No. 05-669

In the Supreme Court of the United States

BP AMERICA PRODUCTION COMPANY, SUCCESSOR IN INTEREST TO AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

v.

REJANE BURTON, ACTING ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Department of the Interior reasonably interpreted the Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*, and its longstanding regulations implementing that Act, to provide that the cost of removing excess carbon dioxide from coalbed methane produced in the San Juan Basin is not deductible from the value of production for royalty purposes.

2. Whether the six-year limitations period of 28 U.S.C. 2415(a) governs the issuance of administrative orders, as opposed to the government's filing of a complaint in court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 410 F.3d 722. The opinion of the district court (Pet. App. 21a-56a) is reported at 300 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2005. A petition for rehearing was denied on August 24, 2005 (Pet. App. 175a). The petition for a writ of certiorari was filed on November 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Mineral Leasing Act of 1920 (MLA or the Act), 30 U.S.C. 181 *et seq.*, to promote prudent development of mineral resources on public lands and "to obtain for the public a reasonable financial return on assets that 'belong' to the public." *California Co.* v. *Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961). Congress charged the Department of the Interior with collecting royalty payments from federal lessees, 30 U.S.C. 1711, who must pay royalties at the rate of at least 12.5 percent of the "amount or value of the production removed or sold from the lease." 30 U.S.C. 226(b)(1)(A).

The MLA directs the Department to "prescribe necessary and proper rules and regulations * * * to carry out" the leasing provisions. 30 U.S.C. 189. The Department's regulations provide that under no circumstances shall the value of production for royalty purposes be less than the "gross proceeds" accruing to the lessee. 30 C.F.R. 206.152(h). "Gross proceeds" is defined as "the total monies and other consideration accruing to * * * [a] gas lessee for the disposition of the gas." 30 C.F.R. 206.151.

Under the Department's regulations, the lessee must "place gas in marketable condition" "at no cost to the Federal Government." 30 C.F.R. 206.152(i). Further, the amount of gross proceeds is increased "to the extent that the gross proceeds have been reduced because the purchaser, or any other person, is providing certain services the cost of which ordinarily is the responsibility of the lessee to place the gas in marketable condition." *Ibid.* The regulations define products in "marketable condition" as being those that are "sufficiently free from impurities and otherwise in a condition that they will be accepted by a purchaser under a sales contract typical for the field or area." 30 C.F.R. 206.151.

2. From 1989 until 1996, Amoco Production Company (Amoco), one of the predecessors in interest to petitioner BP America Production Company, extracted coalbed methane gas under various federal leases in the San Juan Basin in New Mexico. The extracted gas consisted of more than ten percent carbon dioxide (CO_2), which has no energy content and reduces the energy value of the gas. Pet. App. 70a.

Amoco sold most of the gas to purchasers who, at a location removed from the wellhead, treated the gas to reduce its CO_2 level. The treated gas was subsequently transported and marketed through a mainline transportation system to end users mainly in California. See Pet. App. 69a-72a. The CO_2 level had to be reduced to meet the specifications of the mainline transportation system, which would permit only one to three percent CO_2 content. *Id.* at 84a & n.18. Amoco also sold a small percentage of the gas at the wellhead to purchasers who used the gas without first treating it to reduce its CO_2 level. *Id.* at 74a-75a, 77a n.11.

For most of the relevant period, the purchaser of gas at the wellhead was a wholly owned affiliate of Amoco, the Amoco Energy Trading Company (AETC). The price that AETC paid Amoco, and on which Amoco based its royalty payments, was calculated as the amount AETC received from selling the gas to third parties, reduced by costs that AETC incurred to remove the excess CO_2 and transport the gas from the wellhead to the point where AETC sold it. Pet. App. 74a-75a.

