

AMERICAN PETROLEUM ENERGY COMPANY

IBLA 98-174

Decided August 28, 2003

Appeals from a decision of the Chief, Royalty Valuation Division, Royalty Management Program, Minerals Management Service, dismissing as untimely an appeal to the Commissioner of Indian Affairs, Bureau of Indian Affairs, of an order to pay additional royalties and from a subsequent decision of the Chief, Appeals Division, Minerals Management Service, dismissing as untimely an appeal to the Board of Land Appeals of the order dismissing the appeal to the Commissioner. MMS-97-0077-IND.

November 24, 1997, decision dismissing appeal to the Board of Land Appeals vacated; May 15, 1997, decision dismissing appeal to the Commissioner of Indian Affairs reversed and remanded.

1. Appeals--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Effect of--Rules of Practice: Appeals: Timely Filing

The timely filing of a notice of appeal is a jurisdictional requirement, and if an appeal is not timely filed, the Board of Land Appeals does not have jurisdiction to consider it and, pursuant to 43 CFR 4.411(b), the officer issuing the decision must close the case. If an appeal is properly filed, however, the office issuing the decision loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal, until jurisdiction over it is restored by Board action disposing of the appeal. Any adjudicative action taken by the office issuing the decision relating to the subject matter of the appeal after the filing of a timely appeal is a nullity since the office will have acted without jurisdiction.

2. Appeals--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Effect of--Rules of Practice: Appeals: Timely Filing

Pursuant to 43 CFR 4.411(b), “the notice of appeal must give the serial number or other identification of the case.” A timely filed notice of appeal that mistakenly uses the docket number of an MMS matter involving a different appellant that was settled several years before the notice of appeal was submitted, but correctly identifies the name of the party filing the appeal, the date of the order being appealed, and the nature of the order being appealed contains sufficient “other identification of the case” to meet the regulatory requirement. An MMS decision dismissing the appeal as untimely based on the lack of a correct serial number is a nullity and will be vacated by the Board.

3. Appeals--Indians: Leases and Permits--Indians: Mineral Resources: Oil and Gas: Royalties--Minerals Management Service: Appeals to Director--Oil and Gas Leases: Royalties--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Timely Filing

When MMS issues an order to pay additional royalty, indicating that it is subject to immediate appeal, but places the order and bill for collection on hold pending additional review, the appeal period for the order does not begin to run until MMS notifies the appellant that the hold has been lifted, and an MMS decision dismissing as untimely an appeal to the Commissioner of Indian Affairs timely filed within 30 days of receipt of the notice of the lifting of the hold will be reversed and the case remanded for adjudication of the merits of the appeal.

APPEARANCES: Adelia S. Borrasca, Esq., and Stephen K. Gardner, Esq., Washington, D.C., for appellant; Stephen L. Simpson, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

IBLA 98-174

## OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

American Petroleum Energy Company (Ampeco) has appealed both the May 15, 1997, decision of the Chief, Royalty Valuation Division (RVD), Royalty Management Program, Minerals Management Service (MMS), dismissing as untimely Ampeco's appeal to the Commissioner of Indian Affairs, Bureau of Indian Affairs (BIA), of an MMS order to pay additional royalties on certain Southern Ute Tribal Indian oil and gas leases, and the November 24, 1997, decision of the Chief, Appeals Division, MMS, dismissing as untimely Ampeco's appeal to the Board of the May 15, 1997, MMS decision. These appeals have been jointly docketed as IBLA 98-174.

### Factual and Procedural Background

The factual and procedural background of these appeals is crucial to understanding the issues now before the Board. On January 20, 1995, the Chief, Valuation and Standards Division, Royalty Management Program, MMS, issued an order directing Ampeco to report and pay additional royalties on certain Southern Ute Tribal Indian oil and gas leases for 1987 through 1991. See Jan. 20, 1995, order at 1 and Enclosure 1. The order recounted that, by letter dated June 10, 1993, MMS had notified Ampeco of potential underpayments of royalties on those leases arising from Ampeco's failure to pay royalties at a value equal to the highest price paid for the major portion of like-quality gas in the same field, as required by the terms of the leases, and had asked Ampeco to review and respond to the schedule of differences between the estimated median gas value calculated by MMS and the reported royalty value. The MMS order addressed the two concerns raised in Ampeco's August 12, 1993, letter seeking an extension of time to reply to the June 10, 1993, letter:<sup>1/</sup>

You believe that one of the major differences between our calculated estimated median value and your purchase price is that you are paid net of transportation fees charged by your purchasers. If your transportation fees meet our definition of a transportation factor under 30 CFR § 206.157(a) (1993) and you report royalties net of this factor, we will sum the transportation factor and your imputed price on the enclosed Southern Ute Billing Report (Enclosure 1) and recalculate the potential underpaid royalties. Since we did not receive any documentation from you substantiating your transportation fees, Enclosure 1 reflects your current schedule of major portion royalty liabilities.

