

INTERIOR BOARD OF LAND APPEALS

Caballo Coal Company

163 IBLA 116 (September 9, 2004)

Title page added by:
ibiadecisions.com

CABALLO COAL COMPANY

IBLA 99-298, 2001-180

Decided September 9, 2004

Appeals from decisions of the Casper, Wyoming, Field Office, Bureau of Land Management, establishing the amount of advance royalty due in lieu of continued operation on a Federal logical mining unit. WYW-133398.

Affirmed.

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

When BLM has approved the payment of advance royalty in lieu of continued operation on a logical mining unit encompassing Federal coal leases, it properly finds the amount of production on which such royalty is computed for a continued operating year (COY) to be the lesser of (a) one percent of the recoverable coal reserves underlying the unit, and (b) the amount by which the total of estimated production during that COY and actual production during the two previous COYs falls short of required production during that 3-year period.

APPEARANCES: Ryan M. Tew, Esq., for appellant; Brock Wood, Esq., and Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Caballo Coal Company (Caballo) has appealed from two decisions of the Casper, Wyoming, Field Office (CFO), Bureau of Land Management, communicated via decisions of the Chief, Royalty Valuation Division (RVD), Royalty Management

Editor's note: Confidential data submitted by the lessee, as well as other numbers derived from that data, have been redacted throughout this opinion. The symbol "■■■■" refers to every redacted number, regardless of its length.

Program, Minerals Management Service (MMS). BLM's decisions consisted of the determination of the volume of coal on which Caballo owed advance royalty in lieu of continued operation on the Rawhide Mine Logical Mining Unit (LMU) (WYW-133398). As these appeals arise from a common factual background and present similar legal issues, they have been consolidated for decision. We consider each appeal separately.

The January 26, 1999, CFO Decision (IBLA 99-298)

Caballo appealed the January 26, 1999, decision of the CFO finding that it owed advance royalty on ■■■■ tons of coal in lieu of continued operation on the LMU for the continued operation year (COY) beginning January 1, 1999 (COY-15).

The Federal coal at issue here is covered by Caballo's Federal coal leases WYW-5036 and WYW-83395, which were originally issued effective December 1, 1967, to its predecessor-in-interest and later incorporated into the Rawhide Mine LMU effective December 26, 1984, per the February 19, 1986, approval of the Wyoming State Director, BLM. At the time of its creation, the LMU encompassed 5,764.83 acres in Ts. 51 and 52 N., R. 72 W., Sixth Principal Meridian, Campbell County, Wyoming, within the "Rawhide Mine," a surface coal mining operation.

In order to better understand this dispute, it will be helpful to set out the regulatory framework in which it arises in concert with our customary iteration of the facts surrounding the appeal. Under 43 CFR 3483.1(a) (1998), each LMU was required to achieved "diligent development," which was defined as "the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period." 43 CFR 3480.0-5(a)(12) (1998). The term "commercial quantities" was defined in turn as "1 percent of the * * * LMU recoverable coal reserves." 43 CFR 3480.-5(a)(12) (1998). It is undisputed that diligent development was achieved on the Caballo's LMU by mining one percent of the recoverable reserves "many years" before the BLM decision presently under review (see Statement of Reasons (SOR) at 2), apparently since 1984.

Once diligent development was achieved, 43 CFR 3483.1(a)(2) (1998) required that "the operator shall maintain continued operation on the * * * LMU for every continued operation year thereafter." "Continued operation" was defined as

^{1/} COYs are numbered consecutively from the establishment of continued operation in 1984. Three COYs are at issue herein, COY-13, which commenced on Jan. 1, 1997, COY-14, which commenced on Jan. 1, 1998, and COY-15, which (as noted) commenced on Jan. 1, 1999.

the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years following the achievement of diligent development and an average amount of not less than commercial quantities of recoverable coal reserves per continued operation year thereafter, computed on a 3-year basis consisting of the continued operation year in question and the 2 preceding continued operation years.

