

INTERIOR BOARD OF LAND APPEALS

California State Controller

166 IBLA 5 (May 18, 2005)

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CALIFORNIA STATE CONTROLLER

IBLA 2004-202

Decided May 18, 2005

Appeal by the California State Controller from a decision of the Associate Director for Policy and Management Improvement, Minerals Management Service, granting an appeal by Aera Energy, LLC, from a Minerals Management Service order, requiring payment of additional royalties on crude oil produced from Federal leases in California.

Appeal dismissed; motions to enlarge time, to strike, and to close the record denied as moot.

1. Federal Oil and Gas Royalty Management Act of 1982:  
Royalties–Mineral Leasing Act: Royalties–Oil and Gas Leases:  
Royalties: Generally–Federal Oil and Gas Royalty Simplification  
and Fairness Act: Rule of Decision

Section 115(h), added to the Federal Oil and Gas Royalty Management Act of 1982 by section 4(a) of the Federal Oil and Gas Royalty Simplification and Fairness Act, Pub. L. No. 104-185, 110 Stat. 1700, 1709-10 (1996), codified at 30 U.S.C. § 1724(h) (2000), requires the Secretary of the Interior to issue a final decision on appeals from Minerals Management Service or delegated state orders to pay royalty within 33 months from the date such proceeding was commenced, barring which the Act imposes a statutory rule of decision, resolving the appeal finally for the Department, in a manner favorable to either the appellant or the Secretary, depending on the monetary amount at issue.

2. Administrative Appeals–Appeals: Jurisdiction–Board of Land Appeals–Federal Oil and Gas Royalty Management Act of 1982:  
Royalties–Mineral Leasing Act: Royalties–Oil and Gas Leases:  
Royalties: Generally–Rules of Practice: Appeals: Jurisdiction

The Board properly dismisses an appeal by a state from a decision of the Director, Minerals Management Service, granting an appeal by a

lessee or its designee from an MMS order to pay royalty on production from a Federal onshore oil and gas lease, because the regulations at 43 CFR Part 4, Subpart J, which implement the time limits and rule of decision of 30 U.S.C. § 1724(h) (2000), do not provide any opportunity for states to appeal from a decision of the Director, MMS, rescinding or modifying an MMS or delegated state order under 30 CFR 290.108, and because 43 CFR 4.906(b)(3) specifically provides that, in the absence of an appeal by the lessee or its designee, the MMS Director's decision constitutes the final decision of the Department, thus depriving the Board of jurisdiction to entertain the appeal.

APPEARANCES: Lee Ellen Helfrich, Esq., Washington, D.C., for appellant; Michael E. Coney, Esq., New Orleans, Louisiana, for Aera Energy, LLC; Geoffrey Heath, Esq., Sarah Inderbitzin, Esq., and Triscilla Taylor, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

#### OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Steve Westly, acting in his official capacity as the Controller of the State of California (State Controller), has appealed from an August 5, 2003, decision of the Associate Director for Policy and Management Improvement, Minerals Management Service (MMS) (Director's decision), overturning an August 20, 2002, order of the Acting Manager, Onshore Compliance and Asset Management, Minerals Revenue Management (MRM), MMS.<sup>1/</sup> The 2002 order required Aera Energy, LLC (Aera)<sup>2/</sup> to pay additional royalties, in the amount of \$43,736, in connection with the

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<sup>1/</sup> The State Controller has notified this Board that, in addition to filing the present administrative appeal, the State filed suit in Federal district court (Westly v. Norton, No. 1:04CV00199 (D.D.C. Feb. 10, 2004)) asking the court to overturn the Associate Director's August 2003 decision and enjoin MMS' application of the Director's Oct. 15, 2002, policy directive. (Statement of Reasons (SOR) for Appeal, dated Feb. 23, 2004, at 3-5.) The State Controller asserted that "[t]he issues raised in the State Controller's lawsuit overlap those raised in this Statement of Reasons." Id. at 4. The pendency of that lawsuit does not prevent us from adjudicating the present appeal.