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<sup>1/</sup> According to the order, MMS granted an extension by letter dated Aug. 23, 1993, but it received no further responses to the letter. See Jan. 20, 1995, order at 1.

You also stated that you operate marginal wells in a captive market and that paying the major portion differential may force you to prematurely abandon your wells. You asked that the Secretary of the Interior (Secretary) use his discretion in allowing you to pay only on gross proceeds.

The MMS has the authority to collect royalties consistent with Indian lease terms and regulations. Performing major portion analyses does not potentially increase royalties, but simply ensures proper royalty valuation according to Indian lease terms. Our intention is not to make leases uneconomical to operate through the establishment of value for royalty purposes. If collecting proper royalties makes some wells uneconomical to operate, we suggest you meet with the Southern Ute Tribe to negotiate lease terms that result in attractive prospects for drilling and producing on Indian lands.

Accordingly, you are ordered to report and pay the additional royalties shown on the enclosed schedule. To account for all adjustments you made to previously submitted information since our earlier letter we have reprocessed your royalty information to reflect all adjustments made through July 25, 1994. If you submit the transportation factor documentation by lease and month, we will adjust your bill.

(Jan. 20, 1995, order at 1-2.) Appended to the order was a January 20, 1995, bill for collection for \$40,593.88 (FBIL 52950003).

By letter dated February 14, 1995, Ampeco responded to MMS' order, requesting a waiver of the royalty payments calculated on the basis of the median value received by the Southern Ute Tribe. (July 18, 1997, Statement of Reasons (SOR), Exh. B.) Ampeco explained that it had been paid on a net basis by its purchasers Northwest Pipeline Corporation (Northwest) and/or Williams Gas Marketing Company (Williams) after all applicable gathering and processing costs, including transportation charges, had been deducted from the price. Ampeco noted that Williams had been unable to document the total charges, but had indicated that the minimum main line charge, which excluded additional gathering, compression, treating, and similar costs, was \$0.3411/MMBtu. Ampeco enclosed a February 2, 1995, letter from Williams detailing the reasons for its inability to provide the information requested by MMS. Ampeco further asserted that its natural gas sales contract was a spot market contract, that the spot market prices for the period at issue were lower than the median price calculated under the major portion analysis,

that its wells were marginal wells in a captive market, and that it had no alternative other than accepting the price offered by Williams. Ampeco also provided MMS with copies of the statements it received from Williams indicating the net price paid for the gas, which was the value Ampeco had used to calculate its royalty payments to the Southern Ute Tribe.

After receiving a delinquency notice dated March 16, 1995, Ampeco contacted MMS. MMS replied by facsimile dated March 24, 1995, confirming that an extension of time to April 24, 1995, had been placed on the order and bill because a “followup” was required in light of Ampeco’s response. (July 18, 1997, SOR at 3 and Exh. C.) Ampeco contacted MMS again after receiving a second delinquency notice dated July 27, 1995, and MMS responded by facsimile dated August 9, 1995, stating “[p]laced bill on hold until followup review is done. Hold expiration date is 8/31/95.” (July 18, 1997, SOR, Exh. E; see July 18, 1997, SOR at 3 and Exh. D.) Ampeco asserts that, after hearing nothing from MMS for several months, it telephoned MMS on March 14, 1996, to discuss the status of the matter. By letter dated March 27, 1996, MMS advised Ampeco that

[y]our order and bill are currently in hold status. We have not yet reached a decision because [MMS] is in the process of determining a reasonable allocation of costs for your transportation, treating, and gathering charges. The MMS recognizes that some producers are unable to obtain the appropriate information to segregate costs because producers pay an aggregate sum under an arm’s-length contract for transportation, treating, and gathering. We will move toward final resolution as soon as we finalize the reasonable allocation of costs.

(July 18, 1997, SOR, Exh. F.)

By letter dated November 7, 1996, MMS responded to the issues raised in Ampeco’s February 14, 1995, letter. (July 18, 1997, SOR, Exh. G.) MMS refused to adjust the royalty payments for the estimated transportation factor of \$0.3411/MMBtu because the information submitted by Ampeco was insufficient to verify that the transportation costs did not include nonallowable deductions such as treating and gathering charges. MMS also found that the El Paso spot prices it utilized, while generally higher than Northwest’s spot prices in the San Juan Basin used by Ampeco, served as the basis for many gas contracts in the San Juan Basin, thus raising the median values for the gas. In addition, MMS stated that the prices it used did not exceed the applicable Natural Gas Policy Act maximum lawful prices for Southern Ute wells. MMS further found that, consistent with its fiduciary responsibilities, its major portion analysis ensured proper royalty valuation in

accordance with Indian lease terms and regulations. It suggested that, if collecting proper royalties rendered some wells uneconomic to operate, Ampeco should meet with the Southern Ute to negotiate terms which would create attractive prospects for drilling and producing on Indian lands. MMS concluded that it would cancel the hold status for its January 20, 1995, order and bill for collection as of the date of Ampeco's receipt of the November 7, 1996, letter.