Petitioner Atlantic Richfield Company and its subsidiary, Vastar Resources, Inc. (ARCO/Vastar), also extracted coalbed methane gas pursuant to various leases on federal lands in the San Juan Basin in New Mexico. ARCO/Vastar sold its coalbed methane gas under arms-length sales arrangements. The price that ARCO/Vastar received under those arrangements was reduced by costs associated with treating the gas to remove excess CO_2. Pet. App. 99a-102a.

3. In 1996, the Interior Department's Minerals Management Service (MMS) responded to inquiries about how to calculate royalties on coalbed methane in the San Juan Basin by advising that a value derived from gross proceeds "cannot be reduced, either directly or indirectly, for the costs of placing coalbed methane in marketable condition. Placing production in marketable condition includes, but is not limited to, CO_2 removal." Pet. App. 170a.

Pursuant to the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1701 *et seq.*, the State of New Mexico performed an audit of Amoco's royalty calculations. Pet. App. 68a-69a; see 30 U.S.C. 1735. Based on that audit, MMS issued an order on May 27, 1997, directing Amoco to pay royalties of $4,117,607 for sampled leases and production months, and to perform a restructured accounting for all of its leases in the San Juan Basin producing coalbed methane for the period January 1989 through August 1996. Pet. App. 144a-145a.

MMS found that coalbed methane in the San Juan Basin generally has a high CO_2 content, as much as 12 to 15 percent, and that "to transport and sell the coalbed methane, the CO_2 level has to be reduced to around 2 or 3 percent." Pet. App. 145a. MMS determined that in calculating the value of production for royalty purposes, Amoco had improperly deducted various costs, including

CO_2 removal costs, contrary to the requirements of the marketable condition rule. *Id.* at 145a-148a.

The State of New Mexico also performed an audit of ARCO/Vastar's royalty calculations. Pet. App. 98a-99a. Based on that audit, MMS issued an order on January 22, 1997, directing ARCO/Vastar to pay royalties of $782,373 for sampled leases and production months and to perform a restructured accounting for all of its leases in the San Juan Basin producing coalbed methane for the period January 1989 through August 1996. *Id.* at 166a-167a. MMS determined that ARCO/Vastar, in its royalty calculations, had improperly deducted the costs of treating coalbed methane to meet mainline pipeline standards. *Id.* at 157a-169a.

Both petitioners took administrative appeals, which were denied in pertinent part by the Assistant Secretary for Land and Minerals Management. Pet. App. 68a-97a, 98a-126a. In each case, the Assistant Secretary determined that while there was evidence of sales of untreated coalbed methane at the wellhead for use in that area without further treatment, the demand for such sales was very limited, amounting to between 10 and 20 percent of the total San Juan Basin coalbed methane production. *Id.* at 62a-65a, 76a-78a & n.11, 81a-83a & n.17, 103a-105a. The remainder of the gas was sold for use in distant markets and had to be treated to reduce its CO_2 content for those uses and for transmission in the pipelines. *Id.* at 62a-65a, 76a-85a, 103a-105a.

The Assistant Secretary determined that because the limited demand for gas used in untreated form was not typical for gas produced from the field or area, Pet. App. 64a-65a, 77a, 105a-106a, "the value for royalty purposes" of the gas not consumed locally "must be determined by adding to the gross proceeds received from the wellhead purchaser the cost of treating the gas for the removal of CO_2 to the level required to place the gas in marketable condition." *Id.* at 81a, 105a.

Relying on prior Interior Board of Land Appeals (IBLA) decisions, the Assistant Secretary also rejected Amoco's contention that the administrative proceedings were time-barred by 28 U.S.C. 2415, which imposes a six-year limitations period for the filing of a "complaint" in an "action for money damages" brought by the United States and founded upon a contract. Pet. App. 95a-96a. The Assistant Secretary explained that the limitations period does not apply to administrative appeals. *Id.* at 96a.

4. Petitioners sought review in the United States District Court for the District of Columbia, which rejected their challenges. Pet. App. 21a-56a. The court concluded that the Assistant Secretary had reasonably determined that "the gas at issue is not marketable unless it has reduced levels of CO_2." *Id.* at 39a. The court also ruled that the statute of limitations found in 28 U.S.C. 2415(a) does not apply to the agency's administrative orders. Pet. App. 48a-55a.

