Winkler v. Andrus, 614 F.2d 707, 709 (10th Cir. 1980) (decision rejecting appellant's oil and gas lease application).

7/ See note 5, supra.

May 22, 1986, field report was proper because the coal valuation regulations had been redesignated to 30 CFR 203.200 (1983) when these documents were drafted. MMS contends that, considering the history of the formulation and recodification of the regulations, the fact that coal valuation regulations are codified in the part of 30 CFR entitled "Relief or Reduction of Royalty Rates" is irrelevant. MMS further argues that Lone Star had proper notice of the redesignation of the rule.

With respect to the issue of the valuation of the coal for royalty purposes, MMS contends that it has properly valued the coal. MMS notes that the regulatory criteria referred to by Lone Star regarding reasonable profit margin or prices reported to a public utility commission and/or FERC were not incorporated in the relevant regulation until near the end of the period for which additional royalty was assessed. Additionally, MMS asserts that it has the authority to audit lessees such as Lone Star regarding royalty compliance pursuant to the terms of the lease at section 27 and the regulations at 30 CFR 211.66(b) (1982) (now codified at 30 CFR 212.200(b)). Further, MMS argues that this authority is not subject to the requirements of 30 CFR 217.200 regarding audits by independent certified public accountants as this latter regulation applies only to self-audits required of a lessee by order of MMS. Finally, MMS contends that the valuation of appellant's coal was based on the price received for like-quality coal. Since the gross proceeds received by a seller of like-quality coal includes any amounts for reimbursement of Governmental fees (such as black-lung and reclamation fees), there can be no error on the ground that the valuation included such fees.

[1] The first issue we will address is the authority of MMS to review Lone Star's royalty records and issue the demand letter based upon that review. There is little doubt that the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1988), and the Mineral Leasing Act for Acquired lands, 30 U.S.C. §§ 351-359 (1988), the regulations promulgated thereunder, and the lease terms all reserve to the Secretary of the Interior the authority and responsibility for establishing reasonable values for royalty purposes. In turn, the Secretary has delegated the responsibility for the collection of royalties to MMS. Secretarial Order No. 3071, 47 FR 4751 (Feb. 2, 1982) (creating MMS to carry out functions previously delegated to the Conservation Division, Geological Survey (GS)); Secretarial Order No. 3087 and Amendment No. 1, 48 FR 8983 (Mar. 2, 1983) (clarifying all royalty management functions are vested in MMS). Section 27 of the terms of the readjusted leases reserves to the lessor the authority to inspect the lessee's records regarding lease production. By regulation MMS has been granted the authority to audit lessee records to determine the lessee's royalty liability. 30 CFR 211.66 (1982). 8/

8/ This regulation predated the creation of MMS and previously provided audit authority for the Conservation Division, GS, the predecessor of MMS. See 30 CFR 211.66, 41 FR 20271 (May 17, 1976). The Mining Supervisor was defined originally as the Area or District Mining Supervisor of the Conservation Division. 30 CFR 211.2(x), 41 FR 20263 (May 17, 1976). In recognition of the transfer of authority for royalty management to MMS,

[2] Having determined that MMS has the authority to conduct an audit, we will consider whether 30 CFR 217.200 has restricted this authority. Lone Star contends that this regulation bars MMS from conducting its own audit. In response, MMS asserts that the regulation at 30 CFR 217.200 applies only when MMS directs a lessee to perform a self-audit to require that the audit be conducted by an independent certified public accountant or an independent public accountant licensed by the state. The MMS interpretation is supported by the provision in this regulation that the audit be conducted at lessee's expense. We agree with MMS that 30 CFR 217.200 does not limit MMS' authority to review lessee's compliance with royalty obligations under the lease. The language found at 30 CFR 211.66(b) (1982), which provided for access to all lease records relating to royalties, grants sufficient authority for an audit by MMS of a lessee's royalty records.

Having disposed of appellant's objections regarding the authority of MMS to conduct the challenged audit and the audit procedures utilized, the remaining issues relate to the propriety of the value determination itself. From the commencement of the time period at issue in this case (April 1981) until August 30, 1982, the factors relevant to valuation of coal production for royalty purposes were set forth as follows:

> (b) The gross value shall be the sales or contract unit price times the number of units sold, Provided, however, That where the Mining Supervisor determines: * * * (2) that no consideration is received * * * because the lessee is consuming such coal for his own use * * *, the Mining Supervisor shall determine the gross value of such coal taking into account (i) any consideration received by the lessee in other related transactions, (ii) the highest price paid for coal of like quality produced from the same general area during the lease month, (iii) contracts or other business arrangements between coal producers and purchasers for the sale of coal other than coal produced under such lease, which are comparable in terms, volume, time of execution, area of supply and other circumstances, and (iv) such other relevant factors as the Mining Supervisor may deem appropriate * * *. [Emphasis in original.]

30 CFR 211.63(b) (1982). Subsequently, this regulation was amended effective August 30, 1982, moving the provisions of subsection (b) to subsections (f) and (g) and adding two additional factors for consideration in royalty valuation:

> (f) Where Federal royalty is calculated on a percentage basis, the value of coal for Federal royalty purposes shall be

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the definition of Mining Supervisor at 30 CFR 211.2 was changed in 1982 to refer to the appropriate MMS official. 47 FR 28369 (June 30, 1982). Thus, regulatory authority for the audit in this case predated the period for which the additional royalty at issue was assessed.