<sup>2/</sup> Shell Western E&P, Inc. (Shell) was the lessee and royalty payor during the period of production which is at issue here. CalResources, LLC, a Shell affiliate, was the operator during that period. CalResources, LLC and Mobil Oil Corp. merged on June 1, 1997, and formed Aera. (MMS Order, dated Aug. 20, 2002, at 1.)

production of crude oil from Federal Lease No. 006-017329-0, during the period from November 1, 1992, through May 31, 1994.

The underpayment of royalty arose in connection with a dispute over qualification for the stripper oil property royalty rate (stripper well royalty rate) reduction. In 1992, Shell applied for a stripper well royalty rate reduction, under 40 CFR Part 3100, seeking relief from the 12.5 percent rate prescribed by the lease. Shell paid royalties on production from November 1, 1992, through January 31, 1994, at a royalty rate of 3.7 percent - Shell's calculation of the appropriate stripper well royalty rate. On January 28, 1994, MMS notified Shell that the proper stripper well royalty rate was 11.7 percent and advised Shell that it was responsible for the additional payments, plus late and underpayment charges. From February 1, 1994, until the lease ceased production in May 1994, Shell used the 11.7 percent royalty rate but did not pay the additional royalties and charges for the earlier period.

Beginning in January 2001, the State of California conducted an audit of the lease, under a delegation agreement authorized by section 205 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1735 (2000). The State used the 12.5 percent rate prescribed in the lease because it determined that Shell had erroneously included water-only producing days in its production reports for the initial qualifying period and that eliminating these days resulted in Shell exceeding the 15-barrel limit required for a stripper well royalty rate reduction. Applying the 12.5 percent rate, the State determined that Shell had underpaid royalties by \$43,736, for the period of time from November 1, 1992, through May 31, 1994. On August 20, 2002, MRM issued Aera the order to pay \$43,736, in accordance with the State's calculation. (Director's decision at 1-2; MMS Order, dated August 20, 2002, at 2.)

The Director's decision found the order inconsistent with the Director's recent policy against pursuing underpaid royalties for periods more than seven years before the date MMS issues an order to pay.<sup>3/</sup> In addition, it found no "compelling circumstances" for MMS to pursue royalties owed prior to the seven-year period, since MMS was on notice, at least beginning January 28, 1994, that Shell had paid royalty at a rate lower than the approved stripper well royalty rate and the original lease royalty rate and yet delayed "over eight years in issuing a demand." (Director's decision at 6.) The Director's decision reaffirmed the Department's position "set forth

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<sup>3/</sup> The MMS Director issued the policy, by memorandum, dated Oct. 8, 2002. (Director's decision at 3.) The order, issued on Aug. 20, 2002, was for payment of royalties owed from Nov. 1992 through May 1994 - a period more than seven years before the order.

in a long line of cases holding that, because appeals to the MMS Directorate and IBLA are administrative appeals, the statutory bar [28 U.S.C. § 2415(a) (2000)] is inapplicable.”<sup>4/</sup> J-W Operating Co., Inc., 159 IBLA 1, 15 (2003) (citations omitted). The Director’s decision, issued August 5, 2003, concluded with a recitation of the appeal requirements: any notice of appeal must be filed with the Director’s Office within 30 days of service of the decision and must be served on the Office of the Solicitor, pursuant to 43 CFR 4.411 and 4.413 (2002). Not surprisingly, Aera did not appeal from the Director’s decision.