5. The court of appeals unanimously affirmed in a decision authored by then-Judge Roberts. Pet. App. 1a-20a. The court first rejected petitioners' argument that the MLA unambiguously requires MMS to calculate royalties based on the gross proceeds of sales made at the wellhead, as opposed to sales made at other locations. *Id.* at 7a-8a. The statute looks to the "amount or value of the production removed or sold from the lease," and the court concluded that "[t]he phrase 'from the lease' is sufficiently broad to be read as referring simply to the origin of the gas." *Id.* at 8a. "Gas that is 'from the lease' and that is marketed at a remote location can readily be

described as gas 'removed or sold from the lease.' The producers read the statute as if it referred to gas 'sold *at* the lease,' but that is not the case." *Ibid.* (quoting 30 U.S.C. 226(b)(1)(a)). Having found the statute ambiguous, the court of appeals upheld the Assistant Secretary's interpretation as reasonable because petitioners had presented no challenge to the reasonableness of that interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984), and instead had argued only that the statutory text was unambiguous. Pet. App. 8a-9a.

The court then held that the agency's decisions were consistent with its regulation defining gas in "marketable condition" to be gas acceptable to "a purchaser under a sales contract typical for the field or area." 30 C.F.R. 206.151; see Pet. App. 9a-11a. Although petitioners argued that untreated gas sold at the leasehold was in marketable condition under that regulation, the court of appeals deferred to the agency's contrary interpretation. The court noted both that the "field or area" was not necessarily limited to the specific leasehold, and that in any event the Assistant Secretary did not err in determining that "typical" sales contracts for the leases at issue were those that required removal of excess CO_2 for transportation to a distant location. *Id.* at 10a-11a.

Finally, the court of appeals held that the Department's orders were not time-barred by 28 U.S.C. 2415(a). Pet. App. 16a-20a. The court noted that the statute limits only the filing of a "complaint" in an "action for money damages," and "[t]he phrase 'action for money damages' points strongly to a suit in a court of law, rather than an agency enforcement order." *Id.* at 16a. "Any doubt is removed," in the court's view, "by the fact that subsection 2415(a) measures the limitations period from the filing of a 'complaint,'" because the Department issued an "*order*," not a "complaint." *Id.* at 17a. In so holding, the court of appeals expressly agreed with a decision of the Fifth Circuit, *id.* at 20a (citing *Phillips Petroleum Co.* v. *Johnson*, No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994), cert. denied, 514 U.S. 1092 (1995)), but disagreed with decisions of the Tenth and Federal Circuits, *id.* at 18a (citing *OXY USA, Inc.* v. *Babbitt*, 268 F.3d 1001 (10th Cir. 2001) (en banc); *United States* v. *Hanover Ins. Co.*, 82 F.3d 1052 (Fed. Cir. 1996)).

DISCUSSION

Petitioners' challenge to the specific methodology used to calculate royalty payments for coal bed methane leases in the San Juan Basin does not warrant further review. The decision of the court of appeals on that issue is correct and does not conflict with any decision of another court of appeals. The court of appeals' holding that the limitations period of 28 U.S.C. 2415(a) does not apply to administrative orders is also correct. The courts of appeals are divided on that question, however, and it is sufficiently important and recurring that review by this Court would be appropriate. Thus, this Court should grant the petition limited to the second question presented.

1. a. The MLA requires lessees to pay royalties "at a rate of not less than 12.5 percent in amount or value of the production removed or sold from the lease." 30 U.S.C. 226(b)(1)(A). Exercising its authority to administer the MLA and to "prescribe necessary and proper rules and regulations * * * to carry out" the leasing provisions, 30 U.S.C. 189, the Department has specified that the "value of production" for royalty purposes is

"under no circumstances" less than the "gross proceeds accruing to the lessee for lease production." 30 C.F.R. 206.152(h), 206.153(h). Further, the lessee must "place gas in marketable condition" "at no cost to the Federal Government." 30 C.F.R. 206.152(i).

Under the Department's regulations, products are in "marketable condition" if they are "sufficiently free from impurities and otherwise in a condition that they will be accepted by a purchaser under a sales contract typical for the field or area." 30 C.F.R. 206.151. In order to ensure that lessees do in fact bear the full cost of putting the product in marketable condition, the amount of "gross proceeds" for royalty purposes is increased "to the extent that the gross proceeds have been reduced because the purchaser, or any other person, is providing certain services the cost of which ordinarily is the responsibility of the lessee to place the gas in marketable condition." 30 C.F.R. 206.152(i).

For 45 years the courts have upheld the Department's "marketable condition" requirement as a reasonable interpretation of the Act, and petitioner does not appear to challenge that requirement here. See, *e.g.*, *California Co.* v. *Udall*, 296 F.2d 384, 387-388 (D.C. Cir. 1961); *Mesa Operating Ltd. P'ship* v. *Department of the Interior*, 931 F.2d 318, 325 (5th Cir. 1991), cert. denied, 502 U.S. 1058 (1992); cf. *Amerada Hess Corp.* v. *Department of Interior*, 170 F.3d 1032, 1036-1037 (10th Cir. 1999).

b. Although petitioners contend (Pet. 20-22) that the Department misapplied the "marketable condition" requirement in the circumstances of this case, the agency reasonably determined that petitioners' coalbed methane was not in marketable condition until excess CO_2 had been removed, and that the costs associated with

CO_2 removal therefore may not be deducted from gross proceeds for royalty purposes. Pet. App. 77a, 103a-105a.

The vast majority of the coalbed methane produced by petitioners was sold and used in distant markets and had to be conditioned for sale in those markets by removing excess CO_2. Pet. App. 77a-78a, 104a. Indeed, petitioners admitted below that most of the gas was consumed in California markets to which it was transported by pipelines that bought the gas from petitioners. Pet. C.A. Br. 31. Those pipelines treated and conditioned the gas to remove most of the CO_2 before putting it in their pipelines for transportation to California. Further, the price the pipelines (and in later periods, affiliated purchasers) paid for the gas was determined by adjusting for the costs of CO_2 removal. See Pet. App. 147a-153a.

Although a small percentage of the gas produced by petitioners in the San Juan Basin is sold and used in untreated form, gas is in marketable condition only if it is acceptable under a "typical" sales contract for the field or area. 30 C.F.R. 206.151. Here, the agency reasonably concluded that contracts for untreated gas were not typical for the field or area because only a limited amount of gas was sold and used in that manner. See Pet. App. 11a, 62a-65a, 103a-105a.[1]

c. Petitioners argue (Pet. 15-18) that the phrase "value of the production removed or sold from the lease" in 30 U.S.C. 226(b)(1)(A) unambiguously requires that gross proceeds always be calculated based on the condition in which some gas is sold and used at or near the wellhead, even if such sales comprise only a small percentage of the production. As the court of appeals rec-

[1] Further, all federal leases expressly provide that the Department has authority to establish the reasonable value of production for royalty purposes. See, *e.g.*, ARCO/Vastar A.R. 310.

ognized, however, the statutory text does not contain such a geographic limitation. Pet. App. 8a. Instead, "[t]he phrase 'from the lease' is sufficiently broad to be read as referring simply to the origin of the gas. Gas that is 'from the lease' and that is marketed at a remote location can readily be described as gas 'removed or sold from the lease.'" *Ibid.*

The statutory phrase "removed or sold from the lease" also prescribes a "trigger" for when a royalty obligation accrues—the time when production is "removed or sold from the lease." 30 U.S.C. 226(b)(1)(A). If a lessee extracts production but is able to store it at the lease, instead of selling or removing it from the lease, the royalty obligation does not accrue. See *BWAB Inc.*, 108 I.B.L.A. 250, 255-256 (1989).

Consequently, the court of appeals correctly held that Congress did not unambiguously require that the value of production always be measured according to the condition in which some gas is sold and used at or near the wellhead, as petitioners would have it. Instead, Congress conferred authority on the Department to determine how to calculate the value of production, see *California Co.*, 296 F.2d at 387, and the Department's reasonable interpretation of that ambiguous statutory provision is entitled to deference, see, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Here, there is no dispute that the agency's interpretation is at least reasonable. As the court of appeals emphasized, petitioners did not dispute the reasonableness of the agency's interpretation before that court, and therefore waived any argument under *Chevron*'s second step. Pet. App. 8a-9a. In any event, the Department reasonably determined that the costs at issue are non-deductible costs of putting the gas in marketable condition, as explained above. Contrary to petitioners' suggestion (Pet. 17), the agency's interpretation does not reach all so-called "downstream enhancements" in value. The marketable condition rule only requires petitioners to bear the cost of conditioning the gas for a purchaser under a contract typical for production from the field or area.

d. In addition to arguing that the Department ran afoul of the unambiguous text of the Act, petitioners contend (Pet. 18-23) that the agency's decision is a break from its past practice and inconsistent with its regulations. Petitioners cannot, however, cite any ruling that has limited the determination of marketable condition in all circumstances to sales and uses at the wellhead. See Pet. App. 11a-12a. Petitioners' claim that royalty calculations for coalbed methane produced in the San Juan Basin were always so limited is wrong. MMS accepted royalty payments from lessees "subject to audit" in accordance with its usual practice, Gov't C.A. Br. 42, and such "administrative acquiescence does not, therefore, rise to the level of long-standing policy." *Shoshone Indian Tribe* v. *Hodel*, 903 F.2d 784, 788 (10th Cir. 1990).

Nor is the agency's decision inconsistent with its regulation. The agency's interpretation of its own regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (quoting *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965)); Pet. App. 9a. The regulatory definition of "marketable condition" looks to contracts that are "typical for the field or area." 30 C.F.R. 206.151. As the court of appeals held, that phrase does not "foreclose the possibility of defining a region beyond the geographical limits of a leasehold." Pet. App. 10a. To the contrary, the Department's regulations expressly contemplate that the value of gas may be determined "at a point (e.g., sales point or point of value determination) *off the lease*," and then permit a deduction in such circumstances for costs of transporting the product but not of putting it in marketable condition. 30 C.F.R. 206.156(a) (emphasis added). Petitioners' contention (Pet. 19) that the location of the treatment should be dispositive is inherently arbitrary, because it would enable lessees to reduce their royalty payments merely by relocating their conditioning plants or arranging for others to do the conditioning at a different location.

Petitioners' heavy reliance (Pet. 4, 20-22) on the regulations governing *transportation* costs is misplaced because conditioning and transportation costs are different. While conditioning makes a product acceptable to buyers and therefore marketable, transportation moves that marketable product to the location where it will be sold. There is nothing inherently contradictory in concluding that the federal government should share the costs (by taking a reduced royalty) of transporting the product to the place where it will be sold, but not share the costs of putting the product in marketable condition. See *Independent Petroleum Ass'n of Am.* v. *DeWitt*, 279 F.3d 1036, 1041 (D.C. Cir. 2002), cert. denied, 537 U.S. 1105 (2003). Petitioners point to no provision of the MLA that requires the agency to treat the two categories of costs in the same way.[2]

