savings to the financially distressed borrower.

4. Section 1786.5 is being amended by revising paragraph (d) to read as follows:

§ 1786.5 Prepayment authority, program allocations, categories of prepayment applications and financially distressed borrowers' reserve.

* * * * *

(d) *Financially distressed borrowers' reserve.* The $350 million of prepayment authority allocated for REA-financed electric utilities, is initially set aside into a financially distressed borrowers' reserve. This reserve of prepayment authority will be available for prepayments pursuant to this part by financially distressed borrowers who apply to make such a prepayment during the application period. In the event that a portion of financially distressed borrowers' reserve remains unsubscribed at the end of the initial application period, the unallocated portion of the financially distressed borrowers' reserve will be allocated to other electric borrowers having submitted applications during an application period to be announced by REA. Such prepayment applications shall be classified as standard electric program applications.

Dated: June 20, 1990.

George E. Pratt,

Acting Administrator.

[FR Doc. 90-20497 Filed 8-29-90; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 206

RIN 1010-AB42

Coal Product Valuation

August 22, 1990.

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule.

SUMMARY: The Minerals Management Service (MMS) is amending its regulations governing the value of coal production from Federal coal leases. Under the rules being adopted, Federal coal lessees no longer would be permitted to deduct or exclude the costs of Federal Black Lung Excise Taxes, abandoned mine lands (AML) fees, and State and local severance taxes from the value of coal for royalty purposes. The MMS has concluded that these costs are part of the value of coal production and that MMS should return to its historical approach of requiring royalties to be paid on at least gross proceeds.

EFFECTIVE DATE: October 1, 1990.

FOR FURTHER INFORMATION CONTACT: Dennis C. Whitcomb, Chief, Rules and Procedures Branch at (303) 231-3432 or (FTS) 326-3432.

SUPPLEMENTARY INFORMATION: The principal authors of this rule are Herbert B. Wincentsen, Rodney Noah, and Michael Throckmorton of the Royalty Valuation and Standards Division of the Minerals Management Service (MMS), Lakewood, Colorado.

I. Introduction

A notice of proposed rulemaking to amend the coal product value regulations to remove the exclusion from royalty value for the costs of Abandoned Mine Land (AML) fees, Federal Black Lung excise taxes, and State and local severance taxes was published in the **Federal Register** on February 13, 1990 (55 FR 5024), with a 60-day comment period. On April 9, 1990, notice was given in the **Federal Register** that the public comment period was extended for an additional 30 days. As part of the process of receiving public comments on the proposed rule, public meetings were held in St. Louis, Missouri, on April 11, 1990, and in Madison, Wisconsin, on May 9, 1990. During the public comment period from February 13, 1990 to May 15, 1990, a total of 221 written comments were received from industry representatives, members of Congress, State Governments, local Governments, Indian tribes, Indian organizations, and other persons. At the public meetings, 44 oral comments were made. Transcripts from these meetings were included in the record and were incorporated as comments on the rulemaking.

In addition, many comments on the issue of excluding production taxes and fees were received during the period January 13, 1989 to February 13, 1990, after publication of final coal product value regulations on January 13, 1989 (54 FR 1492).

This rulemaking addresses exclusions from royalty value permitted by regulations published January 13, 1989 (54 FR 1492), and made effective March 1, 1989. The coal product value regulations issued on January 13, 1989, were the culmination of an extensive regulatory process including multiple proposed rules, hearings, and meetings with industry and affected States and Indian tribes. The rules also were the subject of considerable study and review by the Secretary of the Interior's Royalty Management Advisory Committee. (See 54 FR 1492.) One of the most controversial issues that was addressed during the rulemaking process was whether the cost of severance taxes, AML fees, and Black Lung excise taxes should be included as part of the value of coal production and, therefore, subject to royalty. Industry commenters generally supported an exclusion from value for these production-related taxes and fees. Some western coal producing States and Indian lessors supported the inclusion of these amounts in the value of production. The preamble to the final rule explains in detail the positions of interested parties. (See 54 FR 1511-1513.)

In that rulemaking, MMS generally continued the historical practice of basing the value of coal on the "gross proceeds" accruing to the lessee from the sale under an arm's-length contract. (30 CFR 206.257(b)(1).) The term gross proceeds was defined as including all monies and other consideration accruing to a coal lessee for the production and disposition of the coal produced. (30 CFR 206.251.) However, at 30 CFR 206.257(b)(5), MMS provided that the value of coal for royalty purposes would not include the costs of severance taxes, AML fees, and Black Lung excise taxes. This exclusion was to apply only to Federal leases—Indian leases were expressly exempted.

After the final rules were published, the Department of the Interior received many requests to reconsider the question of whether production taxes and fees should be excluded from royalty value. On February 13, 1990, MMS issued a Notice of Proposed Rulemaking to reconsider this issue (55 FR 5024) for the reasons outlined in the preamble to that section.

On February 13, 1990, MMS also released its study on the fiscal and production impacts resulting from the January 13, 1989, coal product value regulations. The study found no convincing evidence that production had been increased as a result of the decrease in royalties attributable to the policy change initiated by the decision to exclude production taxes and fees from the royalty base in that rule. In addition, for the period March 1 to August 31, 1989, royalty collections were found to be approximately 15 percent (or $16.6 million dollars) less than what they would have been had the January 13, 1989, rule not adopted the exclusion for production taxes and fees.

This rulemaking revises 30 CFR 206.251 and 206.257. The definition of severance tax is removed from § 206.251. Since there no longer will be an exclusion for such taxes, it is not

necessary to retain the definition. Paragraph (b)(5) is removed from § 206.257, and paragraph (b)(6) is redesignated as a new paragraph (b)(5). Other paragraphs of § 206.257 are amended to delete references to the deleted paragraph (b)(5).