43 CFR 3480.-5(a)(12) (1998). As noted above, diligent development had been achieved more than 2 years prior to BLM's decision. Therefore, Caballo was required by the terms of 43 CFR 3480.-5(a)(12) and 3483.1(a)(2) (1998) to maintain "continued operation" by producing "an average amount of not less than commercial quantities of recoverable coal reserves per continued operation year thereafter, computed on a 3-year basis consisting of the continued operation year in question and the 2 preceding continued operation years." The regulations provided for termination or cancellation of a Federal coal lease or LMU if continued operation was not maintained. 43 CFR 3483.3(c) (1998).

On January 13, 1999, Caballo, anticipating that it would not be able to meet minimum production requirements for the COY beginning January 1, 1999, filed a request with BLM for authorization to pay "advance royalty" in lieu of paying royalty on continued operation. The regulations allowed for an operator to protect its LMU from termination by paying "advance royalty" in lieu of maintaining continued operation. Thus, 43 CFR 3483.3(a)(2) (1998) provided that "[t]he authorized officer may suspend the requirement for continued operation upon the payment of advance royalty in accordance with [43 CFR 3481.0-6] for any operation."

The regulations in effect in January 1999 were deficient in that there was no such provision as 43 CFR "3481.0-6." However, the provisions governing the payment of advance royalty were instead set out at 43 CFR 3473.3-2(c) (1998), which provided that "[t]he authorized officer shall have the discretion, upon the request of the lessee, to authorize the payment of an advance royalty in lieu of continued operation for any particular year," referring to 43 CFR 3485.2 (1998). That regulation, at 43 CFR 3485.2(a) (1998), contains yet another reference, to 43 CFR 3483.4 (1998), which provides as follows concerning payment of advance royalty:

(a) Advance royalty may only be accepted in lieu of continued operation upon application to and approval by the authorized officer.

(b) However, any request by an operator/lessee for suspension of the continued operation requirement and payment of advance

royalty in lieu thereof shall be made no later than 30 days after the beginning of the continued operation year. If an operator/lessee requests authorization to pay advance royalty in lieu of continued operation later than 30 days after the beginning of any continued operation year, the authorized officer may condition acceptance of advance royalty on the payment of a late payment charge on the amount of the advance royalty due. * * *

43 CFR 3483.4 (1998).

On January 15, 1999, BLM issued its decision authorizing Caballo to pay advance royalty in lieu of continued operation. BLM held that, pursuant to 43 CFR 3483.4(c) (1998), “advance royalty accepted in lieu of continued operation shall be paid in an amount equivalent to the production royalty that would be owed on the production of one percent of the recoverable coal reserves.” (BLM Decision dated Jan. 15, 1999, at 1.) The regulation cited by BLM specified how advance royalty was to be calculated in January 1999:

(c) For advance royalty purposes, the value of the Federal coal will be calculated in accordance with [43 CFR 3485.2.] 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 or the Federal LMU recoverable coal reserves. The advance royalty rate for an LMU shall be deemed to be 8 percent where the Federal LMU recoverable coal reserves contained in the LMU would be recovered by only underground mining operations and 12 ½ percent where the Federal LMU recoverable coal reserves contained in the LMU would be recovered only by other mining operations. For LMU’s that contain Federal LMU recoverable coal reserves that would be recovered by a combination of underground and other mining methods, the advance royalty rate shall be deemed to be 12 ½ percent. The unit value of the recoverable coal reserves for determining the advance royalty payment for a Federal lease or LMU shall be:

- (1) The unit value for production royalty purposes of coal produced and sold under the Federal coal lease or LMU 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 or LMU 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.

Id. (emphasis supplied).

By memorandum dated January 26, 1999, BLM provided to MMS its determination of the appropriate tonnage to be used to compute the advance royalty, referred to as BLM's "determination of tonnage basis for advance royalty." That determination is the principal matter in dispute in this appeal. BLM's memorandum applied a double test to determine whether Caballo would achieve "continued operations" for the COY starting on January 1, 1999, based on its estimated production for that COY. The first, called the 1-year test, compared the amount of estimated production to one percent of the recoverable reserves. Since the amount of estimated production (■■■■ tons) was far less than 1 percent of recoverable reserves (found by BLM to be ■■■■ tons), BLM concluded that Caballo had "failed" the 1-year test. BLM also applied what it termed the 3-year test.