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[2] Petitioners also accuse the agency (Pet. 16) of acting inconsistently with the history and practice of mineral leasing not involving the federal government. Even assuming *arguendo* that petitioners' historical analysis is accurate, this case is not governed by the variety of state laws but instead by an Act of Congress that the Department has

e. Petitioners err in contending (Pet. 17-20) that the courts of appeals are divided on this issue. Although petitioners cite primarily (Pet. 18-20) to another D.C. Circuit decision, *California Company*, the D.C. Circuit in that case *upheld* the agency's ruling that the lessee could not deduct from its gross proceeds the costs of conditioning gas by removing excess amounts of a substance in order to make it suitable for pipeline transmission. 296 F.2d at 386-388. Petitioners are correct (Pet. 20) that the gas there was conditioned near the wellhead, but as the court of appeals observed, that serves only to demonstrate that *California Company* did not address the issue presented here. Pet. App. 8a. Although petitioners also contend (Pet. 20) that *California Company* held that transportation costs should be excluded from the royalty base, that is an incorrect reading of *California Company*, which simply reserved the question. See 296 F.2d at 387. That contention is also irrelevant because in this case as in *California Company*, the agency has not sought to include transportation (as opposed to conditioning) costs in the royalty base. In any event, this Court does not sit to review alleged intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Nor are the other cases cited by petitioners in conflict with the decision below. *Continental Oil Co.* v. *United States*, 184 F.2d 802, 820 (9th Cir. 1950), considered whether gas volume lost through evaporation during transportation had to be included in the royalty calculation, not whether gas was in marketable condition. And in *Independent Petroleum Ass'n*, 279 F.3d at 1040, the D.C. Circuit *agreed* with the Department's determi-

administered for more than 80 years.

nation that the costs of "downstream" marketing are not deductible from the royalty base.

2. Petitioners also challenge (Pet. 24-30) the court of appeals' holding that the limitations period of 28 U.S.C. 2415(a) does not apply to MMS's administrative orders to pay royalties. Although that holding is correct, the courts of appeals are divided on the question, which is an important and recurring one.[3]

a. Section 2415(a) does not bar MMS's order because it applies only to the filing of complaints in court, not to the issuance of administrative orders. That section states in pertinent part:

> [E]xcept as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

28 U.S.C. 2415(a).

By its terms, Section 2415(a) applies only to an "action for money damages" initiated by a "complaint." 28 U.S.C. 2415(a). As the court of appeals recognized, those terms clearly connote judicial actions. Pet. App.

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[3] Although the limitations issue is properly presented by BP America as successor-in-interest to Amoco, ARCO/Vastar forfeited that claim by not raising it during the administrative proceedings or in the lower courts. See, *e.g.*, Pet. C.A. Br. 50-51 (raising this issue only with respect to Amoco); Pet. App. 48a (noting that Amoco made the argument). Thus, BP America is the only proper petitioner on this issue, and further proceedings on the issue could not affect the judgment as to ARCO/Vastar.

16a-17a (citing *Black's Law Dictionary* 285, 389 (6th ed. 1990)). Moreover, the "complaint" must be filed "within six years after the right of action accrues or within one year after final decisions have been rendered in applicable *administrative proceedings*, whichever is *later*." 28 U.S.C. 2415(a) (emphases added). Thus, the statute expressly distinguishes between administrative and judicial proceedings, with administrative proceedings *extending* the time bar for filing *in court*. In no way does the provision address, let alone limit, the time period for initiating administrative proceedings.

The statutory context and legislative history confirm the import of the plain text. Section 2415(a) is located within Title 28 of the United States Code, which is entitled "Judiciary and Judicial Procedure"—not administrative procedure—and in Title 28's Chapter 161, which governs the judiciary and judicial procedure in cases involving the "United States As Party Generally." The committee reports further confirm that "Section 2415 defines the time limitations for the United States to bring actions *in the U.S. courts.*" H.R. Rep. No. 1534, 89th Cong., 2d Sess. 2 (1966) (emphasis added); S. Rep. No. 1328, 89th Cong., 2d Sess. 8 (1966) (emphasis added).