The MMS hereby adopts final regulations governing the valuation of coal from Federal leases. The regulations will apply prospectively to production on or after the effective date specified in the EFFECTIVE DATE section of this preamble.

II. Response to Comments Received on Proposed Coal Product Value Regulations

Many different reasons were provided to MMS for its consideration regarding the proposal to remove the production tax and fee exclusions from the value of coal for royalty purposes. These reasons are addressed individually in the material that follows. Parties generally opposing the proposed rule to remove the exclusions for production taxes and fees include coal mining companies, electric utilities, coal mining and utility trade associations, Governors and Congressmen of coal consuming States, and Governors and Congressmen of the coal producing States of Colorado and Montana. Parties generally favoring the proposed rule include railroad land grant mineral owners, environmental and public interest groups, and Governors and Congressmen of the coal producing States of New Mexico, Utah, and Wyoming.

Reason 1: Commenters opposing the proposed rule stated that the January 13, 1989, final rule allowing the exclusion of production taxes and fees from the royalty value of coal mitigates the large increase in the cost of royalties resulting from the Federal Coal Leasing Amendments Act of 1976 (FCLAA) requirement to readjust coal royalty rates from cents per ton to ad valorem rates. One commenter further explained:

> Long term coal contracts were negotiated with provisions to accommodate reasonable royalty increases, presuming they would escalate according to the market factors, similar to inflation. However, the MLA amendments did what no private coal owner could have done. They raised the royalty from flat cents per ton to a 12½ percent ad valorem basis—a unilateral change of lease terms and conditions by the coal owner. As a result, when mines are converted to the ad valorem basis, the royalty cost increases by two to eight times depending on sales price.

Commenters favoring the proposed rule argued that the Department should not be engaged in activities explicitly intended to mitigate the effects of statutes like FCLAA through administrative rulemaking. One commenter explained:

> If people believe royalty rates are too high, they should petition Congress for lower rates. The MMS should not use administrative channels to artificially reduce rates.

MMS Response: The MMS understands that readjusting the royalty rate to a 12½ percent ad valorem rate increased some royalty obligations by more than 1000 percent. In the preamble to the January 13, 1989, final rulemaking, MMS devoted an extensive discussion to the royalty rate issue. (See 54 FR 1494.) The MMS still maintains that royalty rates are not valuation issues. The 12½ percent royalty rate imposed on most surface coal operations is *required by statute. The Mineral Leasing* Act (MLA) of 1920, as amended by FCLAA, 30 U.S.C. 207(a), requires the Secretary to determine a royalty "of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations." On January 26, 1990, the Bureau of Land Management (BLM) published in the **Federal Register** a final rule establishing a flat rate of 8 percent for new and readjusted underground Federal coal leases. (See 55 FR 2653.) The underground royalty rate requirement is codified at 43 CFR 3473.3–2 (1989).

The MLA has provisions at 30 U.S.C. 209 to reduce royalty rates for those *lessees that cannot successfully operate* their leases under the prevailing terms and conditions. Since 1987, BLM has had guidelines under which royalty rate reductions can be obtained. See **Federal Register** publications of June 30, 1987 (52 FR 24347), February 27, 1990 (55 FR 6841), April 30, 1990 (55 FR 12059), and May 2, 1990 (55 FR 18401). These actions make it clear that the Department's approach for mines needing royalty rate relief is through royalty rate reduction criteria allowed under 30 U.S.C. 209, applied on a lease-by-lease basis. An approach of adjusting valuation procedures to address specific mine economic problems has not historically been employed by the Department in its administration of mineral leases.

Reason 2: Commenters opposing the proposed rule generally maintained that the reduced royalty cost under the January 13, 1989, final rule benefits electric power consumers because royalty costs are ultimately passed through to and paid for by the consumers. One commenter went further, stating, "Electric customers will suffer increases in rates and utilities will lose sales of energy extremely sensitive to even minor increases in costs."

Commenters favoring the proposed rule stated the exclusions from royalty value do not measurably decrease prices paid by consumers of electric power. Other commenters stated that the small benefits gained by electric consumers in coal consuming States is at the large economic expense of the coal producing States. One individual commenting on the issue of consumer costs stated:

> The industry continues to use decreased costs to the consumer as its main rationale for justifying the 1989 rulemaking. Federal coal, however, we urgently stress to you, belongs to all the citizens of the United States, not just certain consumers, served by certain utilities, in a certain region of the country where Western coal happens to be economically marketable.

MMS Response: The MMS acknowledges that increases in the cost of royalty, in many cases, will be passed through to the electric utility purchaser and, ultimately, to the electric power consumer. This is primarily due to the current fuel contracting practices between coal producers and electric utilities in which long-term contracts include clauses which allow the price to rise with changes in taxes and royalties (among other factors). According to the text "The Business of Coal" published by Arthur Andersen & Co., the first modern long term coal supply agreement was executed in 1956. The early contracts of that period contained simple price adjustment clauses addressing cost changes due to labor and labor related cost increases, materials and supplies, and taxes. However, from the late 1960's to the present, coal producers have had to cope with numerous changes such as inflation, mine health and safety, and reclamation laws. Arthur Andersen & Co.'s "The Business of Coal" points out at page 55 that because of these changes,

> * * * [m]any producers suffered hardships because old contracts did not allow for the increased costs or decreased production caused by the Mine Health and Safety Act, the Surface Mine Control and Reclamation Act, or other law changes.

As a result, most coal supply agreements now include specific escalation factors for labor wages, labor fringe benefits, welfare fund, workmen's compensation and insurance, materials and supplies, royalties, taxes, influence of legislation on production costs, administrative expenses, and insurance on equipment.