In the 3-year test, BLM summed the estimated amount of coal to be produced in the COY beginning on January 1, 1999, with the amount of coal actually produced in the two preceding COYs. It also summed the "continued operation requirement" amount for each of those three COYs, *i.e.*, one percent of recoverable coal reserves for the LMU per COY. It then compared two amounts, finding that the sum of actual/estimated production during the 3-year period (■■■■ tons) was less than the sum of continued-operation-requirement amounts (■■■■ tons) for the same period. Again, based on that finding, BLM concluded that Caballo had not

established that it would meet its continued operations obligation for the COY beginning on January 1, 1999. ^{2/}

As BLM had (prior to this January 26, 1999, memorandum) already determined that Caballo was not maintaining continued operation (and was, therefore, authorized to pay advance royalty), the purpose of the January 26, 1999, memorandum was to determine the amount of production on which the advance royalty would be assessed. Thus, CFO concluded that the “tonnage basis for the advance royalty calculation” was “the lesser of the two shortages” evinced by the 1-year and 3-year tests, ^{3/} and that, for the COY beginning on January 1, 1999, “this is ■■■■ tons.”

BLM communicated this finding to MMS, which, by decision dated March 22, 1999, notified Caballo that it owed advance royalty on the amount of production determined by CFO. It explained that advance royalty was determined using the amount of the “3 Year Test Shortfall,” set at ■■■■ tons. ^{4/} MMS, based on BLM’s finding, ordered Caballo to pay ■■■■ in advance royalty. Caballo appealed

^{2/} BLM actually simply stated that the 1-year and 3-year tests were “failed.” However, it explained that the consequence of failure was that advance royalty was due. Since advance royalty is only due under the regulations if the continued operations obligation is not met, it follows that BLM equated failure on the test to mean that the continued operations obligation had not been met.

^{3/} As discussed further below, BLM thus effectively ruled that the maximum advance royalty that could be collected was the difference between estimated production in the current COY and 1 percent of the recoverable reserves, the amount disclosed by its 1-year test

^{4/} The shortfall of ■■■■ tons (as determined by BLM) was multiplied by the unit value of each ton of coal of \$■■■■/ton (as determined by MMS). This unit value was said to be the “average unit value for arm’s-length coal sales from the LMU reported for the sales months January through December 1998.” (Decision at 2.) The Federal royalty rate of 12½ percent for coal produced from surface mining operations, was applied.

CFO's finding to this Board. ^{5/} Its appeal was docketed as Caballo Coal Company, IBLA 99-298.

[1] BLM has explained the rationale for its tonnage determination as follows:

It must be remembered that an advance royalty is substituted for actual production. Without an advance royalty, actual production each year, of a minimum amount, is needed to satisfy the "continued operation" requirement. 43 C.F.R. § 3483.1(a)(2).

As we can see from [43 CFR 3480.0-5(a)(8)], the minimum amount of production needed to satisfy the "continued operation" requirement depends on how much time has elapsed since diligent development. * * * For all subsequent continued operation years [after the first two following diligent development], the operator must produce, on average, 1 percent of recoverable [coal] reserves per year. 43 C.F.R. § 3480.0-5(a)(8).

Whether the lessee has produced an average of 1 percent of recoverable [coal] reserves per year, however, is determined by looking at a rolling three[-]year average of production. Per the plain language of [43 CFR 3480.0-5(a)(8)], the BLM must average the current continued operation year's production (or estimated production, in this case) with the production from the previous two years. If the actual

^{5/} In conjunction with its appeal, appellant paid \$■■■■■, the amount it believes is the proper advance royalty, and submitted a bond for the remainder deemed to be owed by MMS, plus an amount considered by MMS sufficient to cover the expected annual interest payable on the remainder. See SOR Ex. D.

Caballo appealed only BLM's calculation of the proper tonnage for advance royalty computation purposes, which was set forth in the Tonnage Determination attached to the BLM Field Manager's January 26, 1999, memorandum to MMS' Solid Minerals Valuation and Reporting Branch. Although the Chief of MMS' RVD provided notification to Caballo of BLM's calculation in her March 1999 decision, Caballo's appeal was, we hold, properly taken from BLM's Jan. 26, 1999, memorandum pursuant to 43 CFR 4.410(a). We also consider appellant's appeal timely, since there is no evidence that appellant had actual notice of BLM's calculation prior to receipt of the March 1999 MMS decision. Compare with Gifford H. Allen, 131 IBLA 195, 204 (1994).