> the gross value at the point of sale * * *. For captive operations or other than arms length transactions, the District Mining Supervisor shall determine gross value and the point of sale.
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> (g) The gross value shall be the unit sale or contract price times the number of units sold, unless MMS determines that:
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> *   *   *   *   *   *   *   *   *   *   *
>
> (2) No consideration is received from some or all of such coal because the operator/lessee is consuming such coal * * * for which Federal royalty is due and payable.
>
> In either case, MMS shall determine the gross value of such coal taking into account:
>
> (i) Any consideration received or paid by the operator/lessee in other related transactions.
>
> (ii) The average price paid for coal of like quality produced from the same general area during the Federal lease month.
>
> (iii) Contracts or other business arrangements, between coal producers and purchasers for the sale of coal other than coal produced under such Federal lease, which are comparable in terms, volume, time of execution, area of supply, and other circumstances.
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> (iv) Mining cost plus reasonable profit margin.
>
> (v) Prices reported to a public utility commission and/or the Federal Energy Regulatory Commission.
>
> (vi) Such other relevant factors as the District Mining Supervisor may deem appropriate.

30 CFR 211.63(f) and (g), 47 FR 33192 (July 30, 1982). 9/

9/ This regulation was recodified to 30 CFR Part 203 effective Aug. 5, 1983. See note 5, supra. Appellant's challenge to the regulatory authority of MMS to make the value determination must be rejected. It is clear from the above-quoted text of the regulations in effect at the time the royalty obligation accrued in this case that the authority to determine the value of coal was vested in the MMS Mining Supervisor at all relevant times herein. Although the provisions of this coal valuation regulation were subsequently recodified, this does not undercut the validity of the regulations under which the royalty at issue was assessed. Further, we can find nothing in the recodification of the regulatory provisions at 30 CFR Part 203 which would qualify the authority granted by the regulation. The fact that the

With respect to the issue of the basis of the royalty valuation used for appellant's coal, the record contains a memorandum dated November 21, 1986, from the Regional Manager, Tulsa Regional Compliance Office, MMS, explaining that:

> Lone Star * * * used all the Federal coal mined from the leases in question in their steel mill in Lone Star, Texas. Consequently, there were no arm's-length sales on which to value the coal. In situations like this, 30 CFR 203.200(g)(2)(i) 10/ allows the valuation to be based on any consideration received or paid by the operator/lessee in other related transactions. The valuation used in this case was based on Lone Star's purchases of like quality coal from Great National Corporation (Great National). Attached is a schedule obtained from BLM that shows invoice numbers, shipment dates, and tonnage sold by Great National. All of Lone Star's coal purchases were at the $49.50/ton rate. We were told by Ernest R. Achterberg, BLM District Mining Supervisor, Tulsa, Oklahoma, that the quality of the coal purchased from Great National was the same as the coal mined from the Federal leases in question.

The transactions shown on the spreadsheet attached to the memorandum reflect several sales at $49.50 per ton during the month of July 1982. This evidence is supported by other information in the record.

Subsequent to the Board decision affirming the readjustment of the royalty rate (and other terms) of NM 059992, Lone Star Steel Co., 65 IBLA at 147, District Mining Supervisor Achterberg recommended in a memorandum dated October 5, 1982, that a valuation of $49.50 per ton be used for computation of royalty on coal produced in April, May, and June of 1981. Achterberg was asked by MMS officials to explain the basis for the valuation, including what values other Oklahoma or Arkansas producers of like coal were reporting; whether the coal was from Federal leases; whether the mining, quality, processing and transportation were comparable; and who Lone Star was buying from during the period. In a responsive memorandum dated November 5, 1982, David R. Sitzler, Mining Engineer, MMS, Tulsa, stated that the valuation "was based on actual spot market purchases for comparable coal by Lone Star Steel Company." The memorandum further indicated that Lone Star has purchased coal from Great National, which mined coal from the same seam, and from HFCO, Inc., which mined coal from a different seam. The memorandum also disclosed that the sale price for coal from Arkansas and Oklahoma during the period ranged from $42 to $50 per ton for coal of comparable quality mined from Federal leases by comparable

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title of 30 CFR Part 203 referred to relief or reduction in royalty rates did not alter either the substance of the regulation or the authority provided by the regulation.

10/ Formerly codified at 30 CFR 211.63(b)(2)(i) (1982) and 30 CFR 211.63(g)(2)(i), 47 FR 33192 (July 30, 1982).

mining methods. Thus, the actual valuation selected by MMS represented the contract price Lone Star paid for coal mined from the same seam as the coal in this case.

We find that the record establishes a substantial basis for the MMS royalty valuation based on several of the factors enumerated in the relevant regulation (i.e., consideration received or paid by the lessee in other related transactions, the price of coal of like quality produced in the same area during the lease month, and comparable contracts between coal producers and purchasers for the sale of coal other than coal produced under the lease at issue).

[3] Appellant argues that MMS improperly applied the royalty valuation regulation by failing to consider either mining costs plus reasonable profit margin, on the one hand, or prices reported to a public utility commission or FERC -- the new factors added at 30 CFR 211.63(g)(2)(iv) and (v). There is no doubt that MMS is bound by the provisions of the valuation regulation in effect at the time for which the valuation of the coal for royalty purposes is made. Thus, the factors cited by the appellant, i.e., profit margin and prices reported to FERC and/or public utility commissions, were relevant to royalty valuation at least subsequent to the August 30, 1982, effective date of the revised regulation. The issue raised by this appeal, however, is whether MMS is required to base its valuation of production for royalty purposes on all of the factors listed in the royalty valuation regulation or whether a valuation may be based on one or more of those factors in the absence of a showing that the valuation is unreasonable or arbitrary in light of one of the other regulatory factors.