The contractual pass-through of any cost component does not, in itself, require the Federal Government to reduce royalty costs. More fundamentally, having acknowledged

the likelihood that a substantial portion of the incidence of all coal royalties is on consumers of electricity. MMS does not believe that it should be guided, in determining rules for valuing the nation's resources, primarily by the question of who pays or who benefits from royalties.

Reason 3: Commenters opposing the proposed rule stated that it would place massive amounts of royalty revenues into the producing States' treasuries at the economic expense of coal consuming States. One commenter stated:

> Producer States argue that significant revenues have been lost since the regulation was changed in 1989, but the adverse fiscal effects which these States take issue with are in reality the loss of additional revenue over and above the sizeable revenues gained in 1989. The total western coal royalty revenue increased by $39 million from 1986 to 1989. This represents a 70 percent increase.

One commenter emphasizing this issue stated:

> In addition, any loss in revenue is more than compensated for by the current rule which allows for 50 percent of the Federal royalty revenues to be returned directly to coal-producing States, and another 40 percent to be returned to Western States for water projects.

Another commenter noted:

> The fiscal impact of reversing the current coal royalty regulation must also be analyzed from a national rather than a regional perspective. It is inappropriate to consider the fiscal impact on producing States without equal consideration being given to the negative impact in consumer States such as Wisconsin. The loss in producer State revenues represents an equal cost increase to ratepayers in our consumer States.

Commenters favoring the proposed rule noted that coal is a nonrenewable resource. As such, it can only be produced once, and whatever revenue is foregone cannot be compensated for because the land, once mined, no longer contains valuable deposits. One commenter addressing this point stated:

> * * * there is no argument that with the ad valorem rates changed, there is an increase in royalties. We think that is reflective of that value to the State. What the figures * * * do not reflect * * * is, one, production * * *. Even as production increases, for whatever reasons, royalties received will be less than under the traditional valuation methods. This is royalty revenue which the public expected to receive. Federal and State programs, when faced with a reduction in revenue, have only two choices. Dropping funding for those programs, resulting in a poorer quality program, is one choice. The other choice is to raise other revenue * * * to replace it, or shift the burdens to other programs.

MMS Response: The sharing of mineral revenues with the States from which the resource is mined is not a valuation issue, although it is clear that royalty valuation can affect revenues to both Federal and State treasuries. The sharing of coal royalty revenue is set forth under MLA, as amended by FCLAA, at section 35 (30 U.S.C. 191). The formula defines how the revenues will be shared, 50 percent to the State, 40 percent to the Reclamation fund and 10 percent to the U.S. Treasury. The legislative history of FCLAA indicates that Congress was concerned with the social and economic impacts of expanded coal production and expressly desired to increase revenues returning to the States. House Report No. 94-681, states:

> When an area is newly opened to large scale mining, local governmental entities must assume the responsibility of providing public services needed for new communities, including schools, roads, hospitals, sewers, police protection, and other public facilities, as well as adequate local planning for the development of the community. Since section 35 of the MLA of 1920 currently provides that the monies returned to the States be available only for schools and roads, it is difficult for affected areas to meet the needs of their new inhabitants. This situation exists both with respect to coal and geothermal development, as well as other mineral resources.
>
> * * * * *
>
> An effort must be made to alleviate these problems by making funds available for the various aspects of community development.
>
> As shown below, H.R. 6721 will add 12.5 percent of the monies received under section 35 of the Minerals Lands Leasing Act to the 37.5 percent share currently returned to the States.
>
> The additional 12½ percent that will go to the States is not ear-marked for schools and roads, and may be spent by the States for planning, public facilities and public services, giving priority to those communities impacted by the mineral development.

Reason 4: Commenters opposing the proposed rule stated that the January 13, 1989, final rule's lower royalty cost lowers the price of Federal coal and thus makes Federal coal more competitive with non-Federal coal and other energy sources, thereby capturing a greater market share and ultimately generating increased royalty revenues, employment, and other tax receipts.

The MMS was provided an extensive study of the Colorado coal market prepared by the Colorado Department of Natural Resources. That study concluded that the royalty valuation rules decreased the price of Colorado coal by $0.25 per ton which, along with the State's actions in reducing its severance tax and in instituting a tax credit (which reduced the price by $1.25 per ton) helped increase the production of Colorado coal by 11 percent in the first three quarters of 1988 from the nadir of recent production in 1987.

Commenters favoring the proposed rule disputed the conclusions drawn by those opposing the proposed rule as well as the professed goal to assist western coal production and sales. One commenter stated that:

> The historical record shows that the increases in Federal coal royalty rates, resulting from the change to ad valorem rates, after 1976, did not lead to higher prices for western coal, and did not prevent production growth from occurring in the West. Consequently, there is no reason to assume that the reduction in effective royalty rates, resulting from the deductions that were allowed in the 1989 regulations, are going to lead to lower coal prices, or higher coal production in the future. Producer costs are simply not the principal determinant of coal prices and production rates.
>
> * * * * *
>
> Production in the Western States, which produce coal, primarily from Federal leases, or from private or Indian lands, with lease rates tied to the Federal rate, grew from 185 million tons in 1980, to 270 million tons in 1988. This was an increase of 85 million tons, or 46 percent, during this very period when Federal royalty rates were rising.

Another commenter stated that:

> The growth rate of western coal production, we would note, next, has been greater than that for the Midwestern or Eastern coal regions. Western coal producers, in other words, simply do not need help to compete against the Midwest or the Appalachian producers.