Although petitioners rely on Section 2415(i)'s exemption of administrative offsets from the six-year limitations period, that provision does not mean that administrative orders are generally subject to the statute of limitations. Courts construe statutory provisions not to be surplusage when "possible," *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) (citation omitted), but the "preference for avoiding surplasage constructions is not absolute." *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004). Here, Section 2415(a) by its plain terms does not apply to administrative orders, and its legislative history and placement in Title 28 confirm that it applies only to actions filed by the United States in court. As the court of appeals explained, the administrative-offset provision was added to the statute well after its enactment and for the purpose of resolving a specific disagreement regarding the treatment of offsets. Pet. App. 18a-19a; see S. Rep. No. 378, 97th Cong., 2d Sess. 16-17 (1982). Thus, the provision was designed to address a specific dispute by "clarifying" that the limitations period is inapplicable in the context of that dispute, *id.* at 2, not to reflect the view that administrative orders are generally subject to the statute of limitations.

Moreover, "[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984) (quoting *E.I. DuPont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924)). As the court of appeals emphasized, "[e]xpanding the apparent scope of a statute of limitations beyond its plain language by inference from an express exception is hardly strict construction." Pet. App. 19a.

b. Even if the statute of limitations applied in some administrative contexts, it would not apply to orders to pay royalties under the MLA. The limitations period applies only to actions for "money damages" "founded upon [a] contract," and only if Congress has not "otherwise provided." 28 U.S.C. 2415(a).

The mineral leasing statutes and their implementing regulations create a comprehensive regulatory structure for the administration of leases. Lessees are initially responsible for computing and paying royalties. The Department, however, retains ultimate authority to determine the value of the production on which royalties are based. See 30 U.S.C. 1711. If an audit reveals a possible underpayment, and MMS determines that additional royalties are in fact due, the agency issues an order to pay. That order is administratively appealable, and the Department's final decision, rendered by the IBLA or an Assistant Secretary, is subject to judicial review. See 30 C.F.R. Pt. 290; 43 C.F.R. Pt. 4.

If a lessee fails to make a required payment, the Department has a variety of remedies, only one of which involves seeking judicial enforcement of the order. See, *e.g.*, 30 U.S.C. 1719(c)(1), (e) (providing for administrative imposition of civil penalties for "knowingly or willfully fail[ing] to make any royalty payment by the date as specified by * * * order"); 30 U.S.C. 1719, 1720 (other civil and criminal penalties); 30 U.S.C. 1722(a) (authorizing civil action to "restrain any violation" or to "compel the taking of any action required"). The Department is unaware of any judicial action first brought by the government for collection or enforcement of a royalty claim.

In the context of that regulatory scheme, MMS's orders do not seek the payment of "money damages" within the meaning of 28 U.S.C. 2415(a). As this Court has explained, the fact that a remedy "may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen* v. *Massachusetts*, 487 U.S. 879, 893-894 (1988) (citation omitted). Here, the administrative orders do not seek payment of "a sum of money used as compensatory relief," but instead compel lessees "to belatedly pay expenses that [they] should have paid all along." *Id.* at 894, 895 (citation omitted). Thus, the orders are more analogous to *equitable* monetary relief than to *damages*. See *id.* at 894-896.

Nor are the orders to pay royalties "founded upon [a] contract" within the meaning of Section 2415(a). Instead, such orders are founded upon statutory and regulatory requirements. The incorporation of those requirements in leases does not change their fundamentally statutory and regulatory character for purposes of Section 2415(a), as shown by petitioners' exclusive reliance on the governing statutes and regulations. Cf. *Transohio Sav. Bank* v. *Director, Office of Thrift Supervision*, 967 F.2d 598, 609-610 (D.C. Cir. 1992).

c. Although the decision below is correct, there is a clear division among the courts of appeals. See Pet. App. 18a, 20a. The decision below agrees with a Fifth Circuit decision holding that orders to pay royalties under the MLA are not subject to the limitations period of Section 2415(a). See *Phillips Petroleum Co.* v. *Johnson*, No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994), cert. denied, 514 U.S. 1092 (1995); Pet. App. 20a. Although *Phillips Petroleum* is unpublished, it has precedential effect under Fifth Circuit Rule 47.5.3.

In conflict with those decisions, the en banc Tenth Circuit has squarely held that "the six-year statute of limitations provided by 28 U.S.C. § 2415(a) govern[s] [administrative] orders directing oil and gas lessees to pay additional royalties." *OXY USA, Inc.* v. *Babbitt*, 268 F.3d 1001, 1003 (2001). A divided panel of the Federal Circuit has similarly held, in tension with the decision below, that the Customs Service "cannot avoid the statute of limitations [of Section 2415(a)] by threat of administrative action based exclusively on non-payment of [a] time-barred claim" because "Congress has considered and dealt not only with judicial actions in section 2415, but with extra-judicial agency actions as well." *United States* v. *Hanover Ins. Co.*, 82 F.3d 1052, 1055 (1996); but see *id.* at 1056-1057 (Bryson, J., dissenting).[4]

d. The issue has sufficient prospective importance to warrant this Court's review. In 1996, Congress enacted a seven-year limitations period for both judicial and administrative actions seeking the payment of obligations under federal oil and gas leases. 30 U.S.C. 1724(b)(1). Although that provision will likely prevent the question presented here from recurring in the context of oil and gas leases on federal lands, Section 1724(b)(1) does not apply to leases on Indian lands. See Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, Pub. L. No. 104-185, § 9, 110 Stat. 1717 ("The amendments made by this Act shall not apply with respect to Indian lands."). Instead, it applies by its terms only to proceedings or demands based on an "obligation," 30 U.S.C. 1724(b)(1), a term which includes royalties for leases on federal but not Indian lands, 30 U.S.C. 1712.

The federal government also administers leases for minerals other than oil and gas, such as coal, other solid minerals, and geothermal resources. See 25 U.S.C. 396; 30 U.S.C. 181 *et seq.*; 30 U.S.C. 261 *et seq.*; 30 U.S.C. 1001 *et seq*. The seven-year limitations period for royalty obligations does not apply to those leases either, because the definition of "obligation" includes only oil and gas royalties. 30 U.S.C. 1712.

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[4] Petitioners also contend (Pet. 26) that the decision in *United States* v. *Suntip Co.*, 82 F.3d 1468 (9th Cir. 1996), cert. denied, 519 U.S. 1108 (1997), conflicts with the decision below. In *Suntip*, however, the Ninth Circuit applied 28 U.S.C. 2415(a) to a *judicial* action by the United States to enforce an administrative decision, and held that the limitations period begins to run upon entry of the administrative decision. 82 F.3d at 1475.

The upshot is that whether 28 U.S.C. 2415(a) applies to royalties not affected by 30 U.S.C. 1724(b)(1) will continue to arise in the context of Indian leases of all minerals and federal leases of minerals other than oil and gas. For fiscal year 2005, the Department reports that 27,817 leases of mineral and geothermal resources generated more than $8.7 billion in royalties. See Minerals Revenue Management, United States Dep't of the Interior <http://www.mrm.mms.gov/MRMWebStats/default.aspx>. Of those leases, 4456 covered either Indian lands or minerals other than oil and gas and generated over $1 billion in royalties.

Although the amount of royalty payments that are potentially subject to Section 2415(a)'s limitations period represents a relatively small portion of the total universe of royalty payments, the limitations issue is important in a significant number of cases. The Department estimates, for example, that more than 20 administrative appeals are currently pending from orders to pay royalties on Indian leases that likely implicate the limitations question at issue here. Moreover, the limitations period applies to actions brought by the United States generally, not only by the Department under the MLA. Although the issue appears to have arisen primarily in the context of orders to pay royalties under the MLA, it has arisen in other contexts, as the Federal Circuit's *Hanover Insurance* decision reflects.

For these reasons, this Court should grant review to resolve the circuit conflict on whether 28 U.S.C. 2415(a) applies in administrative proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted limited to the second question presented.

Respectfully submitted.

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