By letter dated December 3, 1996, Ampeco reiterated its November 25, 1996, verbal request that another hold be placed on the January 20, 1995, order and bill for collection to enable it "to attempt to assimilate the requested information." (July 18, 1997, SOR at 5, Exh. H.)

MMS denied the request for another hold by letter dated February 10, 1997, and received by Ampeco on February 13, 1997. (July 18, 1997, SOR, Exh. I.) That letter also revised the effective date of the cancellation of the original hold, explaining that although the November 7, 1996, letter had stated that the hold status would be cancelled as of the date of receipt of that letter,

we had difficulty tracing the return receipt card and therefore, we could not timely verify the date of receipt. Subsequently, we located the return receipt card and verified that Ampeco had received the November 7 letter on November 12, 1996. Since we cannot retroactively cancel the status of a bill, we cancelled by memorandum dated January 13, 1997, the hold for FBIL No. 5295003 effective January 9, 1997. [ <sup>2/</sup> ]

(July 18, 1997, SOR, Exh. I at 2.)

On March 17, 1997, Ampeco filed a notice of appeal to the Commissioner of Indian Affairs, BIA, dated March 14, 1997, "of the determination of royalty underpayment made by [MMS] in its January 20, 1995 order to pay ('Order'), which Order was stayed by MMS until January 9, 1997. Ampeco was notified by letter of February 10, 1997, received February 13, 1997, that the hold on the Order had been cancelled." (Mar. 14, 1997, Notice of Appeal to Commissioner of Indian Affairs (Mar. 14, 1997, Notice of Appeal) at 1.) Ampeco argued that the January 20, 1995, order unreasonably disallowed reductions from the median price for transportation costs and that MMS had the discretion to deviate from the major portion valuation method and should have exercised that discretion in this case. Ampeco also

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<sup>2/</sup> The record does not contain a copy of the Jan. 13, 1997, memorandum cited by MMS.

contended that its notice of appeal was timely because the January 20, 1995, order had been stayed and the appeal period therefore did not begin to run until February 13, 1997, when Ampeco received notice of MMS' cancellation of the hold put on the order.

By decision dated May 15, 1997, the Chief, RVD, MMS, dismissed Ampeco's appeal, which it had assigned docket number MMS-97-0077-IND, because it was not timely filed under 30 CFR 290.3(a) (1996) or 30 CFR 290.5(b) (1996).<sup>3/</sup> MMS stated:

The return receipt card for the "Order to Report and Pay" dated January 20, 1995, shows that delivery was made to [Ampeco] on January 26, 1995. \* \* \*. [Ampeco's] appeal rights expired on February 25, 1995. The MMS did not receive an appeal for the Order dated January 20, 1995; however, we did place [Ampeco's] FBIL 52950003 on hold to allow [Ampeco] time to provide documentation that would potentially reduce their major portion royalty liability. [Ampeco] did not provide MMS with this documentation. Consequently, by letter dated February 10, 1997, MMS cancelled the hold status of [Ampeco's] FBIL 52950003. In response to the filing requirement for the Order dated January 20, 1995. The filing requirement is jurisdictional; thus MMS may not consider an Appeal on the merits unless it is met. Pennzoil Oil and Gas, Inc., 61 IBLA 308 (1982).

(May 15, 1997, Decision at 1-2.) The decision stated that it could be appealed to the Board of Land Appeals by filing a notice of appeal "within 30 days after service" with the "Deputy Commissioner of Indian Affairs."

On June 18, 1997, Ampeco filed with the Deputy Commissioner of Indian Affairs, BIA, a notice of appeal to the Board of Land Appeals "of the decision of the [MMS] in the above-captioned matter dismissing Ampeco's appeal. The MMS decision was issued May 15, 1997, and was received by Ampeco on May 19, 1997."

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<sup>3/</sup> 30 CFR 290.3(a) (1996) required that an appeal be received in the office of the official issuing the challenged order or decision within 30 days of receipt. Under 30 CFR 290.5(b) (1996), appeals transmitted within the 30-day appeal period and received by MMS no later than 10 days after it was required to be filed would be considered timely.

(Feb. 20, 1998, SOR, Exh. E at 1.) The referenced caption identified the matter as “MMS-094-0629-IND” instead of MMS-97-0077-IND.

Ampeco asserts that, shortly after the filing, its counsel noticed that the appeal document contained the wrong MMS docket number and instructed a legal assistant to contact the Board of Land Appeals to describe the error and to determine what action, if any, needed to be taken to correct the error. The legal assistant alleges that he was told by a Board staff member that the matter could be handled over the phone, that the docket number would be corrected on the filing, and that Ampeco did not need to do anything further. See Feb. 20, 1998, SOR at 3 and Exh. A, Affidavit of Peter M. Dehn (Dehn Aff.), at 1-2. Ampeco apparently did not contact the Commissioner’s office or MMS to correct the erroneous docket number.