MMS Response: The MMS agrees that the historical record indicates, in general, that higher Federal royalties do not appear to have hindered the production and marketability of Western coal. The Department of Energy, Energy Information Administration (EIA) Report No. SR/CD/87-01, titled "Potential Effects of Changes in Federal Coal Royalty Rates," published September 4, 1987, summarized:

> As a result of increasing royalty rates, there is concern that the price of coal from Federal lands may rise to the point that it will be less competitive with alternative sources and fuels—including oil, gas, and imported coal and/or electricity—and thus adversely affect the Nation's energy security.

To test the above hypothesis, EIA considered three scenarios.

> The results of the three cases showed no significant impacts nationally and only modest shifts in production regionally. Electricity prices and market shares of coal for electricity generation appear essentially unaffected.
>
> Eliminating Federal royalties (Scenario C3) did show a shift from eastern to western coal of about 4.5 million tons by the year 2000, out

of a total of 1.2 billion short tons of U.S. coal production. Shifts of production within regions were somewhat more pronounced, particularly in the northern Great Plains and Rocky Mountain areas. In general, reduction or elimination of a percentage royalty increases the competitiveness of higher priced coal. However, it does not appear that coal production will be significantly slowed by the royalties now coming into effect (Scenario C1) or accelerated by elimination of royalties (Scenario C3).

While the information from the State of Colorado is locally encouraging, MMS believes that there is little evidence that the royalty rule played any significant part in the increase in production reported in the State's report. Local incentives appear to be the principal cause of this increase.

Competitive price reductions can result in increases in the sales of the party which reduced price. This occurs because the price of close substitutes has not fallen. On the other hand, general price declines are less likely to result in increases in sales as the price of close substitutes has also fallen and the commodity has only reduced price compared with less close substitutes. Thus, if for example, Colorado can reduce the price of its coal compared with Wyoming coal, which is a close substitute in Colorado, Colorado coal may be able to increase its sales at the expense of Wyoming coal. On the other hand, if the price of all western coal is reduced, any increases in sales are: (1) Less likely, as they must come at the expense of less comparable commodities, such as eastern coal, or oil, and (2) more diffuse, as all western coal will share in the newly enlarged market—to the extent there is any measurable enlargement. Thus, MMS believes that the effect of changes in Federal royalty valuation policy was less likely to have an effect on Colorado coal production than changes in rules which decreased the gross price only of Colorado coal.

With this information on hand as well as MMS's own study, MMS concludes that reduced royalty costs would not substantially increase production and thereby increase royalty receipts. In addition, MMS believes that the degree to which the reduced royalty costs might affect production would be too small to overcome the impact that the January 13, 1989, rulemaking has had on royalty revenues. The MMS believes that other factors such as Clean Air Act legislation, overall economic activity, and costs and availablity of competing fuels appear to be more significant factors affecting coal production levels.

Reason 5: Commenters opposing the proposed rule stated that the costs of AML fees and Black Lung excise taxes, in particular, should be excluded from the royalty value of coal because they are unique taxes and fees and can be distinguished from other Government levies. One commenter pointed out that the January 13, 1989, final rulemaking:

> * * * recognized that Black Lung taxes and AML fees were unique to coal and that royalties on State taxes would improperly give the Federal Government a royalty share of those State taxes. It also recognized that *States should not receive a royalty share of* the Federal taxes and fees, or an additional royalty share, derived from their own State severance taxes.

Commenters favoring the proposed rule disagreed, finding that production taxes and fees are a cost of doing business and cannot be distinguished from other similar costs of doing business like FICA taxes. They represented that value for royalty purposes should recognize all costs of extracting nonrenewable resources without allowing deductions for arbitrarily chosen taxes and fees.

MMS Response: Coal is by no means the only mineral subject to unique taxes. For example, lessees engaged in oil and gas exploration, development and production are required to contribute to the Fishermen's Contingency Fund under section 402 of the Outer Continental Shelf Lands Act Amendment of 1978 (OCSLA) (Pub. L. 95–372). Additionally, section 302 of the OCSLA establishes an Offshore Oil Pollution Compensation Fund and levies a fee on lessees not to exceed 3 cents per barrel of oil produced from the Outer Continental Shelf. From this larger background identifying other unique taxes and fees assessed on other minerals, and after reviewing the conditions under which the AML fee and Black Lung excise tax are levied, MMS believes there is no justification to exclude these particular taxes or fees from the royalty value. These taxes and fees, which are unique to coal, were imposed through the actions of the Congress which intended that industry contribute to funds designed to be spent *to correct some of the health and* environmental problems caused by the mining of coal. The MMS does not believe that royalty costs should be reduced to compensate for the Black Lung excise tax and AML fee which were imposed to cover the health and environmental costs created by coal mining.

In any event, as value is based upon the willingness of the purchaser to pay for the produced coal, value should include all components of that payment, whether unique to coal or not.

Reason 6: Commenters opposing the proposed rule maintained that there were no negative fiscal impacts and that royalty receipts actually increased by 7 percent compared to the period March through August 1988. These commenters also noted that production had increased by 17 percent, which, they argued, was due to the exclusions from royalty value permitted under the January 13, 1989, final rule. Other commenters argued that the MMS study period was not of sufficient duration, and that a longer period of study was necessary in order to fully evaluate the impact of the exclusions from royalty value.

Commenters from two coal producing States disagreed with those stating that there was no negative fiscal impact. One commenter stated:

> Federal royalty payments are an important source of revenue for our public school system in Montana, providing $20.7 million or 12 percent of total State aid to schools in State Fiscal Year 1989. According to the report on Fiscal and Production Impacts of the Exclusion prepared by MMS, the royalty exclusion for AML fees, Black Lung fees, and severance taxes cost Montana approximately $1.95 million in the first 6 months that it was in effect. Projected to an annual basis, Montana's public school system cannot afford the annual loss of $3.9 million.