This question has arisen before in royalty valuation cases. In applying the royalty valuation regulations governing natural gas to production of natural gas liquid products (NGLP) the Board held that:

> The regulation defines several factors which may be properly used in the valuation of NGLP. One of the relevant factors is "posted prices." 30 CFR 206.150 (1987). The Mont Belvieu spot market price for NGLP as published during the production month clearly qualifies as a posted price. Thus, the issue is whether the other factors relevant to NGLP valuation render the use of the posted spot market price arbitrary and capricious as a measure of fair market value. Examining the relevant factors enumerated by the regulation, we note there is no showing by appellants that the posted price is inconsistent with the highest price paid for a part or a majority of like-quality products produced in the area or field. Further, the price received by the lessee, normally a significant factor in royalty valuation, is by definition not applicable in the case of NGLP which are used internally and not marketed. The factor of regulated prices is not relevant here as it appears from the record that the price of the NGLP involved was deregulated during the timeframe at issue. [Emphasis added.]

Conoco, Inc., 110 IBLA 232, 241 (1989), appeal filed, No. 643-89L (Cl. Ct. filed Nov. 28, 1989); see Amoco Production Co., 112 IBLA 77, 86 (1989). It is clear from the holding in Conoco that once it is established from the record that the royalty valuation is based on one or more of the relevant factors under the regulation, the issue is whether the failure to use one of the other factors renders the valuation unreasonable. The dissent misreads our decision in Conoco to the extent the dissent construes this holding to require that a separate valuation be calculated under each regulatory criteria. 11/ Contrary to the assertion in the dissent, we find nothing in the Conoco decision which indicates that the highest price paid for a majority of like-quality products produced in the area or field was calculated by MMS and explicitly compared with the Mont Belvieu spot market price. Rather, the decision states that there was "no showing by appellants that the posted price is inconsistent with the highest price paid for a part or a majority of like-quality products produced in the area or field." 110 IBLA at 241. Lone Star's challenge to the valuation in this case suffers from a similar infirmity, i.e., there has been no showing that reference to the two regulatory factors added by the regulatory revision effective August 30, 1982, would render the MMS valuation unreasonable. There is, however, as discussed above, very probative evidence to support the valuation used by MMS.

The discretion of the Secretary in applying the regulatory factors to valuation of production for royalty purposes has been recognized by the courts. Thus, in the application of a somewhat similar royalty valuation regulation to onshore gas production the courts have held that:

> The regulation enumerates several factors to be considered in determining reasonable value, but does not mandate that any particular formula be used to compute reasonable value. In fact, the Associate Director is expressly directed to consider, in addition to the enumerated factors, "other relevant matters." The thrust of the regulation is that the value for royalty computation purposes set by the Associate Director must be reasonable. The only specific requirement in the regulation is that this value be no less than "gross proceeds." Thus this regulation vests considerable discretion in the Associate Director to decide what the "reasonable value" for royalty purposes shall be.

Marathon Oil Co. v. United States, 604 F. Supp. 1375, 1382 (D. Alaska 1985), aff'd, 807 F.2d 759 (9th Cir. 1986), cert. denied, 480 U.S. 940 (1987). Like the valuation regulation at issue in Marathon and in Conoco, the discretion manifested in the MMS Director by the relevant regulation in this case is confirmed by the direction to consider "other relevant matters" in addition to those factors specifically enumerated.

11/ In describing the decision of the MMS Director under appeal in Conoco we noted that MMS "concluded that royalty value determinations need not incorporate all of the factors identified in the regulation and that the weight to be afforded each factor is within the discretion of MMS." 110 IBLA at 236.

Appellant asserts that MMS committed error in its valuation in that it did not consider either prices reported to FERC or a public utility commission, on the one hand, or appellant's mining costs and profit margin in determining the royalty value. This contention also forms the primary basis for the dissenting opinion in this case. However, the assertion that MMS did not consider these factors is misleading. It would be more accurate to state that the testimony of Achterberg was that he neither researched prices reported to FERC or public utility commissions nor calculated the specific profit margin at a value of $49.50 per ton. 12/ We must reject the contention of appellant (accepted by the dissenting opinion) that MMS failed to

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12/ The transcript of Achterberg's testimony attached to appellant's response to the report of the Tulsa Regional Compliance Office filed in support of the appeal to the MMS Director discloses in pertinent part:

"Q. In arriving at that figure did you take the average price paid for coal of like quality produced in that same general area during the federal lease month in which you arrived at that figure?

"A. Yes.

"Q. You know where I'm getting those words from? You know of 30 CFR, Section 203.200(G)(2), does that spell out what you will consider in arriving at that price?

"A. I believe that it does, I don't remember the exact --

"Q. All right. But you did take that into consideration?

"A. Yes.

"Q. And how did you find out what that was?

"A. By checking the prices that coal is going for at that time.

"Q. Did you check comparable sales of coal in the area?

"A. Yes.

"Q. Did you check -- well, you tell me, what else did you check? I can't read my writing.

"A. Comparable coal, it had to be a comparable coal, basically from a comparable type of operation.

"Q. Okay. Did you check prices reported to public utility commissions or Federal Energy Regulatory Commission?

"A. No.

"Q. Did you check mining costs plus a reasonable profit margin, did you take those things into consideration?

"A. Yes.

* * * * * * * * * * *

"Q. Using twelve and a half percent of gross coal mined and the figure of $49.50 per ton, which causes Lone Star to pay over six dollars royalty, did you determine whether or not there would have been a reasonable profit margin?

"A. There would have been a profit margin. Reasonable is dependent upon interpretation.

* * * * * * * * * * *

"Q. Did you make an actual sit down and figure, when you arrived at the $49.50 per ton, did you actually sit down and figure it out?

"A. Figure what?

take into account all of the relevant regulatory factors in making the royalty valuation. Reliance by the dissent upon the statement of counsel for MMS that the revised criteria were not relevant for most of the valuation period fails to distinguish between the relevance of this argument by counsel and the issue of whether the regulatory factors were considered. Achterberg testified in his deposition that there would have been a margin of profit at the valuation of $49.50 per ton, although he did not calculate a specific figure for the profit. Further, he testified, consistent with the documentary evidence in the case file, that the valuation was based on the price of comparable coal from a comparable type of operation at the time in question. 13/ It appears from the record that the value of the

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"Q. What the reasonable profit margin or whether there was a profit margin?

"A. No." (Tr. at 19-23).

13/ In this regard, we find the case of Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983), cited by the dissent, to be distinguishable from this royalty valuation case. The former involved the application of a statute authorizing the Department of the Interior to obtain reimbursement from applicants for a right-of-way across the public lands with respect to reasonable costs of processing the application. The court found that the statute set forth certain specific factors relevant to a finding of what costs are reasonable and examined in detail the legislative history which the court found "quite persuasive" (711 F.2d at 925 n.8) in indicating an intent that reimbursement of all costs would not be reasonable. The court rejected the Department's blanket determination, first by Secretarial order and subsequently by regulation, to include in "reasonable costs" all of the actual costs incurred in processing the application without considering the factors enumerated by Congress as relevant to the issue of reasonableness. Thus, the court found that "the section contemplates that the Secretary pay some attention to the listed factors in determining reasonable costs to be assessed." 711 F.2d at 921.

With respect to the royalty valuation involved in the present appeal, the relevant regulation sets forth several factors germane to a value determination for royalty purposes. The record establishes that a valuation was properly established on the basis of several of those factors (i.e., consideration received or paid by the lessee in other related transactions, the price of coal of like quality produced in the same area during the lease month, and comparable contracts between coal producers and purchasers for the sale of coal other than coal produced under the lease at issue). It is also clear that having established the valuation on the basis of the price paid for coal mined from the same seam, further research into the costs and profits of mining this coal and/or the prices reported to FERC or a public utility commission was reasonably dismissed as unproductive. Unlike the situation in the Nevada Power case, we do not have a valuation which ignores the factors upon which the exercise of discretion is properly predicated. Rather, we have a valuation decision supported on the record by consideration of the relevant factors.

coal had been established by substantial evidence conforming to the regulatory criteria and, hence, MMS had no reason to resort to other regulatory criteria in the absence of evidence that further consideration of these factors would render the valuation unreasonable. 14/ Under these circumstances, we are unable to find that the fact MMS did not specifically research either prices reported to a public utility commission or
FERC, on the one hand, or undertake an analysis of appellant's mining costs and profit margin, on the other hand, constitutes error. 15/

Further, we note our disagreement with the dissenting opinion's finding that the MMS Director failed to cite evidence relied upon in the valuation decision which would allow the Board on appeal to ascertain that the valuation was made in compliance with the relevant regulation. The Director's decision states in pertinent part that:

> In calculating royalties on the percent of value basis, RMP assigned a royalty value to the coal of $49.50 per ton. The RMP reports that the sales prices of other Oklahoma and Arkansas production of comparable quality during the period ranged from $42.00 to $50.00 per ton. The record also shows that Lone Star purchased significant quantities of like-quality coal produced by similar mining methods and in part from the same seam at a price of $49.50 per ton. In this respect, the record demonstrates convincingly that RMP acted well within the discretionary authority of 30 CFR § 211.63(b) in establishing the royalty value of the coal.

(Director's Decision at 3). As discussed above, the record contains ample documentation to support this valuation including the November 21, 1986, memorandum quoted previously together with its attachments; the November 5, 1982, Sitzler memorandum; and the Achterberg deposition submitted by appellant. While appellant has invested a great deal of effort in litigating the readjustment of the coal leases involved and, subsequently, in challenging the basis of the valuation of the coal pursuant to those readjusted leases, appellant has presented no evidence which would establish the royalty valuation is unreasonable. Accordingly, the decision of MMS is properly affirmed.

14/ No substantive evidence on the issue of valuation has been filed by appellant. Our view in this matter might be different had the record disclosed that MMS was presented by appellant with specific data regarding the impact of the market price on profits which MMS refused to consider in its valuation decision.

15/ We must also reject appellant's contention that the value of the coal should be reduced to exclude such elements as black-lung taxes and reclamation fees. It is well established under the coal valuation regulations at issue that items such as production or severance taxes, blacklung taxes, and reclamation fees are properly considered a cost of production which may not be subtracted from gross value for the purpose of computing Federal royalty. See Black Butte Coal Co., 103 IBLA 145, 95 I.D. 89 (1988); Peabody Coal Co., 72 IBLA 337 (1983); Knife River Mining Co., 43 IBLA 104, 86 I.D. 472 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING IN PART AND DISSENTING IN PART:

In most respects I am in agreement with the majority conclusions. The Minerals Management Service (MMS) had the authority to determine the market value for royalty purposes. As an adjunct to that authority it had the authority to conduct the audit. It is patently obvious, however, that for a portion of the applicable period, MMS did not follow governing regulations when determining the value-per-ton for royalty purposes.