However, on January 30, 2004, the State Controller filed a notice of appeal with this Board and, on February 23, 2004, an SOR,<sup>5/</sup> seeking to recover a 50-percent share in the underpaid royalties under section 35 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 191 (2000).<sup>6/</sup> (SOR at 4.) MMS and Aera

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<sup>4/</sup> The Director’s decision described the Fifth Circuit’s holding in Phillips Petroleum Co. v. Johnson, No. 93-1377 (5<sup>th</sup> Cir. Sept. 7, 1994), notice of unpublished decision at 36 F.3d 89, cert. denied, 514 U.S. 1092 (1995) (an administrative order is not an “action” within the meaning of the general statute of limitations at 28 U.S.C. § 2415(a) and claims for unpaid royalties are not claims for “money damages” within the meaning of that same section). The decision also discussed the Tenth Circuit’s en banc decision in Oxy USA, Inc. v. Babbitt, 268 F.3d 1007 (10<sup>th</sup> Cir. 2001) (expressly rejecting the 5<sup>th</sup> Cir.’s holding in Phillips Petroleum and ruling that section 2415(a) applies to administrative orders to pay royalties not covered by the Federal Oil and Gas Royalty Simplification and Fairness Act (RSFA), Pub. L. No. 104-185, 110 Stat. 1700, 1705 (1996), which enacted a seven-year statute of repose (codified at 30 U.S.C. § 1724(b) (2000)) applicable to royalties on production from Federal oil and gas leases, due after Sept. 1, 1996). Reaffirming the Department’s pre-Oxy position, the Director’s decision stated that “[t]he statute of limitations in section 2415(a) does not bar this administrative adjudication,” and went on to note that “the Oxy decision did not nullify the government’s right to pursue any avenue that may be available,” such as collection by administrative offset. (Director’s decision at 4.)

<sup>5/</sup> The State Controller alleges that he did not obtain a copy of the Director’s August 2003 decision until Jan. 21, 2004. (SOR at 2.)

<sup>6/</sup> Section 35 of the Mineral Leasing Act, as amended, provides, in relevant part: “All money received from \* \* \* royalties including interest charges collected under the Federal Oil and Gas Royalty Management Act of 1982 \* \* \* shall be paid into the Treasury of the United States; and \* \* \* 50 per centum thereof shall be paid by the Secretary of the Treasury to the State other than Alaska within the boundaries of  
(continued...) ”

both responded and, together with the State Controller, have contributed to an impressive list of pleadings.

On February 26, 2004, Aera filed an answer to the State Controller's SOR, urging affirmance of the Director's decision, to the extent it applied the Director's October 2002 policy. In the alternative, Aera moved for dismissal of the original MRM order to pay additional royalties and of the State's claim on appeal, on grounds that the MRM order was barred by 28 U.S.C. § 2415(a); <sup>7/</sup> the State Controller failed to file a timely appeal of the Director's decision; and the State lacks standing to appeal. On April 19, 2004, MMS filed a motion to dismiss the State Controller's appeal for lack of administrative standing and requested a 30-day extension of time to file an answer to the SOR. <sup>8/</sup> The State Controller responded, on April 21, 2004,

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

which the leased lands or deposits are or were located[.]” 30 U.S.C. § 191(a) (2000).

<sup>7/</sup> Aera contends that, were we to entertain the merits of the State Controller's appeal from the Director's decision, we must find that the Director “erred” in holding that the statute of limitations at 28 U.S.C. § 2415(a) (2000) did not bar an administrative order to pay royalties. (Aera's Answer at 4.) In light of this, Aera argues, the Director's decision, applying the recent policy directive to the current case, did not go far enough, since, in Aera's view, MMS was barred by the statute of limitations and, therefore, had no authority to collect additional royalties. *Id.* at 6. The State Controller, by contrast, argues that the Director's decision was correct, insofar as it found that the general Federal statute of limitations did not bar the United States from collecting additional royalties through administrative means.

Since Aera, which prevailed in its appeal of the MRM order, did not file an appeal of the Director's decision within the regulatory period for appeal, we consider Aera's challenge to any aspect of that Decision, through the vehicle of a request for alternative relief, an untimely appeal over which this Board has no jurisdiction. In any event, since, as discussed *infra*, we cannot reach the merits of the Director's decision, we do not address the issue of whether 28 U.S.C. § 2415(a) (2000) provides an alternative basis for precluding any recovery of additional royalties from Aera.

<sup>8/</sup> MMS argued that the State Controller is neither a “party to [the] case” nor “adversely affected” by the Director's decision, within the meaning of the regulations and, therefore, lacks administrative standing to pursue the appeal. The rules, at 30 CFR 290.108, which govern appeals to IBLA from decisions issued by the Director with respect to MMS orders to pay royalty, provide, in relevant part: “Any party to a (continued...) ”

with an opposition to the motion to dismiss. One month later, Aera filed a supplemental answer supporting MMS' motion to dismiss and, that same day, the State Controller moved to strike it. MMS opposed the motion to strike Aera's supplemental answer and filed a second request for extension of time, which the State Controller opposed. MMS then filed a reply in support of its motion to dismiss the appeal. The State Controller countered, on July 8, 2004, with a surreply and a motion to close the record and expedite resolution of the appeal.

This appeal presents issues of first impression with this Board. We decline to address the questions of whether the State Controller has filed a timely appeal, or whether the State Controller is a "party to a case" or is "adversely affected" by the Director's decision, within the meaning of 30 CFR 290.108, and therefore has standing to file an administrative appeal. We think the case must be decided on a more fundamental basis. Simply put, under the regulations at 43 CFR Part 4, Subpart J, the Director's decision constituted the final decision of the Department. In promulgating regulations implementing section 115(h), added to FOGPMA August 13, 1996, by section 4(a) of RSFA,<sup>9/</sup> the Department considered but did not expressly provide for a state to pursue administrative appeals of MMS determinations of lessees' royalty obligations. It did, however, adopt specific regulations which, in rendering the Director's decision the final decision for the Department, clearly preclude this Board from exercising jurisdiction to adjudicate the State Controller's appeal of the Director's decision. Lacking jurisdiction, we dismiss this appeal.<sup>10/</sup>

[1] Section 115(h) of FOGPMA governs the time frame for the Department to process administrative appeals of MMS orders or decisions involving royalty

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<sup>8/</sup> (...continued)

case adversely affected by a final decision of the MMS Director \* \* \* under [30 CFR Part 290, Subpart B] shall have a right of appeal to the IBLA under the procedures provided in 43 CFR part 4, subpart E." (Emphasis added.) Although 30 CFR 290.108 incorporates "the procedures provided in 43 CFR part 4, subpart E," it does not incorporate the standing provisions of 43 CFR 4.410(a), which applies to an appeal from "a decision of an officer of the Bureau of Land Management \* \* \*." It is 30 CFR 290.108 that grants the right of appeal to this Board in cases involving royalty payment orders.

<sup>9/</sup> Pub. L. No. 104-185, 110 Stat. 1709-10 (1996) (codified at 30 U.S.C. § 1724(h) (2000)).

<sup>10/</sup> Since we dismiss the appeal, MMS' request for an extension of time to file an answer to the State Controller's SOR and the State Controller's motions to strike Aera's supplemental answer and to close the record are denied, as moot.

payments due with respect to production from Federal onshore oil and gas leases. 30 U.S.C. § 1724(h)(1) (2000).<sup>11/</sup> Most significantly, Congress required the Secretary of the Interior to “issue a final decision,” in the case of new appeals, “within 33 months from the date such [administrative] proceeding was commenced.” *Id.* In those cases where the Department failed to issue a final decision within the 33-month period, Congress imposed a statutory rule of decision, as follows:

- (A) the Secretary shall be deemed to have issued and granted a decision in favor of the appellant as to \* \* \* any monetary obligation the principal amount of which is less than \$10,000; and
- (B) the Secretary shall be deemed to have issued a final decision in favor of the Secretary, which decision shall be deemed to affirm those issues for which the agency rendered a decision prior to the end of such period, as to any monetary obligation the principal amount of which is \$10,000 or more \* \* \*. [Emphasis added.]

30 U.S.C. § 1724(h)(2) (2000).<sup>12/</sup>

In enacting section 115(h), Congress recognized, in subsection (h)(1), that orders to pay royalty on production from Federal onshore oil and gas leases, issued by MMS or a delegated state,<sup>13/</sup> are subject to “administrative appeal,” in accordance

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<sup>11/</sup> By the time Congress enacted RSFA and section 115(h) of FOGRMA in 1996, the Department had a well-established administrative appeals process for MMS orders to pay royalty on production from Federal onshore oil and gas leases and had long provided for appeals from such orders to the MMS Director, and then to this Board. See 30 CFR Part 290 (1998) (now Part 290, Subpart B). However, there was no time limit on the administrative appeals process for these matters. Reacting to delays in the Department’s final disposition of such appeals, Congress enacted section 115(h) of FOGRMA and “plac[ed] a time limit on administrative appeals,” specifically “requir[ing] the Secretary of the Interior to take a final departmental action on appealed claims within 33 months,” in order “to ensure timely collection of all disputed royalty amounts due the U.S. (and States through the net receipts sharing provisions of law with States) \* \* \*.” H.R. Rep. No. 104-667, at 15, 18 (1996), reprinted in 1996 U.S.C.C.A.N. 1444, 1448; see S. Rep. No. 104-260, at 14 (1996).

<sup>12/</sup> The 33-month deadline does not apply to appeals involving Indian leases. RSFA section 9, 30 U.S.C. § 1701 note.

<sup>13/</sup> Section 3(a) of RSFA, Pub. L. No. 104-185, 110 Stat. 1702 (1996), codified at 30 U.S.C. § 1735 (2000), amended section 205 of FOGRMA, providing new authority  
(continued...)

with the Department's regulations. <sup>14/</sup> 30 U.S.C. § 1724(h)(1) (2000). It provided: "No State shall impose any conditions which would hinder a lessee's or its designee's immediate appeal of an order to the Secretary or the Secretary's designee." Id. Further, it imposed the 33-month time period and allowed an extension only for the period of time "agreed upon in writing by the Secretary and the appellant." Id.

[2] On January 12, 1999, the Department published proposed rules governing the process for issuance of royalty orders by MMS and delegated states and the appeal of orders from MMS' Royalty Management Program. 64 FR 1930. When the Department published the final rules on May 13, 1999, it explained that the Department had decided not to go forward with the entire proposed appeals process because of negative comments and because the need to publish immediately a final rule implementing the RSFA appeals adjudication time and rule of decision requirements under 30 U.S.C. § 1724(h) prevented the Department from conducting a thorough review of comments. 64 FR 26,240, 26,240-41 (May 13, 1999). As a result, the Department chose to make final only those portions of the proposed rulemaking necessary to implement RSFA's 33-month time period and certain other provisions. The final rules implementing the 33-month time period at 30 U.S.C. § 1724(h), specifying when an administrative proceeding commences and ends and how to request extensions, and the joinder requirement of 30 U.S.C. § 1712(a) were located at 43 CFR Part 4, Subpart J. 64 FR at 26,259. The revised procedural rules governing appeals to the MMS Director were located at 30 CFR Part 290, Subpart B. 64 FR at 26,258-59.

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<sup>13/</sup> (...continued)

to the Secretary of the Interior to delegate to a state the authority to issue royalty payment orders, with respect to Federal lands in the state. See 30 CFR Part 227.

<sup>13/</sup> Section 115(h) of FOGRMA specifically states, in relevant part: "Demands \* \* \* issued by the Secretary or a delegated state are subject to administrative appeal in accordance with the regulations of the Secretary." 30 U.S.C. § 1724(h)(1) (2000). Section 2 of RSFA, Pub. L. No. 104-185, 110 Stat. 1700, codified at 30 U.S.C. § 1702 (2000), defines "demand" as an "order to pay issued by the Secretary or the applicable delegated state to a lessee or its designee \* \* \* ." A "lessee" is defined by section 2 of RSFA as "any person to whom the United States issues an oil and gas lease or any person to whom operating rights in a lease have been assigned[.]" 30 U.S.C. § 1702(7) (2000). The term "lessee" thus encompasses a lessee or an operator, each of whom is liable for royalties. See 30 U.S.C. § 1712(a) (2000). The statute defines a "designee" as the person designated by a lessee to make royalty payments, but who is not liable for royalties. 30 U.S.C. § 1702(24) (2000); see 30 U.S.C. § 1712(a) (2000).

In the proposed rulemaking, the Department considered providing a role for delegated states in the administrative appeals process - but only as intervenors, not appellants.<sup>15/</sup> And, when the Department finalized the rules issued in May 1999, it declined to carve out even that role for delegated states.

In describing the proposed rules at 43 CFR 4.904 (“if you receive an order that adversely affects you, you may appeal that order \* \* \*”), the Department explained that it “decided not to allow States to appeal orders or decisions not to issue orders because, unlike Indian lessors, States do not have a property interest in leases” and “[i]n addition, States can request authority to issue orders pursuant to an agreement or agreements under MMS’s regulations at 30 CFR part 227.” 64 FR at 1936. (Emphasis added.) The proposed rules noted, however, that, in some sense, delegated states may be “adversely affected by the MMS Director’s actions regarding an order.” In those situations, the proposed rules allowed delegated states the opportunity to intervene in the administrative appeal and provided affected delegated states a period of 30 days in which to file an intervention brief “if MMS’s rescission or modification of the order adversely affects you.” 64 FR at 1975. However, “a delegated state that does not receive revenues from the leases at issue in the appeal could not intervene.” 64 FR at 1945. Thus, even in these proposed rules, the Department chose not to allow states to appeal royalty-related matters under the jurisdiction of MMS. Moreover, a delegated state that received royalties from the leases at issue in the appeal could only intervene.<sup>16/</sup>

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<sup>15/</sup> The proposed rules recognized, however, the danger that some of the proposed procedures, designed in part to provide “enhanced participation of Indian lessors and delegated states in the appeals process,” could fail to meet the overall goal of achieving “timely and efficient resolution of appeals.” 64 FR at 1931.

<sup>16/</sup> The proposed regulations required MMS to notify any “affected delegated State” when the MMS Director concurs with, rescinds, or modifies an order or decision not to issue an order and provided that state a period of 30 days after receipt of MMS’ notification in which to file an intervention brief. 64 FR at 1974-75. The proposed regulations assumed that a lessee or designee who had succeeded in its appeal of an order would not appeal a rescission to IBLA, but recognized that the former appellant would be bound by any decision on intervenor’s challenge to a rescission. Therefore, the proposed rules provided an opportunity for the lessee or designee to participate in the intervenor’s challenge and established a 60-day window, following receipt of the MMS Director’s rescission, for filing an answer to intervenor’s brief. 64 FR at 1944-45, 1975.

The final rules, promulgated four months later, added, in 30 CFR 290.103, a joinder provision,<sup>17/</sup> allowing lessees that receive a Notice of Order to either appeal the order or join in their designee's appeal under § 290.106. 64 FR at 26,245-46, 26,258-59. They did not, however, provide states (even delegated states receiving royalties) any role in administrative appeals - whether by direct appeal or intervention.<sup>18/</sup>

Furthermore, the applicable final regulations which provide that the statutory 33-month period commences with the initial filing of a notice of appeal from an order to pay royalty, whether issued by MMS or a delegated state, and ends 33 months after that starting point clearly contemplate the initiation of an appeal by only a lessee or designee. See 43 CFR 4.902 and 4.904 (emphasis added). The regulations repeatedly refer to that time period as the beginning and ending of "your appeal," clearly referring to the person who originally challenged the MMS or delegated state order to pay, pursuant to 30 CFR Part 290, Subpart B. See, e.g., 43 CFR 4.904(c) and (d) and 4.906(b) and (c); 64 FR at 26,248 ("It is the recipient of the order who 'commences' an appeal"). Moreover, it is clear that only a lessee or its designee is entitled, under 30 CFR Part 290, Subpart B, to appeal from an order to pay by MMS or a delegated state. The regulations at 30 CFR 290.103 provide, in subsection (a), that "you or your lessee," meaning a lessee or its designee, may appeal an adverse order, and, in subsection (b), that a "lessee" may either appeal or join in its designee's appeal of an order. See 30 CFR 290.106(a) ("If you are a lessee, and your designee files an appeal under [30 CFR] § 290.103"). Such an appeal is, under 30 CFR 290.105, directed to the MMS Director. There is no provision in 30 CFR Part 290, Subpart B allowing a state to appeal from an MMS order in a royalty case.

Most important is the addition of 43 CFR 4.906(b)(3) in the final rules. That provision sets forth the consequences which result when the person who initiated the appeal from the original MMS or delegated state order to pay chooses, as in this case, not to appeal the subsequent MMS Director's decision:

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<sup>17/</sup> Proposed as 43 CFR 4.904(b); 64 FR at 1971.

<sup>18/</sup> There is no provision in the final rules requiring MMS to provide notice to affected states when the MMS Director concurs with, rescinds, or modifies an order or decision not to issue an order, and no provision made in the briefing schedule for the filing of intervention briefs or answers to such briefs. Instead of the proposed rules' one-stage IBLA administrative appeal process and their emphasis on record development and settlement conferences with enhanced opportunity for participation by "interested persons," the final rules retained the essential two-stage appeal process - first to the MMS Director and then to the IBLA.

If the MMS Director issues a decision in your appeal, and if you did not appeal the Director's decision to IBLA within the time required under \* \* \* 30 CFR part 290[,] subpart B \* \* \* and 43 CFR part 4, subpart E, then the MMS Director's decision is the final decision of the Department and 30 U.S.C. 1724(h)(2) has no application. [Emphasis added.]

43 CFR 4.906(b)(3). We conclude that the "you" in 43 CFR 4.906(b)(3) who received a decision from the Director in "your appeal" but did not appeal to IBLA refers only to a person entitled to bring an initial appeal from an MMS or delegated state order to pay royalty - specifically only a lessee or its designee. If a lessee or designee "did not appeal the Director's decision to IBLA within the time required \* \* \*, then the MMS Director's decision is the final decision of the Department."<sup>19/</sup> The Board has no jurisdiction to review an appeal by a state from a decision that has become final for the Department.

We think the regulations are clear: a state is not entitled to appeal from an MMS Director's decision in a royalty case. Rather, that role was reserved solely for a lessee or its designee, who was entitled to bring an appeal from the initial order to pay.

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<sup>19/</sup> Under the circumstances described in 43 CFR 4.906(b)(3), the statutory rule of decision of 30 U.S.C. § 1724(h)(2) (2000) "has no application" because the Director's decision becomes final when the time for appeal has ended and "you" (a lessee or designee) fail to appeal. The administrative appeal process is complete and no further appeal is allowed. Therefore, RSFA's rule of decision is inapplicable.

By contrast, the proposed rules, at 43 CFR 4.956(c)(2), included explicit language designed to determine the rule of decision in the event the proposed intervention language was finalized and the 33-month time period ran before the Department issued a decision: "If neither you [designee] nor a joining lessee continues to contest the order, or any portion of the order, as modified by the Director, and a delegated State has intervened in the appeal to contest a modification that neither you nor a joining lessee contests, then the Secretary will be deemed to have affirmed the MMS Director's modification, regardless of the amount of any monetary or nonmonetary obligation that neither you nor a joining lessee contests." 64 FR at 1977. The final rules dropped this provision along with proposed regulations creating an intervention role for delegated states. In the final rules, there is no need for a rule of decision when the lessee or designee declines to appeal an MMS Director's decision because, in that case, as here, the Director's decision is final for the Department. 43 CFR 4.906(b)(3).

In this case, because the Director's decision is final for the Department and the State is not entitled to bring an appeal of that decision, this Board is without jurisdiction to consider the State's appeal and we, therefore, dismiss it.

To the extent appellant has raised other claims not specifically addressed herein, they have been carefully reviewed and found to be without merit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the State Controller's appeal from the Director's decision is dismissed.

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Christina S. Kalavritinos  
Administrative Judge

I concur:

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H. Barry Holt  
Chief Administrative Judge