Ampeco filed its SOR with the Board on July 18, 1997. The correct MMS docket number appeared on that pleading. On August 28, 1997, counsel for MMS requested an extension of time until November 21, 1997, within which to file its answer. The Board granted the extension by order dated September 4, 1997, noting that the Board had not yet received the case file from the Solicitor’s Office and that, “in keeping with the policy of the Board, this appeal has not been docketed.” (Sept. 4, 1997, order at n.1.)

Counsel for MMS did not file an answer to Ampeco’s SOR relating to MMS’ May 15, 1997, decision. However, on November 24, 1997, the Chief, Appeals Division, MMS, issued a decision dismissing Ampeco’s appeal to the Board because Ampeco had not filed a timely appeal to the Board of the matter docketed as MMS-97-0077-IND. He observed that, rather than appealing the May 15, 1997, decision in MMS-97-0077-IND, Ampeco had ostensibly filed an appeal on June 18, 1997, challenging a separate matter docketed as MMS-94-0629-IND, which involved a different appellant and had been settled in 1995. He asserted that, although Ampeco’s July 18, 1997, SOR had identified the appeal as MMS-97-0077-IND and had referred to its June 18, 1997, notice of appeal to the Board of MMS’ May 15, 1997, decision, the referenced notice of appeal had actually identified the matter as MMS-94-0629-IND, not MMS-97-0077-IND, so that no notice of appeal objecting to MMS-97-0077-IND had been filed. He found that Ampeco’s notice of appeal contained

a fatal error, i.e., its recitation of the wrong docket number of the decision being appealed. The regulations governing appeals to IBLA provide in 43 CFR 4.411(b) that “[t]he notice of appeal must give the serial number or other identification of the case \* \* \*.” (Underlining added.)

Without a Notice of Appeal as required by IBLA's regulations, IBLA has no jurisdiction to review the decision below. Consequently, IBLA is barred from assuming the authority delegated from the Secretary. As a result, dismissal of Ampeco's appeal is required. IBLA Order of June 6, 1990, for BWAB, Incorporated IBLA-90-197.

Ampeco's failure to file a timely appeal from the May 15, 1997, decision in MMS-97-0077-IND rendered that decision final for the Department. Consequently, Ampeco's appeal to IBLA must be denied. See Stewart L. Ashton, 107 IBLA 140, 141 (1989).

(Nov. 24, 1997, decision at 1-2.)

By letter dated December 10, 1997, Ampeco requested that the Chief, Appeals Division, MMS, reconsider his dismissal of the appeal to the Board. While acknowledging that the notice of appeal contained the wrong docket number, Ampeco asserted that the error should not be considered fatal because the notice contained sufficient other identification to comply with the regulations and because it had relied on assurances given by a Board staff member that the docket number could and would be changed with no procedural consequences. The Chief denied the request for reconsideration on December 13, 1997. He stated that the request relied on allegations concerning discussions with a Board representative and, therefore, the Board was the appropriate forum to consider Ampeco's arguments. He noted that the November 24, 1997, decision had granted Ampeco the right to appeal to the Board. Ampeco appealed MMS' November 24, 1997, decision to the Board.<sup>4/</sup>

#### MMS' November 24, 1997, Decision

In its February 20, 1998, SOR, Ampeco argues that its notice of appeal of MMS' May 15, 1997, decision provided sufficient information to identify the challenged MMS action and therefore complied with the requirement of 43 CFR 4.411(b) that the notice of appeal "give the serial number or other identification of

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<sup>4/</sup> The case file does not contain a copy of the notice of appeal to the Board of the Nov. 24, 1997, decision. The record does include copies of Ampeco's notice of appeal "to the Commissioner of Indian Affairs," BIA, filed with the Chief, Appeals Division, MMS. Ampeco noted that 30 CFR 290.1 and 290.2 (1996) required that appeals of MMS decisions related to Indian lands first be considered by the Commissioner before an appeal could be taken to the Board. See n. 6, *infra*. Nevertheless, Ampeco stated therein that it was filing "concurrently with this Notice of Appeal, a Notice of Appeal to the Board as directed."

the case.” While acknowledging that the notice contained the wrong MMS docket number, Ampeco submits that, even if “serial number” is synonymous with “docket number” (a questionable interpretation in its view), the regulation’s use of the disjunctive “or” indicates that a notice of appeal will still be valid as long as it provides sufficient other identification of the case. Ampeco maintains that its notice of appeal furnished ample “other identification of the case” to comply with 43 CFR 4.411(b). It asserts that it gave the company’s name both in the heading and in the body of the notice, identified the agency whose decision was being appealed as MMS, specified the date of the decision as May 15, 1997, and described the nature of the decision as a determination that Ampeco’s appeal to the Commissioner was untimely. Ampeco avers that MMS matched the notice of appeal with the underlying decision early on, suggesting that if MMS had truly been confused about the decision being appealed, it would have contacted Ampeco or the Board about the discrepancy, especially since the erroneous docket number referred to a matter involving a different appellant that was settled in 1995. Ampeco further contends that if MMS was merely executing its authority under 43 CFR 4.411(c) to close cases with untimely filed notices of appeal, it would have closed the case months earlier without seeking an extension of time to file an answer to Ampeco’s July 18, 1997, SOR, in docket number MMS-97-0077-IND. (Feb. 20, 1998, SOR at 7-11.)

Ampeco also argues that MMS exceeded the scope of its authority when it dismissed the appeal to the Board because it no longer had jurisdiction over the case. Ampeco points out that MMS regulations 30 CFR 290.2 and 290.6 (1996) provide that a party appealing a decision involving Indian leases must first appeal to the Commissioner of Indian Affairs, as Ampeco did here, and submits that, once that appeal was filed, MMS lost jurisdiction over the case and that, if any agency had the authority to take action with respect to a defective notice of appeal, it would have been the Commissioner, not MMS. Ampeco further considers it an abuse of discretion for the office issuing the decision to have the power to determine whether the Board may hear a timely challenge to that decision, citing Federal court rules and precedent precluding agencies or lower courts from thwarting timely appeals to higher authorities. (Feb. 20, 1998, SOR at 12-14.)

Ampeco differentiates between untimely appeals and appeals filed in an improper form. While conceding that the Commissioner of Indian Affairs, as the officer with whom the notice of appeal was filed, could have rejected the notice if it had been untimely, Ampeco avers that, consistent with the limited authority the Federal courts grant their administrative officers to act on appeals filed in the improper form, only the Board can determine whether Ampeco’s notice of appeal was fatally defective. Again relying on Federal court rules and procedures, Ampeco insists that improper form is not a fatal error and that parties should be given an

opportunity to correct such errors without affecting the timeliness of the filing. Ampeco distinguishes the order in BWAB, Inc. relied upon by MMS, submitting that it does not give MMS the authority or discretion to act on timely notices of appeal, nor does it allow MMS to dispose of appeals based on the form of the appeal as opposed to its timeliness. Ampeco contends that MMS' actions in this matter have been arbitrary and capricious and an abuse of power and that its usurpation of the Board's authority must be reversed. (Feb. 20, 1998, SOR at 14-18.)

Ampeco maintains that the filing of the notice of appeal with the incorrect docket number was an immaterial error that caused no prejudice to MMS, pointing out that the Solicitor's Office was able to process the appeal and match the SOR using the correct docket number with the notice of appeal utilizing the wrong docket number. The Board similarly was not confused by the difference in docket numbers, Ampeco submits, and was also able to process the case. According to Ampeco, the Federal courts have considered the wrong docket number on a timely filed notice of appeal to be excusable neglect, citing Marshall v. Lancarte, 632 F.2d 1196, 1197 (5th Cir. 1980), and Cleek Aviation v. United States, 20 Cl.Ct. 766, 770 (1990). Ampeco also asserts that the Board distinguishes between the substantive aspects of a notice of appeal, such as the requirement that the notice be filed within 30 days in the office making the decision, and those that are mere form. It observes that the Board has specifically acknowledged that no special form of notice is required. Ampeco argues that the purpose of inclusion of a docket number on a notice of appeal is for identification purposes, but that its inclusion of other identifying information in this case rendered the incorrect docket number a minor error. (Feb. 20, 1998, SOR at 19-21.)

In its answer to Ampeco's February 20, 1998, SOR relating to MMS' November 24, 1997, decision,<sup>5/</sup> MMS insists that Ampeco's notice of appeal did not comply with the regulations and therefore was untimely. MMS maintains that its docketing and case processing system relies on the identification of cases by docket number and that the other information provided by Ampeco was too generic to adequately identify the challenged case. MMS points out that the company appealing a decision is not necessarily the party against whom the decision was rendered but could be an interested party or a party adversely affected by a decision nominally against another entity; that the date of the decision is only marginally useful since

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<sup>5/</sup> Although Ampeco has moved to strike MMS' answer as untimely, we deny that motion. Between June 1998 and June 2000, MMS requested and received multiple extensions of time to file an answer in this case. Thereafter, the parties engaged in settlement negotiations, which ultimately failed. MMS filed its answer following the failure of those negotiations.

MMS daily makes many decisions nationwide; and that the nature of the decision does not sufficiently limit the universe of possible decisions to avoid the type of “extensive detective work” a docketing system is designed to eliminate, *i.e.*, MMS or Board review of every decision issued nationwide on a particular day to figure out which one a prospective appeal is challenging. (Answer at 2-3.)

MMS denies that it lacks the authority to dismiss appeals filed with the Commissioner of Indian Affairs, asserting that, on October 6, 1994, the Acting Deputy Commissioner for Indian Affairs concurred in a September 2, 1994, memorandum delegating the authority to dismiss untimely filed royalty appeals to MMS.<sup>6/</sup> MMS further argues that the relevant regulation, 43 CFR 4.411(c), explicitly grants the officer from whose decision the appeal was taken authority to close a case if a notice of appeal is filed after the grace period provided in 43 CFR 4.401(a). MMS submits that Ampeco cannot challenge that regulation in an adjudication but only in the context of a new rulemaking. (Answer at 4-6.)