Anticipating this situation, the Mar. 22, 1999, decision noted Caballo's right to appeal BLM's determination of quantity on which advance royalty lies with the Board of Land Appeals. See Decision at 3.

production falls below 3 percent of recoverable [coal] reserves for the three[-]year period (i.e., an average of 1 percent of recoverable [coal] reserves per year), an advance royalty is required to prevent the lease becoming subject to cancellation for failure to meet the “continued operation” requirement. The advance royalty will be paid on the difference between what the lessee should have produced, 3 percent over three years (the equivalent of 1 percent over 1 year), and what the lessee actually produced.

(Supplement to BLM’s Answer at 3-4; see BLM’s Answer at 9-10.) What BLM did in calculating the amount of advance royalty was to determine, over a 3-year period, how much Caballo’s actual and estimated production had fallen short of the production amount imposed by its obligation to maintain continued operation over the same period.

How to calculate the amount of royalty is governed by 43 CFR 3483.4(c). That regulation plainly provides that advance royalty consists of “an amount equivalent to the production royalty that would be owed on 1 percent of the recoverable coal reserves” underlying the LMU. KMF Mineral Resources, Inc., 151 IBLA 35, 39 (1999), and cases cited. At first blush, it is not apparent that the amount Caballo had to produce to establish continued operation under 43 CFR 3483.1(a) is relevant to the question of how to determine the amount of production on which royalty was owed under 43 CFR 3483.4(c). Nor is it immediately apparent how BLM could find that the amount of production on which advance royalty was owed was anything other than “1 percent of the recoverable coal reserves,” in view of the clarity of 43 CFR 3483.4(c).

We note that, if (as authorized by 43 CFR 3483.4(c)) BLM had merely assessed Caballo advance royalty on “an amount equivalent to the production royalty that would be owed on 1 percent of the recoverable coal reserves,” Caballo would owe much more than it does under the methodology BLM actually adopted.^{6/} However, the wisdom of BLM’s interpretation of 43 CFR 3483.4(c) to incorporate a 3-year lookback provision is evident from a hypothetical case not dissimilar to Caballo’s. Thus, where (as here) more than 2 years of continued operation have been established, and an LMU operator anticipates that it will mine no coal in a COY, it may nevertheless be in “continued operation” under 43 CFR 3480.0-5(a)(8) if it has mined enough coal in the previous 2 years that the average amount over the 3-year

^{6/} Advance royalty on 1 percent of recoverable reserves for COY-15 (■■■■■ tons) would, using the Department’s unit value of \$■■■■■ per ton and the 12½ percent royalty rate, would have totaled some \$■■■■■, as compared with the \$■■■■■ actually billed using BLM’s methodology.

period (the amount actually mined in the previous 2 years and the amount projected to be mined in the present COY) is not less than commercial quantities (1 percent) of recoverable coal reserves per COY. If it is in continued operation in this manner, it will owe no advance royalty despite the fact that it is producing nothing in the present COY. Since it has no production for the COY on which regular royalty is due, it will owe no royalty of any kind during that COY.

If, hypothetically, the operator had mined less than enough coal (even by 1 ton) in the previous 2 years, so that the average amount over the 3-year period is less than commercial quantities (1 percent) of recoverable coal reserves per COY, the operator would not be in “continued operation” and would therefore have to pay advance royalties in order to preserve its LMU from termination. It would be patently unfair to charge the operator royalty on a full 1 percent of the recoverable reserves (an amount that can easily total several million dollars) where it could have avoided any liability by increasing its production by a tiny amount. It would be inequitable to have the advance royalty “spike” in this manner.

CFO’s methodology also places an upper limit on the amount of advance royalty that can be collected in a COY. Thus, the maximum amount of production that royalty can be collected on in any COY equals the difference between projected production and 1 percent. In this manner, an operator is protected from being repeatedly held liable for low production years. The approach is consistent with 43 CFR 3483.4(c) (1998), which is properly read as establishing advance royalty based on a maximum of 1 percent of recoverable reserves.

CFO’s methodology avoids any inequity. It credits the operator with any overproduction from the two COYs preceding the COY on which advance royalty is being collected, while, at the same time, limiting the operator’s exposure for any COY to the 1-percent standard imposed by the regulations. While CFO could have interpreted its regulations to require Caballo (or any other LMU operator found not to be in continued operation in any COY) to pay royalty on 1 percent of the volume of recoverable reserves in the LMU, regardless of any overpayments in recent years, we deem it appropriate to affirm the methodology BLM adopted here, in view of the fairness it brings to collection of advance royalty.

Moreover, the CFO did not pick the methodology it used here out of the air. The Department provided notice thereof in August 1985 in the Federal Register as part of its “Final Guidelines, ” which were adopted, among other things, to monitor operator compliance on an approved LMU. 50 FR 35145, 35154-56 (Aug. 29, 1985). Our review indicates that CFO followed those guidelines exactly in making its determination. See e.g. 50 FR 35154 (establishing both the 1-year and 3-year tests for determining continued operation and the rule that “advance royalty is paid on

1 percent of the prorated Federal LMU recoverable coal reserves for the [COY] in question *or* 3 percent of the prorated Federal LMU recoverable reserves for the [COY] plus 2 preceding years, *whichever is less*” (emphasis original).)

Caballo complains that BLM’s methodology fails to take into account the word “average” in 43 CFR 3480.0-5(a)(8). It disputes BLM’s use of what it terms a “three-year aggregate basis” for determining the proper tonnage to use for advance royalty computation purposes. (SOR at 7.) It proffers its own methodology, set forth in its January 12, 1999, letter to BLM at Attachment I, resulting in a sharply smaller production volume.

We note that Caballo’s methodology, when a minor change is made to match its calculation of the LMU recoverable reserve base to BLM’s, ^{7/} results in a production deficit that is exactly one-third that used by BLM as the basis for calculating advance royalty. ^{8/} This is not a coincidence. What Caballo is actually calculating is the production deficit per year over the last 3 COYs. Its methodology thus grossly understates the collective deficit over the past 3 COYs, using only one-third of the total deficit during that period. BLM’s methodology credits all production in 3 previous years, when viewed as a whole. It is only fair to compare that production against the total of the continued operation requirement for that period.

Moreover, Caballo’s methodology is at odds with that adopted in BLM’s 1985 guidelines, which provide:

If the LMU is in the 3-year rolling average for continuing operation, a determination must be made as to whether the LMU produced 1 percent in the [COY] *or* 3 percent during the [COY] in question plus the 2 preceding [COYs].

^{7/} The inequality in Caballo’s and BLM’s respective determination of the amount of recoverable reserves is discussed below.

^{8/} To be consistent with BLM’s calculation, Caballo’s recoverable reserve base, which is the average amount of recoverable reserves over the three-year period, would be ■■■■ tons divided by 3 years, or ■■■■ tons per year, instead of the ■■■■ tons per year Caballo adopted. See Letter dated Jan. 12, 1999, from Caballo to BLM, Attachment I.) Subtracting Caballo’s “three-year rolling average production” (■■■■ tons divided by 3 years, or ■■■■ tons per year) from the corrected recoverable reserve base yields ■■■■ tons per year, which is exactly one-third of the tonnage that BLM used to calculate advance royalty due.

To determine the amount of advance royalty due for an LMU, compare the *total tons* that should have been produced to maintain continued operation for the year in question with the *total tons* that should have been produced to maintain continued operation for the 3-year period consisting of the [COY] in question plus the 2 preceding [COYs]. The LMU advance royalty due will be assessed on the lesser of the two amounts.

* * * * *

If the 3-year rolling average results in the lesser *total tons*, the [volume on which advance royalty is charged] is calculated as follows:

* * * 3 Continued Operation Years' *Production Requirement* (i.e., 3 percent of *total recoverable coal reserves*, Federal plus non-Federal, in LMU) [minus] *Total LMU Production Achieved*, Federal plus non-Federal [d]uring the [COY] *plus* the 2 Preceding [COYs].

50 FR 35154-55 (Aug. 29, 1985) (emphasis original). The methodology that BLM used follows those guidelines by using 3-year totals. ^{2/} The guidelines do not sanction the use of average amounts in calculating advance royalty in the manner advanced by Caballo.

Accordingly, we affirm BLM's interpretation of 43 CFR 3483.4(c) (1998), wherein, in lieu of assessing advance royalty on the production of 1 percent of the LMU recoverable reserves in every case, it calculates the amount of production on a 3-year-total-ton basis. We reject Caballo's challenge to that interpretation. ^{10/}

^{2/} This conclusion is unquestionable in view of the examples set out in the 1985 guidelines. See 50 FR 35155 (Aug. 29, 1985.)

^{10/} The question of the amount of recoverable reserves against which actual and estimated production is to be measured is indirectly presented, as Caballo and BLM used different amounts in their respective calculations. The term "recoverable coal reserves" meant "the minable reserve base excluding all coal that will be left, such as in pillars, fenders, and property barriers." 43 CFR 3480.0-5(a)(32) (1998). The recoverable reserves thus consist of the amount of recoverable coal (in tons) remaining in LMU. Although the amount of recoverable reserves does not decrease due to production during coal removal operations from the LMU, the number of tons be adjusted downwardly to reflect new determinations of the amount of coal that cannot be mined from the LMU or LMU modification. See Final Guidelines, 50 FR (continued...)

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 26, 1999, memorandum of the CFO is affirmed.

The February 18, 2000, CFO Decision Affecting COY-16 (IBLA 2001-180)

This appeal concerns CFO's determination of the amount of production on which advance royalty is to be calculated for COY-16, beginning on January 1, 2000.

^{10/} (...continued)

35157 (Aug. 29, 1985).

For both COY-13 (beginning on January 1, 1997) and COY-14 (beginning on January 1, 1998), BLM used the amount of recoverable reserves (■■■■■ tons) that it had most recently determined prior to the commencements of those COYs, that is, as of November 6, 1996. (Memorandum from CFO to Powder River Coal dated June 12, 1998, Attachment A.) It appears that BLM downwardly adjusted the amount of recoverable reserves (to ■■■■■ tons) in June 1998 prior to the start of COY-15 on January 1, 1999. (Memorandum from CFO to Powder River Coal dated June 12, 1998, Attachment B.) BLM did not pro-rate the amount of recoverable reserves for COY-14, but applied the new, lower figure at the start of the next COY (COY-15).

Caballo instead applied the lower figure (■■■■■ tons) to all three COYs (Letter dated Jan. 12, 1999, from Caballo to BLM, Attachment I), thus applying the adjustment retroactively to a period well before its effective date.

The Final Guidelines provided that, "[i]f the LMU recoverable reserves are adjusted, based on new information or LMU modification, prior to the LMU achieving diligent development, the 1 percent LMU commercial quantities must also be adjusted, effective on the date of the adjustment or LMU modification." 50 FR 35157. Although addressing LMUs that have not achieved diligent development, the guidelines thus set out a policy of applying an adjustment to a recoverable reserve determination effective on the date of the adjustment. Neither BLM nor Caballo's methodology follows that policy.

As the parties did not argue the merits of the respective methodologies on appeal, we decline to resolve this matter.

We also note that the Department and Caballo used different unit values in their respective royalty calculation, the Department using \$■■■■■ per ton (Decision at 1), and Caballo using \$■■■■■ per ton. (Letter dated Jan. 12, 1999, from Caballo to BLM, Attachment I.) MMS determined the unit value determination. Its decision was subject to appeal to the Director, MMS, under 30 CFR Part 290. We do not know whether such appeal was prosecuted. The issue is not justiciable before this Board at this time.