At the outset I will briefly outline the history of the applicable regulations. During the period in question the royalty management program was in a state of flux. On January 19, 1982, the Department created MMS. 1/ In 1982, the regulations applicable to coal mining operations were codified at 30 CFR Part 211, and the regulation applicable to determining the value of coal was found at 30 CFR 211.63 (1982).

The regulations found in 30 CFR Part 211, including 30 CFR 211.63, were amended effective August 30, 1982. See 47 FR 33154 (July 30, 1982). 2/ New provisions were added to section 211.63. Those previously found at 211.63(b) (applicable to this case) were amended and made a part of section 211.63(f) through (h). 47 FR 33154 at 33191-92. 3/

The parties to the appeal and the majority have made numerous references to code sections that, other than the section number, are identical in language. In this dissent I have attempted to use a single code reference to avoid this confusion whenever possible. On the other hand, the parties have also referred to a code section which was amended during the period of the audit with no change of the section number. During the period in question, April 1, 1981, through October 31, 1982, the provisions of 30 CFR 211.63 were clearly applicable to Lone Star Steel Company (Lone Star). It is important to keep in mind, however, that the language of this section was

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1/ See 47 FR 4751 (Jan. 19, 1982). Most royalty management responsibilities had been in the Conservation Division of Geological Survey.

2/ 30 CFR 211.63, as amended in July 1982 was never printed in the Code of Federal Regulations. Prior to the next printing that regulation had been redesignated as 30 CFR 203.200 and 43 CFR 3485.2.

3/ The following outline is given in explanation of the citations in the majority opinion. The regulations in Chapter II of 30 CFR were reorganized and redesignated, effective Aug. 5, 1983. See 48 FR 35639 (Aug. 5, 1983). When the redesignation was published, the supplementary information specifically noted that "[t]he regulations now contained at 30 CFR 211.63(a) through (k) are the joint responsibility of MMS and BLM." In order to make this clear to readers of these regulations, the final rule repeats section 211.63(a) through (k) in the new CFR Chapter II at section 203.200. At the same time, 211.63 was retained in its present position until BLM redesignated it to Title 43. 48 FR 35639, 35640 (Aug. 5, 1983). The 1982 edition of 30 CFR contained no Part 203. When the 1983 edition was printed, 30 CFR 211.63 was moved to 30 CFR 203.200. The comparable provision is now found at 30 CFR 206.257 (1990).

amended during the audit period, and the added language has direct impact on the responsibilities of the parties. I have attempted to carefully distinguish between the two versions of that section. 30 CFR 211.63 (1982) is used to designate the language in effect until August 30, 1982, and 30 CFR 211.63 (July FR) is used to designate the code provisions in effect after that date. The cited section has been enclosed in brackets when the document referred to identified the code provision by another section number.

Certain facts omitted from or only alluded to in the majority opinion should be set out more completely. Others are repeated because of their importance.

Following readjustment the MMS Royalty Management Program (RMP) audited Lone Star's records to determine whether royalties were being paid in accordance with the new lease terms. RMP concluded that Lone Star had improperly stated the value of coal used at its Lone Star, Texas, steel mill between April 1, 1981, and October 30, 1982. It then set a market value for coal used at the steel mill and recalculated the royalties. By demand letter dated May 15, 1985, RMP directed Lone Star to pay an additional $348,495.81.

Lone Star appealed to the Director, MMS. 4/ The only argument in the appeal to the Director relevant to this dissent is Lone Star's contention that RMP did not conduct its royalty valuation in accordance with applicable regulations. On December 23, 1986, the Director, MMS issued his decision. He found that the value of the coal was determined pursuant to 30 CFR 211.63(b) (1982), specifically held that RMP had acted within the discretionary authority found in 30 CFR 211.63(b) (1982) when determining the value of the coal for royalty purposes, and affirmed its decision. Lone Star appealed the Director's decision to this Board.

On appeal Lone Star again contends that MMS did not comply with the governing regulations when determining the value-per-ton for royalty purposes, and cites the deposition of Ernest R. Achterberg, the author of the May 22nd RMP memorandum in support of this contention. In his deposition Achterberg states that he did not consider the provisions of 30 CFR 211.63(g)(v) (July FR) and did not make the calculations called for in

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4/ In its statement of reasons filed with this Board, Lone Star notes that when it filed its June 19, 1986, notice of appeal to the Director, it requested a 30-day extension of time to file documents and statements in support of its appeal. By letter received by Lone Star on June 27, 1989, MMS granted an extension to July 19, 1985. Lone Star complains that this was not a true 30-day extension and that the submittal of additional documents was rendered impossible. The MMS response was tendered to Lone Star on Oct. 9, 1986, more than a year after the date of the notice. Lone Star alleges that this resulted in a violation of its due process. We find that any denial of due process which may have occurred below has been overcome by this Board's allowing Lone Star the opportunity to submit such material to this Board and our consideration of those submittals. As noted by MMS in its answer filed on May 15, 1987, the Director's decision was not final action for the Department.

30 CFR 211.63(g)(iv) (July FR) when determining the fair market value of the coal used by Lone Star. 5/ Lone Star argues that nothing in the record supports the Director's finding that the Regional Office applied the proper regulations when determining the value of the coal.

An answer was filed by MMS. In its answer MMS also argues that 30 CFR 211.63 (1982) was applicable during the period in question. MMS cites this Board's opinion in Amoco Production Co., 85 IBLA 121 (1985), and Amoco Production Co., 78 IBLA 93 (1983), for the proposition that the party challenging an MMS determination must show that the methodology used is erroneous, and contends that Lone Star has failed to meet the Amoco standard. MMS specifically states that:

> All [Lone Star] has done is to state that the District Mining Supervisor * * * stated that he did not consider * * * [30 CFR 211.63(g)(2)(v) (July FR)] * * * and the specific calculations were not conducted to determine profit margin as required by * * * [30 CFR 211.63(g)(2)(iv) (July FR)] * * *. The reason he did not fully consider these factors is that for most of the time in question, the coal valuation regulations did not direct that profit margins and prices reported to utilities or FERC be considered. [Emphasis added.]

(Answer at 6).

A reply to MMS' answer was filed by Lone Star contending that MMS' methodology for determining the value-per-ton is erroneous. Noting the MMS admission that it did not consider either the profit margin or prices reported to utilities or FERC, Lone Star contends that this statement is an admission of error as both 43 CFR 3485.2(g)(v) and 30 CFR 211.62(g)(2)(v) (July FR) call for consideration of these factors. 6/

During most of the period the value of Lone Star's coal for royalty purposes was determined in accordance with 30 CFR 211.63 (1982), the section cited by the Director, MMS, as the basis for his December 23, 1986, determination.

30 CFR 211.63 (1982) states, in applicable part:

> (b) The gross value shall be the sales or contract price times the number of units sold, provided, however, That where

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5/ The transcript of the deposition is a part of the case file. The deposition actually refers to 30 CFR 203.200(g)(v) (1983), which contains the same language as 211.63(g)(iv) (July FR).

6/ Lone Star also contends that MMS' procedural conduct in the lower proceeding did not allow Lone Star the opportunity to present evidence which would have satisfied the Amoco standard. It argues that the decision by the MMS Director repeatedly referred to "evidence in the record" without stating the specific evidence relied upon, leaving no way to rebut the evidence allegedly relied upon, other than by an open challenge.

> the Mining Supervisor determines: * * * (2) that no consideration is received * * * because the lessee is consuming such coal for his own use * * *, the Mining Supervisor 7/ shall determine the gross value of such coal taking into account (i) any consideration received by the lessee in other related transactions, (ii) the highest price paid for coal of like quality produced from the same general area during the lease month, (iii) contracts or other business arrangements between coal producers and purchasers for the sale of coal other than coal produced under such lease, which are comparable in terms, volume, time of execution, area of supply and other circumstances, and (iv) such other relevant factors as the Mining Supervisor may deem appropriate, * * *. [Emphasis in original.]

30 CFR 211.63(b) (1982).

As noted above, 30 CFR Part 211, including 30 CFR 211.63, were amended effective August 30, 1982. New provisions were added to section 211.63, and those previously found at 211.63(b) were amended and made a part of section 211.63(f) through (h). 47 FR 33154 at 33191-92. The applicable portions of this regulation, referred to in this dissent as the "July FR" version, provide:

> (f) Where Federal royalty is calculated on a percentage basis, the value of coal for federal royalty purposes shall be the gross value at the point of sale, * * *. For captive operations or other than arms length transactions, the district mining supervisor shall determine gross value at the point of sale.
>
> (g) The gross value shall be the unit sale or contract price times the number of units sold, unless MMS determines that:
>
> * * * * * * * * * * *
>
> (2) No consideration is received from some or all of such coal because the operator/lessee is consuming such coal * * *, and for which Federal royalty is due and payable.
>
> In either case, MMS <u>shall</u> determine the gross value of such coal <u>taking into account</u>:
>
> (i) Any consideration received or paid by the operator/lessee in other related transactions.
>
> (ii) The average price paid for coal of like quantity produced from the same general area during the Federal lease month.

7/ As used in Part 211 the term "Mining Supervisor" means the appropriate Deputy Minerals Manager of MMS or the District Mining Supervisor or other subordinate acting under his direction. See 30 CFR 211.2 (1982).

> (iii) Contracts or other business arrangements between coal producers and purchasers for the sale of coal other than coal produced under such Federal lease which are comparable in terms, volume, time of execution, area of supply, and other circumstances.
>
> (iv) Mining cost plus reasonable profit margin.
>
> (v) Prices reported to a public utility commission and/or the Federal Energy Regulatory Commission.
>
> (vi) Such other relevant factors as the District Mining Supervisor may deem appropriate. [Emphasis added.]

30 CFR 211.63(f) and (g) as found at 47 FR 33154 at 33191-92 (July 30, 1982). For the period from August 31 through October 30, 1982, MMS was required to determine the value of the coal in accordance with 30 CFR 211.63 (July FR), as that regulation was set out at 47 FR 33191-92 (July 30, 1982).

If there was ever any confusion regarding which code provision was applied by MMS when determining the value of the coal, the answer filed by MMS clears up the problem. MMS states that the reason that Achterberg did not consider either the profit margin or prices reported to utilities or FERC (both of which are set forth in 30 CFR 211.63 (July FR) as factors that shall be taken into consideration) is that "for most of the time in question, the coal valuation regulations did not direct that profit margins and prices reported to utilities or FERC be considered" (MMS Answer at 6, emphasis added). Achterberg's statement relied upon by the majority, that he considered mining costs plus a reasonable profit margin and determined there would have been a profit margin, is not credible in light of his admission that he never calculated the profit margin (see Tr. 19-23). This is the necessary calculation.

If for most of the time the coal valuation regulations did not direct that profit margins and prices reported to utilities or FERC be considered, for a part of that time the regulations directed MMS to consider those items! Achterberg determined the value of coal pursuant to 30 CFR 211.63 (1982), and stated under oath that certain factors set out in 30 CFR 211.63 (July FR) were never considered.

MMS cites this Board's opinion in Amoco Production Co., 85 IBLA at 121, and Amoco Production Co., 78 IBLA at 93, when stating that there must be a showing that erroneous methodology was used when determining the per-ton value of the coal for royalty purposes. This statement is correct. However, when in the course of the same argument MMS admits that "[t]he reason [Achterberg] did not fully consider these factors is that for most of the time in question, the coal valuation regulations did not direct that profit margins and prices reported to utilities or FERC be considered" (Answer at 6, emphasis added).

Achterberg, the person making the analysis called for in the regulation, admitted under oath that he failed to follow the methodology mandated by the regulation and MMS echoed this fact in its answer. Regardless of what might be intimated by the majority, both Achterberg and counsel for MMS have stated unequivocally that Achterberg did not consider the provisions of 30 CFR 211.63(g)(v) (July FR), and did not make the calculations called for in 30 CFR 211.63(g)(iv) (July FR) when determining the fair market value of the coal used by Lone Star. Subsequent to August 30, 1982, MMS was under a regulatory mandate to consider those factors. Thus, by its own admission MMS agrees with Lone Star that, for the period subsequent to August 30, MMS did not apply the proper methodology for determining the value of the coal.

The decision must be set aside. On remand MMS should determine the value of the coal for royalty purposes applying the proper regulation. 8/ To hold otherwise would be reversible error.

The MMS error has been compounded by the majority holding. The majority has erred when finding that MMS had properly determined the fair market value for the coal when the record clearly demonstrates MMS' admitted failure to consider enumerated factors set out in 30 CFR 211.63 (July FR) in the

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8/ Lone Star complained that the Director, MMS, repeatedly referred to evidence in the record without stating the specific evidence he relied upon, leaving no way to rebut the evidence other than by an open challenge. I also find the failure to refer to specific evidence precludes my being able to determine if he had complied with 30 CFR 211.63, as amended. The majority quotes the Director's recitation of the evidence in full, and the quoted portion of the decision is the sum and substance of his statement of the evidence he relied upon when rendering his decision. The quoted statement contains absolutely no reference to the calculation of "profit margins" or "prices reported to utilities or FERC." The issue is not whether the Director considered one or more of the enumerated factors -- he may well have. I echo the words of the Tenth Circuit Court of Appeals in Nevada Power Co. v. Watt, 711 F.2d 913, 928 (10th Cir. 1983), when it stated:

"[W]e echo the trial court's admonition in Nevada Power Co. that the Secretary must provide a reasonably articulate record showing the bases of the determination so that a reviewing court might determine whether the action is in accordance with FLPMA. The record must be adequate to show that 'consideration was given to the relevant factors and that the consideration was sufficiently meaningful to commend deference by the court.'" (Emphasis in original.)

The issue is whether there is sufficient evidence in the record to conclude that MMS properly considered and weighed each of the enumerated factors. Had I been able to make this determination, I believe that, by meeting this more restrictive regulation, MMS would have met the requirements of the earlier version. I urge MMS and its Director to make a more detailed statement of the basis of its determination so that the addressee of the MMS decision and, if necessary, this Board can more fully understand the reasoning behind the decision.

course of that determination. 9/ The mandatory language in the regulation has been rendered meaningless.

The Conoco, Amoco, and Marathon cases relied upon by the majority fully support the finding that MMS is required to consider all of the factors set out in the regulation, even though the majority reaches an opposite conclusion without overruling those cases. To say that MMS is not required to give equal weight to each of the factors in any given case does not logically equate to a conclusion that MMS need not consider one or more of those factors. At the very minimum, the record should contain evidence of MMS' having considered each of the enumerated factors and the rationale for according more weight to one than is afforded to another.

The majority has erroneously relied on the following language in the Conoco Inc., 110 IBLA 232, 241 (1989):

> The regulation defines several factors which may be properly used in the valuation of NGLP. One of the relevant factors is "posted prices." 30 CFR 206.150 (1987). The Mont Belvieu spot market price for NGLP as published during the production month clearly qualifies as a posted price. Thus, the issue is whether the other factors relevant to NGLP valuation render the use of the posted spot market price arbitrary and capricious as a measure of fair market value. Examining the relevant factors enumerated by the regulation, we note there is no showing by appellants that the posted price is inconsistent with the highest price paid for a part or a majority of like-quality products produced in the area or field. Further, the price received by the lessee, normally a significant factor in royalty valuation, is by definition not applicable in the case of NGLP which are used internally and not marketed. The factor of regulated prices is not relevant here as it appears from the record that the price of the NGLP involved was deregulated during the timeframe at issue. [Emphasis added by majority.]

The quoted language reflects MMS and Board consideration of all of the factors enumerated in the regulation applicable to that case, and a reasonable analysis of what weight should be accorded to each enumerated factor. For example, MMS and the Board considered regulated price (an enumerated factor) and rejected it because the natural gas liquid products market was deregulated at the time in question. Likewise the factor "price received by lessee" was considered, but discounted. MMS noted that no significant weight should be afforded because the sale was not an arms-length transaction. The Board agreed. The factor "highest price paid for a part or

9/ The holding is applicable to the regulation now found at 30 CFR 206.257 as the language of that section is almost identical to 30 CFR 211.63 (July FR).

a majority of like quality products produced in the area or field," which must be considered pursuant to 30 CFR 206.150 (1987), was determined and considered. MMS found that the use of the posted prices was not shown by appellants to be "inconsistent with the highest price paid for a part or a majority of the like-quality products produced in the area or field." Id. at 241.

If we had been of the same opinion in Conoco as that expressed by the majority in this case there would have been no need to indulge in a reasoned analysis of the consideration given to and relative weights afforded to each of the enumerated factors. It would have only been necessary to state that the record establishes a substantial basis for the MMS royalty valuation based on several of the factors enumerated in the regulation.

Nor do the Amoco cases, Marathon, or Marathon Oil Co. v. United States, 604 F. Supp. 1375 (D. Alaska 1985), aff'd, 807 F.2d 759 (9th Cir. 1986), cert. denied, 480 U.S. 940 (1987), support the conclusion reached by the majority. The majority quotes the following portion of the Marathon case:

> The regulation enumerates several factors to be considered in determining reasonable value, but does not mandate that any particular formula be used to compute reasonable value. In fact, the Associate Director is expressly directed to consider, in addition to the enumerated factors, "other relevant matters." The thrust of the regulation is that the value for royalty computation purposes set by the Associate Director must be reasonable. The only specific requirement in the regulation is that this value be no less than "gross proceeds." Thus this regulation vests considerable discretion in the Associate Director to decide what the "reasonable value" for royalty purposes shall be.

Marathon Oil Co., supra at 1382.

The majority then construes the language that "the regulation * * * does not mandate that any particular formula be used to compute reasonable value" to mean that MMS need not consider one or more of the enumerated factors. The court specifically recognized that no fixed algebraic formula was to be applied when weighing various factors. It, nonetheless, recognized that MMS must "take into account" the various factors when deriving a formula. Because no particular formula is mandated it is imperative that MMS set out its analysis of each factor and explain the logic behind its acceptance or rejection of a factor. The application of this logic requires consideration of all factors and an explanation for the rejection of those not used. When MMS chooses not to or fails to consider one or more of the factors the logic is reduced to a choice of factors to be considered. The tortured construction of the Marathon holding advanced in the majority opinion "renders superfluous the factors carefully set out in" 30 CFR 211.63 (July FR) (Nevada Power Co., supra at 920) and is plainly inconsistent with the express wording of the regulation construed by the Marathon Court, which provided that "the Director shall consider" and then listed the factors in 30 CFR 250.64 (1980).

The Tenth Circuit Court of Appeals in Nevada Power Co. v. Watt, supra, examined the language of section 304(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1734 (1988), which provides that "in determining reasonable costs for reimbursement, the Secretary 'may take into consideration' the several listed factors." Id. at 919 (reasonableness factors). The Tenth Circuit rejected Interior's argument that consideration of the reasonableness factors was purely discretionary, id. at 920-21, and dismissed Interior's suggestion that "the factors were listed by Congress solely to provide helpful guidance to the department's quest to identify the elements of 'reasonable' costs," id. at 921, concluding that

> the Secretary must examine and weigh each of the factors [emphasis supplied] listed in section 304(b), as well as whatever other factors he finds relevant, in determining the "reasonable costs" allowed by FLPMA to be assessed. The touchstone of the Secretary's determination is reasonableness, and the Secretary is thus vested with considerable discretion in performing the weighing mandated by section 304(b), whether by rulemaking or adjudication. [Emphasis in original.]

Id. at 927. The majority's attempt to distinguish Nevada Power Co. v. Watt (note 13) is only sustainable if MMS has the authority to ignore one or more of the enumerated factors in 30 CFR 211.63 (July FR). MMS does not have the authority. A valuation which fails to consider all of the enumerated factors is unreasonable as a matter of law.

In affirming this Board's decision, the Court of Appeals for the Fifth Circuit, in Amoco Production Co. (On Reconsideration), 94 IBLA 129 (1986), commented on language similar to that now before us, and said:

> The rule was unchanged until 1979, when it was amended to state explicitly that "the value of production shall never be less than the fair market value." 30 C.F.R. 250.64 (effective Dec. 13, 1979) the new rule stipulated that "the computation of royalty shall be determined by the Director" of the Minerals Management Service, and instructed the Director to "consider" certain factors "[i]n establishing the value." [Emphasis added.]

Amoco Production Co. v. Lujan, 877 F.2d 1243, 1246 (5th Cir. 1989). The similarity of the language is obvious.

As noted above, MMS admits that it did not consider appellant's mining cost, what may have been a reasonable profit margin, or the prices reported to a public utility commission and/or the Federal Energy Regulatory Commission when it determined the market value of the coal produced between August 31 and October 30, 1982. The majority specifically finds that it is not necessary for MMS to do so. This finding ignores the regulatory requirement that "MMS shall determine the gross value of such coal taking into account: * * * (iv) Mining cost plus reasonable profit margin; [and] (v) Prices reported to a public utility commission and/or the Federal Energy Regulatory Commission." 30 CFR 211.63(g), 47 FR 33154 at 33192 (July 30, 1982) (emphasis added).

The decision should be remanded to MMS for further consideration. MMS should be directed to support its decision with sufficient explanation to allow Lone Star and this Board an understanding of its basis and how the relevant regulatory provisions were considered and applied.

R. W. Mullen
Administrative Judge