MMS disputes that the incorrect docket number was harmless error asserting that it required extensive detective work to determine the proper case. MMS further maintains that an alleged call to an unnamed Board staff member does not excuse Ampeco’s error or demonstrate reasonable diligence since Ampeco could have faxed or hand-delivered a revised notice with the correct docket number and/or contacted the office where the appeal was filed as well as the Board. (Answer at 6-7.) MMS concludes that the filing of a timely notice of appeal is jurisdictional, and Ampeco’s failure to file a timely notice of appeal mandates dismissal of its appeal. (Answer at 7-8.)

[1] Under 30 CFR 290.7 (1996), any party adversely affected by a final decision of the Director, MMS, or the Commissioner of Indian Affairs had the right of appeal to this Board “in accordance with the procedures in 43 CFR part 4.”<sup>7/</sup> The regulations at 43 CFR 4.411 set forth the procedures for appealing to the Board:

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<sup>6/</sup> MMS has appended a copy of that memorandum, entitled “Lower Signing Authority for Certain Appeals Decisions,” to its answer. Both the May 15, 1997, decision and the Nov. 24, 1997, decision must be considered final decisions issued on behalf of the Commissioner and, therefore, appealable to the Board under 30 CFR 290.7 (1996).

<sup>7/</sup> The appeals regulations in 30 CFR Part 290 were revised in 1999. 64 FR 26257 (May 13, 1999). However, appeals to the Board in MMS cases continue to be governed procedurally by the regulations in 43 CFR Part 4. See 30 CFR 290.108 (2002).

(a) A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service.

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(b) The notice of appeal must give the serial number or other identification of the case and may include a statement of reasons for the appeal, a statement of standing if required by [43 CFR 4.412(b)], and any arguments the appellant wishes to make.

(c) No extension of time will be granted for filing the notice of appeal. If a notice of appeal is filed after the grace period provided in [43 CFR 4.401(a)], the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken. [<sup>8/</sup>] If the notice of appeal is filed during the grace period provided in [43 CFR 4.401(a)] and the delay in filing is not waived, as provided in that section, the notice of appeal will not be considered and the appeal will be dismissed by the Board.

The Board has consistently held that the timely filing of a notice of appeal is a jurisdictional requirement, and if an appeal is not timely filed in the office of the officer who made the decision, the appeal must be dismissed.<sup>2/</sup> See, e.g., Pamela

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<sup>8/</sup> The regulation's express empowerment of the officer issuing the decision to close a case where the notice of appeal is untimely mandates rejection of Ampeco's challenge to the issuing officer's authority to dismiss such appeals. Ampeco's related contention that, if such authority exists, it can only be exercised by the Deputy Commissioner of Indian Affairs, not MMS, fails because on Oct. 6, 1994, the Deputy Commissioner explicitly delegated to MMS officials the authority to sign dismissals of untimely filed appeals of decisions involving Indian leases. See n. 6, supra.

<sup>2/</sup> The regulations and Board precedent clarify that if a notice of appeal is filed after the 10-day grace period set forth in 43 CFR 4.401(a), the notice will not be considered and the case will be closed by the officer from whose decision the appeal is taken; however, if the notice of appeal is received during the 10-day grace period and requires a determination whether it was transmitted before the end of the filing period, the Board, as sole arbiter of its jurisdiction, makes that decision, not the  
(continued...)

Neville, 155 IBLA 303, 304 (2001); Friends of the River, 146 IBLA 157, 161, (1998); Ron Williams Construction Co., 124 IBLA 340, 341 (1992); State of Alaska v. Patterson, 46 IBLA 56, 59 (1980). As we explained in Ron Williams Construction Co., 124 IBLA at 341-42, “[a]lthough this Board is generally reluctant to take any action that would preclude review of appeals on the merits, the purpose of the rule is to establish a definite time when administrative proceedings regarding a claim are at an end in order to protect other parties to the proceedings and the public interest, and strict adherence to the rule is required.”

Conversely, if a timely notice of appeal is properly filed, the office issuing the decision loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal until jurisdiction over it is restored by Board action disposing of the appeal. See The Moran Corp., 120 IBLA 245, 247 (1991); Thana Cook, 114 IBLA 263, 273, (1990); Harriet B. Ravenscroft 105 IBLA 324, 330 (1988) (Hughes, A.J., concurring); Benton C. Cavin, 83 IBLA 107, 113-14 (1984); State of Alaska v. Patterson, 46 IBLA at 59. Any adjudicative action taken by the office issuing the decision relating to the subject matter of the appeal after the filing of a timely appeal is a nullity since the office will have acted without jurisdiction. State of Alaska v. Patterson, 46 IBLA at 59.

The Board addressed the relationship between these principles and the regulatory appeal procedures in State of Alaska v. Patterson:

Departmental procedures found in [43 CFR 4.411(c)] do not detract from these principles. They simply eliminate the need for review by this Board and the concomitant delay before a final decision is reached in a situation where the outcome is mandated by the regulation. Where appeal is untimely, it must be dismissed. The regulations direct the method for closing the case: “[T]he case will be closed by the officer from whose decision the appeal is taken.” The Board, however, still retains the exclusive power to decide who may or may not appeal to it. \* \* \* If [the officer] should close a case on the grounds that an appeal was untimely filed when in fact it was timely, the Board’s jurisdiction will have been triggered at the time of filing regardless of the [officer’s] action. That action is a nullity and does not affect the appellant’s rights before the Board. We may thereafter consider the appeal on its merits.

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<sup>2/</sup> (...continued)

officer issuing the challenged decision. 43 CFR 4.411(c); William R. Smith, 149 IBLA 358, 361 (1999).

46 IBLA at 59 (citations omitted).

[2] There is no dispute that on June 18, 1997, within 30 days of its receipt of MMS' May 15, 1997, decision, Ampeco filed a document purporting to be a "Notice of Appeal to the Board of Land Appeals" with the Deputy Commissioner of Indian Affairs, BIA.<sup>10/</sup> The issue before us is whether this document, the subject line of which states: "Re: MMS-094-0629-IND," nevertheless qualifies as a notice of appeal from the May 15, 1997, MMS decision which was denominated "MMS-97-0077-IND." We find that it does so qualify and, because it was timely filed, we vacate MMS' November 24, 1997, decision dismissing Ampeco's appeal to the Board.

This case raises the question of whether the June 18, 1997, document complies with the directive found in 43 CFR 4.411(b) that "the notice of appeal must give the serial number or other identification of the case." Ampeco concedes that it captioned the document with the wrong docket number, but maintains that the document contained sufficient other identification to cure the use of an erroneous docket number. We agree.

The June 18, 1997, notice of appeal states in relevant part at page 1:

Pursuant to the Rules and Regulations of the Department of the Interior, 30 C.F.R. Part 290, and 43 C.F.R. Sections 4.411 and 4.413, American Petroleum Energy Company ("Ampeco") hereby files a Notice of Appeal to the Board of Lands Appeals ("Board") of the decision by the Minerals Management Service ("MMS") in the above-captioned matter dismissing Ampeco's appeal. The MMS decision was issued on May 15, 1997, and was received by Ampeco on May 19, 1997. Accordingly, this Notice of Appeal is filed within the time period provided in the regulations.

Thus, despite the reference to the wrong docket number, the notice provided the name of the appellant (Ampeco), the nature of the decision (dismissal of Ampeco's appeal), the fact that it was an MMS decision, and the date of the decision

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<sup>10/</sup>We note that although 43 CFR 4.411(a) states that the notice of appeal is to be filed in the office of the officer who made the decision (in this case the Chief, RVD, MMS), the May 15, 1997, decision expressly required that notice of appeal be filed with the "Deputy Commissioner of Indian Affairs." Ampeco had filed its underlying Mar. 14, 1997, appeal with the Commissioner of Indian Affairs. As noted, *supra* at n. 6, MMS officials were authorized to sign certain appeal decisions involving Indian leases.

(May 15, 1997). In addition, Ampeco filed the notice with the Deputy Commissioner of Indian Affairs, as required by the May 15, 1997, decision. Moreover, MMS acknowledges that the erroneous docket number, MMS-94-0629-IND, identified a different appellant whose appeal had been settled in 1995, well before the date of the appealed decision. This is not a case in which MMS had issued separate decisions to Ampeco on May 15, 1997, in both MMS-94-0629-IND and MMS-97-0077-IND, and thus might reasonably be confused about which matter Ampeco was appealing.<sup>11/</sup> We believe that only a cursory examination of the records, rather than the “extensive detective work” alleged by MMS, would have revealed the Ampeco appeal dismissed on May 15, 1997.

Accordingly, we find that, under the circumstances presented here, Ampeco timely filed a notice of appeal of MMS’ May 15, 1997, decision. The timely filing of that notice of appeal on June 18, 1997, triggered the Board’s jurisdiction. Thus, MMS’ November 24, 1997, decision dismissing that appeal is a nullity and must be vacated. See State of Alaska v. Patterson, 46 IBLA at 59. Accordingly, we now proceed to address the issues raised in the timely appeal of MMS’ May 15, 1997, decision.

#### MMS’ May 15, 1997, Decision

[3] As noted above, MMS’ May 15, 1997, decision dismissed as untimely Ampeco’s March 17, 1997, notice of appeal to the Commissioner of Indian Affairs, BIA, of MMS’ January 20, 1995, royalty underpayment determination and bill for additional royalties. Ampeco contends that its appeal to the Commissioner was timely because the appeal period did not begin until it received notice that the hold placed on the 1995 order had been cancelled. Citing Shell Oil Company, 52 IBLA 74 (1981), Ampeco contends that MMS’ actions after receiving Ampeco’s February 14, 1995, response to the order, including the numerous statements in MMS communications to Ampeco, expressly indicated that the order and bill were on hold pending further MMS review. Those actions, Ampeco argues, clearly negate the finality of the January 20, 1995, order. Ampeco maintains that it was not officially

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<sup>11/</sup> Even assuming such a situation, at least one Federal court has held that the use of the wrong docket number in a notice of appeal was excusable neglect. Marshall v. Lancarte, 632 F.2d 1196, 1197 (5<sup>th</sup> Cir. 1980) (notice of appeal erroneously used the docket number of the case appellant had won instead of the case he had lost); cf. Jean Emanuel Hatton, 107 IBLA 47, 49-50 (1989) (although styled as an appeal of a Feb. 27, 1987, BLM notice, Board determined that notice of appeal actually sought review of Apr. 3, 1986, BLM decisions and found the appeal timely because appellants had not received notice of the earlier decisions).

notified of the cancellation of the hold until February 13, 1997, when it received MMS' February 10, 1997, letter, and that the January 20, 1995, order therefore did not become final and the appeal period did not commence until after that date. Ampeco asserts that it filed its notice of appeal on March 17, 1997, within the 30-day appeal period, as set forth in 30 CFR 290.3(a) (1996),<sup>12/</sup> and that MMS erred in dismissing the appeal as untimely. (July 18, 1997, SOR at 5-8.)

The rules that governed appeals to the Commissioner of Indian Affairs at the time Ampeco filed its appeal granted the right to appeal to “[a]ny party to a case adversely affected by a final order or decision of an officer of [MMS].” 30 CFR 290.2 (1996) (emphasis added); see 30 CFR 290.1 (1996) and 30 CFR 290.6 (1996). An appealing party had to file a notice of appeal in the office of the officer issuing the decision or order within 30 days of service of the decision or order. 30 CFR 290.3(a)(1) (1996). “No extension of time will be granted for filing the notice of appeal,” and an untimely notice of appeal “will not be considered and the case will be closed.” 30 CFR 290.3(a)(2) (1996).

The issue before us is whether MMS' January 20, 1995, order was a final order activating the 30-day appeal period. We find that it was not.

Although the January 20, 1995, order directed Ampeco to report and pay additional royalties, it also advised Ampeco that “[i]f you submit the transportation factor documentation by lease and month, we will adjust your bill.” (Jan. 20, 1995, order at 1-2.) This language left open the possibility that the order could be modified to reflect documented deductible transportation costs, and thus weakens the purported finality of the order for appeal purposes. Additionally, MMS' actions subsequent to issuance of the order limned above, including its numerous written acknowledgments that the order and bill had been placed on hold pending further review, such as MMS' letter to Ampeco, dated March 27, 1996, stating, “[y]our order and bill are currently in hold status,” seriously undermine its claim that the order was final for purposes of appeal on the date it was issued. See, e.g., July 18, 1997, SOR, Exhs. C, D, E, and F; see also June 14, 2002, MMS Status Report at 1 (acknowledging that the January 20, 1995, order “was placed on hold and then reinstated in February 1997.”) MMS did not conclusively notify Ampeco of the cancellation of the hold placed on the order and bill until February 13, 1997, when Ampeco received MMS' February 10, 1997, letter, advising Ampeco that the hold had been cancelled effective January 9, 1997. (July 18, 1997, SOR, Exh. I at 2.)

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<sup>12/</sup> Ampeco notes that the thirtieth day, Mar. 15, 1997, fell on a Saturday and that, pursuant to 43 CFR 4.22(e), that day and Sunday, Mar. 16, 1997, were not included in the 30-day appeal period.

The totality of the circumstances here, including MMS' actions and written representations after the issuance of the January 20, 1995, order, therefore clearly belie the finality of that order, and its ripeness for appeal, prior to February 13, 1997. See Kirby Exploration Company of Texas (On Reconsideration), 149 IBLA 205, 208-209 (1999); F. Howard Walsh, Jr., 93 IBLA 297, 308-09 (1986); Mobil Oil Corp., 65 IBLA 295, 301 (1982); Shell Oil Co., 52 IBLA at 76-77. We conclude that the 30-day appeal period for MMS' January 20, 1995, order did not begin to run until February 13, 1997, and that Ampeco's March 14, 1997, notice of appeal was timely received. Accordingly, we reverse MMS' May 15, 1997, decision dismissing the appeal and remand the matter for adjudication of the merits of Ampeco's appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, MMS' November 24, 1997, decision dismissing Ampeco's appeal to the Board is vacated, and MMS' May 15, 1997, decision dismissing Ampeco's appeal to the Commissioner of Indian Affairs is reversed and remanded for further adjudication.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge