BTU EMPIRE CORPORATION

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IBLA 2006-21 Decided August 28, 2007

Appeal from a decision of the Minerals Management Service affirming an order to pay advance royalties for coal leases. MMS-03-0114-COAL.

Set Aside and Remanded.

1. Coal Leases and Permits: Continued Operation--Coal Leases and Permits: Royalties

Under section 7 of the Mineral Leasing Act, as amended by section 6 of the Federal Coal Leasing Act Amendments of 1976, 30 U.S.C. § 207(b) (2000), the Secretary of the Interior may suspend continued operation of a coal lease upon payment of advance royalty in lieu of production in an amount "no less than the production royalty which would otherwise be paid . . . ." Where a lessee submits information suggesting that prices from five captive mines in a coal region defined by an industry journal do not represent the unit value of the production royalty which would otherwise be paid for coal from its leases, and presents probative data showing that prices for coal from a mine closer geographically and producing from the same mine seam (as the lessee's leases subject to a suspension of continued operations) are representative of the unit value of production royalty from the subject mine, and MMS fails to explain why the lessee's arguments and data are irrelevant to its decision regarding the proper valuation of the lessee's advance royalty payments due, the Board will set aside the decision on appeal and remand the matter for further consideration.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, for appellant; Matthew E. Fox, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service and the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

BTU Empire Corporation (BEC) (successor-in-interest, *inter alia*, to RAG Empire Corporation (RAG) and Cyprus Empire Corporation (CEC)) appeals from a July 21, 2005, decision of the Associate Director for Policy and Management Improvement, Minerals Management Service (MMS), MMS-03-0114-COAL, affirming an October 27, 2003, order of the Assistant Program Director, Onshore Compliance and Asset Management, MMS, to pay advance royalties for coal leases C-0126480, C-030656, and D-056298 (the three leases).[1] The MMS decision rejected an appeal to the Director from the order to pay, and affirmed BEC's obligation to pay $381,005.02.

STATUTORY AND REGULATORY BACKGROUND

Section 7 of the Mineral Leasing Act (MLA), as amended by section 6 of the Federal Coal Leasing Act Amendments of 1976 (FCLAA), 30 U.S.C. § 207(b) (2000), subjects Federal coal leases "to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee." To achieve diligent development, a lessee must produce commercial quantities of coal (1 percent of recoverable coal reserves) within 10 years after either the effective date of the lease or the effective date of the first lease readjustment after FCLAA's passage on August 4, 1976. *See* 43 C.F.R. § 3480.0-5(a)(6), (12), and (13).

The MLA, as amended by FCLAA, allows the Secretary of the Interior to suspend the continued operation requirement upon payment of "advance royalties" if he determines that the suspension will serve the public interest. The dispute in this case centers not on whether BEC should have been permitted to suspend operations, but rather whether the amount of advance royalties demanded by the Department has properly been calculated. Accordingly, we focus on statutory and regulatory provisions governing calculation of coal unit value rather than approval of the suspension.

The statutory standard permitting the suspension of the continued operation requirement by payment of advance royalty in lieu of production requires the advance royalty to be "no less than the production royalty which would otherwise be paid and shall be computed on a fixed reserve to production ratio (determined by the Secretary)." 30 U.S.C. § 207(b) (2000). Notably, barely 2 weeks after the MMS decision at issue here, Congress enacted the Energy Policy Act (EPA 2005), Pub. L. No. 109-58, Title IV §§ 434-35, 119 Stat. 761-62 (Aug. 8, 2005), in a manner that

[1] The decision is dated July 20, but was sent by cover letter dated July 21 to BEC's predecessor RAG.

fleshes out the way such advance royalty should be calculated. Section 7 of the MLA, as amended by FCLAA and the EPA 2005, now requires that advance royalty shall be

> computed [b]ased on–
>
> > (i) the average price in the spot market for sales of comparable coal from the same region during the last month of each applicable continued operation year; or
> >
> > (ii) in the absence of a spot market for comparable coal from the same region, by using a comparable method established by the Secretary of the Interior to capture the commercial value of the coal . . . .

30 U.S.C. § 207(b)(4)(A) (2005 Supp.). While this provision was not applicable at the time of the decision, it has relevance to our analysis below.

In 1981, the Department of Energy (DOE) issued proposed rules governing diligence requirements for Federal coal leases, which included a regulation governing calculation of advance royalty, proposed as 10 C.F.R. § 378.307(c). 46 Fed. Reg. 62226 (Dec. 22, 1981).[2] Proposing the rule that we implement today, DOE explained that its purpose was to ensure that advance royalties

> are based on an estimate of the production royalties that would have been owed if the lessee had actually produced the amount of coal necessary to meet the requirement of continued operation. . . . The approximate value per ton of coal (unit value) is determined by DOI in accordance with proposed § 378.307(c). When the unit value is based on previous production from the lease, it is anticipated that DOI will calculate the value of the coal produced in accordance with their procedures set forth at 30 CFR 211.63.

46 Fed. Reg. at 62233. The rule at 30 C.F.R. § 211.63 (1981), to which DOE referred, was the rule establishing the value of coal for purposes of royalty computation by the U.S. Geological Survey, predecessor to MMS.

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[2] DOE explains in the rulemaking that Congress had delegated certain authorities previously vested in the Department of the Interior (DOI) to DOE in the Department of Energy Organization Act, 42 U.S.C. §§ 7152, 7153. 46 Fed. Reg. 62226. A copy of the rulemaking is in the record as Attachment 5 to the Statement of Reasons submitted by RAG to the Director, MMS, in February 2004.

The rule proposed as 10 C.F.R. § 378.307 was ultimately promulgated instead as 30 C.F.R. § 211.23, in all material respects as it was proposed, at 47 Fed. Reg. 33179 (July 30, 1982). This 1982 rulemaking made MMS responsible for advance royalties under the MLA. The rule was subsequently redesignated as 43 C.F.R. § 3483.4, at 48 Fed. Reg. 41589 (Sept. 16, 1983), putting responsibility for its implementation with the Bureau of Land Management (BLM). The rule specifies:

> When *advance royalty* is accepted in lieu of continued operation, it *shall be paid in an amount equivalent to the production royalty that would be owed on the production of 1 percent of the recoverable coal reserves* . . . . The unit value of the recoverable coal reserves for determining the advance royalty payment for a Federal lease . . . shall be:
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> (1) The unit value for production royalty purposes of coal produced and sold under the Federal coal lease . . . during the immediately preceding production royalty payment period; or
>
> (2) Computed at the average unit price at which coal from other Federal leases in the same region was sold during such period, if no coal was produced and sold under the Federal coal lease . . . during the immediately preceding royalty payment period, or if the authorized officer finds that there is an insufficient number of such sales to determine such value equitably; or
>
> (3) Determined by the authorized officer, if there were no sales of Federal coal from such region during such period or if the authorized officer finds that there is an insufficient number of such sales to determine such value equitably.

43 C.F.R. § 3483.4(c) (emphasis added; references to logical mining units (LMUs) deleted); *see Ark Land Co.*, 132 IBLA 235, 236 (1995); *Coastal States Energy Co.*, 110 IBLA 179, 182 (1989); *Western Slope Carbon, Inc.*, 98 IBLA 198, 201 (1987). As ultimately promulgated, this rule appears in regulations implemented by BLM and subject to the general responsibility of BLM to administer the MLA. 43 C.F.R. § 3480.0-6(b).

FACTUAL BACKGROUND

The following facts are generally not in dispute. BEC is the successor-in-interest and the current holder of the three coal leases issued originally between 1949 and 1981 for lands in Moffatt County, Colorado. The original leases and readjusted leases appear in the record at, *inter alia*, Exs. A-H to the February 5, 2004, Declaration of William M. Hartzler, Tax Manager for RAG American Coal Holding, Inc. (Hartzler Declaration). The lands subject to the three leases made up the Empire (coal) Mine which began operation and production in the 1970s.

According to maps in the record, the Empire Mine is one of several surface and underground coal mines in Colorado in or near Moffatt County along or near a common rail line. BEC operates one of these, the Twentymile Mine, located approximately 37 miles to the east of the Empire Mine along the Union Pacific rail line. Hartzler Declaration at ¶ 25. The Colowyo Mine is a Kennecott facility 20 miles southwest of the Empire Mine and is at the "next rail loadout South of the Empire Mine" along the same Union Pacific rail line. Hartzler Declaration at ¶ 24; Hartzler Declaration Ex. I (maps); Ex. A to Feb. 24, 2004, Declaration of Ellen Ewart, Director of Market Research for RAG Energy Sales Inc. (Ewart Declaration).[3]

BEC's predecessor CEC made the decision to idle the Empire Mine in 1995. According to Hartzler, this decision related to low market demand for coal. Hartzler Declaration at ¶ 22. BEC explains that CEC decided to emphasize production at its Twentymile Mine with a new longwall section that had the capacity to produce 2,000 more tons per hour than the previous longwall unit, while closing production of coal that was more expensive to produce at the Empire Mine. *Id.* The record contains suggestions by MMS that the decision may have related to the fact that the Twentymile Mine employed non-union workers, while the Empire Mine was unionized and less productive. Hartzler Declaration Ex. T at 2 (May 3, 1999, letter from MMS to Cyprus Amax Coal Company).

Through a series of letters, CEC and later RAG requested approval to pay advance royalty in lieu of continued operation of the Empire Mine for the continued operation years 1995-99. The set of letters and various BLM or MMS responses appears in the record at Hartzler Declaration Exs. J-U, and we need not provide details of this substantial material. It suffices to say that BLM approved the requests and the parties are in agreement as to (1) the amount of coal tonnage equal to 1 percent of recoverable reserves based upon production reports showing 374,936 tons of coal for 1995, the last year the mine was in production, and (2) the royalty rate of 8 percent. The various communications culminated in an Order to

[3] The Ewart and Hartzler Declarations were appended as Attachments 1 and 2 to a Statement of Reasons submitted on behalf of RAG to the Director MMS (RAG SOR). That RAG SOR is attached as Attachment 1 to and incorporated by reference into the SOR submitted by BEC in this appeal. For convenience, we identify the SORs as the BEC SOR and the RAG SOR, and identify the Declaration attachments separately.

Report and Pay Advance Royalty in the amount of $302,274.73, and dated July 20, 2001 (2001 Order). Hartzler Declaration Ex. V.[4]

The critical element of this letter was the unit value, or value per ton of coal, used to calculate the advance royalty. For the various continued operation years involved for the three leases, the unit value per ton ranged from $10.96 to $12.74. MMS reached this conclusion based on the regulatory history of the rule, 30 C.F.R. § 378.307, citing DOE's logic in promulgating it, explaining that:

- Unit values are computed using the same criteria as normally applied for production value purposes. When the [DOE] originally proposed the rules now in effect for advance royalty, it stated: The approximate value per ton of coal (unit value) is determined by DOI in accordance with proposed 30 CFR § 378.307(c). When the unit value is based on previous production from the lease, it is anticipated that DOI will calculate the value if the coal produced is in accordance with their procedures set forth at 30 C.F.R. § 211.63 (2000). (46 F.R. 62232, December 22, 1981)

- Accordingly, we use the product valuation regulation at 30 CFR § 206.250 (2000) to compute advance royalty unit value.

July 20, 2001, Order at 3. (It is clear that the reference to the 2000 version of 30 C.F.R. § 211.63, was in error and meant to refer to the version in effect in 1981, given that this rule was superceded by royalty valuation regulations for coal at 30 C.F.R. § 206.250 by 2000.)

The 2001 Order went on to explain that, pursuant to 43 C.F.R. § 3483.4(c), MMS had accepted the unit values proposed by RAG.

- The unit values used for your advance royalty determination were derived from the Colowyo Mine.

\- You recommended that we use Colowyo Mine price data because that mine is in the same market area as the Eagle Mine. Additionally, we note that the "F" seam is also recovered by the Colowyo Mine, thus quality differences are minimized. You

[4] The 2001 Order addressed the three leases as the "Eagle Mine." The parties appear to accept without question that the Eagle and Empire Mine are the same mine. *E.g.*, Hartzler Declaration at 12-14.

> supplied us with Colowyo Mine unit values, extracted from the Resource Data International (RDI) database.
>
> - We used only spot prices reported from the Colowyo Mine. We did not use values reported to us for royalty payment purposes directly from the Colowyo Coal Company, as they include intermixed spot price and long term contract values. We realize that the coal Subcommittee of the Royalty Policy Committee is engaged in a review of the factors and methodologies used for advance royalty unit value determination. The Subcommittee ultimately may suggest a different procedure than that provided herein. We believe, however, that based on the extensive review and discussions with you that these values are reasonable and we should proceed with this decision without further delay that would occur while awaiting the Subcommittee's final recommendations.[[5]]
>
> - RDI's spot prices are f.o.b. mine values; this is consistent with the requirement to compute unit values for advance royalty in the same manner production royalty is calculated . . . .

2001 Order at 3.[6] RAG paid the advance royalty as calculated by MMS without objection or appeal.

Pending the calculations ultimately made for 1995-1999, RAG sought suspension of the continued operation requirement for the same leases for subsequent continued operation years from 2000-2004 in a series of letters in the

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[5] It is not clear from the record whether the recommendations of this Subcommittee were relevant to changes to the MLA reflected by the EPA 2005.

[6] This 2001 Order followed the May 3, 1999, letter from MMS to Cyprus Amax Coal Company, in which the Chief, Solid Minerals Valuation and Reporting Branch, MMS, communicated with CEC's affiliate regarding the proper manner of achieving a unit value determination. In this letter, the Branch Chief raised questions regarding the use of spot prices for unit value. He noted that a number of coal producers "have elected to consolidate existing sales obligations into one mine, thereby increasing production and reducing per ton costs . . . ." Hartzler Declaration Ex. T at 2. He questioned whether spot prices accurately reflected the unit value of the coal if the idled mine would not commence production merely for purposes of receiving spot market prices. He also discussed the relevant "region" as the "market region versus the geographic region." *Id.* at 4.

record at Exs. W-DD to the Hartzler Declaration. On October 27, 2003, the Assistant Program Director, Onshore Compliance and Asset Management, MMS, issued an Order to Pay Advance Royalty in the amount of $381,005.02 for the leases. Hartzler Declaration Ex. EE. Again there is no dispute regarding the 1 percent calculation of recoverable reserves or the 8 percent royalty percentage. Oct. 27, 2003, Order (2003 Order) at 2.

This time, however, MMS calculated the unit value for a ton of coal differently. Based on 43 C.F.R. § 3483.4(c), the 2003 Order noted that because coal had not been sold under the leases "during the immediately preceding production royalty payment period," as specified in subsection (c)(1), MMS would proceed to calculate unit value based on subsection (c)(2), which stated that unit value would be "[c]omputed at the average unit price at which coal from other Federal leases in the same region was sold during such period, if no coal was produced and sold under the Federal coal lease." 2003 Order at 4. MMS computed the value for each lease and continued operating year as ranging between $17.41 and $20.91 per ton, by contrast with the range of $11.50-$14.00 per ton suggested by RAG, based on "proprietary information submitted to MMS from other mines in the Green River Coal Region." 2003 Order at 4. MMS employed data from five mines in the "Green River Coal Region": the Trapper Mine, Seneca Mine, Bridger Mine, Black Butte Mine, and Twentymile Mine.[7]

RAG appealed to the Director, MMS (subsequently changing identity to BEC). As a matter of procedure, RAG contested MMS's authority to make the advance royalty calculation which, it contended, was left in the exclusive authority of BLM. RAG SOR at 33, 35. Reciting the provisions of the three leases permitting "the authorized officer" to accept payment of advance royalties, RAG contended that its lease and regulatory obligations extended to communications on the topic with BLM and not MMS. *See* RAG SOR at 44-45, and Lease Section 2; Hartzler Declaration Exs. A-H (leases). RAG cited the regulatory history of 43 C.F.R. § 3483.4 and explained that responsibility for its implementation had been transferred unequivocally to BLM in 1983. RAG SOR at 48-49. Pointing to this Board's decision in *KMF Mineral Resources, Inc.*, 151 IBLA 35, 37 (1999), RAG contended that MMS's authority extended only to providing a calculation of unit value to BLM, but that the

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[7] Maps in the record show that the Trapper, Seneca, and Twentymile Mines are located generally east of the Empire Mine along the rail line through Moffatt County but that the Jim Bridger and Black Butte Mines are significantly to the northwest in Wyoming. Maps in the Board's library indicate that these mines are approximately 70-100 miles away. According to Hartzler, the Trapper and Seneca Mines are near the Twentymile, Colowyo, and Empire Mines but are not served by the Union Pacific rail line serving those three mines because they are captive mines which sell only to their associated generating facilities. Hartzler Declaration at ¶¶ 26-27.

decision as to the proper calculation rests under Departmental regulations with BLM. RAG SOR at 58-59.

RAG also contested MMS's substantive valuation conclusions. RAG challenged the 2003 Order's use of proprietary data withheld from RAG's examination. RAG contended that the MLA, as amended by FCLAA, 30 U.S.C. § 207 (2000), the rule at 43 C.F.R. § 3483.4, and the 1981 DOE preamble to the rule as it was proposed, all compel that the unit value of coal for purposes of determining advance royalty must approximate the production royalty that would be required to be paid had the coal been produced. RAG SOR at 67-68. RAG contended that prices used by MMS in its 2003 Order from the five subject mines were based on long-term contracts and also contracts at captive mines, neither of which could reflect the value of coal from the marginal Empire Mine. RAG SOR at 74-76. RAG contended that spot prices would more accurately reflect the value of coal. RAG also contended that the mines relied on by MMS were not in the same "market region" and that the proper comparison was to spot prices for the Colowyo Mine because that mine sells to the same market on the same transportation system as the Empire Mine, and even markets coal produced from the same coal seam (seam "F"). RAG SOR at 76-84. By contrast, RAG contended that the coal from the Green River Coal Region, to which MMS looked for comparison, sold from mines captive to particular generating stations, were located in part in Wyoming, sold under higher long-term contract prices than the spot market could obtain, and had coal that was superior in quality to any coal at the Empire Mine. *See generally id.*

On July 20, 2005, the Associate Director, MMS, issued his decision affirming the 2003 Order in its entirety. With respect to the procedural issue of MMS's authority to issue the order, he explained that by Secretarial Order No. 3087 dated February 7, 1983, the Secretary had transferred responsibility for royalty and minerals revenue management to MMS. Citing a September 6, 1991, Memorandum of Understanding (MOU) among MMS, BLM, and the Bureau of Indian Affairs (BIA), and an August 11, 1997, MMS Memorandum, the Associate Director explained that MMS had the authority to advise coal lessees of its advance royalty calculations and "MMS is charged with the billing and collection of advance royalty payments."

With regard to the substantive calculation of unit value, the Associate Director acknowledged without dispute RAG's arguments regarding the five mines in the Green River Coal Region. He explained that RAG contended that the Trapper, Seneca, Bridger, and Black Butte Mines are utility-owned captive mines that supply coal to nearby power plants under high-priced long-term contracts. Decision at 4. He restated RAG's argument that the Twentymile Mine "produces a significantly higher quality coal (800 to 1,000 Btu higher than the Empire Mine); has lower production costs; has lower transportation costs ($0.50 to $1.50/ton less); and can compete in more distant markets," and that the Empire Mine is a marginal property poorly situated to any market with no long-term contract and sales opportunities limited to the spot market. *Id.*

The Associate Director did not contest RAG's factual assertions. Nonetheless, he concluded that he was required to employ mines "in the region" based on 43 C.F.R. § 3483.4(c)(2), because subparagraph (c)(1) directs that the unit value shall be the value of production sold under the lease for the immediately preceding production royalty payment period, and there had been no such production. Thus, he concluded:

> It is not disputed that, in the instant case, both the subject mine and the five mines examined by MMS are located in the Green River Coal Region. *See* the 1999 Keystone Coal Industry Manual at page 570. Nor is it disputed that the Colowyo Mine, which the Appellant argues is more comparable, is located in the Uintah Coal Region.
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> In view of the foregoing, I conclude, as a matter of law, that MMS calculated the subject unit value for advance royalty purposes in a manner that was fully consistent with applicable regulations.
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> Although the Appellant argues that MMS should, as it did in 1995, have used coal values derived from the Colowyo mine which, as noted previously herein is located in the Uintah Coal Region, the regulations clearly and unequivocally call for a calculation of average unit price based on coal sales from Federal mines located in the *same region* which, in this case, is the Green River Coal Region.

Decision at 7.

The Associate Director rejected RAG's argument that the regulation's requirement that the royalty value be determined "equitably" meant that MMS could not rely on long term contract prices from distant captive mines.

> Since the term "equitably" is not defined in the regulations, the Appellant offers its own definition, the substance of which is that the unit value determined by the authorized officer should, in so far as possible, correspond to the value the Appellant's coal would have had if it had actually been produced and sold from the subject lease(s).
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> Applying this definition of its own making, the Appellant argues that the five mines in the Green River Coal Region examined by MMS are not comparable to the Appellant's mine; that, as a result, the price(s) of

> the coal produced from those other mines are likewise not comparable; and that, therefore, the unit price derived by MMS is inequitable.
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> I cannot accept the Appellant's argument. If [DOI] had wanted to include in the unit value determination section of the advance royalty regulations the factors that the Appellant advocates, and are generally included in the coal valuation regulations, such as like-quality of coal, similar production methods, and sales into similar or like markets, it could have done so. It is clear that DOI knew how to include such standards. *See* the coal valuation regulations at 30 C.F.R. § 211.63 (1982), which were promulgated before 43 C.F.R. § 3483.2. However, the fact is that DOI did not choose to attach those standards to advance royalty.
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> Thus, where, as here, MMS was able to find five other mines in the same coal region and obtain the prices for sales from those mines, and derive a unit value, I conclude that MMS acted in full compliance with the regulations at 43 C.F.R. § 3483.4(c)(2) (2000), and that the resulting determination of unit value is proper.

Decision at 6-7. To the extent MMS had employed different calculations in its 2001 Order for the previous 5-year period, MMS concluded that it had done so in error. *Id.* at 7.

BEC appealed. BEC raises largely the same arguments made in RAG's SOR. BEC persists in its argument that the redesignation of the regulations, from 30 C.F.R. § 211.23 to 43 C.F.R. § 3483.4, in 1983, transferred jurisdiction over implementation of that rule to BLM. BEC contends that a subsequent internal MOU and Memorandum cannot change a duly promulgated BLM regulation.

BEC challenges BLM's unit value calculation on the grounds discussed above, incorporating by reference RAG's SOR. BEC contends that the unit prices used must represent the value of the coal as if it were produced and sold, and that coal from captive mines sold under long term contracts bears no relation to the value of coal at the Empire Mine. BEC also notes that MMS has construed the term "in the same region" to mean something more than the common sense notion of a region. Pointing out that the Colowyo Mine is closer to the Empire Mine than all but the Trapper Mine, and that the Bridger and Black Butte Mines are not even in the same geographical region near the Colowyo, Empire, Trapper, Seneca and Twentymile Mines located in Colorado, being some considerable distance away in Wyoming, BEC states that the only way that MMS can reject the geographically nearby Colowyo Mine, which produces coal from the same "F" coal seam as the Empire Mine, is to redefine the "same region" as the "same coal region" listed in the Keystone Coal

Industry Manual. BEC notes that neither a reference to this industry coal manual nor a definition of "coal region" can be found in the regulation. *See generally* BEC SOR. BEC contends that, even if the "same region" could include the five mines looked to by MMS, it would have to reject those sales because they are not "equitable" as required in the rule at 43 C.F.R. § 3483.4(c).

MMS defends the decision in an Answer. As to MMS's procedural authority to issue the decision, MMS concedes that the "authorized officer" is defined at 43 C.F.R. § 3400.0-5(b) as an employee of the BLM. Answer at unpaginated 3. Nonetheless MMS argues that MMS was acting as the agent of BLM and that it exercised authority granted to MMS by the MOU. Answer at unpaginated 4, MMS Ex. 1 (MOU) at B-19.[8]

As to the substantive conclusion regarding unit value, MMS defends the decision exclusively on grounds that the Trapper, Seneca, Jim Bridger, Black Butte, and Twentymile Mines are in the "Green River Coal Region," as identified in a 1999 Keystone Coal Industry Manual at page 570. According to MMS, it is obliged by 43 C.F.R. § 3483.4(c)(3) to consider "average unit prices from coal produced from other Federal leases in the same region." Thus, MMS contends not only that it was obliged to consider such prices from mines in a broadly defined coal region that extends a considerable distance from the Empire Mine, but that it was disallowed by the rule from considering prices from the Colowyo Mine a mere 20 miles away. Answer at unpaginated 6, *citing* 43 C.F.R. § 3483.4(c). MMS rejects BEC's argument that the Colowyo Mine is more representative because its coal is similar in quality and closer to the Empire Mine than the Wyoming mines.

> [T]he regulations for determining unit value in advance royalty cases are hierarchical in nature. If there was no production on the subject leases in the preceding royalty period, MMS is to calculate the unit value by looking to production from other federal leases in the region. Finally, if there are "no sales," or "an insufficient number of sales" the unit value can be determined by an authorized officer.

Answer at unpaginated 8. MMS rejects the notion that similarity in coal features is at issue, let alone relevant.

> [T]he regulations do not allow such latitude. They clearly state unit values are to be determined by sales within the same region, when

[8] The bulk of MMS's Answer on this point relies on the assertion that it was BLM, not MMS, which approved CEC's requests to suspend operation and pay advance royalty in lieu of production. This is beside the point. The decision before us is an MMS decision regarding unit value; to the extent it may approve the request to pay advance royalty BEC has not challenged such an approval.

> there is no production from the same lease (as in this case). There is no provision or condition in the regulation that requires these same-region sales to be similar in any other manner (quality of the coal, purchaser, available transportation networks, etc). Likewise, there is no provision that would permit MMS to skip this step if, as here, data is available for mines in the same region. Therefore, not only was MMS correct in using the other Green River Region mines as a basis, this was the only course of action allowed by the regulations.

Answer at unpaginated 8-9. MMS contends, without explanation, that its prior calculation using the Colowyo mine figures was "in error." *Id.* at 9.

ANALYSIS

We begin with the issue of whether MMS had authority to issue the 2003 Order. BEC contends that because MMS had no authority to issue the order and subsequent decision, the Board must either reverse or vacate the decision and then remand the matter to BLM to issue a unit value determination in the first instance. From MMS's somewhat abbreviated response, our understanding of its position is that, because the 1991 MOU between BLM and MMS turns unit valuation determinations over to MMS, all a remand would accomplish would be to compel BLM to issue the same decision on the same record. We are hesitant to take an action which would so plainly waste the considerable effort the parties have spent on this matter only to return them to their respective positions as presented to us today, albeit with BLM as appellee.

That said, BEC has a legitimate concern about the process employed by MMS and BLM. We cannot accept MMS's suggestion that identification of the proper decisionmaker is a distinction without a difference. The rules governing royalty orders require a first appeal to the Director of MMS, thus adding the additional layer of administrative review we find here with a previously filed SOR and the passage of close to 2 years before issuance of a decision appealable to IBLA. *See* 30 C.F.R. Part 290 Subpart B (appeals of royalty decisions). Had the decision been issued first by BLM, a direct appeal to the Board would have been possible. 43 C.F.R. § 4.410. This is the import of BEC's citation to the *KMF* case. While we recognize advantages to the parties and to the Board from each of the separate agency processes, this difference has considerable significance to lessees in BEC's position.

As noted above, the authority for implementation of the advance royalty regulation was initially vested in MMS in 1982 at 30 C.F.R. § 211.23 (1982).[9] It is

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[9] The rule at 30 C.F.R. § 211.23(c)(6) (1982) vested in MMS general responsibility (continued...)

beyond dispute that when the rule was redesignated on September 16, 1983, by duly promulgated rule, the Department vested the authority in BLM to implement the rule under 43 C.F.R. § 3483.4; *see* 43 C.F.R. § 3480.0-6(3) (responsibilities of BLM). In redesignating this rule, the Department went to the trouble of substituting officers of the MMS with the "authorized officer," defined as an employee of BLM. *See* 48 Fed. Reg. 41592 (Sept. 16, 1983); 43 C.F.R. § 3483.4(c)(2) and (3) (references to findings of "authorized officer").

Thus, members of the public were advised by *Federal Register* notice that authorized officers of BLM would be making advance royalty decisions. Any question as to the ultimate responsibility for making such determinations should be resolved by 43 C.F.R. § 3483.4(c)(3) which specifies that, if there are insufficient sales from which to "determine such value equitably," the final decision on unit value is to be "determined by the authorized officer," defined at 43 C.F.R. § 3400.0-5(b) to mean an employee of BLM. Obviously, had the Department intended MMS to implement the rule, it would have retained it within Title 30 of the *Code of Federal Regulations*.

The only ambiguity we can find in the various rulemaking packages is that, when transferring authority from MMS to BLM and redesignating rules for that purpose, the preamble to the 1983 rule states that it was implementing Secretarial Order No. 3087, as issued on December 3, 1982, and amended February 7, 1983. That order, as amended, "transferr[ed] all onshore management functions of [MMS], not relating to royalty management, to [BLM]." 48 Fed. Reg. 41589 (Sept. 16, 1983). Secretarial Order No. 3087, in turn, was published in the *Federal Register* on March 2, 1983. It specifies that all "functions related to royalty and mineral revenue management, including collection and distribution, within [BLM] are the responsibility of the MMS." 48 Fed. Reg. 8982, 8983 (Mar. 2, 1983). The order terminated in June 1983, in anticipation of rulemakings to properly transfer regulatory authority to the respective organizations.

Why the Department proceeded 6 months later to transfer advance royalty collection to BLM in the September 16, 1983, rule is not entirely clear. It may be that it was an oversight; it may be that the Department did not envision "advance royalty," a payment *in lieu of* production, to be in the same category as "royalty," which is a payment *for* production. Whatever the logic, the rule clearly vests the unit value determination in an authorized officer defined as a BLM employee.

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[9] (...continued)
to administer the MLA and to "receive and act on applications for reduction of royalties, but not advance royalties." As we understand it, this rule prohibits application for reduction of advance royalty payments, and was continued in 43 C.F.R. § 3480.0-6(3)(d)(6).

Perhaps because of this seeming dilemma, BLM and MMS entered into the above-described MOU. The purpose of the MOU, as amended in 1997, *see* RAG SOR Attachment 6 and MMS Ex. 1, was to better define how "agreed-to information can be exchanged more effectively and efficiently." It "describes working relationships between BIA, BLM and MMS in carrying out [DOI's] responsibilities for Federal onshore and Indian lease management and accounting." *Id. at 1.* Attachment B to the MOU describes information sharing and responsibilities for onshore minerals and "represents agreed-to division of responsibilities for Federal onshore lands." *Id.* The MOU did not indicate that the parties to it believed that they were amending or could amend existing rules, but rather expressed the view that the three agency parties should review rulemakings by the others as they occur. *Id.* at 2. The MOU contains two provisions regarding advance royalties: (1) On Attachment B at page B-5, paragraph G envisions that for topics including "advance royalty," "MMS will provide written confirmation to the operator/lessee of BLM approval, with advance royalty data." (2) On Attachment B at page B-19, however, with respect to "billing and payment of advance royalty - solids," the MOU states that "[t]onnage on which advance royalty is due will be calculated by BLM and sent to MMS (RVD). *MMS (RVD) will notify BLM of the unit value and advanced royalty due*." *Id.* at Attachment B (emphasis added).

Having reviewed the various rulemakings which serve as the history of 43 C.F.R. § 3483.4(c), and the MOU, it seems clear to us that BLM and MMS understood that the rule requires a BLM decision. The MOU anticipated that MMS would calculate the unit value and provide "data" to the lessee, but ultimately MMS would provide the unit data and calculations to BLM for a decision.

It is unclear to us where MMS believes that the matters before us fit into this procedural framework. The explanation provided by the MMS Associate Director in the challenged decision for MMS's undertaking to issue the final determination of advance royalties in an order appealable to the Director, MMS, depends on a memorandum prepared August 11, 1997, by the Associate Director for Royalty Management, MMS, entitled "Standardization of Coal Advance Royalty Procedures and Responsibilities for [BLM] and [MMS]." *See* Decision at 2-3. It is *this* document which apparently specifies that it will be MMS, and not BLM, that will issue an appealable decision on advance royalty. Notably, we do not find this MMS document in the record; rather, MMS attached (as Enclosure 1) to the 2001 Order to pay for the 1995-99 period a Decision and Supporting Rationale for that order, referring to the August 11, 1997, Memorandum and the MOU. Hartzler Declaration Ex. V, 2001 Order.

Perhaps in recognition of the fact that an MMS document cannot amend an MOU signed jointly among three agencies, let alone a rulemaking promulgated by the Department in the *Federal Register*, the MMS Answer submitted by the Office of the

Solicitor does not rely on this Memorandum. Instead, it relies on the MOU. Answer at unpaginated 5-6. There, it cites the MOU, at B-19, and the fact that under a column entitled "Responsibility" next to "billing and payment of advance royalty – solids," the letter "S" for "sole" is typed under "MMS." RAG SOR Ex. 6 at B-19. The Office of the Solicitor fails to recognize that the next sentence states that MMS will provide notification of the unit value and advance royalty due to *BLM,* and it fails also to address the rule itself and whether the MOU could amend the rule. The Answer goes on to state that MMS is "an agent of BLM" without citation to law or precedent on the law of "agency" or delegation of authority vested by regulation. Answer at unpaginated 5.

BEC has raised a troubling issue regarding authority presented by somewhat conflicting rulemakings stemming from 1983. MMS's response lacks the logic or vitality suggesting that it investigated the matter or that it expected we would consider the issue seriously. For reasons stated below, we set aside the decision and remand the matter to MMS and BLM. Among the issues that should be clarified in a subsequent decision is the issue of the governing authority that establishes who is the final decisionmaker on the topic of advance royalty calculations.

We turn to the 2005 decision regarding unit value. Our consideration of the merits is, of course, complicated by the fact that the arguments presented regarding authority may lead to a conclusion that BLM is the proper decisionmaker, in which case our discussion could be an advisory opinion. If we believed that there was a clear chance that BLM would issue a different conclusion, we would consider the following analysis premature. In this appeal, however, MMS has plainly stated its conclusions, and includes commentary that it is acting as agent for BLM. If MMS followed the information-sharing goal of the MOU, it *did* provide BLM its calculations, without objection from BLM. The record includes full briefing by the appellant, not once but twice, and briefing by MMS purporting to represent BLM's views. We are not comfortable remanding without addressing the merits, only to find before us the same appeal to IBLA from the same decision, but by a different Departmental representative. No purpose would be served by forcing the parties through a jurisdictional maze to come back to the point where the arguments lie today. Accordingly, we provide the following analysis on the understanding that the decision was endorsed and considered by both MMS and BLM.

The record shows that, during the first period for which it considered advance royalty, MMS apparently believed that "unit values are computed using the same criteria as normally applied for production value purposes." Hartzler Declaration Ex. V, 2001 Order at 3. Looking to the DOI preamble to the 1982 proposed rule, which required advertence to the then-applicable royalty valuation rule for coal, 30 C.F.R. § 211.63 (1981), when determining the unit value based on previous production from the lease, MMS followed the then-applicable coal valuation rules at

30 C.F.R. § 206.250. Hartzler Declaration Ex. V, 2001 Order at 3. Doing so, it looked to the most comparable coal, which it found to be that at the Colowyo Mine. According to the 2001 Order, the Empire Mine and the nearby Colowyo Mine both produced from the "F" seam, a fact which minimized quality differences, were in the same market area, and had similar transportation issues. MMS found that spot prices from the Colowyo Mine, rather than long-term contract prices, were the most representative value of the coal at the Empire Mine.

In the 2005 decision, MMS concluded that it would apply entirely different criteria, using prices from mines in the "Green River Coal Region" as defined by a 1999 Industry Study, and that this outcome, whether or not it reflected production as it could be sold from the Empire Mine, was compelled by 43 C.F.R. § 3483.4(c)(2). To the extent its 2005 answer differs from its 2003 answer, MMS concludes that the earlier one was wrong.[10]

We disagree. Contrary to MMS's conclusion in both its 2005 decision and its Answer defending it, there is more to 43 C.F.R. § 3483.4(c) than the requirement in subsection (2) that MMS advert to prices of coal sold in the "same region." This is not the only factor, and in assuming that it is, MMS ignores the overarching purpose of the statute and the regulation. The MLA requires the unit value to be determined based on "the production royalty which would otherwise be paid . . . ." 30 U.S.C. § 207 (2000). The regulation bases unit value "on an estimate of the production royalties that would have been owed if the lessee had actually produced the amount of coal necessary . . ." 43 C.F.R. § 3483.4(c). This is the purpose of the rule, and it is consistent with the statute. Subsections (1)-(3) of the rule are methods of achieving that clearly articulated regulatory purpose, not ways to avoid it.

Thus, we cannot support MMS's suggestion that the regulations "do not allow such latitude" as ensuring some kind of representative value of the coal in question. Nor can we endorse MMS's construction of the rule as allowing it to substitute "sales within the same region when there is no production from the same lease" without regard to whether such sales would relate to the statutory standard of "the production royalty which would otherwise be paid" for production from the mine. Likewise, we fail to comprehend MMS's suggestion that "no provision or condition in the regulation . . . requires these same-region sales to be similar." It is only by ignoring the point of the unit value calculation in statute and rule that MMS can focus on sales prices from mines "in the region" that may bear no relation to "the production royalty which would otherwise be paid . . . ."

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[10] MMS has not clearly articulated *what* in its 2001 Order it now believes to be in error.

Further, while MMS claims that "there is no provision [in the rule] that would permit MMS to skip this step [of looking to prices within the region] if, as here, data is available for mines in the same region," BEC is correct to point out that the rule repeatedly reminds the agency that the unit value must be "equitable." *See* 43 C.F.R. § 3483.4(c)(2) and (3). Subsection (2) specifies that the "authorized officer" must go on to the next step of looking to prices "in the region" if prices in the prior sales period are insufficient upon which "to determine such value equitably." Subsection (3) allows a separate determination of unit value, irrespective of the "hierarchical standards," if prices from "the region" are insufficient upon which "to determine such value equitably." Thus, it is hardly a leap to conclude that the regulation anticipates equitable valuation.

Rejecting BEC's argument that the word "equitable" in subsections (c)(2) and (3) reminds the agency that the unit value must approximate the price at which the mine's production might be sold if produced, the Associate Director characterizes BEC's views as a definition of "its own making" which he "cannot accept. If [DOI] had wanted to include in the unit value determination section of the advance royalty regulations the factors that the Appellant advocates," it would have done so. In outright denying BEC's position that "unit value determined by the authorized officer should, in so far as possible, correspond to the value the Appellant's coal would have had if it had actually been produced and sold from the subject lease(s)," Decision at 6, the Associate Director failed to consider the introductory portion of the rule and the MLA, both requiring just that. The Associate Director misses that not only DOI, but Congress and DOE addressed in concept the very factors advocated by BEC in specifying that the unit value must reflect "the production royalty which would otherwise be paid." 30 U.S.C. § 207(b) (2000). Notably the EPA 2005 reinforces this concept in basing advance royalty on "comparable coal" and seeking to "capture competitive value." 30 U.S.C. § 207(b)(4)(A) (2005 Supp.).

With considerable detail and substantiation, BEC and, before it, RAG, have submitted information suggesting that the prices relied on from the five mines chosen by BLM and MMS do not and cannot represent the unit value of the production royalty which would otherwise be paid or owed if they had produced from the Empire Mine. They have contended that "captive mine" prices, such as those from the the Trapper and Seneca Mines contracts, are not representative of Empire coal. They have noted that the Black Butte and Bridger Mines, miles away in Wyoming with different markets and different coal values, also captive in part to existing power generation facilities, with long-term contracts for such use, are not representative. They have argued that spot prices would represent the market that the Empire Mine could achieve. They have pointed to the Colowyo Mine as closer physically and in quality to the Empire Mine, with similar transportation features and facilities, and similarly distant from an active market. They present data to substantiate their own prices of between $10.55 and $14.47 for the 2000-2004 period, BEC SOR at 41, based on data "sourced from FERC 423 records as reported in Platts' COALdat database," *id.,* and documented in the record. Ewart Declaration Exs. B-O. They have drawn comparisons between their own coal and the Twentymile Mine coal, and shown that the Colowyo Mine coal characteristics are more representative of Empire Mine production.

Not only has MMS not overcome the weight of this information, it has determined "as a matter of law" that it is irrelevant. So long as it can show "prices in the Green River Coal Region," MMS concludes that it is barred from looking at any other information, however probative. As shown above, MMS avoids the point of the rule. Whether or not the "Green River Coal Region" mines are properly considered in the first place, BEC has gone to considerable lengths to show that the price data from those mines does not establish "the production royalty which would otherwise be paid" for the Empire Mine. 30 U.S.C. § 207(b) (2000). We have no response to that data from MMS other than its statement that, as a matter of law, it need not consider it. We cannot affirm MMS's decision where the lessee has successfully rebutted MMS's valuation determination with facts to show that the average price used by MMS has no bearing on its coal, and where MMS has failed to justify its determination to ignore the rebuttal.

Moreover, MMS has failed to substantiate or explain its refusal to consider the Colowyo Mine prices presented by BEC. MMS's answer, again, is that it is bound by regulation to consider the prices "in the Green River Coal Region." MMS misreads 43 C.F.R. § 3483.4(c)(2). That subsection specifies that, in the absence of prior production, the unit value shall be "computed at the average unit price at which coal from other Federal leases in the same region was sold . . . ." This rule does not discuss the Green River Coal Region, the 1999 Keystone Coal Industry Manual at page 570, which apparently identified the region, or hold this lessee to prices in a "coal region" so defined.[11] While we do not discount MMS's authority to consider coal regions, as defined by the industry, as relevant to pricing, where the lessee successfully identifies another mine, allegedly in another coal region, but closer geographically to and mining from the same mine seam ("F") as the mine in question,

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[11] Notably, even if it did, the record fails to substantiate that MMS properly considered prices within the "Green River Coal Region." The 1999 Keystone Coal Industry Manual at page 570 does not appear in this record. The only identification of the Green River Coal Region appears in a map at Ewart Declaration Ex. A. That map shows a "coal supply region" beginning just to the south of the Empire Mine in Moffatt County and extending north, without apparent end, far into Wyoming. BEC correctly points out that MMS chose five mines in the region, but does not disclose how far the region goes, or what other mines might have been considered. The map shows the nearby Colowyo Mine, by contrast, at the northern edge of another (apparently, the Uintah) Coal Region.

it is incumbent upon MMS to explain why that mine's prices do not count as "average unit price[s] at which coal from other Federal leases in the same region was sold." BEC has posited a mine "in the same region." This is all that the rule requires. That the Keystone Industry Manual does not co-locate a nearby mine producing from the same seam within the same "coal region" is not an element of the rule.

We do not by our conclusion decide what unit value must be chosen. We merely hold that where the lessee has posited significant information supporting its contentions regarding "the production royalty which would otherwise be paid" as required by the MLA, and "in an amount equivalent to the production royalty that would be owed on the production" as required by rule, neither BLM nor MMS can expect to be affirmed if it ignores it, in favor of data that has been substantially undermined as nonrepresentative of the price of Empire Mine coal. In reconsidering the proper unit value of the Empire Mine coal, MMS or BLM should consider the recent enactment of the EPA 2005 and its provisions regarding advance royalty and their relevance here.[12]

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and remanded.

/s/
Lisa Hemmer
Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge

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[12] We recognize that, due to the limited number of years (10) a lessee may pay advance royalty in lieu of production, it is likely that the Empire Mine is producing now and BEC is recouping its advance royalty payments. If it ultimately recoups all prior advance payments by crediting to later production, this would ultimately moot the issues in this case. Because we have no verification that this has happened, and because the matter is capable of repetition yet evading review, we have proceeded to consider the issues presented. Moreover, it may be that the perceived inability to recoup all advance royalty payments with sufficient production from a marginal mine was the impetus for BEC's appeal in the first place.