Another commenter similarly stated:

> [A] significant amount of the royalty revenue loss, in excess of 50 percent, is a loss to education or education-related funds. The difference between what Wyoming receives under the current rule and * * * under the proposed rule—the rule that had been in effect before last year—is nearly $12 million per year. That represents a loss to Wyoming's public schools of nearly $6 million yearly, or more than $60 for every public school student in Wyoming.

MMS Response: As part of the Department's study of the effects of the exclusions from royalty value, MMS reviewed the fiscal and production impacts resulting from the rule. The study found that royalty revenues did increase by over 8 percent compared to the same 6-month period of the previous year. The two most significant factors *contributing to that rise in royalty* revenue were increased production and higher reported sales values. Had these events not occurred, an absolute decline of revenues, when compared to the previous period, would have occurred. However, it is also a fact that royalties would have been higher had the exclusions not been permitted.

On the issue of study duration and the effect of the exclusions from value on production, MMS recognizes that the 6 months of data available did not allow for clearly established conclusions on

production impacts. However, the analyses were able to show the relative magnitude of the impacts on costs and prices, and discuss the market mechanisms by which such impacts could affect production. As there was a trend of increasing Federal coal production during a period of increasing royalty rates by readjustment, and 1989 production was consistent with that trend, it was not possible to find a separate effect of the exclusions on coal production. Furthermore, in the future, other factors which influence the demand for coal will have a far greater impact on production, including amendments to the Clean Air Act, changes in the general level of economic activity, and changes in the availability and relative prices of competing fuels. This would likely make any future study even more complex and problematic.

Reason 7: Commenters opposing the proposed rule stated that production taxes and fees add to the cost of coal but do not add to its value. One commenter clarified this rationale, stating:

I do not believe that tax, in any form—a fee, a tax, whatever it happens to be—in any form, is a question of value. It does increase the price. It does increase the cost, but it is not a part of value. Value is a totally different idea, and I * * * do not accept that price, itself, is equated to value.

Commenters favoring the proposed rule countered with the opinion that production taxes and fees are a cost of doing business and cannot be distinguished from other similar costs of doing business like social security taxes. One commenter further explained:

The value of the coal is established by the compensation given and received under a coal supply contract. The compensation includes the base price for coal, contractor escalators and reimbursements for AML, Black Lung and state and local production taxes. Reimbursements for these fees and taxes clearly add value to the coal for the producer because they result in a guaranteed cash flow and protect the base coal price and all escalators from out of pocket costs for those taxes and royalties.

MMS Response: In the preamble to the January 13, 1989, final rule, MMS discussed at length the underlying premise of valuation in a free and open market economy such as that in the United States. (See 54 FR 1493.) The meaning of value has been at the heart of the debate that has persisted for years on coal royalty valuation. For royalty valuation purposes, for coal and other leasable minerals, the Department has historically placed principal reliance on the marketability of the product, allowing buyers and sellers to forge a value within the bounds of the economic realm of supply and demand forces. Market-based valuation is a universally accepted point of determining value. It is neither intrinsic nor subjective but, instead, is an economic event measurable by the price paid for the product, including all consideration passing between buyer and seller. This characteristic of market-based valuation is critical, because it describes the necessity to account for all monies paid for the purchase of coal, not just those price components arbitrarily deemed by the buyer or seller to represent value. In other words, the true measure of value, and its meaning as used by the Department in royalty valuation, is the price that willing coal purchasers agree to give to willing coal producers, in arm's-length transactions, for the acquisition of coal.

Reason 8: Commenters opposing the proposed rule suggested that this rule would add to the cost of low-sulfur coal and therefore conflict with the Administration's environmental goals. One commenter stated:

* * * we expect Congress will enact acid rain legislation this year which will mandate reduction of sulfur dioxide emissions from coal-fired generating plants * * *. As more utilities * * * convert from high-sulfur to low-sulfur coal mined in Western States, demand will increase the market price. The MMS's proposed regulations would defy emerging national environmental goals by increasing the cost of low-sulfur coal even higher than the natural market forces which will develop. The consumer will bear the consequences of such a policy decision.

Another commenter stated:

* * * [i]n implementing Federal Acid Rain Legislation other utilities will also fuel switch to comply. We find it especially distressing to see a Federal agency increase the cost of utilizing low sulfur western coal at the same time President Bush is expressing concern that the proposed Clean Air Act revisions are too expensive. This inconsistency in Federal policy actions is disturbing.

Commenters favoring the proposed rule countered with the argument that the concept of the rule raising western coal prices was a fallacy. The rule merely adjusts coal royalty so that it is restored to the level that existed before the January 13, 1989, rulemaking, commensurate with the level required by a uniform definition of royalty value, which favors no leasable mineral over another.

MMS Response: Federal policies and laws must deal with many, sometimes conflicting, goals and balance those conflicting goals as best they can. A rise in coal prices itself does not constitute a valid reason for abandoning long-standing valuation principles. The MMS believes that the private sector is the most appropriate economic agent for establishing the value of coal production. As a general rule, governmental tampering with markets has historically not been as successful in adjusting prices as the adjustments made by free-market forces. Hence, in deference to the market concept, MMS accepts the principle that the most effective and efficient value-setting mechanism is the value set by competition in the free market.

Reason 9: Commenters opposing the proposed rule argued that the January 13, 1989, final rule was the result of a long rulemaking process resulting in a compromise in which both of the opposing camps did not receive everything they wanted. These commenters stated that the January 13, 1969, rule was acceptable and should remain in place.

Commenters favoring the proposed rule did not view the January 13, 1989, final rule as a compromise. To them, the January 13, 1989, final rule was a step to lower royalties and the cost of coal. Several State recipients of Federal coal royalties did not believe that they received anything in return for decreasing royalties, since the January 13, 1989, rulemaking, by and large, otherwise clarified and continued prior policy.

MMS Response: The MMS does not consider the January 13, 1989, final rule to represent a compromise in the sense that valuation principles were exchanged in return for acceptance of the entire rulemaking package. The January 13, 1989, final rule represented the outcome of lengthy consensus building on many issues involving coal product valuation. In the time period since the January 13, 1989, final rule, MMS has received many comments and conducted a study of the effects of that rule. The MMS found that the principal effect of the January 13, 1989, final rules was to transfer more than $32 million from Federal, State, and tribal treasuries to the producers of coal and electricity and the consumers of electricity. Consequently, MMS now concludes that it would like to retain longstanding mineral valuation principles.

Reason 10: Several commenters stated that this rule ignores previous policy recommendations on royalties by the 1984 Commission on Fair Market Value Policy for Federal Coal Leasing (Linowes Commission) and the Congressional Research Service (CRS) Report for Congress, 88-0250E.

MMS Response: There was only one recommendation by the Linowes Commission concerning royalty valuation policy. The Linowes

Commission concluded that the base for calculating Federal royalty payments should be the FOB price minus all State and local severance and similar taxes.

The Commission concluded that the Federal royalty should be based on the value of the coal being produced, not on State and local taxes as well. Federal royalty policies should not create an incentive for higher State and local severance taxes—or similar production-based taxes—by increasing the effective total return to a given percentage tax. State and local Governments should bear the direct responsibility for the full financial impact of their severance taxes. (See February 1984 Report of Linowes Commission, "Fair Market Value Policy for Federal Coal Leasing," at page 321.)

In 1984, the Department responded to the Linowes Commission report. In the "Review of Federal Coal Leasing," at pages 38 and 39, the Department responded to the recommendation as follows:

The Commission concluded that the base for calculating Federal royalty payments should be the F.O.B. price minus all State and local severance and similar taxes. Under the terms of most Federal and Indian mineral leases, the Department computes its royalty based on the "value" of the minerals produced. This "value" is the gross proceeds from the sale of the produced minerals, including all valuable consideration received by the lessee such as any fees and taxes which, under the terms of the sales agreement, the buyer reimburses the lessee or pays on behalf of the lessee.

This method of royalty computation is not limited to Federal coal production or to severance taxes, but extends to other Federal minerals, such as oil and gas, to other reimbursed costs such as reclamation fees and royalty payments, and to Indian minerals. Elimination of reimbursed taxes from coal value alone would create inconsistent practice with regard to other minerals and to other reimbursed costs.

In the view of the Commission, inclusion of State and local severance and similar taxes in the value of Federal coal for royalty purposes results is an inappropriate "hidden" tax on the production. The Commission believed the elimination of these taxes from the royalty valuation process will distinguish the impact of State taxes from Federal royalties on the ultimate cost of coal. Thus, each governmental entity will then be clearly responsible for its policies on revenue collection.

However, elimination of any or all reimbursed costs may create a situation of collecting royalty on less than the "value" of the production as required by the Mineral Lands Leasing Act, as amended. The Department has taken the legal position in the past that royalty on Federal leases is owed to the United States as lessor and only after the royalty is paid is the revenue distributed according to the statutory formula. Accordingly, the Department believes this issue must be addressed by Congress after a study of its effects on other programs and on State and local Governments.

The MMS believes that the above response is still appropriate.

In the CRS report's summary and conclusions, CRS concluded that Black Lung excise taxes, AML fees, and severance taxes imposed on the production of coal should be deducted from the arm's length sales price in determining the base for calculating the royalty payment.

The CRS report attempted to determine the appropriate royalty, or economic rent, that the lessee should pay so neither the government was discouraged from leasing coal because the royalty paid was too low, nor coal production was inhibited because the royalty was too high. The CRS report, therefore, looked at the "royalty" issue as a whole and did not separately consider value issues and royalty rate issues. Therefore, the conclusions in the CRS study are not directly transferable to the considerations in this rulemaking.

Reason 11: Commenters opposing this rule claimed that, in fairness, if the January 13, 1989, rule is being reconsidered, other issues within the scope of that rule such as the gross proceeds concept and contract submission should also be reconsidered. One commenter stated:

[W]e must ask the Department, and MMS, why, despite our repeated requests, have you refused to open this rulemaking [sic] to allow submission by the industry, and consideration by the Government, of these other issues? Why are we being penalized, merely because we bit our tongue when the March 1, 1989, regulations were promulgated, and decided to accept the bitter with the sweet.

Does not absolute, and basic, fairness, equity and good Government policy mandate that if you are going to reopen these rules, partially, for reconsideration, you should do a full re-opening, in order to allow consideration of all the inter-related portions of the rules.

MMS Response: The MMS decided to revisit the production tax and fee exclusion from value issue because the January 13, 1989, final rule as viewed by many affected parties departed from the traditional view of the Department that value is, at a minimum, equal to gross proceeds, or the total consideration received for production of the Federal resource. The Department had completed a long rulemaking, culminating in the January 13, 1989, rule, and did not believe the other parts of the rule needed to be revisited.

III. Conclusion

As explained above, the question of whether production taxes and fees are part of the value of production is not a new issue. It was given considerable attention during the process leading to the January 1989 rules. At that time, MMS concluded that coal is distinguishable from other minerals for purposes of Federal royalty valuation policy, and that production taxes and fees could be excluded from value for royalty purposes.

However, as a result of the record in this rulemaking, including MMS's study of the effects of the January 1989 rules, MMS has now determined that production taxes and fees should not be excluded from royalty value. Therefore, MMS is adopting the proposed rule to remove the exclusion from value for production taxes and fees applicable to Federal coal leases.

There are many reasons why MMS has chosen this course. First, as explained above, the valuation principle that MMS has relied upon consistently in developing its product valuation regulations for oil, gas and coal, is that value is best determined in the market, reflected by the total proceeds accruing to the seller for the sale of production under an arm's-length contract. See 30 CFR 206.257(b)(1), 206.102(b)(1)(i), 206.152(b)(1)(i), and 206.153(b)(1)(i). The definition of "gross proceeds" in the coal valuation regulations at § 206.251 always has been defined as including all consideration accruing to the lessee, including reimbursement for production taxes and fees. Therefore, the exclusion that was adopted in § 206.257(b)(5) was an aberration from the fundamental standard that the value of production cannot be less than gross proceeds. While MMS recognizes that coal is different from oil and gas, and that coal is marketed differently, it nonetheless does not change the fundamental economic notion that the minimum "value" of the coal resource owned by the people of the United States is what the purchaser actually paid for that coal.

The MMS also relied in the 1989 rules upon the prospect that as a consequence of reducing the royalty obligation on Federal coal, production might be stimulated and total production and royalty payments would increase. From MMS's study, however, it cannot be concluded that the royalty reduction had this effect. While production and royalties did in fact increase, those increases were in line with previous year's growth before the royalty reduction was adopted. While Colorado coal production was particularly enhanced, it is more likely the result of the incentives granted by the State of Colorado which were worth 4 to 5 times the amount of the Federal royalty

exclusion. Therefore, from the MMS study the only clear result that emerged is that Federal royalty collections for the first year after the 1989 rules were effective were $32.2 million less than they would have been had the exclusion not been a part of those rules. Under 30 U.S.C. 192, half of the revenues would have gone directly to the coal producing States, thus the States particularly have suffered revenue shortfalls greater than anticipated. This dollar impact far exceeded MMS's expectations when it adopted the exclusion.

As part of its rationale for adopting the exclusion from value for production taxes and fees, MMS also expected in 1989 that the exclusions would not affect Indian leases. (See 54 FR 1511.) The MMS wanted the rule to be revenue neutral for Indians, and in the preamble to the 1988 proposed rule, MMS asked for comment on this issue as it related to existing Indian coal leases (there are less than 10 producing Indian coal leases):

> The MMS specifically would like comment whether the proposed exclusion language will be sufficient to ensure that the exception provided by paragraph (b)(5) will not be applicable to existing Indian leases. (See 53 FR 26942.)

However, after the exclusions became effective, the lessees of Indian leases accounting for a majority of Indian lease production claimed that the exclusions would in fact be applicable to their Indian lease production. Their claim is premised on lease terms which they maintain base royalty value on the regulations applicable to Federal leases, including the exclusion for production taxes and fees. While MMS's Royalty Management Program has disputed the Indian lessees' interpretation of the lease terms and regulations, the matter is on administrative appeal and is unsettled. If the lessees are correct in their interpretation, then one of MMS's assumptions in the 1989 rule is invalid. Since this issue has a potential impact on the Indian lessors of several millions of dollars per year, MMS believes that it is more prudent to eliminate the Federal lease exclusion and thereby end the dispute rather than let it continue through several more years of administrative and judicial litigation.

In calling for comments in the Notice of Proposed Rulemaking, MMS specifically requested information which might tend to show that the rule had resulted in increased production. No party came forward with persuasive evidence that the January 13, 1989, rule accomplished anything other than transferring over $32 million annually from Federal and State treasuries to the producers and consumers of coal and electricity. In addition, in the Notice of Proposed Rulemaking and at every public hearing, all commenters were asked for some alternative market based valuation principle which would imply that production fees and taxes should be excluded. None was suggested.

Thus, as the Department has traditionally used market based criteria for defining value, and for the additional reasons for using market based criteria enunciated in the January 13, 1989, rule, MMS believes that it should return to the historic basis of valuing production to be at least equal to the gross proceeds accruing to the lessee in payments for the produced coal.

IV. Procedural Matters

Executive Order 12291

The Department has hereby determined that this document is not a major rule and does not require analysis under Executive Order 12291. This rulemaking is to modify the Department's definition of the value of coal for royalty purposes under the coal product valuation regulations that were issued on January 13, 1989.

Executive Order 12630

Because this rule will not affect the use of or the value of private property, the Department certifies that the rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus, a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, "Government Action and Interference with Constitutionally Protected Property Rights."

Regulatory Flexibility Act

Because this rule simplifies existing regulations, administrative requirements regarding royalty reporting would be reduced for small business entities as a result of implementation of this rule. Therefore, the Department has determined that this rulemaking will not have a significant economic effect on any small business entities and does not require a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*).

Paperwork Reduction Act of 1980

The collection of information contained in this rule has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1010-0074.

National Environmental Policy Act of 1969

It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and that a detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is not required.

List of Subjects in 30 CFR Part 206

Coal, Continental Shelf, Geothermal energy, Government contracts, Indian lands, Mineral royalties, Natural gas, Petroleum, Public lands—mineral resources, Reporting and recordkeeping requirements.

Dated: August 23, 1990.

James M. Hughes,

Deputy Assistant Secretary, Land and Minerals Management.

For the reasons set out in the preamble, 30 CFR part 206 is amended as follows:

PART 206—PRODUCT VALUATION

1. The authority citation for part 206 is revised to read as follows:

Authority: 5 U.S.C. 301 et seq.; 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2101 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 31 U.S.C. 9701; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

§ 206.251 [Amended]

2. Section 206.251 under Subpart F—Coal, is amended to remove the definition of "Severance tax."

3. Section 206.257 under Subpart F—Coal, is amended to remove the existing paragraph (b)(5) and to redesignate paragraph (b)(6) as a new paragraph (b)(5). Newly redesignated paragraph (b)(5) and paragraphs (b)(1), (c)(3) and (g) are revised to read as follows:

§ 206.257 Valuation standards for ad valorem leases.

* * * * *

(b)(1) The value of coal that is sold pursuant to an arm's-length contract shall be the gross proceeds accruing to the lessee, except as provided in paragraphs (b)(2), (b)(3), and (b)(5) of this section. The lessee shall have the burden of demonstrating that its contract is arm's-length. The value which the lessee reports, for royalty purposes, is subject to monitoring, review, and audit.

* * * * *

(5) The value of production for royalty purposes shall not include payments received by the lessee pursuant to a contract which the lessee demonstrates,

to MMS's satisfaction, were not part of the total consideration paid for the purchase of coal production.

(c) * * *

(3) When the value of coal is determined pursuant to paragraph (c)(2) of this section, that value determination shall be consistent with the provisions contained in paragraph (b)(5) of this section.

* * * * *

(g) Notwithstanding any other provisions of this section, under no circumstances shall the value for royalty purposes be less than the gross proceeds accruing to the lessee for the disposition of produced coal less applicable provisions of paragraph (b)(5) of this section and less applicable allowances determined pursuant to §§ 206.258 through 206.262 and § 206.265 of this subpart.

* * * * *

[FR Doc. 90-20523 Filed 8-29-90; 8:45 am]

BILLING CODE 4310-MR-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[OPTS-400044B; FRL-3798-2]

Ozone Depleting Chemicals; Toxic Chemical Release Reporting; Community Right-To-Know; Addition of Chemicals; Technical Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule, technical amendment.

SUMMARY: This notice corrects an error in a final rule published in the **Federal Register** of August 3, 1990, concerning a petition EPA received from three State Governors and the Natural Resources Defense Council to add seven ozone depleting chemicals to the list of toxic chemicals subject to reporting under section 313 of the Emergency Planning and Community Right-to-Know Act of 1986. The CAS number for the chemical substance bromochlorodifluoromethane (Halon 1211) was incorrectly listed. This document corrects that error.

EFFECTIVE DATE: This rule is effective August 30, 1990.

FOR FURTHER INFORMATION CONTACT: Robert J. Israel, Petitions Coordinator, Emergency Planning and Community Right-to-Know, Information Hotline, Environmental Protection Agency, Mail Stop OS-120, 401 M St., SW., Washington, DC 20460, Toll free: 800-535-0202, In Washington, DC and Alaska, 202-479-2449.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 3, 1990 (55 FR 31594), EPA issued a final rule which added seven ozone depleting chemicals to the section 313 list of chemicals and chemical categories. The CAS number for the chemical bromochlorodifluoromethane (Halon 1211) was incorrectly listed as "421-01-2" in the preamble on page 31594, second column, second line from the bottom and in the tables under § 372.65. The correct CAS number is 353-59-3.

Dated: August 22, 1990.

Charles L. Elkins,

Director, Office of Toxic Substances.

Therefore, 40 CFR part 372 is amended as follows:

1. The authority citation for part 372 continues to read as follows:

PART 372—[AMENDED]

Authority: 42 U.S.C. 11013 and 11028.

§ 372.65 [Amended]

2. In § 372.65 by revising the entry for bromochlorodifluoromethane in paragraph (a) and revising the entry for 421-01-2 in paragraph (b) to read as follows:

§ 372.65 Chemicals and chemical categories to which the part applies.

(a) * * *

Chemical Name	CAS No.	Effective Date
* * *	*	*
Bromochlorodifluoromethane (Halon 1211)	353-59-3	7/8/90
* * *	*	*

(b) * * *

CAS No.	Chemical Name	Effective Date
*	* * *	*
353-59-3	Bromochlorodifluoromethane (Halon 1211).	7/8/90
*	* * *	*

[FR Doc. 90-20517 Filed 8-29-90; 8:45 am]

BILLING CODE 6560-50-F

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 390

[FHWA Docket Nos. MC-114]

Federal Motor Carrier Safety Regulations; General; Technical Amendments

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Correction to final rules.

SUMMARY: This document corrects an error in a technical amendment to the final rules that appeared in the **Federal Register** on May 19, 1988 (53 FR 18042) and October 30, 1987 (52 FR 41718). The technical amendment appeared in the **Federal Register** on Monday, August 13, 1990 (55 FR 32916). In the August 13, 1990 amendment the first correction amended the definitions of "private motor carrier of passengers" and "private motor carrier of property" in 49 CFR 390.5 to make them consistent with the definition of "motor private carrier" in the underlying statutory authority and to eliminate any misinterpretation of those definitions. Inadvertently, in the revision of the definition of "private motor carrier of property" the word "passengers" was substituted for the correct term "property". This amendment is intended to correct that oversight.

EFFECTIVE DATES: August 30, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. Neill L. Thomas, Office of Motor Carrier Standards, (202) 366-2983, or Mr. Charles E. Medalen, Office of the Chief Counsel, (202) 366-1354, Federal Highway Administration, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e. t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION: Title 49, Code of Federal Regulations, § 390.5, Definitions, was amended by a final rule published in the **Federal Register** on May 19, 1988 (53 FR 18042, 18054). The rule included definitions of the terms "private motor carrier of passengers" and "private motor carrier of property." On August 13, 1990 both of these terms were redefined and the new definitions were published in the **Federal Register** (55 FR 32916). Inadvertently, the word "passengers" was included in the definition for "private motor carrier of property" rather than "property" as had been intended. This document corrects that error.