On February 11, 2000, Caballo filed a request with the Wyoming State Office (WSO), BLM, for authorization to pay advance royalty on the Rawhide Mine LMU for COY-16, beginning on January 1, 2000. That request was accompanied by an estimated advance royalty calculation for 2000, as Attachment I. The estimate reported the “recoverable reserve base” for COY-16 as ■■■■ tons and the “required annual tons” as ■■■■ tons. The estimate cited 1998 (COY-14) production of ■■■■ tons, 1999 (COY-15) production of ■■■■ tons, and projected 2000 (COY-16) production of ■■■■ tons. It also cited “1999 [(COY-15)] advance royalty tons” of ■■■■ tons.^{11/} It added all four tonnages together and divided the total by 3 years, arriving at an asserted “3 Year Rolling Average Production” of ■■■■ tons per year. It subtracted that amount from ■■■■ tons per year to arrive at its estimated 2000 (COY-16) “Production Deficit” of ■■■■ tons per year. It valued the production using a “March, 1999 average sales price” of \$■■■■ per ton, and, using the 12½ percent royalty rate, arrived at an “Estimated 2000 Advance Royalty Due” of \$■■■■ .

On February 18, 2000, the CFO determined that Caballo was qualified to pay advance royalty. It also calculated the amount of coal on which advance royalty was to be calculated and even estimated the total amount of advance royalty to charge Caballo for COY-16. Following the same methodology as that used for COY-15, CFO applied the 1-year test, in which it noted simply that the estimated production for COY-16 was zero tons, which was less than ■■■■ tons it deemed to be required, so that Caballo had “failed” the 1-year test. It then applied the same 3-year test, in which it noted that ■■■■ tons had been produced in COY-14, that ■■■■ tons had been produced in COY-15, and that ■■■■ tons were projected to be produced in COY-16, for a total of ■■■■ tons.^{12/} It determined that the ■■■■ tons were “required” in COY-14, and that ■■■■ tons were “required” in both COY-15 and COY-16, for a total of ■■■■ tons “required” for the 3-year period. It found that the shortage using the 3-year test was ■■■■ tons.^{13/} The shortage in 3-year production was thus greater than 1 percent of the recoverable reserves. In determining the amount of coal on which advance royalty was to be calculated, the CFO adopted the smaller amount, that is, 1 percent of recoverable reserves, or

^{11/} That amount was the estimate that Caballo had used to calculate its advance royalty for CY-15. BLM rejected that estimate, and we have affirmed BLM’s decision.

^{12/} The calculation contains an addition error, and the total production was misstated as ■■■■ tons. This error is inconsequential, as the total production was still well below that required for the 3-year period, as shown below.

^{13/} As a result of the addition error noted above, BLM mis-reported the shortage as ■■■■ tons.

■■■■ tons. ^{14/} The CFO communicated its finding to the Wyoming State Office on February 18, 2000.

By decision dated March 6, 2000, the WSO advised Caballo that its request for authorization to pay advance royalty in lieu of continued operation for COY-16 had been granted. Although the WSO noted that Caballo had not filed its application timely, it ruled that no late payment charges would be assessed. The WSO advised that MMS would convey the unit value of such production in subsequent correspondence.

On January 30, 2001, MMS RVD notified Powder River Coal Co., *inter alia*, of BLM's determination that advance royalty was due on ■■■■ tons of coal for COY-16. MMS adopted a unit value of \$■■■■ (as proffered by Caballo). Using the 12½ percent royalty rate, MMS calculated the advance royalty due for COY-16 at \$■■■■. Caballo appealed BLM's determination to this Board, which docketed its appeal as Caballo Coal Company, IBLA 2001-180.

Caballo argued that this dispute centers on the same legal issue presented in Caballo Coal Company, IBLA 99-298. We agree. We have found no basis to adopt Caballo's methodology for calculating the quantity of coal on which advance royalty is based using yearly averages, and such practice is contrary to the 1985 Departmental guidelines, BLM's application of which we have affirmed herein. ^{15/} We likewise affirm CFO's determination of the volume of coal on which advance royalty was to be calculated for COY-16.

^{14/} CFO also purported to value the production at \$■■■■ per ton, when that function was properly that of MMS. MMS ultimately adopted a higher figure.

^{15/} Caballo also treated tonnages on which advance royalty had been paid in the 2 COYs preceding the COY in question as equivalent to actual production during those COYs. Although we find no support for that practice in the regulations or Guidelines, it is unnecessary to consider the matter, as, even assuming *arguendo* that they were properly included, Caballo still would have owed advance royalty on 1 percent of recoverable reserves in the present dispute, as the 3-year test would have yielded a greater amount even using Caballo's figures.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the CFO's February 18, 2000, decision is affirmed.

David L. Hughes
Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge