BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF) **SUBLETTE COUNTY BOARD OF COUNTY**) **COMMISSIONERS** FROM A DECISION BY) THE DEPARTMENT OF REVENUE) (NOVC 2000-0400 amending 1994-1997) Valuation of 1993-1996 Gas & Oil Production) Exxon Corporation))	Docket No. **2000-142**
IN THE MATTER OF THE APPEAL OF) **SUBLETTE COUNTY BOARD OF COUNTY**) **COMMISSIONERS** FROM A DECISION BY) THE DEPARTMENT OF REVENUE) (NOVC 2002-0886 audit of 1997-1999) LaBarge Production 1997-1999 Gas) & Oil Production Exxon Corporation))	Docket No. **2003-02**

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER
MAY 20, 2004

APPEARANCES

Mr. John C. McKinley and Mr. Anthony T. Wendtland, of Davis & Cannon, for Petitioner Board of County Commissioners of Sublette County (County).

Mr. Martin L. Hardsocg and Mr. Karl D. Anderson for the Wyoming Department of Revenue (Department).

Mr. Lawrence J. Wolfe and Mr. Patrick R. Day, of Holland & Hart; Mr. Brent R. Kunz of Hathaway & Kunz; Mr. Michael Murray of Exxon Mobil Corporation; and Mr. Roy Partain of Exxon Mobil Corporation, for Exxon Mobil Corporation (Exxon Mobil or Exxon).

Mr. Phillip William Lear and Ms. Michelle McConkie of Lear & Lear, LLP, for Howell Petroleum and Yates Petroleum (Howell and Yates).

DIGEST

This matter came on for hearing on January 12 through 29, 2004, by the State Board of Equalization (Board), consisting of Chairman Roberta A. Coates, Vice Chairman Alan B. Minier and Thomas R. Satterfield, Board Member. Gayle R. Stewart acted as Hearing Officer. All Board Members have considered the matter by attending the hearing; by reviewing the file, hearing transcript, and exhibits; and by participating in this Decision and Order. This appeal arises from audits of Exxon Mobil Corporation's LaBarge project production for the period 1993 through 1999, and based on the audits, the subsequent certification of increased value to Sublette County for ad valorem tax purposes.

JURISDICTION

The Board must review final decisions of the Department on application of any interested person adversely affected, including boards of county commissioners. *Wyo. Stat. Ann. §30-11-102.1(c)*. An appeal must be filed with the Board within thirty days of the Department's final decision. *Rules, Wyoming State Board of Equalization, Chapter 2, §5(a),(e).* The County filed timely appeals of two notices of taxable valuation change issued by the Department. The notices followed, and were based on, audits of LaBarge production for production years 1993 - 1996 and 1997 - 1999. The audits were conducted by the Department of Audit.

DISCUSSION

The Department is responsible for determining the taxable value of natural gas production each year. Wyoming counties must use the Department's value to levy ad valorem property taxes. This case involves the determination of a value for gas which cannot be sold when production is completed, but instead can only be sold after it has been processed to separate hydrogen sulfide, carbon dioxide, methane, nitrogen, and helium.

Since 1989, the Department has determined the value of natural gas produced from Exxon Mobil's LaBarge project by use of a method stated in a Tax Settlement Agreement approved by judicial decree. In 1990, the Wyoming legislature enacted four methods for the Department's use in determining the value of gas sold after processing. One of those four methods is known as the comparable value method. The legislature also granted the Department authority to agree to mutually acceptable alternative methods when the newly specified methods did not achieve a representative fair market value.

Sublette County has appealed two final determinations of taxable value made by the Department following audits conducted by the Wyoming Department of Audit. Sublette County identified twenty-eight separate appeal issues. The County generally claims that the Department has improperly applied the valuation method found in the Tax Settlement Agreement, and thereby failed to perform its duty statutory to value the LaBarge production at its full fair market value. Many of the County's issues rest on a claim that the use of the Tax Settlement Agreement method is governed by the standards of the comparable value method enacted in 1990. The County has also made claims related to the Department's administration of the Tax Settlement Agreement method in the context of such specific issues as a deduction for payments to overriding royalties, the computation of the taxable value of helium, and the value of methane production used as plant fuel.

We find for the Department on all twenty-eight issues, and thereby resolve the dispute in favor of the Department. Our principal conclusions of law are that: (1) the statutes adopted in 1990 govern the actions of the Department only to the extent that the requirements of the 1990 statutes are not inconsistent with the requirements of the Tax Settlement Agreement; and (2) the Tax Settlement Agreement method is not the comparable value method.

Late in the proceedings, Exxon Mobil filed a Motion to Dismiss claiming that this Board did not have subject matter jurisdiction to hear the County's claims. The Motion was based on two separate grounds. The first ground was the Board of County Commissioners of Sublette County violated the Wyoming Public Meetings Act, so that the appeals were void. The second ground was that the Board of County Commissioners had unlawfully delegated the conduct of this litigation to their attorneys. The Motion was renewed after the close of evidence.

In light of our Findings of Fact, we reject both grounds advanced by Exxon Mobil, and deny Exxon Mobil's Motion to Dismiss.

<u>FINDINGS OF FACT</u>

A. Introduction

The pertinent events in this case span more than twenty years. The County has expressed concerns about the Tax Settlement Agreement by taking appeals to this Board since 1997. This history has created a case that is unusually complex.

Our disposition of the case takes into account an unusual number of intervening developments in the law. We therefore have been obliged to address various aspects of legislation and adjudications as facts that appear in this portion of our decision. Additional discussion of pertinent statutes and adjudications follows in our Conclusions of Law.

The case also presents unusual difficulties with the precise use of terms of art. In particular, our decision rests on distinctions between the comparison approach, comparison value, and comparable value. We have found it necessary to pay considerable attention to the use of these phrases over the past fifteen years.

We have attempted to alleviate the potential for confusion by organizing our Findings of Fact, insofar as possible, in chronological order. The general subject matter order of our Findings is:

A description of the LaBarge project and its products;
The LaBarge project accounting system;
The crisis that gave rise to the Tax Settlement Agreement;
How the Tax Settlement Agreement works;
The 1990 statutes, and administration of the Tax Settlement Agreement;
The County's first challenge in 1997, and the Department's response;
The audit for production years 1993-1996 and the Section 14 examination;
The audit for production years 1997-1999 and subsequent events;
Current positions of the parties; and
Evidence regarding the value of the LaBarge production.

We do not intend this listing to be an exhaustive statement of the facts we have taken into account, nor do we intend to limit the subject matter addressed under each of these headings. Our sole intent is to make the Findings more manageable.

We have found it useful to employ the words of contemporary documents in our Findings, and to closely follow words chosen by the witnesses who appeared before us. We have often had cause to use the name Exxon, rather than Exxon Mobil, but remain aware of the merger and the current identity of the corporation. Similarly, Howell Petroleum and Yates Petroleum are predecessors in interest to current corporate interests, but we found it useful to maintain those identities for the sake of continuity in our Findings.

B. The LaBarge project and its products

1. Exxon Mobil's LaBarge operation is the subject of this dispute. The LaBarge operation produces gas from three unitized well fields located in the Bridger-Teton National Forest in Sublette County, Wyoming. [Tr. Vol. VII, pp. 1546-1547]. The three units are known as Fogarty Creek, Lake Ridge, and Graphite. [Tr. Vol. VII, p. 1546]. Gas from the three Units is processed principally in neighboring Lincoln County, Wyoming. [Tr. Vol. VII, pp. 1545-1546].

2. Mobil drilled the first well into the Madison Formation Reservoir, the source of LaBarge gas, in 1963. [Tr. Vol. VII, p. 1548]. Exxon drilled its first well in 1969. [Tr. Vol. VII, p. 1549]. The existing well fields are perforated at a depth of 15,500 to 16,000 feet below the wellheads. [Tr. Vol. VII, p. 1566].

3. The LaBarge gas reserve is "multi-component gas that is primarily CO2 [carbon dioxide] but also contains other valuable components, including methane and helium. This reserve is also a sour gas because it contains H2S [hydrogen sulfide], and this reserve is well suited for the development and sale of products of CO2 for CO2 flooding, methane for energy and helium as a helium source." [Tr. Vol. VIII, pp. 1949-1950]. The general composition of the gas reserve is:

Carbon dioxide	65%
Methane	22%
Nitrogen	7.4%
Hydrogen sulfide	5%
Helium	.6%

[Exhibit 328, p. 7; Tr. Vol. VIII, p. 1848, Vol. VII, p. 1560]. Unlike most natural gas in Wyoming, LaBarge gas is not flammable. [Tr. Vol. VII, p. 1572]. The gas stream is lethal due to the high concentration of hydrogen sulfide. [Tr. Vol. VII, p. 1560]. In the view of the Department, because of the concentration of carbon dioxide, no natural gas stream in Wyoming is "remotely similar." [Tr. Vol. III, p. 621].

4. Exxon Mobil estimates that there are 167 trillion cubic feet of natural gas in place in the reserve. [Tr. Vol. VII, p. 1561]. Based on current processing capacity of 720 million standard cubic feet a day [Tr. Vol. VII, p.1556], the LaBarge project could produce gas for hundreds of years. [Tr. Vol. VIII, p. 1623].

5. Exxon designed the LaBarge plant to have an unusually long life. [Tr. Vol. VIII, p. 1623]. As a result, the plant has extra wall thicknesses in its vessels, equipment, and piping. [Tr. Vol. VIII, p. 1624]. In some instances, Exxon used exotic materials to guard against long-term corrosion. [Tr. Vol. VIII, p. 1623]. While the original design life was fifty years, the current stated plant life is sixty years. [Tr. Vol. VIII, pp. 1623, 1625]. There is already internal discussion of extending the stated plant life to seventy years. [Tr. Vol. VIII, p. 1625].

6. Exxon first began to plan for permitting, siting and construction in the early 1980's. [Tr. Vol. VII, pp. 1549-1550]. After a full environmental impact statement process, the Federal Bureau of Land Management dictated that gas processing facilities must be located at Shute Creek, approximately forty miles south of the well fields. [Tr.

Vol. VII, pp. 1550-1551]. The final environmental decision was dated January 25, 1984. [Exhibit 354].

7. In 1983, Exxon sought permission from the Wyoming Oil and Gas Conservation Commission to vent all gases but hydrocarbons. [Exhibit 310]. Exxon told the Commission that all hydrocarbons would be sold or utilized, but that it was not "even close to having a purchaser for the carbon dioxide, or any other non-hydrocarbon gas, at the present time, nor does it appear that there is a potential for finding such a purchaser in the immediate future." [Exhibit 310, Findings, ¶6]. On September 23, 1983, the Commission determined that "the venting of the subject carbon dioxide and other non-hydrocarbon gases is not waste and the venting should be permitted." [Exhibit 310, Conclusions, ¶3]. At the same time, the Commission ordered Exxon to provide written annual reports about its efforts to find purchasers for these other gases. [Exhibit 310]. Exxon Mobil made the required annual reports and continues to do so. [Tr. Vol. VIII, pp. 1716-1717].

8. Construction on the LaBarge plant commenced in May 1984. [Tr. Vol. VII, p. 1550].

9. On June 1, 1985, Exxon entered into a Helium Sale and Disposition Agreement with the United States of America. [Exhibit 814]. Exxon's federal oil and gas leases did not convey any rights to helium, because "helium owned by the United States of America is excepted and reserved from the coverage of the oil and gas leases granted under the Mineral Leasing Act, and ownership of the helium in place is reserved...." [Tr. Vol. XII, p. 2745, Vol. IX, p. 1988; Exhibit 814]. Under this Agreement, the United States retains title to helium extracted from federal lands, but Exxon is granted (1) the right to take possession of the gas stream from federal lands for the purpose of extracting helium; (2) the right to extract helium up to a maximum amount in a contract year; and (3) title to extracted gas for which payment is made under the terms of the Agreement. [Exhibit 814, Article II]. The payment terms include payment of one-twelfth of the gross proceeds of sales of refined helium. [Exhibit 814]. The original duration of the Agreement was twenty years; that duration was recently extended through October 2011. [Exhibit 814; Tr. Vol. XII, p. 2743].

10. Exxon thereafter entered into helium supply contracts with several industrial gas distribution companies. [Tr. Vol. XII, pp. 2750-2751]. The record includes a contract with Air Products and Chemicals, Inc., with a commencement date of September 1, 1986. [Exhibit 353]. These contracts typically included take-or-pay clauses, obliging the buyer to pay for helium even if the helium was not taken, thereby protecting Exxon's investment in its plant. [Tr. Vol. XII, pp. 2751-2753]. For its part, Exxon typically agreed to a most favored nation provision, by which Exxon agreed to offer as low a price to its buyer as to any other buyer. [Tr. Vol. XII, pp. 2752-2753]. The parties also typically agreed to a tax reimbursement provision, requiring the seller to reimburse Exxon for a portion of any increase in taxes during the life of the agreement. [Tr. Vol. XII, pp. 2793-2796].

11. When construction was completed, the LaBarge processing facilities comprised four main elements: a gathering and separating system; the Black Canyon dehydration plant; a pipeline from the dehydration plant to the Shute Creek processing plant; and the Shute Creek processing plant. The Shute Creek plant began processing gas from the well fields in August 1986. [Tr. Vol. VII, p. 1550].

12. The gathering and separating system collects gas from eighteen wells. [Exhibit 345, slide 23]. A principal function of this system is to separate 95% the water found in the gas. [Tr. Vol. VII p. 1580,Vol. VIII, p. 1797]. The gas in the wellbore is 3.7% water. [Tr. Vol. IX, p. 1890]. As the gas rises three miles to the wellhead, its pressure drops from 5000 psi to 1400 psi; the gas cools from 270-280°F to 120-140°F; and the velocity of the gas increases from 100 mph to 300 mph. [Tr. Vol. VIII, p. 1874; Exhibit 328, p. 14]. Some of the water in the gas condenses on the way up the well, so that the gas includes a fine liquid mist when it reaches the well head, together with water in the gaseous phase. [Tr. Vol. VIII, p. 1875]. The gathering system takes this misted gas stream to manifolds, where the gas stream enters a very long and very wide vessel for separation. [Tr. Vol. VIII, pp. 1877-1878]. In the large space, the gas simply slows down, and gravity pulls the water out of the gas. [Tr. Vol. IX, p. 1970]. After separation, the remaining gas is 0.22% water. [Tr. Vol. IX, pp. 1890-1891].

13. The Black Canyon dehydrator prepares the gas stream for transport to the Shute Creek processing facility via pipeline. [Tr. Vol. VII, pp. 1585-1586]. Dehydration is necessary because carbon dioxide and hydrogen sulfide both form highly corrosive acids when mixed with water, and could damage the pipeline. [Tr. Vol. VII, p. 1587]. A triethylene glycol (TEG) dehydrator removes all but 0.02% of the water in the gas stream. [Tr. Vol. IX, p. 1891].

14. The forty-mile pipeline between Black Canyon and Shute Creek has thick walls that were designed to last for the life of the plant. [Tr. Vol. VII, p. 1610]. It is equipped with eleven automatic block valves to limit public exposure to hydrogen sulfide in the event of a leak. [Tr. Vol. VII, pp. 1610-1611]. The inlet pressure of the pipeline is 1300 psi, and the outlet pressure is 1050 psi. [Tr. Vol. VII, p. 1611; Exhibit 328, p. 17]. The temperature of the gas drops from 125°F to 90°F between Black Canyon and Shute Creek. [Tr. Vol. VII, p. 1611].

15. For the years at issue, the Shute Creek processing plant removed and recovered carbon dioxide; removed nitrogen; diverted methane and liquid natural gas (LNG) for sale; recovered all but 14% of the helium in a form that is 99.9% pure; and removed and converted the hydrogen sulfide to sulfur.

16. When the gas stream reaches the Shute Creek plant, it is rehydrated to a moisture content of 0.07% water for processing. [Tr. Vol. IX, p. 1891]. Hydrogen sulfide is then extracted from the gas stream by using liquid Selexol. [Tr. Vol. VIII, p. 1626; Exhibit 328, p. 19].

17. Carbon dioxide is next extracted from the gas stream using a different technique that also employs Selexol. [Tr. Vol. VIII, p. 1627; Exhibit 328, pp. 20-21]. Carbon dioxide that can be sold is directed to compressors located nearby in Sweetwater County. [Tr. Vol. VIII, p. 1650]. Carbon dioxide that cannot be sold is vented. [Tr. Vol. VIII, p. 1627]. The balance of the gas stream is dehydrated again, this time using a catalyst, to prepare the gas for an extremely cold process. [Tr. Vol. VIII, pp. 1627-1628].

18. The Nitrogen Rejection Unit, operating at -250°F to -300°F, separates the remaining gas into three streams. [Tr. Vol. VIII, pp. 1628, 1672]. The first stream is half nitrogen and half helium, and feeds into the helium recovery plant. [Tr. Vol. VIII, p. 1629]. The second stream is methane. About five percent of this stream is compressed and sold as liquid natural gas (LNG). [Tr. Vol. VIII, p. 1629]. Although LNG is more valuable than methane, the plant design depends on revaporization of methane as a coolant, which reduces potential LNG production. [Tr. Vol. VIII, pp. 1674-1676]. The third stream is nitrogen, which is usually vented. [Tr. Vol. VIII, p. 1629]. Although the plant can produce liquid nitrogen, it cannot do so when the helium plant is operating a full capacity. [Tr. Vol. VIII, p. 1684].

19. The Shute Creek helium plant is the largest in the world. [Tr. Vol. VIII, p. 1683]. The helium stream is separated from nitrogen and other trace elements by further reducing the pressure on the gas. [Tr. Vol. VIII, p. 1685]. The initial separation occurs as -317°F. The majority of the nitrogen is removed at -350°F. The remaining contaminants are removed by a pressure swing absorption process, which employs a rapid cycle of pressurization and depressurization, and a catalyst. [Tr. Vol. VIII, pp. 1685, 1690]. The gas leaving the pressure swing absorber is 99.997% helium. [Tr. Vol. VIII, p. 1686]. The helium is then liquified to -452°F, slightly above absolute zero. [Tr. Vol. VIII, pp. 1683-1684]. About 14% of the helium in the raw gas stream cannot be recovered, due to the thermodynamic limitations of the separation process. [Tr. Vol. XII, p. 2787].

20. In liquid form, helium can be transported around the world in specially designed trucks fitted with vessels similar to thermos bottles. [Tr. Vol. VIII, pp. 1683, 1692]. The plant uses liquid nitrogen to cool the storage vessels when the temperature in the truck vessels is higher than -452°F. [Tr. Vol. VIII, p. 1693]. The trucks are then loaded with liquid helium by a hose relying on gravity feed. [Tr. Vol. VIII, p. 1695]. A separate hose recovers helium vapors that are displaced during loading, and returns the helium vapors to the plant for reprocessing. [Tr. Vol. VIII, p. 1693]. No helium is lost in the loading process. [Tr. Vol. XI, pp. 2559, 2569-2570]. The plant charges customers for the service of cleaning and cooling the trucks, but does not report these sales as product sales revenue. [Tr. Vol. VIII, p. 1745, Vol. XI, pp. 2558, 2559-2560].

21. The refined hydrogen sulfide stream from the Selexol removal process feeds to a Sulfur Recovery Unit and a Tail Gas Cleanup Unit. [Tr. Vol. VIII, p. 1630]. During the audit years, the plant produced 1200 long tons of sulfur per day. [Tr. Vol. VIII, p. 1696]. The majority of sulfur was recovered in a furnace operating at 2000°F, fueled in part by burning a portion of the hydrogen sulfide. [Tr. Vol. VIII, p. 1697]. The plant achieved 99.9% sulfur recovery, slightly higher than required by its environmental permit. [Tr. Vol.

VIII, p. 1701]. The small portion of unrecovered sulfur is incinerated, but incineration releases enough sulfur dioxide into the air to have affected the location of the plant. [Tr. Vol. VIII, p. 1702].

22. We find that the LaBarge plant, from the wellhead through the tailpipe of the Shute Creek processing plant, was competently engineered and constructed, and has been competently operated. [*E.g.*, Tr. Vol. VIII, pp. 1866-1868, 1951-1952; Exhibit 328].

23. The principal products of the plant are methane, liquified natural gas, carbon dioxide, and helium. Methane gas is the most valuable product on the basis of total sales. [Tr. Vol. III, p. 513].

24. Exxon Mobil sells carbon dioxide to assist with enhanced oil recovery from aging oil fields. [Tr. Vol. VIII, p. 1654, Vol. IX, pp. 1956-1958]. Exxon Mobil has long sold carbon dioxide to the Bairoil Field and Rangely Field. [Tr. Vol. VIII, p. 1654]. Two pipelines were constructed at the time of the original construction of the plant for this purpose. [Tr. Vol. VIII, p. 1654]. However, the carbon dioxide recovery technique is dependent on market and field pressure conditions that adversely affected demand for carbon dioxide during the years at issue. [Tr. Vol. VIII, pp. 1657-1658]. For most of the audit period, the plant ran one, and at most two, of the four large compressors used to compress and transport carbon dioxide for sale. [Tr. Vol. VIII, p. 1737]. Over 300 million cubic feet a day of carbon dioxide were vented during the audit period. [Tr. Vol. VIII, p. 1739].

25. During the audit years, LaBarge produced twenty to thirty percent of the world's helium supply. [Tr. Vol. XII, p. 2749]. About twenty-five percent of the helium market was in medical technology, which relied on the low temperatures of liquid helium to make materials lose their resistance to electricity. [Tr. Vol. XII, p. 2748, Vol. VIII, p. 1686]. The lifting and leisure segment of the market is less than ten percent. [Tr. Vol. XII, p. 2748]. Helium also has uses in deep sea diving, gas chromatography, welding, and as a nuclear reactor coolant. [Tr. Vol. XII, p. 2749]. However, during the life of the plant, the market has episodically suffered from overcapacity stimulated by demand, and from the threat of oversupply by release of government-processed helium. [Tr. Vol. XII, pp. 2757-2758; 2781-2785].

26. The majority of the market for sulfur is for the manufacture of fertilizer. [Tr. Vol. VIII, p. 1701]. The majority of sulfur customers are on the East Coast or Gulf Coast of the United States. [Tr. Vol. VIII, p. 1701]. Due to the transportation costs that must be incurred to sell sulfur, the sulfur production and sales operation has often lost money. [Tr. Vol. VIII, pp. 1700-1701]. Exxon Mobil nonetheless continued to sell sulfur because its environmental permits required sulfur removal, and the only alternative to sale was stockpiling at the plant site. [Tr. Vol. VIII, p. 1702]. In 2004, Exxon will cease its sulfur operations, and dispose of hydrogen sulfide by reinjection in the Madison Formation. [Tr. Vol. VIII, p. 1721]. This change in operations will also allow the plant to save costs by generating its own electricity. [Tr. Vol. VIII, pp. 1722-1723].

27. We find that Exxon Mobil's general descriptions of the markets for carbon dioxide, helium and sulfur are sound, and that Exxon Mobil's responses to changing market conditions have been reasonable.

C. The LaBarge project accounting system

28. Exxon Mobil's accounting system, and its limits, provide a context that is vital to understanding the dispute between and among the parties. The accounting system is the common source of information on which the positions of all parties rest. Cindy Lee Gentry was Operations Accounting Supervisor of the La Barge operations team which succeeded the project's construction team in the summer of 1986. [Tr. Vol. X, pp. 2125-2126]. She and her team were responsible for assuring that accounting systems existed to handle five operations issues: (1) cost accounting; (2) revenue accounting; (3) ownership; (4) state and federal royalties; and (5) severance and ad valorem taxes. [Tr. Vol. X, pp. 2128-2129].

29. The cost accounting system addressed the problem of providing for the collection of useful operating expense information. [Tr. Vol. X, p. 2129]. Each cost incurred on the project is recorded in Exxon Mobil's general ledger. [Tr. Vol. X, p. 2131]. Exxon Mobil's standard accounting system was adapted to the particular requirements of LaBarge by the establishment of plant-specific detail codes. [Tr. Vol. X, p. 2131]. Gentry and her team tried to anticipate a lowest common denominator of "cost buckets" that would be useful for tracking operating expenses, thereby assisting the management of the plant. [Tr. Vol. X, pp. 2130-2131]. Exxon Mobil regularly prepares internal cost documents known as F & O (financial and operating) reports. [Tr. Vol. X, pp. 2179, 2184, Vol. VIII, p. 1720]. However, no F & O reports were offered into the record.

30. Cost accounts used during construction did not necessarily survive when the plant began to operate; the construction costs were generally transformed into asset accounts. [Tr. Vol. X, p. 2186].

31. Over the years, Exxon Mobil has used cost accounting to contain costs and improve operations, so much so that operating expenses have declined faster than inflation. [Tr. Vol. X, p. 2162, Vol. XI, pp. 2441-2442]. However, we find that the cost accounting system did not track costs that Exxon did not find useful to track. It did not, for example, track methane used for plant fuel as a cost [Tr. Vol. XI, p. 2438], although that information is available on a report of product disposition. [Exhibit 346, p. 11]. As important, the LaBarge project's cost accounts have never been audited by anyone. [Tr. Vol. X, p. 2170, Vol. XI, pp. 2443-2444, Vol. XII, p. 2683]. We accordingly cannot assume that cost categories useful to Exxon Mobil are suitable for any purposes other than those for which they were expressly designed. [Vol. XII, p. 2695].

32. The revenue accounting system was established in a climate of uncertainty about how the project's natural gas was to be produced and marketed. [Tr. Vol. X, p. 2132]. Exxon Mobil potentially had to account for five products for every owner of every well, including the helium that Exxon Mobil had never previously sold. [Tr. Vol. X, p. 2133]. As a response to these uncertainties, the revenue accounting system was established

with the capacity to generate special reports known as 100% sales reports. [Tr. Vol. X, p. 2134]. We address these reports in greater detail below. *Infra*, ¶131.

33. One cannot assume that the accounting system uniformly captures accounting detail related to a specific subject. Exxon Mobil relates sales back to each well, and calculates payouts based on production, gas composition, and ownership. [Tr. Vol. XI, pp. 2364-2365]. Exxon Mobil nonetheless does not track well-by-well costs in the units where Exxon Mobil holds all leases. [Tr. Vol. X, pp. 2165-2166].

34. In 1986, ownership-related accounting issues arose from the development history of the well field and the plant. The plant processes gas from three production units: Lake Ridge, Graphite, and Fogarty Creek. [Tr. Vol. X, p. 2147]. Only Exxon Mobil holds the federal leases in the Lake Ridge and Graphite Units. [Tr. Vol. X, p. 2147]. There are other leaseholders in Fogarty Creek. Exxon Mobil is the operator of all three units. Exxon bore the costs of drilling in all three units, but leaseholders Howell and Yates elected to share in the cost of drilling the Fogarty Creek unit. [Tr. Vol. X, p. 2148]. All other interest owners were non-consent, that is, they did not participate in the cost of drilling the wells, and by contract would not enjoy any proceeds from the wells until the investors had received their investment back, plus a penalty. [Tr. Vol. X, p. 2151]. The proportion at which Exxon Mobil, Howell, and Yates carried the non-consents varied from well to well. [Tr. Vol. X, p. 2151].

35. In addition to the lease holders in the three units, there were many private overriding royalty interests. [Tr. Vol. X, p. 2174]. Federal leases had in many instances been obtained in a lottery, and then resold to Exxon and others. [Tr. Vol. X, p. 2174]. When resold, the original leaseholder commonly retained an interest in production from the lease. [Tr. Vol. X, p. 2174]. Payments of these overriding royalties are the responsibility of the leaseholder, so that Howell and Yates remained responsible for overriding royalties on production from their leases, and Exxon remained responsible for overriding royalties on production from its leases. [Tr. Vol. X, pp. 2175-2176].

36. The construction of the plant created an independent set of ownership issues, most significantly with Howell and Yates. Exxon refers to, and accounts for, the LaBarge plant cost as the cost of the entire infrastructure beyond the wellhead. [Tr. Vol. X, p. 2155]. By 1985, plant cost had doubled over original projections, and methane prices were falling. [Tr. Vol. X, p. 2154]. In this financial climate, Exxon's project team offered Howell and Yates a chance to acquire an ownership interest in the plant. [Tr. Vol. X, pp. 2153, 2155-2156]. Howell and Yates declined. [Tr. Vol. X, p. 2155].

37. Howell and Yates also balked at the alternative of a straight processing fee agreement with Exxon, because a fee based on Exxon's processing costs was too high, once depreciation and a return on investment were factored in. [Tr. Vol. X, p. 2157]. This impasse eventually prompted Howell and Yates to file an antitrust suit against Exxon, seeking damages of $380 million. [Tr. Vol. X, p. 2158].

38. In 1986, the accounting for federal and state royalties presented separate but interrelated problems. The federal royalty program, managed by the Mineral Management Service (MMS), requires a cost netting calculation by product (excluding helium, to which a federal leaseholder has no rights). [Tr. Vol. X, p. 2141]. The three consistent components of these costs were: (1) out of pocket operating and maintenance expense; (2) straight line depreciation on invested capital at the rate of two percent per year, relating to the fifty year life of the plant; and (3) return on investment, tied to a published BBB bond rating. [Tr. Vol. X, p. 2142].

39. Exxon Mobil did not have a final decision on MMS processing and transportation allowances until 1991. [Tr. Vol. X, p. 2140]. *Infra*,¶127. However, since the MMS calculation eventually became routine, the pattern of this calculation provided a ready template when the State began to have reason to evaluate Exxon Mobil's costs in subsequent years. *Infra*, ¶201. That is, the MMS calculation offered a ready model for estimating return <u>of</u> Exxon's original invested capital, or depreciation, and return <u>on</u> investment, in the form of the BBB bond rate.

40. The state leases were structured in a different way. The state leases provided that the state royalty would not be less than the federal royalty. [Tr. Vol. X, p. 2137]. It was therefore impossible to calculate the royalty on methane until that calculation was resolved with the MMS. [Tr. Vol. X, pp. 2138-2139]. The state royalty issue was simplified by the fact that the state leases conveyed helium, while the federal leases did not. [Tr. Vol. X, p. 2138]. Exxon Mobil did not resolve its royalty calculation issues with the State of Wyoming until 1995. *Infra*, ¶144.

41. Severance and ad valorem tax accounting had to provide for a calculation of taxable value using the netback method that was then used by the Wyoming Department of Revenue and Taxation. [Tr. Vol. X, p. 2135]. When Exxon originally calculated its taxable value using the netback method, the result was a value less than zero. [Tr. Vol. X, p. 2135]. In part, this was due to falling prices and costs that were higher than anticipated. [Tr. Vol. X, p. 2135]. However, the principal reason for this result was the massive amount of Exxon's capital investment. [Tr. Vol. IX, p. 1980]. The main components of this investment, in round numbers, were as follows:

Gathering system, to Black Canyon inlet	$225,000,000
Black Canyon dehydration plant	$134,000,000
Pipeline from dehydration outlet to plant inlet	$ 40,000,000
Shute Creek Plant	$850,000,000
Total investment in plant	*$1,249,000,000*

[Tr. Vol. X, pp. 2188-2190]. The expense of drilling the well field, up to the wing valve of each well head, was an additional $300,000,000. [Tr. Vol. X, p. 2197].

42. The amount of total investment was so large that, for the earlier years in the useful life of the plant, any allowance for a rate of return on investment overwhelms a calculation of current revenues and costs. Since the calculation of current revenues and costs was at the heart of the netback valuation method then in place, it is important to articulate why this is so. We accordingly provide a simplified illustration of the problem, using some figures that are found in the record, and some that are calculated. The record does not include such a specific illustration or calculation for the first years the plant was in production. We note that Exxon "never books [a return on investment], but a netback allows [a return on investment] as a cost component." [Tr. Vol. X, p. 2327].

43. To aid us in our illustration, the record includes a document prepared in 1997 that shows historical financial data, including data from 1987. [Exhibit 324]. Exxon's total plant proceeds in 1987 were $137,963,147. [Exhibit 324, p. 00735]. Operating and maintenance expenses in 1987 were $64,681,000. [Exhibit 324, p. 00735]. Exxon made additional capital expenditures in 1987 of $15,000,000 [Exhibit 324, p. 00735], which for the sake of illustration we will treat as an annual expense. Straight line depreciation on total investment in plant (i.e., $1,249,000,000) for fifty years is two percent annually, or approximately $25,000,000.

44. If one assumes a ten percent return on investment, the required first year of an annual return on the total investment in plant (i.e., $1,249,000,000) is nearly $125,000,000. Revenue of $137,963,147 compares to operating and capital costs of $229,681,000 (operating expenses plus capital costs from our illustration).

45. We can change the illustration substantially by using a rate of return of two percent, which approximates Exxon Mobil's actual rate of return for its entire investment in well field and plant from 1987 through 1998. [Tr. Vol. VIII, pp. 1769-1770, 1826, Vol. X, pp. 2313-2317; Exhibit 360]. At two percent, our simplified calculation would yield revenue of $137,963,147 against operating and capital costs of $129,681,000, or a reduction in $100,000,000 in costs. In summary form:

1987	Return on investment @ 10%	Return on investment @ 2%
revenue	$137,963,147	$137,963,147
operating and maintenance	$64,681,000	$64,681,000
depreciation (50 year life)	$25,000,000	$25,000,000
required return on investment	$125,000,000	$25,000,000
profit/(loss)	($76,717,853)	$23,282,147

46. For the purposes of this type of illustration, the passage of time has the same effect as reducing the rate of return, because accumulated depreciation reduces the

amount of outstanding assets against which the return on investment is applied. However, forty years of a fifty year plant life would have to pass in this illustration to achieve the mathematical effect of reducing a ten percent rate of return to a two percent rate of return. Using a BBB bond rating for a rate of return, Exxon Mobil has demonstrated that the netback method yields a zero or negative taxable value for the years at issue. [Tr. Vol. XI, p. 2423]. *Infra*, ¶244.

47. We cannot say how long the plant would have to operate to reduce the effect of a netback component for required return on investment. We have already seen that the life of the plant will in fact be longer than fifty years. *Supra*, ¶5. Further, Gentry explained that Exxon Mobil does not book the LaBarge reserves in the ground, but rather books reserves as a function of the capacity of the plant times the plant's estimated useful life. [Tr. Vol. X, pp. 2171-2172]. The plant's original design capacity was 480 million standard cubic feet a day. [Tr. Vol. VII, p. 1556]. During the audit period, the capacity was around 650 million standard cubic feet a day. [Tr. Vol. VII, p. 1556]. In 2004, upon completion of an expansion project, plant capacity will rise to 720 million cubic feet a day. [Tr. Vol. VII, p. 1556]. The evidence presented to us indicates a likelihood that future depreciation will be taken based on units of production. [Tr. Vol. X, p. 2172, Vol. XI, p. 2441; Exhibits 803, 804, pp. EMC 00102, EMC 00220]. If reserves are a function of plant capacity, reserves increase with both the extended life of the plant and with the increase in operating capacity. (There is so much gas in the ground that gas in the ground is not an independent limit. *Supra*, ¶4.) So, the overall balance between revenues, operating and maintenance expense, depreciation and required return on investment could be considerably different in the future than it was in 1987.

48. In 1987, Exxon returned to the Wyoming Oil and Gas Conservation Commission to secure permission to vent carbon dioxide from the plant. [Exhibit 165]. This permission was granted by order of November 10, 1987. [Exhibit 165]. The County directs our attention to a Finding of Fact in this Order, which states that "CO2 is the only gas that is vented from the Shute Creek Plant." [Exhibit 165]. This was incorrect then and later. *Supra*, ¶18-19; *infra*, ¶142. Exxon again secured permission to vent carbon dioxide from the plant in 1988, by Order of July 22, 1988. [Exhibit 166]. However, both Orders continued the Order entered in 1983, with the modification related to carbon dioxide. [Exhibits 165,166]. No party called a witness from the Wyoming Oil and Gas Conservation Commission to testify regarding the 1983, 1987, or 1988 Orders. The County presented no evidence that it ever complained to the Commission regarding improper venting from the Shute Creek Plant.

D. The crisis that gave rise to the Tax Settlement Agreement

49. In its 1988 session, the Wyoming Legislature directly addressed the application of the netback method to processed natural gas. "Cap legislation" is a shorthand for 1988 Wyo. Session Laws, Chapter 93, which became effective April 1, 1988. The law limited the maximum cost deduction against revenues to 40%. *Rev. W. S. 1977, §39-1-402(a)*. The law also authorized a variance to any producer whose processing plant was valued at less than $250,000,000, prompting Exxon to conclude that it applied only to the

LaBarge Project. [Exhibit 356, Testimony, p.11]. Exxon immediately filed suit to declare the statute unconstitutional. [Tr. Vol. IX, p. 1988; see Exhibit 805]. The Board of County Commissioners of Sublette County was among the many state and local government entities that Exxon named as defendants. [Exhibit 805].

50. To understand what followed, it is necessary to describe a conceptual distinction between the State's severance taxes and the County's ad valorem property taxes. The severance tax is an excise tax, levied on the privilege of severing or extracting minerals. *E.g.*, *Wyo. Stat. Ann. § 39-14-203(a)*. The ad valorem tax is a property tax. *Wyo. Stat. Ann. § 39-13-103(b)*. The Wyoming Constitution provides that the property of the United States, when used primarily for a governmental purpose, shall be exempt from taxation. *Wyo. Const., Art. 15, § 12.* There may therefore be a state constitutional distinction between the two taxes as they apply to helium produced from federal lands. We do not intend to draw legal conclusions, but only to cast light on the positions that affected negotiation of the Tax Settlement Agreement which is the subject of this case.

51. For all times at issue, the Department determined the taxable value against which both the severance tax and the ad valorem tax was levied. [Tr. Vol. II, p. 455]. A county has no role in the process of determining the taxable value of mineral production. [Tr. Vol. III, p. 520]. The Department notifies a county of the value it has determined by certifying that value to the county. [Tr. Vol. III, p. 467].

52. On March 9, 1988, the Wyoming Supreme Court held that Wyoming's severance tax statutes, which then levied excise taxes on the value of the gross product of gas and natural gas, included non-hydrocarbon gases and carbon dioxide. *Amoco Production Company v. State*, 751 P.2d 379 (Wyo. 1988). The case arose from the sale of carbon dioxide produced by Exxon's LaBarge project. While helium was not specifically at issue, the Court's opinion identified helium as a gas within the meaning of the Wyoming statutes. *Amoco Production Company,* 751 P. 2d at 382.

53. On May 27, 1988, the Wyoming Attorney General Joe Meyer issued Opinion No. 88-020 regarding the taxation of helium. The Attorney General concluded that the value of helium severed by a lessee of federally owned land was subject to Wyoming severance taxes. This Opinion added to the concerns of Exxon management regarding the State's intention to tax LaBarge production. [Tr. Vol. IX, pp. 1976-1977]. However, Exxon's rights to federal helium arise from the Helium Sale and Disposition Agreement dated June 1, 1985, not from a federal lease. *Supra*, ¶9. Exxon was also aware that Opinion No. 88-020 did not address ad valorem taxes. [Tr. Vol. IX, p. 1989]. To this day, Exxon denies that the State or County can tax federal helium. [*E.g.*, Tr. Vol. XI, pp. 2349-2350].

54. On June 30, 1988, Attorney General Meyer told Exxon that the State would be willing to settle severance and ad valorem taxes on the 1986-1988 LaBarge production for $12,000,000. [Exhibit 355; Tr. Vol. IX, p. 1993].

55. When Denney L. Wright assumed the position of Exxon's upstream tax advisor on July 1, 1988, Exxon's management "was very, very concerned with what had gone on and what was going on in Wyoming at the time," particularly with respect to LaBarge taxes. [Tr. Vol. IX, p. 1976]. A portion of this concern arose from a public perception that Exxon was "evading" its taxes. [Tr. Vol. IX, p. 1984].

56. Sometime in July 1988, Exxon reached agreement with Howell and Yates to settle the antitrust litigation. *Supra*, ¶37. The final settlement documents with Yates were executed on August 1, 1988, and an identical set of documents was executed with Howell two days later. [Exhibits 800, 801, 802, 803]. Two features of the settlement are broadly significant for what followed.

57. First, Exxon agreed to pay Howell and Yates for the proceeds of sales of helium originating from the Howell and Yates federal leases. [Exhibits 800, 801, ¶12; Exhibits 802, 803, ¶¶6, 10, 12]. This was plainly a compromise. The Howell and Yates Settlement Agreements reflect Exxon's position that Howell and Yates had no rights to the federal helium. [Id.]

58. Second, Howell and Yates agreed to pay Exxon a gas processing fee of 65% of their production for three years. [Exhibits 802, 803, ¶6.2].

59. After the first three years, and until 2021, the processing fee was to be 75% of production. [Exhibits 802, 803, ¶6.2]. After 2021, the fee would be based on actual processing costs not to exceed 50% of revenues, and would remain there for the life of the project. [Exhibits 802, 803, ¶6.4; Tr. Vol. X, p. 2273]. The Howell and Yates Processing Agreements addressed how processing costs would be calculated after September 1, 2021. [Exhibits 802, 803, ¶6.4].

60. The 75% fee would be reduced to an actual cost fee before 2021 if the total revenues generated by the plant: (1) allowed Exxon to meet current operating costs and new capital costs; and (2) provided enough left over to recover the original cost of construction, computed in 1984 dollars. [Exhibits 802, 803, ¶6.3]. The Howell and Yates Processing Agreements refer to this as the Zero Cumulative Present Value calculation. [Exhibits 802, 803, Paragraph 6.3] In Exxon Mobil's view, the core principle is that Exxon Mobil receives a percentage-of-revenue deduction until all of the deductions it has taken equal all of its processing and transportation costs on a present value basis over time. [Tr. Vol. III, p. 631].

61. The principle can be stated with a different emphasis: the processing fee would not drop unless, over thirty-five years, Exxon recovered a negotiated return on and of the cost of facilities designed to last at least fifty years. The negotiated discount rate for converting present dollars to 1984 dollars was 11%. [Exhibits 802, 803, ¶6.3; Exhibit C, p. 2, column 9]. The practical effect of such a rate, applied to Exxon's large investment, was to include a massive capital requirement in the Howell and Yates cost calculation. In this regard, the cumulative capital costs of the project calculated under the Howell and Yates settlement resembled the combined depreciation and return on investment costs under a netback approach to taxable value. *Supra*, ¶44.

62. The Howell and Yates settlement was not formally completed when, on August 1, 1988, Exxon contacted the State to begin settlement discussions. [Exhibit 302]. The first documentation of these negotiations is a letter of August 9, 1988, from J. B. McNeil, Exxon's LaBarge Project Manager, to Nancy Freudenthal, Governor Sullivan's Attorney for Intergovernmental Affairs. [Exhibit 302]. McNeil proposed a face-to-face discussion to explore "resolution of outstanding issues" between Exxon and the State of Wyoming. McNeil's list of issues included:

(1) the cap legislation, *supra*, ¶49;
(2) the amount of ad valorem and severance taxes due, *supra*, ¶54;
(3) taxes on federal helium, *supra*, ¶53; and
(4) the state royalty on state helium, *supra*, ¶40.

[Exhibit 302; Tr. Vol. IX, pp. 1988-1989]. McNeil anticipated that "finding solutions to these issues that are acceptable to both the State and Exxon may be a long and difficult task." [Exhibit 302].

63. In view of substantial amendments to the Wyoming statutes in 1990, the language eventually chosen by the parties to express their settlement, and Exxon's present criticism of the Department, we find it useful to consider how Exxon understood the determination of taxable value. On August 10, 1988, Wright appeared before the Wyoming Legislature's Joint Committee on Mineral Taxation to express Exxon's views on: (1) the point at which gas production was valued; and (2) the available methods for determining value. [Exhibit 356; Tr. Vol. IX, p. 2002]. This testimony directly reflects the conceptual difficulties that were eventually resolved by settlement.

64. Wright told the Joint Committee that the value of LaBarge production was "[n]ot just value at any point – it must be value <u>at the wellhead</u> in the case of oil and gas." [Exhibit 356, Testimony, p. 4 (emphasis in original)]. A year and a half later, the Wyoming Legislature specifically addressed the location of the point of valuation and enacted a different principle. *Infra*, ¶113.

65. Wright told the Joint Committee that "Wyoming regulations" recognized three methods for determining value. [Exhibit 356, Testimony, p. 7]. A year and a half later, the Wyoming Legislature enacted four methods to determine the taxable value of natural gas not sold at the wellhead. *Infra*, ¶114.

66. The first method for determining value in 1988 was "the comparison method – the sales price of gas sold at the wellhead by others which is comparable in quality and characteristics." [Exhibit 356, Testimony, p. 5]. However, Wright stated that, "[t]he comparable sales method cannot be applied [to LaBarge production] because there are no comparable sales in the vicinity of LaBarge." [Exhibit 356, Testimony, p. 7]. Wright made no mention of a comparison *value* method or a *comparable value* method.

67. The second method for determining value in 1988 was the netback method, "where you take the sales price and subtract out of the value added by transportation and processing after the gas is produced at the wellhead." However, Wright explained that, "Using the netback method for 1986 and 1987 LaBarge gas production yields a zero dollar value. This is so because a $1.3 billion investment was required to provide transportation and processing facilities ... and because of today's depressed gas market." [Exhibit 356, Testimony, p. 7].

68. The third method for determining value in 1988 was the cost to produce method. "In applying this method to gas production, you add up the total costs up to the point of getting the gas up out of the ground to the wellhead." This method assumes "that if you had a buyer for the gas at that point you would be willing to sell the gas at a price sufficient to recover your costs..." [Exhibit 356, Testimony, p. 5]. The cost to produce simply ignores the entire plant investment after the wellhead, or in the case of LaBarge, would ignore $1.25 billion of plant investment and focus instead on $300 million of well field investment. *Supra*, ¶41. However, this method yielded "a positive dollar value..." [Exhibit 356, Testimony, p. 7]. Exxon used the cost to produce method to report its production for 1986 and 1987. [Tr. Vol. IX, p. 2106, Vol. XI, p. 2430].

69. On September 2, 1988, Wright summarized his analysis of Exxon's settlement posture. In a memorandum to a superior, Wright estimated Exxon's exposure for 1986-1988 taxes as ranging from $7.2 million to $12.2 million, depending principally on what valuation method was used, and on whether helium was subject to taxation. [Exhibit 355]. Wright also identified Exxon's three principal concerns, together with an optimal goal for each. They were:

> 1. CAP legislation – Repeal.
> 2. 1986-1987 Production Values - Establish cost to produce or alternative method; limited or no audit.
> 3. Helium Severance Tax - Establish LaBarge helium not taxable.

[Exhibit 355]. We have no similar contemporary documentation of the State's objectives.

70. On September 6, 1988, the State informed Exxon that it would begin an audit of the LaBarge project. [Exhibit 355]. This audit added another issue to the settlement negotiations. Exxon generally supported the establishment of an adequately funded program of "regular, thorough audits." [Exhibit 356, Testimony, p.14; Tr. Vol. IX, p. 2003]. However, Exxon was alarmed that the State would not be conducting a normally structured audit:

> We attempted to halt this audit because of the litigation and since Bill Shaefer, the consultant to the legislative committee studying the Wyoming tax system, is the state's auditor (he is also an audit consultant to the Wyoming Department of Revenue and Taxation).... Our fear is that Bill

> Shaefer may use Exxon audit information in the report to the legislative committee.

[Exhibit 355]. In Exxon's view, audits should be conducted by an employee of the State, not an outside contractor. [Tr. Vol. IX, p. 2107]. Exxon also considered Shaefer's simultaneous representation of the executive and legislative branches of Wyoming government to be a conflict of interest, and a threat to normal standards of confidentiality. [Tr. Vol. IX, pp. 1994, 2108].

71. Exxon representatives met with Governor Sullivan, Attorney General Meyer, and Nancy Freudenthal on September 8, 1988. [Exhibits 355, 356]. Attorney General Meyer recalls that he was the first to suggest that the parties consider establishing a value based on what Exxon was paying its "royalty owners". [Tr. Vol. VII, p. 1445]. Meyer was not acquainted with Howell or Yates. [Tr. Vol. VII, p. 1463]. However, since Howell and Yates had resolved a valuation dispute with Exxon, Meyer believed that the results of complex litigation between sophisticated adversaries could provide a useful guide for determining a value. [Tr. Vol. VII, pp. 1446,1463].

72. Meanwhile, Shaefer spent five to six weeks in Houston auditing Exxon's records. [Tr. Vol. IX, pp. 2003-2004]. In mid-October, after Shaefer completed his field work, representatives of Exxon and the State met in Houston to discuss Shaefer's preliminary findings. [Tr. Vol. IX, p. 2043]. Earl Kabeisman, Director of the Department of Revenue, decided that the matter required further study, and activity on the audit was suspended after this meeting. [Tr. Vol. IX, pp. 2043, 2067]. While Shaefer's preliminary results were not admitted into evidence, it is clear that Shaefer's work confirmed the magnitude of Exxon's investment in the facilities from the wellhead to the tailpipe of the Shute Creek plant. [Tr. Vol. II, pp. 262-263].

73. Our record includes no documents dated between September 15, 1988, and December 2, 1988. [Exhibits 303, 356]. We cannot determine from the record precisely when or how the Howell and Yates settlement became the working premise for the settlement between Exxon and the State, and we have no internal Exxon memoranda on this subject after September 2, 1988. [Exhibit 355]. However, Wright testified that he was unaware of the "ramifications" of the Howell and Yates settlement until November. [Tr. Vol. IX, p. 2008]. His principal realization was that the Howell and Yates formula could establish a value at the wellhead. [Tr. Vol. IX, pp. 2008-2009]. However, we have no contemporaneous documentation of Exxon's analysis of the settlement issues that had been identified in August and September.

74. By the late fall of 1988, the State's participation in the settlement negotiations was firmly in the hands of Attorney General Meyer. [Tr. Vol. VII, pp. 1441-1442, Vol. VII, p. 1398]. Kabeisman "relied heavily" on the Attorney General to achieve two broad objectives: (1) to reach a positive number for a taxable value, knowing that Exxon was claiming a negative taxable value; and (2) to establish a value that could be proven on audit. [Tr. Vol. VII, pp. 1401, 1405, 1411]. Kabeisman had no direct involvement in the

negotiations, although his staff provided support to the Attorney General. [Tr. Vol. VII, pp. 1398-1400].

75. Meyer was less concerned about the nuances of achieving fair cash market value than he was about successfully concluding the pending litigation. [Tr. Vol. VII, pp. 1442-1444, 1508]. The State's "primary motivator" was the "dollar amount" necessary to resolve 1986-1988 severance and ad valorem taxes. [Tr. Vol. VII, pp. 1458, 1468]. This presented an immediate litigation problem: "what can you put on in evidence for the Board of Equalization to establish and verify that valuation tax bill that was sent?" [Tr. Vol. VII, p. 1443]. Meyer also faced a long-term concern about disposing of the litigation in a way that would "get the valuation piece behind us," that is, in a way that would avoid future litigation. [Tr. Vol. VII, p. 1443].

76. In assessing the State's litigation position, Meyer had concluded that the State was unlikely to prevail on the helium taxation issue. [Tr. Vol. VII, pp. 1445, 1459]. While Opinion No. 88-020 was "our best thinking," Meyer understood that Opinion No. 88-020 was "not an opinion of the court." [Tr. Vol. VII, p. 1495]. Meyer cannot recall if he shared this aspect of his case evaluation with John Crow, the Sublette County Attorney. [Tr. Vol. VII, p. 1495].

77. At the hearing of this matter in 2004, the present Administrator of the Mineral Tax Division of the Department of Revenue took the position that at least severance taxes are due on helium, but testified that there "is a legal question about ad valorem tax that I'm not qualified to answer." [Exhibit 367, afternoon session, p. 47; Tr. Vol. III, p. 610].

78. On December 2, 1988, Wright sent Meyer a letter with calculations of taxes for 1986 through 1988 using the "comparison value method," with copies to Crow and Nancy Freudenthal. [Exhibit 303]. Wright stated that Exxon's calculations of state severance taxes included the value of federal helium, but the calculations of the County's ad valorem taxes did not include the value of federal helium, "consistent with your May opinion." [Exhibit 303].

79. Wright's December 2nd letter is our first documented reference to the "comparison value method." Wyoming Tax Commission Rules then in effect identified a "comparison method," which corresponded to Wright's August 10, 1988, testimony describing the comparison sales method. *Supra*, ¶66. These Rules did not define or state a comparison value method. *Rules and Regulations, Wyoming State Tax Commission, Chapter XXI, Section 10(a).* No witness explained why the Howell and Yates settlement with Exxon came to be characterized as an application of the comparison value method.

80. Beginning at this time and throughout the settlement negotiations, Meyer did not analyze whether the eventual settlement reached a fair cash market value. [Tr. Vol. VII, p. 1496]. Wright assumed that any value to which Exxon could agree would establish "a fair value, taxable value." [Tr. Vol. IX, pp. 2077-2078]. We find that both acted reasonably. The settlement could not have taken place if the parties had insisted on

either: (1) characterizing the Howell and Yates settlement method in terms of valuation methods then found in the Department's Rules; or (2) resolving the imponderable of whether a fair cash market value can be assigned to gas (helium) that may not be subject to taxation.

81. Wright and other Exxon representatives met with Meyer, Nancy Freudenthal, Crow and school district officials on December 7, 1988. [Exhibit 304; Tr. Vol. IX, p. 2016]. Wright memorialized a settlement offer the following day. [Exhibit 304]. Exxon now proposed to settle 1986-1988 for $11 million. [Id.] Seeking certainty for the life of the project, Exxon proposed to determine the value of future production by "the comparison value method based on the Howell and Yates agreements for a period of twenty-five years commencing January 1, 1989." [Exhibit 304; Tr. Vol. IX, p. 2017]. During that time, Exxon would not contest the taxation of helium. [Exhibit 304; Tr. Vol. IX, p. 2016]. The cap legislation would be declared unconstitutional. [Exhibit 304]. Wright's letter stated that, "[a]ll of the parties have agreed that federal helium is not subject to ad valorem tax under any prevailing legal analysis. Exxon is willing to offer to pay ad valorem tax on helium in order to assure additional long term benefits to the County." [Id.] Although a copy of this letter went to Crow, we have neither testimony nor documentation that enables us to determine if the County agreed that federal helium was not subject to ad valorem taxation.

82. Christine Edwards of Exxon sent a revised set of tax calculations to Meyer on December 20, 1988. [Exhibit 305]. These calculations reflected two alternative approaches to the calculation of exempt royalties, one by volume of gas and the other by amounts paid. [Exhibit 305]. Although the yield of taxes was slightly higher using the volumetric approach, the State preferred to use amounts paid because amounts paid would be easier to audit than the volumes, so Exxon agreed. [Tr. Vol. IX, p. 2021].

83. On December 27, 1988, Exxon's Wyoming attorneys sent a revised draft Settlement Agreement to Meyer, Freudenthal, and Crow. [Exhibit 306]. The cover letter recites that, "[s]ections 2.e. and 2.f. are new," and we conclude that these important sections of the final Tax Settlement Agreement were drafted by Exxon. [Exhibit 306]. At this time, the parties had still not agreed on a payment for 1986-1988 taxes. However, from handwritten notes on the draft, we can document the progress on other issues. [Exhibits 306, 804].

84. The State rejected a twenty-five year term for the Howell and Yates valuation method. [Exhibit 306, p. 0027]. Meyer did not want the State to be committed to the 75% deduction scheduled to become effective in 1991. [Tr. Vol. VII, p. 1450]. The State also insisted on limiting the grounds for dismissing the cap legislation, and refused a final resolution of the state royalty dispute. [Exhibit 306, pp. 0026, 0029]. However, the State agreed to "conclude" the Shaefer audit before a final assessment, without prejudice to audits in future years. [Exhibit 306, p. 0025].

85. By the time of the December 27, 1988, draft, the parties to the Settlement Agreement were identified as Exxon Corporation; the State of Wyoming; the Wyoming

State Board of Equalization, and its three members in their official capacities; the Wyoming Department of Revenue and Taxation; the Wyoming State Tax Commission; Sublette County, Wyoming; the Sublette County Board of County Commissioners; the County Assessor, in her official capacity; and the County Treasurer, in her official capacity. [Exhibit 306, p. 0020]. This same roster of parties appeared in the final version of the Tax Settlement Agreement. [Exhibit 804].

86. During a conference call on January 6, 1989, Exxon agreed to a payment of $12 million for back taxes, and so the parties reached an agreement in principle. [Tr. Vol. IX, p. 2051]. The agreement in principle was publicly announced on January 9, 1989. [Tr. Vol. IX, p. 2051]. The Tax Settlement Agreement was dated January 12, 1989. [Tr. Vol. IX, p. 2051; Exhibit 804]. The Tax Settlement Agreement was executed by Attorney General Meyer and Director of the Department of Revenue Kabeisman on behalf of the State, by County Attorney Crow on behalf of the County, and by Holland & Hart on behalf of Exxon. [Exhibit 804]. Checks were delivered shortly thereafter. [Tr. Vol. IX., p. 2050]. Meyer, Crow, and Holland & Hart executed a Stipulation for Entry of Declaratory Judgment of the cap legislation suit, with the Tax Settlement Agreement attached. [Exhibit 805]. A Declaratory Judgment was entered on January 17, 1989. [Exhibit 805].

87. From the evidence presented to us, we distill these facts from the negotiations leading up to the Tax Settlement Agreement:

> (1) The Wyoming Attorney General doubted the power of the State and County to tax helium produced from federal lands.
> (2) The Sublette County Attorney participated in the negotiations and was informed of Exxon's view that the County could not tax helium produced from federal lands.
> (3) Use of the Howell and Yates agreements enabled the parties to overcome limitations of existing valuation methods.
> (4) The parties intended to create a valuation method for which the State could readily determine compliance on audit.

E. How the Tax Settlement Agreement works

88. The County's present challenge to the 1993-1996 and 1997-1999 audits cannot be understood without addressing the details of the valuation methodology stated in the Tax Settlement Agreement. These details appear in Section 2.e., Section 2.f., and Exhibit C of the Tax Settlement Agreement. Sections 2.e. and 2.f. were initially drafted by Exxon, and Exhibit C was initially drafted by the State. [Exhibit 306; Tr. Vol. IX, pp. 2101-2102].

89. Section 2.e. is entitled, "Valuation of Future Production for all Purposes." The two paragraphs of the Section, broken up into individual sentences for easier digestion, provide:

> The State and the County agree to value, for all tax purposes, all production from the Wellfield occurring during the period of January 1, 1989 through August 31, 1991 using the comparison value method provided in Section 10 of the current Regulations of the Board of Equalization by using the agreements negotiated between Exxon and Howell Petroleum Corp. and Yates Petroleum Corp. as the comparable value.
>
> The Howell and Yates agreements set a taxable value for the Wellfield natural gas and associated natural resources as determined in Section 2.f. During this period [of January 1, 1989 through August 31, 1991], Exxon agrees not to contest the applicability of ad valorem and severance tax to Federal helium.
>
> If the Wyoming legislature passes legislation that requires Exxon to use valuation methods other than the comparison value method described above, or if the Legislature in the future imposes a specific tax on helium, the Parties agree that the questions of future taxability, for both severance and ad valorem purposes on production on and after January 1, 1989, and value of future helium production remain open and the parties are not prejudiced nor are the issues resolved in any manner by this Agreement.
>
> After August 31, 1991, the State agrees that it will recognize the Howell and Yates agreements as a comparison value and that the comparison value method may be used in conjunction with other recognized appraisal techniques to determine value.
>
> If the State uses any method other than the comparison value based on the Howell and Yates agreements, the Parties agree that the question of the future taxability, for severance and ad valorem purposes, and value of future helium remain open and are not resolved by this Agreement.
>
> The State and the County agree that Exxon's payment of tax on helium under the terms of this Agreement cannot be relied upon by either party if a dispute arises as to the taxability of helium.
>
> The parties agree the Howell and Yates agreements are unique and applicable only to valuation of raw gas produced by Exxon from the LaBarge Wellfields in Sublette County as a settlement of the present valuation controversy between Exxon and Defendants.

[Exhibit 804, pp. 100107-100108].

90. We have already remarked that there was no such thing as a "comparison value method" in Section 10 of the referenced Regulations. The recital that the Howell and Yates agreements are "unique and applicable only to" the gas at issue is also

inconsistent with the notion of an established method. Further, the pertinent Rules and Regulations were issued under the rubric of the Wyoming State Tax Commission, not the State Board of Equalization as referenced in the first sentence of Section 2.e.

91. At the same time, the intention of the parties is reasonably clear. The Howell and Yates agreements are the basis of valuation through August 31, 1991, and the State may continue to use the same basis for valuation after August 31, 1991. If and when the State elects to use any other valuation method, the issue of helium taxation is open to litigation. Legislation inconsistent with the agreed valuation method likewise puts the issue of helium taxation back on the table.

92. The first sentence of Section 2.e. of the Tax Settlement Agreement includes a significant change of wording from the draft of December 27, 1988. For the first time, the Tax Settlement Agreement refers to the agreements negotiated between Exxon and Howell Petroleum Corp. and Yates Petroleum Corp. "as the comparable value." [Exhibit 804, p. 100107]. In 1990, the Legislature employed the words "comparable value" to describe a valuation method for natural gas sold away from the point of valuation. *Infra*, ¶114. However, the fifth sentence of Section 2.e. which applies after August 31, 1991 and hence to the audit periods of this proceeding, refers to the Howell and Yates agreements as a comparison value and not as a comparable value.

93. Section 2.f. is entitled, "Calculation of Taxable Value of Future Production as Set by the Howell and Yates Agreements." This section articulates the steps required to calculate Taxable Value, starting with Total Gross Revenue. Section 2.f. provides:

> The Parties agree that the method of valuation pursuant to the Howell and Yates agreements for Exxon's natural gas production from the Wellfield shall include the following specific steps:
>
> (1) The Total Gross Revenue for the particular reporting period, from the sale of all natural gas and associated natural gas products, specifically including methane, carbon dioxide, sulfur, nitrogen, and helium, shall be calculated and reported to the Department of Revenue;
>
> (2) The Post-Production Cost Deduction for the reporting period shall be determined by multiplying the gross revenue for methane, carbon dioxide, sulfur, and nitrogen plus 91.67% of the gross revenue for helium by .65 or 65% (for the period through August 31, 1991; for production after August 31, 1991 the percentage changes from 65% to 75%) in accordance with the Howell and Yates agreements;
>
> (3) The Gross Value for the reporting period shall be determined by subtracting from the Total Gross Revenue (1), the Post-Production Cost Deduction (2);

> (4) Exxon's Taxable Value shall be determined by subtracting from the Gross Value at the Well (3), the actual dollars paid by Exxon during the reporting period for exempt and non-exempt royalties, for helium from the federal government, and to other working interest owners for their respective share of the gas;
>
> Attached and incorporated herein by reference is Exhibit C which is an example calculation used solely to illustrate the method for determining taxable value using the Howell and Yates agreements. While this Section 2.f. summarizes the pertinent provision of the Howell and Yates agreements, the specifics of those agreements will control the calculation of taxable value.

[Exhibit 804, pp. 100108-100110]. We find that Section 2.f. of the Tax Settlement Agreement does not fully explain the valuation method.

94. Exhibit C to the Tax Settlement Agreement restates Section 2.f. as a formula. It provides:

> <u>Exhibit C to the Settlement Agreement between Exxon, the State and the County</u>
>
> <u>Example Calculation</u>
>
> (a) CH_4, CO_2, S, and N_2 Sales Revenue
> (b) State Helium Sales Revenue
> (c) Federal Helium Sales Revenue
> (d) Exempt Royalty Paid
> (e) Federal Helium Paid Amount
> (f) Overriding Royalty Paid
> (g) Payments to Working Interest Owners
>
> ---
>
> 1. Total Gross Revenue (TGR) = a + b + c
>
> 2. Post-Production Cost Deduction (PPCD) = 0.65 x [a + (0.9167 x [b + c])]
>
> 3. Gross Value (GV) = TGR - PPCD
>
> 4. Exxon's Taxable Value (TV) = GV - d - e - f - g
>
> 5. Tax = TV x 0.12827 (severance rate (6%) + 1988 mill levy rate)

[Exhibit 804, p. 100114]. Exhibit C clarifies the arithmetic of the taxable value calculation. However, Section 2.f. and Exhibit C together do not fully explain the valuation method. We must turn to the Howell and Yates Processing Agreements to fully explain the Gross Value calculation. In contrast, deductions (d) through (g) are unrelated to the Howell and Yates Processing Agreements.

95. The first set of key points concerns the calculation of Gross Value. These points include the source of the 0.9167 multiplier; the exclusion of direct marketing and transportation costs from Total Gross Revenue; and the exclusion of products taken in-kind and used for plant operations from Total Gross Revenue. A closely related key point is the universe of costs included in Exxon Mobil's calculations of actual costs.

96. Section 2.f. and Exhibit C state that, but do not explain why, the deduction associated with helium is based on 91.67% of the gross value of state and federal helium sales revenue. The 91.67% factor is a direct consequence of the Howell and Yates Processing Agreements, which distinguish between Gross Proceeds and Helium Proceeds. [Exhibit 802, p. 5]. Gross Proceeds are the Total Compensation (a defined term) received for sales, deliveries, or exchanges of Facilities Products prior to the deduction of royalties and other costs. [Exhibit 802, p. 5]. Facilities Products are all products from the gas stream other than helium. [Exhibit 802, p. 4]. Helium Proceeds are the Total Compensation received from sales, deliveries, or exchanges of helium prior to the deduction of royalties and other costs, multiplied by 0.9167. [Exhibit 802, p. 5]. This factor subtracts Exxon Mobil's one-twelfth payment for helium under the Helium Sale and Disposition Agreement with the United States of America, and reduces the helium proceeds paid to working interest owners to more closely reflect the amount received by Exxon Mobil. [Tr. Vol. XI, p. 2345].

97. The Post-Production Cost Deduction picks up the processing fee defined in Section 6.2 of the Howell and Yates Processing Agreements. This monthly processing fee initially equaled 65% of the sum of the Gross Proceeds and Helium Proceeds. [Exhibit 802, pp. 19-20]. From September 1, 1991, the processing fee equaled 75%. [Exhibit 802, p. 20]. The wording of the processing fee definition directly incorporates the 0.9167 factor included in the Helium Proceeds definition. The effect of including the 0.9167 factor in the Post-Production Cost Deduction is to make the Deduction less than if the processing fee were applied against the full value of helium revenues. [Tr. Vol. III, pp. 543-544]. However, this reduction in the Post-Production Cost Deduction is offset for taxable value purposes by the adjustment allowed by item (e) in Exhibit C, which is a deduction for Exxon Mobil's payment under the Helium Disposition and Sale Agreement.

98. Total Compensation is a defined term in the Howell and Yates Processing Agreements:

> "Total Compensation" shall mean the total consideration received for sales, deliveries or exchanges of products produced from the Facilities as reflected in Owner's accounts less direct costs incurred in marketing and

> transportation.... The total consideration for products taken in-kind by Owner, which shall exclude those used in operations, shall be its fair market value, less direct costs incurred in marketing and transportation.

[Exhibit 802, p. 8]. “Owner” is defined as Exxon acting as the owner and operator of the Facilities. [Exhibit 802, p. 6].

99. The Total Compensation definition of the Howell and Yates Processing Agreements bears directly on two issues relating to amounts excluded from Total Gross Revenue. The first issue is “direct costs incurred in marketing and transportation of sulfur.” On its face, the definition excludes such direct costs from Total Compensation. The second issue is plant fuel, or methane produced by the plant and used for fuel. The definition of Total Compensation excludes products “taken in-kind” by the plant Owner and “used in operations.”

100. The County has raised an issue concerning the correct point of valuation, and therefore concerning what plant costs are properly included in actual costs for valuation purposes. The valuation method of the Tax Settlement Agreement expressly addresses that issue by the definition of Facilities in the Howell and Yates Processing Agreements:

> 3.1 Facilities. “Facilities” shall mean a gas gathering and manifold system and a dehydration plant (including disposal wells), a feed gas pipeline system connecting the dehydration plant to the main manufacturing facility, and a main manufacturing facility for the manufacturing of Facilities Products from the Raw Gas produced from the Authorized Production Area, helium recovery facilities which begin at the flange on the outlet of the nitrogen rejection unit, compression facilities, railroad spur facilities, carbon dioxide sales and transportation facilities and all other present or future facilities and appurtenances deemed or construed by the Owner to be necessary for the operation of the Facilities...

[Exhibit 802, p. 10]. The effect of this definition is that costs related to Facilities capture all downstream costs after “the wing valve on the wellhead.” [Exhibit 802, p. 11].

101. The second set of key points concerns explicit deductions from Taxable Value. The Tax Settlement Agreement does not expressly state the reason for the deductions identified as items (d), (e), (f), and (g). However, the overall purpose may be readily inferred. Generally speaking, the parties agreed that Exxon should not be obliged to pay taxes on the total revenues from gas sales, adjusted for the cost deduction. While we look at this as a negotiation, it is not hard to understand why the parties could agree to deductions for royalties, helium payments, and payments to third parties who themselves should be paying taxes on what they receive from Exxon Mobil.

102. Item (d) of Exhibit C, “Exempt Royalty Paid,” represents all payments made by Exxon Mobil under its gas leases. Generally speaking, these royalties are paid to the United States Mineral Management Service and to the State of Wyoming. [Exhibit 346; Tr. Vol. XI, pp. 2509-2510].

103. Item (e) of Exhibit C, “Federal Helium Paid Amount,” represents all payments made by Exxon Mobil under the Helium Sale and Disposition Agreement of June 1, 1985, as amended. [Exhibits 314, 346, pp. 1, 10; Tr. Vol. XI, pp. 2498-2500]. *Supra*, ¶9.

104. Item (f) of Exhibit C, “Overriding Royalty Paid,” represents amounts paid to third parties holding overriding royalties on the federal leases held by Exxon Mobil. The royalty is associated only with gas production from the underlying Exxon Mobil leases. *Supra*, ¶35. This deduction does not include royalty owed by Exxon Mobil to itself for overriding royalty interests that have, over the years, been acquired by Exxon Mobil with respect to its own leases. [Tr. Vol. XI, p. 2513]. All revenues related to Exxon Mobil’s after acquired overriding royalty interests in its own leases are included in Total Gross Revenues. [Tr. Vol. XI, p. 2513].

105. The County’s issues include a concern related to whether the recipients of royalties from Exxon Mobil have reported and paid tax on those royalties. The Department’s policy is that all private royalties and overrides are subject to taxation, and that the recipients should pay the tax. [Tr. Vol. VII, p. 1364, Vol. III, pp. 507-508, 560]. However, the Department has no specific procedure or process in place for collecting these royalties. [Tr. Vol. III, p. 609]. The Department depends on individual royalty recipients to report and pay the taxes, and is unable to say whether taxes have or have not been paid on the overriding royalties deducted by Exxon Mobil. [Tr. Vol. III, p. 609].

106. Hank Barger, a revenue accountant for Exxon Mobil, acknowledges that Exxon Mobil has the ability to identify the overriding royalty interest owners because that information is used to send payment checks. [Tr. Vol. XI, p. 2477]. However, only a partial sample of Exxon Mobil’s regular internal report of interest owner information is included in the record, and in that sample, the royalty owners are identified only by number. [Exhibit 346, pp. 16-17]. The royalty recipients appear to be numerous and payments appear to be small. [Id.]

107. Item (g) of Exhibit C, “Payments to Working Interest Owners,” represents payments to third parties for gas production from federal leases held by entities other than Exxon Mobil. Only Howell, Yates and Foreman Enterprises, Inc. fit this description. [Exhibit 346; Tr. Vol. XI, pp. 2471-2473].

108. Exxon Mobil’s payments to the Working Interest Owners included amounts that each working interest owner owed to third parties for overriding royalty interests in the leases held by the working interest owners. Under Article 14 of their respective Processing Agreements, Howell, Yates and Foreman Enterprises, Inc., were responsible for payment of the overriding royalties associated with their respective federal leases. [Exhibit 802, p. 28; Exhibit 803, p. 28; Exhibit 29, p. 29].

109. Where Exxon Mobil has overriding royalty interests in the Howell and Yates leases, Exxon Mobil nets the amounts due out of its payments to Howell and Yates. [Tr. Vol. XI, pp. 2544-2545, Vol. XI, pp. 2382-2383]. Exxon Mobil does not reflect this netting when it deducts payments to working interest owners. [Tr. Vol. XI, pp. 2545, 2569, Vol. XI, pp. 2382-2383]. However, we find that this practice conforms literally to the requirements of the Tax Settlement Agreement method, which authorizes a deduction for actual dollars paid "to other working interest owners for their respective share of the gas."

110. The payments to Working Interest Owners include a payment for helium. [Exhibits 346, p.1, ¶G, 802, ¶12.3, 803, ¶12.3, 29, ¶12.3; Tr. Vol. XI, p. 2549;]. The combined share of the Working Interest Owners was approximately five per cent of all helium revenues. [Tr. Vol. XI, p. 2549]. As a result, tax paid on this five per cent of helium revenues was to be paid, if at all, by the Working Interest Owners. [Tr. Vol. XI, p. 2549].

111. Exxon makes its helium payments to Working Interest Owners with checks separate from the checks for all other gas. [Tr. Vol. XI, p. 2472].

F. The 1990 statutes, and administration of the Tax Settlement Agreement

112. In 1990, after the Tax Settlement Agreement had been in effect for one year, the Wyoming Legislature restructured the statutes governing the valuation of oil and gas. *1990 Wyo. Sess. Laws, Ch. 54*. For the events that followed in this case, it is important to summarize three features of the revised statute, which was then identified as W. S. 1977, §39-2-208.

113. First, the Legislature established a specific point of valuation for natural gas, "after the mining or production process is completed...." *W. S. 1977, §39-2-208(a)*. The point of production affected taxable value, because "expenses incurred by the producer prior to the point of valuation are not deductible in determining the fair cash market value of the mineral." *W. S. 1977, §39-2-208(a).* The statute specified when the production process was completed: "For natural gas, after extracting from the well, gathering, separating, injecting and any other activity which occurs before the outlet of the initial dehydrator." *W. S. 1977, §39-2-208(a),(b)(ii).* In this case the County identifies the Black Canyon dehydrator as the initial dehydrator, and argues that costs incurred before the outlet of the Black Canyon dehydrator must not be allowed.

114. Second, the Legislature required that natural gas be valued at its fair market value, W. S. §39-2-208(a), and provided specific directions for doing so. When natural gas was sold away from the point of valuation, the Legislature required the Department of Revenue and Taxation to determine the fair cash market value of the gas by one of four specific methods: comparable sales; comparable value; netback; or proportionate profits. *W. S. 1977, §39-2-208(d)(i)-(iv).* The netback method could not be used for "natural gas which is processed by the producer of the natural gas." *W. S. 1977, §39-2-*

208(d)(iii). When the taxpayer and the Department jointly agreed, with the approval of the Board, that the foregoing methods did not produce fair cash market value, "a mutually acceptable alternative method may be applied." *W. S. 1977, §39-2-208(e).*

115. Third, the Legislature required the Department to identify the valuation method it intended to apply, and notify the taxpayer of the selected method no later than September 1 of the year before the method was to be applied. *W. S. 1977, §39-2-208(d)*. Once one of the four specified methods was selected, it had to be used "for three (3) years including the year in which it was first applied or until changed by mutual agreement between the department and the taxpayer." *W. S. 1977, §39-2-208(g).* Under the plain terms of the statute, neither the notification requirement nor three year requirement applied to valuation by a mutually acceptable alternative method. *W. S. 1977, §39-2-208(e).*

116. Generally speaking, these three features of Wyoming's system for valuing natural gas have remained in place to this day. [Tr. Vol. III, p. 648]. *Wyo. Stat. Ann. §39-14-203(b)*. However, the functions of the Department and the Board of Equalization were separated in 1991. *1991 Wyo. Sess. Laws, Ch. 174.*

117. None of the four methods specified in W. S. 1977, §39-2-208(d)(i)-(iv) was defined in a way that repeated the wording of Section 10 of Chapter XXII of the Wyoming State Tax Commission Rules and Regulations, in effect in 1988 and 1989. [Tr. Vol. III, p. 594]. *Infra,* ¶272.

118. If more than one of the four methods specified in W. S. 1977, §39-2-208(d)(i)-(iv) applies to the circumstances of a taxpayer, the different methods typically reach different taxable values. [Tr. Vol. III, p. 462].

119. Exxon Mobil processes the gas that it produces, so the Department considers Exxon Mobil ineligible to use the netback method. [Tr. Vol. III, p. 539]. Due to the statutory limitation, the netback method has fallen into disuse since 1990. [Tr. Vol. III, pp. 540, 651].

120. Richard Marble was Director of the Mineral Tax Division of the Department of Revenue and Taxation from March 1, 1989 (about two months after the Tax Settlement Agreement was signed) to mid-March 1995. [Tr. Vol. VII, p. 1350].

121. The Tax Settlement Agreement was brand new when Marble became Director of the Mineral Tax Division. [Tr. Vol. VII, p. 1374]. Marble simply accepted the Tax Settlement Agreement as the valuation methodology. [Tr. Vol. VII, pp. 1359,1371]. During his tenure, Marble never had any reason to question whether the Tax Settlement Agreement reached an appropriate taxable value. [Tr. Vol. VII, p. 1376]. Marble does

not recall that he ever analyzed the Tax Settlement Agreement to see where it fit into the statutory scheme enacted in 1990. [Tr. Vol. VII, p. 1358].

122. On August 31, 1990, Marble sent a memorandum to all Wyoming oil and gas producers. [Exhibit 815, pp. 00076-00077; Tr. Vol. VII, p. 1353]. In this letter, Marble stated that the Department of Revenue and Taxation had elected the comparable value method of valuation for "instances where oil or gas production is not sold at or prior to the point of valuation pursuant to a bona fide arms-length sale or where the product is used without sale," citing W. S. 1977 §39-2-208(d)(ii). [Exhibit 815, p. 00076]. Nothing about the letter specifically identifies any specific oil and gas property; and Exxon Mobil held producing properties other than LaBarge. [Exhibit 815, pp. 00076-00077; Exhibit 807].

123. The second page of the letter states that, "[t]he comparable value method must be used for 1991, 1992, and 1993 production unless an alternate method is mutually agreed to by the Department and the taxpayer...." [Exhibit 815, p. 00077]. We find that the Tax Settlement Agreement was an alternate method mutually agreed to by the Department and the taxpayer. In support of our finding, we note that a change in valuation method to the comparable value method at the beginning of 1991 would have been inconsistent with the plain terms of the Tax Settlement Agreement, which remained in force until at least August 31, 1991. [Tr. Vol. VII, p. 1375; Exhibit 804, ¶2.e.].

124. The record includes an e-mail from Wright of Exxon to other Exxon employees, sent shortly after receiving Marble's notification letter. [Exhibit 307]. The e-mail states that Wright contacted Marble, and that Marble confirmed that the letter "puts LaBarge on the comparable value method through 1993." [Exhibit 307].

125. We find that Marble had no intention of changing the valuation method during the initial three-year period of the Tax Settlement Agreement, and that no such change occurred. In addition to the facts already mentioned regarding the timing and context of the August 30, 1990 letter, Marble has no recollection of any such conversation with Wright. [Tr. Vol. VII, p. 1356]. The e-mail itself acknowledges that Wright did not know whether Marble had reviewed the substance of the conversation with state officials superior to Marble. [Exhibit 307]. There is no evidence such clearances ever occurred. We also take notice of the fact that the Department's interpretation of the comparable value method was unsettled during this period. *Union Pacific Resources Company et al*, Docket No. 2000-147 et al., June 9, 2003, 2003 WL 21774603 (Wyo. St. Bd. Eq.)(hereafter *Whitney Canyon*), ¶¶161-168.

126. In Wyoming's self-reporting system, the Department of Revenue assumes the taxpayer uses the correct method when it reports production. [Tr. Vol. III, pp. 463, 473]. Severance tax returns are due a month and twenty-five days after production; ad valorem returns are due on February 25th of the year following production. [Tr. Vol. III, p. 464]. The Department reviews the returns for mathematical and clerical errors, but does not carefully evaluate every return. [Tr. Vol. III, pp. 469-471]. Instead, the Department of

Revenue relies heavily on the Department of Audit to assure that the taxpayer is complying with the law and using the correct valuation method. [Tr. Vol. III, pp. 471-473].

127. On March 8, 1991, the Interior Board of Land Appeals (IBLA) of the United States Department of the Interior decided what transportation and processing allowances would be available to Exxon for calculation of the value of its gas production for federal royalty purposes. [Exhibit 314]. From our review of this decision, we find, and conclude, that the authorities and standards governing the calculation of federal royalties differ from those related to the taxes at issue in this proceeding, and are therefore of little interest or relevance to this proceeding. However, we nonetheless find that the facts recited in this IBLA opinion do not conflict with testimony in this case concerning the LaBarge plant and its operation. Further, the IBLA decision supports Gentry's testimony regarding uncertainties surrounding the calculation of taxes and royalties. *Supra*, ¶39.

128. On September 1, 1991, the processing fee rate under the Howell and Yates Processing Agreements changed from 65% to 75%. [Exhibits 802, 803]. The percentage rate of the Post-Processing Cost Deduction in the Tax Settlement Agreement likewise changed from 65% to 75%. [Exhibit 804, ¶¶ 2.e., 2.f.].

129. On January 1, 1993, Exxon entered into a Processing Agreement with Washington Energy, Inc. [Exhibit 29]. Washington Energy, Inc., later Foreman Enterprises, Inc. was a working interest owner, and its Processing Agreement is virtually identical to the Howell and Yates Processing Agreements. [Exhibits 802, 803]. At least a portion of this Processing Agreement was recorded with the Sublette County Clerk on March 15, 1993. [Exhibit 29]. Volumes taken under the Foreman Enterprises Processing Agreement were very small in comparison to Howell and Yates. [Tr. Vol. XI, pp. 2473, 2521-2522].

130. Following adoption and implementation of the Tax Settlement Agreement, Exxon adopted additional internal accounting and reporting procedures to support its tax reporting. [Exhibits 87, 88, 116, 346; Tr. Vol. XI, pp. 2459-2460]. These procedures and reports were in place for the 1993-1999 audit periods that are the subject of this proceeding. [Tr. Vol. XI, pp. 2462]. The procedures center on two accounting reports that Exxon Mobil prepares monthly. One of these is known as the 100% Sales report, and the other is known as the WTAX report.

131. For several of the years at issue, revenue accountant Hank Barger prepared the 100% Sales report, which is a monthly report intended to summarize all plant sales and other dispositions of plant products. [Tr. Vol. XI, pp. 2463, 2501-2504]. Each monthly 100% Sales report consists of a single page. [Exhibit 346, p. 11]. This page summarizes what happens to the volumes of all five plant products: methane, sulfur, helium, nitrogen, and carbon dioxide. [Exhibit 346, p. 11]. Sales of each product are identified by customer, together with codes describing the terms of the sale to that customer. [Exhibit 346, p. 11; Tr. Vol. XI, p. 2506]. When applicable, the report also shows volumes of product that have been vented or flared; beginning and ending inventories;

and in the case of methane, the volume consumed as plant fuel. [Exhibit 346, p. 11]. For each customer, there is also a summary total of price and volumes, and for each product, there is a total gross value of the sales and volumes sold. [Exhibit 346, p. 11].

132. Barger prepared the WTAX report as a taxable value report for the use of Exxon's tax department. [Tr. Vol. XI, p. 2458]. The format of the WTAX report tracks the formula found in Exhibit C to the Tax Settlement Agreement. [Exhibit 804, Exhibit C; Exhibit 346, p. 1]. Exxon provided lengthy testimony to explain the contents of a sample report for September 1987:

> Item A, "Sales Revenue (Other than Helium)," lists and totals sales volumes and values associated with methane, carbon dioxide, sulfur and helium. It also includes a line for the addition of tax reimbursements for carbon dioxide; a line for the addition of marketing fees paid to an Exxon affiliate that markets sulfur [thereby including these fees in the total revenues used to determine value]; and a line for the subtraction of third party transportation fees. All sales volumes and values on the WTAX report tie to the 100% Sales report. However, since the WTAX report relates to revenues, it contains no information about volumes vented or flared.
>
> Item B, "State Helium (He) Sales Revenue," lists the total sales volume and value for sales of helium originating from State leases.
>
> Item C, "Federal Helium (He) Sales Revenue," lists the total sales volume and value for sales of helium originating from Federal leases. It also includes a line item for tax reimbursements from Exxon's customers, related to tax increases during the life of some contracts. [*Supra*, ¶10].
>
> Item D, "Exempt Royalty Paid," has two line items, one for royalty paid to the federal Minerals Management Service, and one for royalty paid to the State of Wyoming. An Exxon federal royalty group provides the federal item to accounting, and an Exxon state royalty group provides the state item.
>
> Item E, "Federal Helium (He) Purchase Amount," states the amount paid by Exxon Mobil to the United States under the Helium Sale and Disposition Agreement of June 1, 1985.
>
> Item F, "Overriding Royalty Paid," states the amounts paid to third parties holding overriding royalty interests in those federal leases held by Exxon Mobil. It does not include overriding royalty payments due to Exxon Mobil from itself, where Exxon Mobil has acquired the overriding royalty interests. That revenue remains in the revenues used to determine taxable value. This entry is provided by a report that is designed to pull out and

> include third party overrides; the report excludes payments to Exxon by assigning Exxon interests a code that is not retrieved.
>
> Item G, “Payments to Working Interest Owners,” includes listings for the three other federal leaseholders, Howell, Yates, and Foreman Enterprises, Inc. (in earlier years, Foreman was listed as Washington Energy, Inc.). For each of these three, there are separate line items reflecting payments related to helium, and payments related to other products.
>
> At the bottom of the first page of the WTAX form, there is a box which performs arithmetical calculations corresponding to the requirements of the Tax Settlement Agreement. These include Total Gross Revenue, the Post-Production Cost Deduction, “Gross Value At The Well,” and Exxon’s Taxable Value. Severance and conservation taxes are also calculated.

[Exhibit 346; Tr. XI, pp. 2464-2475, 2478-2479, 2482-2483, 2509-2510, 2513, 2523-2524, 2534, 2568, Vol. X, p. 2178].

133. We find that the 100% Sales and WTAX reports reflect Exxon Mobil’s interpretation of various details of the correct administration of Exhibit C to the Tax Settlement Agreement.

134. Exxon’s tax department used the WTAX reports to generate monthly severance tax reports in a standard format prescribed by the Department; the format does not follow Exhibit C of the Tax Settlement Agreement. [Tr. Vol. XII, pp. 2614-2617]. Exxon’s tax department used the same base of information to generate annual ad valorem tax reports, but in a separate annual report format prescribed by the Department. [Tr. Vol. XII, pp. 2618-2619].

135. The other parties in the case relied heavily on the information in Exxon Mobil’s 100% Sales and WTAX reports. The Department of Audit relied heavily on the 100% Sales and WTAX reports to conduct audits for 1993 to 1999. *Infra*, ¶¶181, 218. The County’s expert, Steve Wilson, used the 100% Sales and WTAX reports to prepare his opinions. *Infra*, ¶236.

136. The County expressed concerns about possible unreported exchanges. The County examined witnesses about an Exxon Mobil accounting entry dated on or about January 21, 1993. The County implied that the entries in question showed that Exxon Mobil had entered into an exchange of methane with the Sand Dunes unit, and that the exchange resulted in unrecorded revenue. [Exhibit 44; Tr. Vol. V, pp. 1140-1142]. However, Barger testified that he was familiar with the accounting system and that the entry on Exhibit 44 had the effect of recording revenue, so that the exchange was recorded on a 100% sales report. [Tr. Vol. XI, pp. 2556-2559, 2570-2571]. An entry for methane revenue attributed to the Sand Dunes unit likewise appears in the 100% Sales report for January 1993. [Tr. Vol. XI, p. 2573; Exhibit 116, first page]. We also note that under the Howell, Yates, and Washington Energy Processing Agreements, the

definitions of Total Compensation, Gross Proceeds, and Helium Proceeds all refer to sales, deliveries, and *exchanges* of the products in question. [Exhibits 802, 803, 29]. We accept the testimony of Barger, as supported by the 100% Sales report and by the express standards of the Processing Agreements.

137. In a similar vein, the County questioned several witnesses about volumes of gas reported by Exxon as take-in-kind volumes, implying that these entries demonstrated that these volumes of gas had been omitted from revenue. The usual significance of take-in-kind volumes is that the recipient of the volumes has taken the gas to sell the gas itself. No witness testified that anyone other than Exxon Mobil sold products of the plant. The audits found no evidence that Howell or Yates had taken gas in kind. *Infra*, ¶¶187, 223.

138. In support of its concern about take-in-kind volumes, the County offered a handwritten document dated June 7, 1993. [Exhibit 52]. This document refers to "TIK" reporting on the Department's ATD Form 4. [Id.] After consultation with Pat Parsenault [of the Department], the author indicates that amendments to previous filings would be made to correct reporting errors related "HPC" (presumably Howell). [Exhibit 52]. The author of the document was not a witness, and no witness could state whether the corrections had or had not been made.

139. We find that any concern for take-in-kind volumes was fully addressed by an Exxon witness. Tuan Pham of Exxon Mobil explained that, for the Fogarty Creek unit, Exxon Mobil had consistently reported the volumes of gas associated with Howell, Yates, and Foreman as take-in-kind volumes. [Exhibit 371, pp. 6-7; Tr. Vol. XII, pp. 2638-1639]. The reason for doing so was that each of the working interest owners was to file its own tax returns, and the Department did not have a special form that suited the circumstances of the LaBarge production. [Tr. Vol. XII, p. 2639]. The Department never requested an alternative to this form of reporting. [Tr. Vol. XII, p. 2639]. We find Pham's testimony credible. We also find that the County did not demonstrate that any volumes of gas were omitted from Exxon Mobil's revenue reporting by virtue of being taken in kind for sale by one of the working interest owners.

140. On August 26, 1993, Richard Marble again sent a memorandum to all Wyoming oil and gas producers regarding the valuation method for the upcoming three years. [Exhibit 815; Tr. Vol. VII, p. 1355]. This letter was identical in form and content to the memorandum of August 31, 1990, and distributed in the same manner. [Exhibit 815; Tr. Vol. VII, p. 1355]. Marble again communicated no intention to change the valuation method of the Tax Settlement Agreement.

141. In the fall of 1993, Exxon saw the first signs of a global downturn in the market for helium. [Tr. Vol. XII, pp. 2756-2758]. Air Products informed Exxon that it would take the minimum amount of helium under its Helium Sales Agreement with Exxon. [Tr. Vol. XII, p. 2756]. *Supra*, ¶10. A contract with Praxair/Union Carbide Industrial Gases expired and was not renewed by the buyer, which had built its own helium plant. [Tr. Vol. XII, p. 2756]. Market prices dropped below the prices in Exxon's remaining long-term

contracts. [Tr. Vol. XII, pp. 2757-2759]. Because Exxon's contracts generally contained most favored nation clauses, *supra*, ¶10, sales at the lower prices would have required Exxon to reduce prices for its long-term customers, and would have reduced its overall helium revenues. [Tr. Vol. XII, p. 2755]. We find that Exxon reasonably refused opportunities for sales that would have resulted in increased volumes, but at decreased prices, causing an overall reduction in helium revenues.

142. Due to the loss of helium sales, Exxon vented substantial quantities of helium in 1995 and 1996. [Tr. Vol. XII, p. 2754]. Its overall revenues were affected. *Infra*, ¶149.

143. The Department of Audit began an audit of LaBarge production for 1989-1992 in the fall of 1994. [Tr. Vol. IV, p. 848]. The Department of Audit stated its preliminary issues in a letter to Exxon dated January 5, 1995. [Tr. Vol. IV, p. 849]. The audit was concluded in 1997. [Tr. Vol. IV, p. 849]. The 1989-1992 audit is not at issue in this case.

144. On March 2, 1995, the Wyoming Board of Land Commissioners approved a method of valuing the LaBarge production for state royalty purposes. [Exhibit 320]. The Board of Land Commissioners agreed to accept a royalty based on 45% of revenue received by Exxon for all products produced, together with a method for Exxon to offset amounts previously overpaid. [Exhibit 320].

145. Based on the testimony of the two State witnesses, we find that the 55% deduction that applies to the state royalty on LaBarge production is of no relevance to the disposition of the County's claims. At the hearing of this case, Harold Kemp, Assistant Director of the Wyoming Office of State Lands and Investments, testified that he had been involved in the negotiations of the LaBarge royalty payments since 1986. [Tr. Vol. VII, pp. 1515-1516]. Kemp testified that there were no value calculations to support the 55% deduction. [Tr. Vol. VII, p. 1523]. The 55% deduction was simply negotiated, and as such was unrelated to the cost to operate the plant, or to fair market value. [Tr. Vol. VII, p. 1526]. Another State official explained that state lands were a very small portion of the producing gas units. [Tr. Vol. IV, p. 889]. He characterized the overall royalty amount as "de minimus," and not a valid benchmark. [Tr. Vol. IV, p. 889].

146. On May 1, 1995, Edmund J. Schmidt became Administrator of the Mineral Tax Division of the Department of Revenue. [Tr. Vol. IV, p. 776]. Mrs. Johnnie Burton, the new Director of the Department, was his supervisor. [Tr. Vol. IV, p. 778].

147. On November 30, 1995, Schmidt issued a memorandum to all oil and gas producers regarding the Department's policy "for valuation of natural gas sold in Non Arms-Length transactions." [Exhibit 815]. This memorandum arose from difficulties between the Department and the industry when taxpayers elected to report value using the proportionate profits method rather than the comparable value method. [Tr. Vol. IV, pp. 785-786]. Like Marble's earlier memoranda to the industry, Schmidt's memorandum addressed the availability of a "mutually acceptable alternative method." [Exhibit 815].

148. On August 30, 1996, Schmidt issued a memorandum notifying all oil and gas producers that the Department would use the comparable value method to determine the value of natural gas not sold at the point of valuation. [Exhibit 815]. The memorandum stated that, "The comparable value method must be used for 1997, 1998, and 1999 production unless an alternative method is mutually agreed by the Department and the taxpayer." [Exhibit 815, p. DOR-A 00157]. The Department "never thought of [the Tax Settlement Agreement] as being anything other than a negotiated settlement." [Tr. Vol. IV, p. 840]. The Department did not expect parties with settlement agreements to respond to the notification of method. [Tr. Vol. IV, p. 838]. We find that this letter continued the pattern originally initiated by Marble, and contemplated that the Tax Settlement Agreement was a mutually agreed method of valuation.

149. Meanwhile, in 1995, the Board of County Commissioners of Sublette County had become concerned about steadily declining county tax revenues from the LaBarge production. The trend had begun after a peak year in 1991. [Exhibit 348, p. 100717; Tr. Vol. I, p. 118]. In the words of Commissioner Bill Cramer, "in this particular plant it seemed like the volumes were going up, but the revenue was going down." [Tr. Vol. I, p. 93]. The Commissioners met with officials of the Department of Revenue and Department of Audit on more than one occasion, but in 1996 the Commissioners concluded that they had not received satisfactory answers. [Tr. Vol. I, pp. 94-95].

150. At a public meeting on July 16, 1996, the Commissioners acted to retain the law firm of Davis & Cannon "to inquire into, appear in proceedings, pursue, and recover and defend the County's position on matters relating to reporting and valuation of property, including but not limited to natural gas and all related products, produced, severed, sold, owned, or operated from certain wells in Sublette County, to assure that current practices comply with law and recognized assessment practices." [Exhibit 363, p. SC3-037]. A contingent fee agreement of that same date was executed on July 22, 1996. [Exhibit 364]. In early November 1996, Davis & Cannon subcontracted for the services of an expert auditing consultant, Wyoming Royalties, to review the basis of ad valorem taxation for gas sales from the Fogarty Creek, Lake Ridge, and Graphite Units for production years 1991 through 1995. [Exhibit 365].

151. On August 19, 1996, the Department of Revenue and the Department of Audit completed a formal Memorandum of Understanding on Interagency Procedures. [Exhibit 58]. This Memorandum was in place for the two audits that are at issue in this case. [Tr. Vol. III, p. 546]. The Memorandum states, inter alia, that the Department of Audit "will exercise complete independence in all areas related to selecting audit candidates, determining scope of audits, and application of procedures to conduct audits and scheduling audits." [Exhibit 58, p.1]. The Department of Revenue has "very little control" over the scope of audits. [Tr. Vol. IV, pp. 738-739]. However, the Department of Revenue is ultimately responsible for deciding "what valuation method an audit will be audited to." [Tr. Vol. V, p. 1089]. Director Burton told Craig Grenvik, the Department of Revenue's audit coordinator, to be sure to follow the Tax Settlement Agreement when auditing LaBarge. [Tr. Vol. V, pp. 1098-1099].

152. Schmidt recalled that in the fall of 1996, Nancy Freudenthal (by this time in law practice with Davis & Cannon) contacted him for information regarding the methodology used for valuation of all gas producers in Sublette County. [Tr. Vol. IV, p. 850]. These enquiries eventually focused on the LaBarge project. [Tr. Vol. IV, p. 850].

153. Prior to the commencement of litigation in 1997, the Department had not done any analysis of the operation and application of the Tax Settlement Agreement to LaBarge production. [Tr. Vol. IV, p. 790]. There was no annual review process to evaluate mutually agreed upon valuation methods. [Tr. Vol. IV, p. 789, 831]. The Department simply continued with the course of action that had been in place since 1989. [Tr. Vol. IV, pp. 860-861].

G. The County's first challenge in 1997, and the Department's response

154. We take notice of our public files to establish the precise dates when litigation began. On January 6, 1997, the County filed an action with the Board challenging the Department's refusal to release tax-related information to the County. [Board Record, Docket 97-3].

155. On January 21, 1997, in a public meeting, the Board of County Commissioners authorized "the County's retained attorneys, Davis & Cannon, to proceed with all steps necessary to resolve valuation issues relating to oil and gas production in Sublette County,

including the filing of petitions before the State Board of Equalization." [Exhibit 363, p. SC3-047].

156. On January 23, 1997, the County filed a broader challenge to the Department's administration of the Tax Settlement Agreement, Docket 97-10, which has been correctly described as follows:

> In 1997, Sublette County filed a 'Petition for Board Examination' with the Board of Equalization (Board). Initiated pursuant to Wyo. Stat. Ann. § 39-1-304(a)(xiv) (Michie 1977), Sublette County's petition requested the Board to investigate allegations that the 1989 settlement agreement, as it was administered, resulted in illegal, improper, and unequal assessment of the LaBarge production. At the heart of Sublette County's petition were allegations that use of the Howell and Yates agreements as comparable value permitted Exxon to make numerous improper deductions. The petition questioned Exxon's valuations for the 1992-1996 tax years (1991-1995 production years). Upon Sublette County's motion, the Board joined Exxon as a party.

Exxon Corporation v. Board of County Commissioners, Sublette County, 987 P.2d 158, 161 (Wyo. 1999). [See also Exhibit 815, ¶¶2-4]. Board Dockets 97-03 and 97-10 were consolidated by the Board.

157. When the Board receives allegations such as those filed by Sublette County, it must both "carefully examine" and "cause to be instituted proceedings which will remedy improper or negligent administration of the tax laws of the State." *W. S. 1977 § 39-1-304(a)(xiv); Wyo. Stat. Ann. § 39-11-102.1(x)*. Due to the subsection of the Board's authority under statute in effect in 1997, the Board proceeding was commonly referred to as a Section 14 examination.

158. After earlier service as a County Commissioner, Gordon Johnston was elected to a term which began in January 1997. [Tr. Vol. XII, p. 2711]. Johnston felt that the County's issues with the Department could be resolved with the assistance of the Governor. [Tr. Vol. XII, p. 2728]. The Commissioners subsequently met with Governor Geringer, Director Burton, and Assistant Attorney General Vicci Colgan. [Tr. Vol. XII, p. 2728]. At the meeting, the Governor informed the Commissioners that the State and County were now adversaries. [Tr. Vol. XII, p. 2728]. The Commissioners concluded that they "were looked upon with disfavor by several folks in Cheyenne," and this impression has lingered. [Tr. Vol. XII, p. 2728, Vol. XIII, pp. 2833-2834].

159. With the onset of litigation, the Attorney General's office advised the Department that communication with the County must stop. [Tr. Vol. IV, pp. 813-814]. Schmidt acknowledges that this prohibition may have been taken "too literally." [Tr. Vol. IV, pp. 813-814]. For example, the Department worried that the litigation would put "helium on the table again," and in doing so expose the State and County to refund claims, but did not communicate or explain this concern to the County. [Tr. Vol. IV, pp. 810, 812].

160. From the Department's perspective, the principal and overriding issue presented by the County's petition was whether or not the Tax Settlement Agreement was valid. [Tr. Vol. IV, p. 793]. The urgency of resolving this issue eventually prompted the Department to join Exxon in filing a declaratory judgment action in state district court. [Tr. Vol. IV, pp. 838-839].

161. The most important secondary issue was whether the Department should be using the 55% deduction that had been negotiated by State Lands, rather than the 75% deduction of the Tax Settlement Agreement. [Tr. Vol. IV, pp. 793-794]. On this issue, the Department perceived a risk that it would be unable to provide a sound theoretical justification for either percentage of deduction. [Tr. Vol. IV, pp. 810-811]. With the benefit of hindsight, we have found that there was no such justification for the 55% deduction. *Supra*, ¶150. As a further and separate litigation risk, the Department was concerned that the County's petition would lead to a lawsuit over the point of valuation if an alternative valuation method were ultimately required. [Tr. Vol. IV, p. 839].

162. During this period, the Department did not analyze whether the valuation method in the Tax Settlement Agreement was a comparable value method within the meaning of the 1990 statutes. [Tr. Vol. IV, pp. 806, 818]. Also during this period, the Department considered the comparable value method "many times in regards to some of the southwest gas plants." [Tr. Vol. IV, p. 818].

163. The Department gave no thought during this period to recognizing the distinction between comparison value and comparable value, a distinction "which now seems so critical." [Tr. Vol. IV, p. 806].

164. During this same period in early 1997, Exxon was considering its exposure to the County's claims, but the record includes mere glimpses of Exxon's activity, in the form of unprivileged documents produced to the County in discovery. [Exhibits 39, 72].

165. The Wyoming Supreme Court has summarized the declaratory judgment action against Sublette County in this way:

> Exxon and the Department of Revenue responded to Sublette County's petition before the Board by filing the present declaratory action in the district court for the First Judicial District. These unconventional allies sought, *inter alia*, a declaration that Sublette County had waived any right it may have had to challenge Exxon's valuation. Exxon and the Department also sought a declaration that Sublette County was bound to the 1989 settlement agreement. With the battle shifted to district court, the Board of Equalization stayed action on Sublette County's petition before the Board, believing that
>
> "[g]iven the unique circumstances of these matters, it is in the best interest of all parties to seek judicial clarification of the scope of the administrative remedies available, if any, prior to any further administrative proceedings."

Exxon Corporation, 987 P.2d at 161.

166. On May 27, 1997, after the declaratory judgment action was filed, Exxon and the State of Wyoming entered into a Joint Defense Agreement. [Exhibit 37]. This enabled Exxon and the Department to share information that could not otherwise be disclosed without waiver of the attorney client privilege, or waiver of the protection of the work product doctrine. [Exhibit 37]. The Joint Defense Agreement was unusual in that the officials from the Department who have testified in this proceeding were not aware that there was such an agreement until it was publicly disclosed in the fall of 2003. [Tr. Vol. III, pp.582, 586-587, Vol. IV, p. 814, Vol. VI, p. 1248].

167. After the Joint Defense Agreement was executed, representatives of Exxon and the Departments of Revenue and Audit, including Director Burton, met for a point-by-point discussion of the County's claims. [Tr. Vol. IV, pp. 794, 888]. Based on Schmidt's recollection, we find that the Department of Revenue was mainly concerned with learning Exxon's responses to the many points raised by the County. [Tr. Vol. IV, pp. 796, 824-825]. We find this limited scope of concern to have been reasonable, since a hearing on the merits of the County's many theories would have to await the outcome of the declaratory judgment action.

168. The Department took advantage of access to confidential Exxon cost data to perform a proportionate profits valuation estimate, that is, to calculate a taxable value using an alternative method authorized by the 1990 statutes. [Tr. Vol. IV, p. 794]. *Supra*, ¶114. The proportionate profits method is a percent-of-revenue type formula that determines the amount of revenue that will be subject to tax based on a ratio of direct production costs to total direct production, processing and transportation costs. [Tr. Vol. III, p. 634]. The Department therefore required access to cost data to prepare the ratio. Director Burton recruited Elwood Soderlind, an audit supervisor in the Mineral Audit Division of the Department of Audit, for this purpose. [Tr. Vol. VI, pp. 1269, 1332].

169. Soderlind, Colgan, and Randy Bolles (then an employee of the Department of Audit) traveled to Exxon's offices to collect information for the valuation estimate of 1996 LaBarge production. [Tr. Vol. VI, pp. 1332-1333].

170. Soderlind's calculations were intended to yield an estimate, nothing more. He was obliged to accommodate limitations in the available data, such as "one lump-sum cost" for the Black Canyon dehydration facility. [Tr. Vol. VI, p. 1333]. He did not attempt to verify the underlying cost invoices because that would have taken "months, if not years to do because they have hundreds of thousands of invoices." [Tr. Vol. VI, p. 1333]. At a deeper level, the accuracy of the proportionate profits method depends not only on the accuracy of every cost, but also the accurate classification of every cost. [Tr. Vol. III, p. 637]. The Department generally does not favor use of the proportionate profits method. [Tr. Vol. III, p. 637].

171. In order to accommodate uncertainties in the taxability of helium and point of valuation, Soderlind calculated six to eight different scenarios that varied by including or excluding categories of costs. [Tr. Vol. VI, p. 1333].

172. Soderlind found a cost ratio that ran from 66% to 83%, for comparison with the actual Post-Production Cost Deduction of 75%. [Tr. Vol. VI, p. 1333]. With an eye to which of the calculation scenarios would ultimately be most likely, the Department concluded that the Tax Settlement Agreement yielded more revenue than the proportionate profits method. [Tr. Vol. IV, pp. 795, 854].

173. Randy Bolles succeeded Schmidt as Administrator of the Mineral Tax Division of the Department of Revenue in May 1998. [Tr. Vol. II, p. 417]. The Tax Settlement Agreement continued to determine the valuation of LaBarge production. [Tr. Vol. III, pp. 557-558]. Bolles is unaware of any effort that the Department made to take a hard look at the Tax Settlement Agreement method for the balance of the years at issue. [Tr. Vol. III, p. 505].

174. On April 7, 1998, the County Commissioners once again publicly acted on the scope of representation of its attorneys. By this time, the Department and Exxon were arguing in the declaratory judgment case that the County could only maintain its appeal rights by an appeal of any certification of value within thirty days. *Exxon Corporation*, 987 P.2d at 163.

175. The Department's certifications of value to the County were frequently amended. [Tr. Vol. VI, p. 1223]. Amendments to monthly and annual reports to the Department have commonly arisen from meter adjustments for volumes, pricing adjustments for contracts, and tax reimbursements, among many other possibilities. [Tr. Vol. VI, pp. 1223-1224, Vol. XI, pp. 2481-2482]. Information regarding the causes to amend might also come to the taxpayer at different times. [Tr. Vol. VI, p. 1225].

176. The County was obliged to file appeals of the Department's many notices of valuation change (NOVC) for fear of losing its appeal rights. [Tr. Vol. XII, p. 2734]. In this context, we view the minutes of the Commission meeting of April 7, 1998, which state:

> It was moved by Commissioner Cramer and seconded by Commissioner Johnston that Davis & Cannon be authorized to investigate and to proceed with all actions related to the information which has developed from the representation of Davis & Cannon to the Board of County Commissioners of Sublette County in regard to mineral production and valuation and payments required by law in Sublette County. The motion carried.

[Exhibit 363, p. SC3-054]. We find that the Commissioners intended to enable their attorneys to act on a continuing basis, and as necessary to see the County's conflict with the Department and Exxon through to a conclusion. [Tr. Vol. I, p. 13, Vol. XII, p. 2734].

177. On June 24, 1998, the Department determined and certified valuations of Exxon Mobil's LaBarge gas production for the tax year 1998. *Board of*

County Commissioners for Sublette County, Wyoming v. Exxon Mobil Corporation, 55 P. 3d 714, 717, 2002 WY 151, ¶1 (2002). This was a regular annual certification, unrelated to the audits which are the subject of this proceeding. The Count y appealed the certification of value to this Board by filing a contested case, trial-type, appeal on July 14, 1998. *Id*. In this litigation, Exxon Mobil objected to a request from the County for records regarding production years prior to

1997, and set in motion an appeal through district court to the Wyoming Supreme Court. *Id.*, 55 P. 3d at 717, 2002 WY 151, ¶2.

H. The audit for production years 1993-1996 and the Section 14 examination

178. While the declaratory judgment action was in progress in 1997, the Department of Audit engaged its audit for production years 1993 - 1996. [Tr. Vol. IV, p. 897].

179. The Department of Audit does compliance audits, and the purpose of this audit was to assure that Exxon Mobil was in compliance with the Tax Settlement Agreement. [Tr. Vol. VI, p. 1274]. Its audits are also taxpayer audits, rather than property based audits. [Tr. Vol. IV, p. 799, Vol. V, p. 934]. The Department of Audit accordingly focuses on the records of one taxpayer at a time, rather than on the records of all taxpayers associated with a given well field. [Tr. Vol. IV, p. 799].

180. The lead auditor was Francine Schoen. [Tr. Vol. IV, p. 897]. Consistent with the practices of the Department of Audit, Schoen did not participate in the audit for production years 1989-1992. [Tr. Vol. IV, p. 897, Vol. VI, p. 1336]. Her work nonetheless included a review the prior audit to see how it was done, and she talked to the person who performed the prior audit. [Tr. Vol. IV, p. 898, Vol. V, 994]. Schoen followed the Department of Audit's customary procedures for contacting the company; making arrangements to review records of sales, invoices, contracts; and comparing company records with other reports, including reports to the Wyoming Oil and Gas Conservation

Commission. [Tr. Vol. VI, pp. 1278, 1282, Vol. V, pp. 930-932; Exhibit 807, p. 0035]. Exxon personnel were courteous, and provided all of the information that Schoen requested. [Tr. Vol. V, pp. 940-941].

181. Schoen audited to the Tax Settlement Agreement methodology, with a focus on Exhibit C to the Tax Settlement Agreement. [Tr. Vol. IV, pp. 898, 900]. She accordingly conducted a revenue-based audit. [Tr. Vol. IV, p. 902]. This began with Exxon's monthly severance tax reports. [Tr. Vol. V, p. 921]. Exxon's 100% sales sheets and WTAX forms, *supra*, ¶¶131-132, were central to her investigation. [Tr. Vol. V, pp. 962-970]. Her audit included testing the sales and purchase information behind the 100% sales sheets. [Tr. Vol. V, p. 959]. She was satisfied that they were accurate. [Tr. Vol. V, p. 968]. Due to the issues that arose during the audit, she also reviewed the Howell and Yates Processing Agreements. [Tr. Vol. V, pp. 943-944].

182. Schoen denied that this was a comparable value audit, and denied that she was ever told to use the comparable value method. [Tr. Vol. IV, p. 902, Vol. V, pp. 928-929]. She did not analyze the 75% Post-Production Cost Deduction to see if it was supported by a proper comparable value. [Tr. Vol. IV, p. 902]. She did not analyze the point of valuation. [Tr. Vol. V, p. 928, Vol. III, p. 614]. She did not analyze the quantity or quality of the gas stream. [Tr. Vol. V, pp. 928-929]. She stated that she considered the Tax Settlement Agreement to be a mutually acceptable method. [Tr. Vol. V, p. 927].

183. Schoen did not otherwise deviate from the focus of the audit. She did not look at costs, because there was no need to do so. [Tr. Vol. V, p. 930]. Indeed, the Department of Revenue did not expect an audit of costs, since the Tax Settlement Agreement is primarily based on a percentage of revenue. [Tr. Vol. III, p. 613]. Nor did Schoen run hypothetical figures. [Tr. Vol. IV, p. 902].

184. Schoen did not audit the issue of whether Exxon had an obligation to withhold and pay taxes on the payments of overriding royalties that Exxon made to third parties. [Tr. Vol. V, pp. 984-986]. Schoen accepted the amounts shown on the WTAX forms as payments to overriding royalty interests. [Tr. Vol. V, p. 968]. She testified that she had no independent way to determine whether recipients of overriding royalty payments paid taxes on the payments. [Tr. Vol. V, p. 985].

185. By chance, Schoen audited Howell and Yates for production years 1990 through 1994. [Tr. Vol. V, p. 942]. Although her recollection of those audits is limited, she testified that Howell and Yates reported values received from Exxon Mobil for all products other than helium, although it is not clear whether or not these values included receipts of overriding royalties from Exxon Mobil. [Tr. Vol. V, p. 978]. The Department has not determined whether the Howell and Yates agreements were intended to allow Howell and Yates to avoid tax consequences for payments for helium by Exxon Mobil. [Tr. Vol. VI, p. 1245].

186. Schoen specifically stated that she could not remember, from the Yates audit, whether or not Yates paid tax on the overriding royalty it received from Exxon, since at the time she was looking just at Yates' share of production. [Tr. Vol. V, pp. 983-984].

187. Schoen found no evidence in the Howell and Yates audits of Howell or Yates taking in kind, or otherwise marketing LaBarge production. [Tr. Vol. V, pp. 980-981]. In any event, the Howell and Yates audits are closed. [Tr. Vol. V, p. 981].

188. Schoen did not recall any issues arising from take-in-kind arrangements. [Tr. Vol. IV, p. 904]. This was in part because she was concerned with Exxon in this audit, and not other working interest owners. [Tr. Vol. V, p. 945]. However, she saw no evidence that anyone other than Exxon sold the LaBarge production. [Tr. Vol. V, pp. 980-981].

189. Schoen originally disallowed any deduction for third-party transportation costs for sulfur. [Tr. Vol. V, pp. 991-992]. After later review of the Howell and Yates agreements, she allowed these costs. [Tr. Vol. IV, p. 906]. In contrast, she disallowed sulfur marketing fees paid to an Exxon affiliate, with the practical effect that these fees became a part of gross revenue, and taxable value. [Tr. Vol. V, pp. 964-965].

190. Schoen encountered a different issue with Exxon's sulfur sales. These revenues were aggregated on a monthly basis, consistent with the severance tax reporting period. [Tr. Vol. IV, p. 907, Vol V, pp. 921, 938]. In months when the aggregate sales value was negative, the auditors reduced the entire month to zero. [Tr. Vol. IV, p. 907, Vol. V, pp. 921-922].

191. The auditors requested exchange agreements in their engagement letter. [Tr. Vol. IV, p. 905]. Exxon said there were no such agreements. [Tr. Vol. IV, p. 905]. Schoen saw no evidence of exchanges. [Tr. Vol. V, p. 937].

192. Since taxable value was based on revenues, the effect of the Tax Settlement Agreement was to exclude from value any production of gas that does not generate revenue. Schoen saw no revenues associated with methane used as plant fuel, and no provisions of the Tax Settlement Agreement which called for her to impute a value to plant fuel. [Tr. Vol. V, pp. 934-935]. She likewise saw no revenues associated with helium that had been vented. [Tr. Vol. V, p. 935].

193. Schoen did not question the validity of helium venting because that was under the authority of the Wyoming Oil and Gas Conservation Commission. [Tr. Vol. IV, p. 905]. *Supra*, ¶¶7, 48.

194. On March 11, 1999, the Department of Audit sent a preliminary issue letter to Exxon, and began a customary dialogue between the auditors and the taxpayer. [Exhibit 807, pp. 0032 et seq.]. Schoen prepared the letter "from scratch." [Tr. Vol. V, p. 918]. The Department of Audit sent revised preliminary issue letter to Exxon dated September 14, 1999. [Exhibit 807, pp. 0073 et seq.] By this time, the principal remaining issue was the deduction of third party sulfur transportation costs. [Id.]

195. Meanwhile, on August 27, 1999, the Wyoming Supreme Court decided the declaratory judgment appeal. *Exxon Corporation*, 987 P.2d 158*; supra,* ¶¶160, 165*.* The Court addressed the principal concern of the Department and Exxon by concluding that "Sublette County may not void the 1989 settlement agreement." *Exxon Corporation,* 987 P.2d at 166. The decision set the Board's Section 14 examination in motion again.

196. The Board of Equalization had the option of conducting its Section 14 examination as a regulatory hearing or a contested case (trial type) hearing. For reasons related to the statutory history of Section 14 and its subsequent interpretation by the Wyoming Supreme Court, the Board chose to conduct a regulatory proceeding. [Exhibit 815]. As a consequence, the attorneys for the County, the Department, and Exxon were restricted to submitting written questions to the Board; in the words of a document in the Board's files, they were not "permitted to ask questions or make any inquiry themselves at the hearing." *Amended Order Establishing Procedure for an Examination*, Docket Nos. 97-3 and 97-10, p. 2 (February 3, 2000). Discovery procedures associated with contested case proceedings, such as depositions and interrogatories, were not available to any party.

197. To develop the information necessary to make a decision, the Board enlisted staff support from the Departments of Revenue and Audit. [Exhibit 813, ¶7]. The Department of Revenue assigned Randy Bolles, and Department of Audit assigned Steve Dilsaver, to assist the Board. [Exhibit 367, morning session, p. 9; Exhibit 312, p. 1]. Although the Board did not learn of Elwood Soderlind's 1997 proportionate profits calculation *(supra*, ¶168) until this hearing in 2004, the Board adopted a similar concept by looking to the valuation methods of the 1990 statutes to provide standards for measurement. We find it helpful to take notice of the Board's specific instructions:

> The Board also requests the Department make a calculation of the value of Respondent Exxon's production using its 1992, 1993, 1994 and 1995 gross products returns and the audit information collected by DOA for production years 1992, 1993, 1994, and 1995. The calculation should be determined using the (1) Comparative value method as applied in the Settlement Agreement ie, the "Howell and Yates" agreement, (2) the Proportionate profits method, and (3) the Netback method, providing exhibits to the Board demonstrating the calculations for all three methods on or before March 24, 2000. Finally, the Board requests that the Department provide a list of any other comparable sales or values, if any, that the Department may have considered, but ultimately discarded, prior to using the Howell-Yates Agreement provided for in the Exxon Settlement Agreement, for production years 1992 through 1995.

Amended Order Establishing Procedure for an Examination, Docket Nos. 97-3 and 97-10, p. 2 (February 3, 2000).

198. The Board's Order contemplated four possible valuation methods as indicators of fair market value. The first method, "comparative value," imperfectly quoted the words of the Tax Settlement Agreement. [Exhibit 804, ¶2.e.]. The second method, proportionate profits, was enacted in 1990 and used by Soderlind in 1997 with the limited cost data available to him. *Supra*, ¶¶114, 168. The third method, netback, could not be applied to a producer/processor after 1990. *Supra*, ¶114, 119. [Exhibit 815, ¶8]. Since the netback method had fallen into disuse, Bolles and Dilsaver drew on experience to prepare the netback calculations in the same general way as before 1990. [Tr. Vol. III, p. 650]. The fourth method, comparable sales, depended on the possible existence of previously unknown contracts. The Departments of Revenue and Audit unequivocally denied the existence of "other comparable transportation and processing fee contracts." [Exhibit 312, p. 4]. This left only proportionate profits and netback as a basis for evaluating the Tax Settlement Agreement method.

199. With the field of alternative methods narrowed to proportionate profits and netback, Bolles and Dilsaver generally handled the disputes over helium taxation and point of valuation as Soderlind had. They prepared four alternative calculations for each of the two methods, so that the Board could see the results of different assumptions about two different points of valuation, and whether helium was taxable or not. [Exhibit 312, pp. 7-8; Exhibit 311]. The result was eight different options in addition to the Tax Settlement Agreement method. [Exhibit 312, p. 7-8; Exhibit 311]. The eight options translated into eight different values for each of the years studied.

200. Bolles and Dilsaver had to rely heavily on Exxon for the cost data to perform the valuation estimates. [Tr. Vol. III, pp. 639-640]. They spent four days in Exxon's offices in Houston to acquire information. [Tr. Vol. III, p. 573]. Bolles and Dilsaver were accompanied by Craig Grenvik of the Department of Revenue, who helped to verify Exxon's data within the time allowed. [Tr. Vol. IV, p. 748]. Dilsaver focused on verifying revenues, and Grenvik focused on verifying costs. [Tr. Vol. III, p. 641]. In the end, Exxon prepared the schedules that were submitted to the Board, and Bolles and Dilsaver independently reviewed the schedules for content and validity. [Tr. Vol. III, p. 643]. Tuan Pham of Exxon provided this assistance. [Tr. Vol. IV, p. 748, Vol. XII, pp. 2647-2648].

201. The netback method calculations required Bolles and Dilsaver to use a rate of return on investment. [Exhibit 311]. In the absence of a rate established by the Department's own rule or practice for the generally unused method, Bolles and Dilsaver used the same BBB bond rate that was used by the federal Minerals Management Service for federal royalty calculations. [Tr. Vol. III, p. 652, Vol. IV, p. 706]. We remain mindful that the selection of this rate occurred under time pressure, without study, and because it was convenient. By accepting the use of this rate or return on investment in our Section 14 examination, we did not and do not endorse its use as a future standard, but reserve that question for another time.

202. At the Section 14 hearing in 2004, Bolles testified that he had no reason to doubt the validity of the costs, and saw no costs that he thought were unreasonable. [Tr. Vol.

III, pp. 640-641]. However, we find that there were natural limits on what could be accomplished in the time allotted. We also find that the informal assistance of Exxon resulted in a more limited disclosure of source material than the disclosure that has occurred in this contested case appeal. For example, Bolles was allowed to look at, but not copy, the Helium Sale and Disposition Agreement with the United States of America. [Tr. Vol. IV, pp. 735-736; Exhibit 814]. Bolles' predecessor Schmidt never saw the Helium Sale and Disposition Agreement while he was Administrator of the Mineral Tax Division. [Tr. Vol. IV, p. 784].

203. Bolles and Dilsaver submitted a written report to the Board on March 27, 2000. [Exhibit 312]. This report echoes the difficulties encountered by Soderlind when cost, rather than revenue, became critical to the determination of value. *Supra*, ¶170. In bold letters, Bolles and Dilsaver warned:

> ...Audit and Revenue are familiar with Exxon's accounting system. All numbers are unaudited and have not been completely tracked to invoices. The Department and Exxon are not bound by these numbers, or by the characterization of costs in any of the computations, or by the assumptions made in any of the computations. A full-fledged audit under the proportionate profits method could take up to two years.

[Exhibit 312, p. 5]. At our hearing in 2004, Bolles confirmed this warning. [Tr. Vol. III, pp. 574, 579].

204. At a hearing on April 10, 2000, the testimony presented to the Board supported the written report. [Exhibit 367]. Bolles and Dilsaver presented eight different values, plus the Tax Settlement Agreement method value, for each year from 1992 through 1995. [Exhibit 311]. The eight different values bracketed the settlement method value, with most of the alternative methods yielding a lower taxable value than the settlement method did. [Exhibit 311].

205. The Board issued its Examination Report on June 10, 2000. [Exhibit 815]. Based principally on the results of the values presented by the Departments of Revenue and Audit, the Board affirmed that the Tax Settlement Agreement method "reflects fair market value of Exxon's production of gas and associated minerals at the LaBarge Wellfield." [Exhibit 815, Regulatory Finding B].

206. More than a year later, on July 29, 2001, this Board ruled that taxes and royalties must be included in the direct cost ratio when the proportionate profits method is used to determine value. *Appeal of Amoco Production Company*, Docket No. 96-216, 2001 WL 770800 (Wyo. St. Bd. Eq., June 29, 2001); on reconsideration, 2001 WL 1150220 (September 24, 2001). Based on this ruling, the proportionate profits calculations which

supported our Section 14 Examination Report were inaccurate. [Tr. Vol. III, p. 578]. Revisions to the proportionate profits calculations would increase the value determined by the proportionate profits method. [Tr. Vol. III, p. 578]. We find, however, that the resulting changes are not so great as to materially affect Regulatory Finding B in the Board's Examination Report. [Exhibit 813].

207. Consistent with the cautions in the written report of Bolles and Dilsaver, the Board anticipated audit review "as to the correctness of the reported values, volumes, and amount of deductions, and the proper application of the valuation method outlined in the settlement agreement." [Exhibit 815, Regulatory Finding E].

208. Our Section 14 Examination Report inadvertently gave rise to an issue that was not significant then, but is significant now. During the course of the Section 14 examination, Bolles and Dilsaver lost track of the distinction between comparison method, comparative value, and comparable value. For example, their written report squarely endorsed the Tax Settlement Agreement method with words that made no apparent distinction between comparison method and comparable value method:

> The use of a comparison method looks to contracts which are comparable for the gas processed. The fact that the contract might allow deductions that would not be allowed under a different method, or that it treats costs differently, is irrelevant. Sublette County cannot rewrite the Howell and Yates contract. The legal question is: Was the use of the Howell and Yates agreements legal under the comparable value method? Revenue thinks yes.

[Exhibit 312, p. 2]. The written report includes two similar characterizations using to the word comparable and referring to the 1990 statute. [Exhibit 312, pp. 2-3]. At the Section 14 hearing, Bolles and Dilsaver used the words "comparable" and "comparable value" at least four times. [Exhibit 367, afternoon session, pp. 22, 23, 42, 49].

209. During our hearing in 2004, Bolles testified that there are differences in meaning associated with the words "comparison," "value," and "comparable." [Tr. Vol. III, pp. 494, 592-593]. The Department's Rules provided for a comparison approach before 1990; the Tax Settlement Agreement refers to comparison value; and the 1990 statutues provided for the comparable value method. [Tr. Vol. III, pp. 592-593]. In 2000, Bolles nonetheless interpreted the Board's Amended Order Establishing Procedure (quoted *supra*, ¶208), which referred to the Tax Settlement Agreement, as a directive "to use and calculate the values under the Settlement Agreement as a comparable value." [Tr. Vol. III, p. 676].

210. The Board made no Regulatory Finding that the Tax Settlement Agreement methodology was the comparable value method. However, the explanatory discussion in the Examination Report stated that:

> ....The SBOE has carefully looked in to each one of these alleged problems with the settlement agreement and concludes that the settlement agreement was validly entered into by the State of Wyoming which had the authority to settle the civil action filed by Exxon. The method agreed upon, and approved by the First Judicial District, is not illegal but is the comparable value methodology which is authorized by Wyo. Stat. §39-2-208 (d)(ii).....

[Exhibit 813, ¶13]. In short, the Board adopted the words of Bolles and Dilsaver, and pronounced the settlement method to be the comparable value method. The Department now says that the Board's statement is wrong as it relates to comparable value. [Tr. Vol. III, pp. 665-666, 680-681].

211. We find that changed circumstances support a reconsideration of our June 28, 2000, statement that, "[t]he method agreed upon....is the comparable value methodology which is authorized by Wyo. Stat. §39-2-208(d)(ii) [recodified as Wyo. Stat. Ann. §39-14-203(b)(vi)(B)]..." First, the Department's position has changed. We appreciate the candor of Director Schmidt, who testified that the Department was not then "recognizing this distinction [between comparison value and comparable value] which now seems to be so critical." [Tr. Vol. IV, p. 806]. Second, the Board now has before it a fully developed record from a contested case proceeding, renewed briefing by the parties, additional guidance from the Wyoming Supreme Court, and recent decisions of its own, all of which have sensitized us to the distinction between comparison value and comparable value. The words in the last portion of the last sentence of Paragraph 13 of our Examination Report, characterizing the Tax Settlement Agreement method as "the comparable value methodology which is authorized by Wyo. Stat. §39-2-208(d)(ii)," were premature. We reaffirm our statement that the Tax Settlement Agreement method "agreed upon, and approved by the First Judicial District, is not illegal..."

212. Meanwhile, on May 31, 2000, less than a month before the Board issued its Examination Report, the Department of Audit sent Exxon the final issue letter for the 1993 - 1996 audit. [Exhibit 809]. The Department of Audit explained that "upon review of the settlement agreement between Exxon and the State and the Howell & Yates agreements with Exxon, it was determined to allow Exxon the [third party sulfur] transportation costs." [Exhibit 809, p. 3]. The end result was additional severance tax due in the amount of $16,841.72, and a corresponding increase in gross products taxable value of $210,987. [Exhibit 809, p. 2]. The County's ad valorem taxes would be levied against this gross products taxable value, and represented a final result on the same scale as the severance tax due.

213. The Department also issued its final determination letter and assessment notice on May 31, 2000. [Exhibit 811]. In doing so, the Department of Revenue accepted the findings of the Department of Audit and determined that the audit was complete and correct. [Tr. Vol. VI, p. 1217]. The interest due on the additional severance tax was $17,614, for a total amount due the State of $34,455.75. [Exhibit 811, p. 1]. Exxon took

no exception to the final audit, and paid the amount due. [Tr. Vol. XII, p. 2596]. This closed the state severance tax side of the 1993-1996 audit.

214. On July 10, 2000, Sublette County appealed the Board's refusal to employ contested case procedures in the examination proceeding by filing a writ of mandamus in District Court. [Board Record]. This writ was denied on August 3, 2000. [Board Record]. The denial of the writ was appealed to the Wyoming Supreme Court on August 15, 2000. [Board Record].

215. The Department issued the County a Notice of Valuation Change arising from the 1993 -1996 audit, dated August 11, 2000. [Exhibit 817]. The County, of course, was free to independently decide whether the result of the 1993 - 1996 audit was satisfactory. Sublette County filed a timely notice of appeal on August 23, 2000, initiating Docket No. 2000-142, the first of the two matters consolidated into this case. [Board Record].

I. The audit for production years 1997-1999 and subsequent events

216. By letter of October 25, 2000, the Department of Audit engaged its audit of LaBarge production for 1997 - 1999. [Exhibit 810, telefax pp. 13-17; Tr. Vol. XII, p. 2591]. The engagement letter requested the customary suite of documentation, including "all....exchange agreements, if applicable." [Exhibit 810, telefax p. 14].

217. This time the lead auditor was Paul Koehler. [Tr. Vol. V, pp. 1008-1009]. Koehler consulted Schoen's audit for direction, but did not use the prior audit as a template. [Tr. Vol. V, pp. 1012-1013]. A team of auditors again traveled to Houston to inspect records, including the 100% sales reports. [Tr. Vol. V, pp. 1010-1011].

218. Koehler was directed by his supervisor to audit to the Tax Settlement Agreement method. [Tr. Vol. V, p. 1012]. Like Schoen, he accordingly conducted a revenue-based audit. [Tr. Vol. V, p. 1021]. Koehler and his staff verified that the information contained on the 100% sales reports was accurate. [Tr. Vol. V, p. 1023]. He also observed that the numbers on the 100% sales reports flowed into the WTAX report. [Tr. Vol. V, p. 1028]. Koehler relied heavily on Exhibit C of the Tax Settlement Agreement, but had no reason to refer to the Howell and Yates agreements, or to the helium agreement between Exxon and the United States. [Tr. Vol. V, pp. 1016-1017, 1019].

219. Like Schoen before him, Koehler did not analyze the point of valuation, did not analyze the quantity or quality of the gas stream, did not analyze the terms of the processing agreements, and did not question the 75% deduction. [Tr. Vol. V, pp. 1037-1038]. We find that Koehler audited to the Tax Settlement Agreement, and not to the comparable value method.

220. Koehler made no effort to look into whether taxes were paid on overriding royalty payments made by Exxon Mobil. [Tr. Vol. V, pp. 1031-1032].

221. Koehler allowed the deduction for third party sulfur transportation, and substantiated the backup information for this deduction. [Tr. Vol. V, pp. 1032-1033].

222. Koehler allowed monthly amalgamations of sulfur sales the same way that Schoen did. [Tr. Vol. V, p. 1041]. *Supra*, ¶190.

223. Koehler did not receive any exchange agreements from the taxpayer, nor did he find any take-in-kind production. [Tr. Vol. V, pp. 1032, 1040].

224. Like Schoen before him, the focus of Koehler's audit was determined by the scope of the settlement method. Koehler was not concerned with whether helium was properly vented, but only whether helium revenue was recorded when there was a sale. [Tr. Vol. V, pp. 1025-1026]. For the same reason, he did not question the use of methane as plant fuel. [Tr. Vol. V, pp. 1029, 1040].

225. On October 4, 2001, the Wyoming Supreme Court ruled that the Board had not been required to conduct its Section 14 examination as a contested case, or "trial type," proceeding. *Board of County Commissioners, Sublette County, In re,* 33 P.3d 107, 2001 WY 91 (2001).

226. On April 8, 2002, the Department of Audit sent a preliminary issue letter to Exxon for the 1997 - 1999 audit of LaBarge production. [Exhibit 808]. Koehler drafted the narrative which appeared in the letter. [Tr. Vol. V, p. 1022]. The narrative provided a detailed review of sales, of the processing deduction allowed under the Tax Settlement Agreement, and of the other deductions allowed under the Tax Settlement Agreement. [Exhibit 808, pp. 8-12]. The Department of Audit concluded that for 1997 - 1999, there was additional severance tax due in the amount of $1,794.90, and additional ad valorem taxable value in the amount of $37,959. [Exhibit 808, pp. 1, 3]. The County's ad valorem taxes would be levied against this gross products taxable value, and represented a final result on the same scale as the severance tax due.

227. On September 12, 2002, the Department of Audit sent a final issue letter to Exxon for LaBarge production for 1997 - 1999. [Exhibit 810]. The amounts of severance tax due and additional ad valorem taxable value remained the same as in the preliminary issue letter. [Exhibit 810, pp. 2-3].

228. The Department simultaneously issued its final determination letter and assessment notice on September 12, 2002. [Exhibit 812]. In doing so, the Department of Revenue accepted the findings of the Department of Audit and determined that the audit was complete and correct. [Tr. Vol. VI, p. 1217]. Exxon Mobil took no exception to the audit results, and paid the severance tax assessment on October 11, 2002. [Tr. Vol. XII, p. 2596; Exhibit 812]. This closed the severance tax side of the 1997 -1999 audit.

229. On December 11, 2002, the Department issued the County a Notice of Valuation Change arising from the 1997 - 1999 audit. [Exhibit 818]. The County was free to independently decide whether the result of the 1997 - 1999 audit was satisfactory.

Sublette County filed a timely notice of appeal on January 10, 2003, initiating Docket No. 2003-02, the second of the two matters consolidated into this proceeding. [Board Record].

230. On October 9, 2002, the Wyoming Supreme Court issued its decision in the matter that the County had filed with the Board on July 14, 1998, and which had eventually posed issues regarding the proper scope of a county's appeal to the Board. *Board of County Commissioners for Sublette County, Wyoming v. Exxon Mobil Corporation*, 55 P. 3d 714, 2002 WY 151 (2002), rehearing denied, November 5, 2002. For the purposes of our evaluation of the facts in this proceeding, two points of the Wyoming Supreme Court's decision were significant. First, the County cannot appeal the Department's annual determination and certification of value; it can only appeal the results of an audit. *Id.*, 55 P. 3d at 723, 2002 WY 151, ¶28 (2002). Second, the County cannot appeal the Department's selection of a valuation methodology. *Id.*, 55 P. 3d at 723, 2002 WY 151, ¶28 (2002). Commissioner Cramer confirmed that the County is not attacking the Tax Settlement Agreement in this proceeding, but does dispute a variety of issues that it views as separate from the Tax Settlement Agreement method. [Tr. Vol. I, pp. 161-162].

J. Current positions of the State and County

231. The Department's current position is that the Tax Settlement Agreement is a mutually agreed alternative method under the 1990 statute, presently codified as Wyo. Stat. Ann. §39-14-203(b)(vii). [Tr. Vol. III, p. 499, Vol. V, pp. 1101, 1105]. The Department explains that it has never analyzed the Howell and Yates Processing Agreements to see if they met the requirements of the comparable value method. [Tr. Vol. III, pp. 567-568, 595-596]. Exxon Mobil's criticism of this position has been scathing, and the County's only slightly less so. [Closing Briefs]. We view the Department's posture as a natural outgrowth of conflicts between the Tax Settlement Method and the comparable value method subsequently enacted in 1990. These conflicts include, at a minimum, the taxability of helium and the treatment of the point of valuation. Generally speaking, these conflicts have long been understood by all parties to this proceeding.

232. We find that the Tax Settlement Agreement method is a mutually agreed alternative method, and is an alternative to the valuation methods codified in 1990. We accept the Department's position as supported by the facts in the record. We do not fault the Department for declining, when confronted by the imminent prospect of the hearing in this matter, to resolve conceptual difficulties that have proven so resistant to resolution over the years.

233. We find that the Department has never exercised its right to opt out of the Tax Settlement Agreement. [Tr. Vol. III, pp. 548, 558].

234. Exxon Mobil has been extremely critical of individual County Commissioners, based on testimony of the Commissioners on cross-examination. Exxon Mobil's

criticism is based on such matters as a supposed failure to appreciate potential risks posed by the litigation, not knowing whether the Tax Settlement Agreement methodology reaches fair market value, and a concession that this proceeding relitigates the Section 14 examination, at least in part. [*E.g.*, Tr. Vol. XII, pp. 2718, 2720, Vol. XIII, pp. 2815, 2822, 2829]. Despite Exxon Mobil's intensive cross-examination, the Commissioners have affirmed the litigation has proceeded at their behest and under their control. [Tr. Vol. I, p. 110, Vol. XII, pp. 2713-2717, Vol. XIII, pp. 2836-2838, 2842-2843]. We find that the Commissioners have controlled this litigation and have not delegated the conduct of this litigation to their attorneys.

235. We further find that the Commissioners were united in pursuing the opportunity for a contested case proceeding before this Board. [Tr. Vol. I, pp. 107-109, Vol. XII, pp. 2719-2720, Vol. XIII, pp. 2823, 2836-2837]. Moreover, we find that the Commissioners are broadly motivated by their individual and collective responsibility to advance the interests of Sublette County. [*E.g.*, Tr. Vol. XIII, pp. 2822-2823, 2833-2836].

K. Evidence regarding the value of the LaBarge production

236. The County presented its entire critique of the specific values reached by the Department through the testimony of Steve Wilson of Wyoming Royalties. Wilson an expert auditor who is experienced in assisting Wyoming counties in performing ad valorem tax reviews. [Tr. Vol. I, pp. 164-167]. The original core of his analysis was a thorough comparison of: (1) the reports made by Exxon Mobil to the Wyoming Oil and Gas Conservation Commission; (2) reports made to the Department; (3) Exxon Mobil's own internal reports (including the WTAX); and (4) tax notices from the Sublette County Assessor. [Tr. Vol. I pp. 168-170, Vol. II, pp. 305-315]. Wilson "looked at every single mcf of production for the years at issue," "about 500 million mcf of gas." [Tr. Vol. II, pp. 307, 322]. The broad purpose of this review was to address "correctness of the reported values, volumes and amount of deductions" that had not been addressed during the Board's Section 14 examination. [Exhibit 813, Regulatory Finding F].

237. Wilson found a discrepancy of "about one tenth of one percent" between Exxon Mobil's internal records and the taxable values actually reported to the Department for the period 1993 to 1999. [Exhibit 3, p. 2; Tr. Vol. II, pp. 322-323]. We find that this is an insubstantial discrepancy. Wilson's result is supported by the fact that, in Exxon Mobil's accounting system, one person is responsible for reports to the Wyoming Oil and Gas Conservation Commission and for preparation of the internal WTAX and 100% Sales reports. [Tr. Vol. XI, pp. 2457-2460].

238. Wilson testified that he did not conduct a cost audit of Exxon Mobil. [Tr. Vol. I, pp. 172-173]. Specifically, he did not "determine the accuracy of the financial statements presented and that [the financial statements] are presented according to generally accepted accounting principles and to make sure that the numbers flowed through to the proper tax reports." [Tr. Vol. I, p. 173]. We accept this testimony about the limitation of his review and analysis.

239. Wilson prepared a number of schedules to quantify the values associated with the County's theories regarding four tax valuation effects of the Tax Settlement Agreement. These include schedules to illustrate: (1) the amounts paid by Exxon Mobil to working interest owners for helium; (2) payments made by Exxon Mobil to third parties holding overriding royalty interests in leases held by Exxon Mobil; (3) the value of methane used as plant fuel, and therefore not included in revenue under the definitions incorporated into the Tax Settlement Agreement; and (4) volumes of helium (in excess of the 14% that cannot be captured by the production process) vented during production years 1995 and 1996. [Exhibit 3, pp. 2-4; Exhibits 14, 16, 18, 20, 21]. We find that the calculations are accurate. We further find that similar calculations pertaining to production years 1991 and 1992 are accurate. [Exhibits 15, 17, 19]. The accuracy of the calculations does not, however, affect our disposition of the underlying issues.

240. In an implicit response to the valuation estimates accepted by this Board in its Section 14 examination, Wilson revised the Exxon cost data submitted in 2000 to reach a

percentage that represents the County's view of Exxon Mobil's actual costs. [Exhibit 3, pp. 4-5; Exhibits 22, 167]. Wilson's adjustments eliminated any costs before the outlet of the Black Canyon dehydration unit; employed a simple straight line depreciation of fifty years against a stipulated amount of capital costs for all plant after the outlet of the Black Canyon dehydration unit; and eliminated all return on investment. [Exhibits 22, 167]. In other words, Wilson eliminated capital and operating costs prior to the point of valuation that the County considered to be required by the 1990 statutes. Wilson also eliminated all return on investment for the rest of the plant facilities, and thereby addressed the long-standing netback quandary by denying the most critical allowance. See *supra*, ¶¶41-47. The result is a percentage cost figure which varies between 41% and 50% for the years at issue, a result substantially less than the established Post-Production Cost Deduction of 75%. [Exhibit 22]. We find that the calculations are accurate. The accuracy of the calculations does not, however, affect our disposition of the underlying issues.

241. Wilson performed two types of calculations for illustrative purposes. The first type of calculation shows "an effective tax rate." [Exhibit 3, p. 2; Exhibit 8]. An effective tax rate merely restates the fact that the tax value under the settlement method is less than the total value of revenue. It is not a concept or a calculation of independent significance.

242. The second illustrative calculation shows taxable values for the years at issue using alternative post-production cost deductions of 70%, 65%, 60%, and 55%. [Exhibit 3, p. 2; Exhibits 10, 11, 12, 13]. The purpose of these alternative deductions was motivated in part by the 55% deduction "used by Wyoming State Lands for royalty

purposes for the same period.” [Exhibit 3, p. 4]. Regarding the royalty, see *supra*, ¶¶144-145. Again, these calculations have no independent significance.

243. To present an alternative reflection of taxable value, Exxon Mobil followed established paths. During the Section 14 examination, Tuan Pham learned how the Department approached the use of the proportionate profits and netback methods. *Supra*, ¶200. Based on this experience, Exxon prepared an updated and expanded version of the analysis performed for the Board during its Section 14 examination by estimating taxable values with the proportionate profits and netback methods, and again employing different assumptions about the point of valuation and the taxability of helium. [Exhibits 167, 361; Tr. Vol. X, pp. 2282-2297, Vol. XII, pp. 2647-2652]. In this exercise, Exxon accounting personnel verified costs and revenues, and its tax department provided the details of method. [Tr. Vol. X, p. 2329]. We note that there are minor variances from the costs presented to the Board during its Section 14 examination [Exhibit 311], due to routine adjustments to data in the company books. See *supra*, ¶175.

244. Exxon Mobil extended the Section 14 examination calculations to cover 1993 to 1999, rather than just 1992 to 1995. [Tr. Vol. XII, pp. 2248-2249, Vol. X, pp. 2295-2310]. Exxon Mobil also prepared a second set of calculations with one further adjustment. One set of calculated taxable values does not include a return on investment for transportation [Exhibit 167], and the other does. [Exhibit 361; Tr. Vol. XII, p. 2652]. As in 2000, the overall result is values bracketing the values generated by the Tax Settlement Agreement method. [Exhibits 167, 361].

245. We find that the two sets of calculations support the general conclusions that the Board reached in its Section 14 examination, but are subject to the same limitations. *Supra*, ¶¶201-203. In particular, nothing has yet been done to audit costs. *Supra,* ¶¶31, 203, 238. Similarly, we have accepted the use of the BBB bond rate as one answer to the rate of return problem, but reserve judgment about its use outside of the context of our Section 14 examination and this proceeding. *Supra*, ¶201.

246. Exxon Mobil declined to adjust its Section 14 examination calculations for a change in the law which occurred after the close of the Section 14 proceedings. The Board required adjustments to the proportionate profits method in *Appeal of Amoco Production Company*, Docket No. 96-216, 2001 WL 770800 (Wyo. St. Bd. Eq., June 29, 2001); on reconsideration, 2001 WL 1150220 (September 24, 2001). See *supra*, ¶206. We find that this flaw does not materially alter the general conclusions the Board reached in the Section 14 examination and we reaffirm those conclusions here.

247. Exxon Mobil otherwise presented evidence that the performance of the LaBarge plant has been disappointing. Plant Manager Keith Merkeley testified that for the period 1987 to 1999, the typical rate of return on the entire LaBarge project (well field and plant) was 1 ½ to 2 percent annually. [Tr. Vol. VIII, pp. 1769-1770, Vol. X, pp. 2313-2317]. He states that the project would never have been developed if this rate of return had been foreseen. [Tr. Vol. VIII, pp. 1771]. However, although Merkeley said that he

had reviewed documents related to the funding of the project [Tr. Vol. VII, p. 1539], he could not say who had prepared the economic justification for the project. [Tr. Vol. VIII, pp. 1801-1802]. We put little weight on documents not admitted into evidence, and have no reason to put more weight on recollection of such documents.

248. We have similar concerns about testimony from Gentry regarding early price projections for methane, helium, carbon dioxide and sulfur. She identified these projections as providing support for the original decision to go forward with the LaBarge project. [Exhibit 338; Tr. Vol. X, p. 2222]. Gentry pulled the projections from a chart used in management presentations "whenever we were reviewing the reappraisal of our project for this time period." [Tr. Vol. X, p. 2222]. This cannot be taken as a complete picture of the original decision, even if the projections are what Gentry believes them to be. Gentry underscored the limits of her knowledge when she testified that she is not privy to Exxon's hurdle rates (minimum anticipated returns for proposed investments) and does not run economics for the company on future projects. [Tr. Vol. XI, p. 2426]. On the basis of other points of Gentry's testimony, we find – as we often do – that it is important to have a complete picture. For example, Gentry explained that Exxon was then more limited by investment opportunities than cash on hand. [Tr. Vol. X, p. 2145]. Generally speaking, cash that was not promptly invested in the high interest rate environment of 1983 rapidly
lost value. Based on common business experience, it is difficult for us to accept that the LaBarge project went forward exclusively on the basis of price projections. We therefore decline to place much weight on the information, which is clearly excerpted.

249. Moreover, the product price projections cannot be squared with the representations Exxon made to the Wyoming Oil and Gas Conservation Commission in 1983, shortly before the commencement of construction. At the time, Exxon was not "even close to having a purchaser for the carbon dioxide, or any other non-hydrocarbon gas, at the present time, nor does it appear that there is a potential for finding such a purchaser in the immediate future." *Supra*, ¶7. Yet, Gentry confirmed that the projections for methane, helium, carbon dioxide and sulfur were dated around 1983, rather than earlier. [Tr. Vol. X, p. 2229].

250. Gentry provided similar testimony regarding the price projections prepared by Exxon in 1988 when it was evaluating the zero cumulative calculation aspect of the Howell and Yates settlement. [Tr. Vol. X, pp. 2219-2221; Exhibits 338, 341]. The source of these figures was a spreadsheet in the possession of an unnamed individual who ran the calculation. [Tr. Vol. X, p. 2223]. Although Gentry states that Exxon used a forecast of prices and volumes to decide what percentage of fee over time would be needed to recover its costs, it is equally plausible for the exercise to have been run the other way around: for a given discount rate, what product prices were required? We cannot reliably understand the significance of these price projections without having the spreadsheet itself, the testimony of the person who prepared the spreadsheet, and if the prices were indeed forecasted rather than inferred, the testimony of the person who prepared the price forecasts. Even if we had such information, we would have an incomplete picture of the settlement analysis made by Exxon at the time.

251. Gentry characterized the 1988 settlement projections as the basis for "its forecast that [Exxon Mobil] would receive payout under Howell and Yates in 35 years." [Tr. Vol. X, p. 2226]. Gentry prepared charts intended to show how far short of achieving payout Exxon would likely fall. [Exhibit 340]. She extended the logic further with charts depicting Howell and Yates cumulative cost shortfalls against the benchmark of the value resulting from 75% Post-Production Cost Deduction. [Exhibit 342; Tr. Vol. X pp. 2282-2295]. In the end, we find this line of argument unpersuasive because there is nothing in the record to suggest that Exxon Mobil expected the life of its plant to be a mere 35 years, while there is much to support a conclusion that Exxon Mobil expected its 75% processing fee to endure with Howell and Yates for that long. We decline to confuse the two propositions.

252. We find that the LaBarge project has remained profitable enough for Exxon Mobil to have made money on the operation year in and year out, even though the project is less profitable than once hoped. [Tr. Vol. VIII, pp. 1821-1822].

253. We likewise find that the calculus of profitability is now changing. Methane prices have risen. Helium prices have stabilized, after a period of concern that release of federal stockpiles would ruin the market. [Tr. Vol. XII, pp. 2781-2785, 2797]. Prospects are bright for sale of the plant's entire carbon dioxide capacity for the next five to ten years. [Tr. Vol. VIII, pp. 1823-1824]. Investments are being completed in 2004 that will handle sulfur in an entirely different way. Instead of processing hydrogen sulfide to recover sulfur, Exxon Mobil will reinject the hydrogen sulfide in the Madison Formation. [Tr. Vol. VIII, p. 1721]. Exxon Mobil will shortly liberate itself from the unprofitable sulfur market. [Tr. Vol. VIII, p. 1722]. The company expects improved operations because the sulfur plant is the largest source of downtime and the largest cost area in the plant. [Tr. Vol. VIII, p. 1722]. As part of the investments now being made, Exxon Mobil will add 112 megawatts of generating capacity, and in so doing relieve itself of electricity costs of about $20 million per year. [Tr. Vol. VIII, pp. 1722-1723]. We have already noted that the plant's capacity will increase to about 720 million standard cubic feet a day, and that the stated life of the plant will likely be increased to seventy years. *Supra*, ¶¶4-5.

254. Any Conclusion of Law set forth below which includes a Finding of Fact may also be considered a finding of fact and is therefore incorporated herein by reference.

CONCLUSIONS OF LAW

A. Standards of review

(1) Scope of review

255. The Board of County Commissioners of Sublette County filed the appeals in this matter under the authority of Wyo. Stat. Ann. §39-11-102.1(c), and Chapter 2 of the

Rules of Practice and Procedure of this Board. [Board Record, Case Notices]. In pertinent part, the statute provides that:

> (c) The state board of equalization shall perform the duties specified in article 15, section 10 of the Wyoming constitution and shall hear appeals from county boards of equalization and review final decisions of the department [of revenue] upon application of any interested person adversely affected, including boards of county commissioners for the purposes of this subsection, under the contested case procedures of the Wyoming Administrative Procedure Act....

Wyo. Stat. Ann. §39-11-102.1(c). This subsection is not the same as the authority under which we have heard taxpayer appeals regarding other gas processing plants, Wyo. Stat. Ann. §39-14-203(b)(viii). *E.g.*, *Whitney Canyon*, Docket No. 2000-147 et al., June 9, 2003, 2003 WL 21774603.

256. The Wyoming Supreme Court recently specified what final decision of the Department is subject to appeal by a county. That final decision is the Department's assessment on the basis of an audit:

> ....It is only after the time for an audit has expired, or an audit is complete, and the [Department of Revenue] has assessed on the basis of the audit (Wyo. Stat. Ann. § 39-14-208(b)(v)(E)) that there is nothing more to be accomplished. Only then has the DOR made a final decision that a county may appeal...

Board of County Commissioners for Sublette County, Wyoming, 55 P. 3d 714, 723-724, 2002 WY 151, ¶36.

257. The Wyoming Supreme Court otherwise held that appeals brought by counties under Wyo. Stat. Ann. §39-11-102.1(c) are limited in scope to specific errors allegedly committed by the Department:

> ....[A] county's appeal may not challenge valuation methodology. Such appeals are governed by Wyo. Stat. Ann. §39-14-203(b)(LexisNexis 2001). Such an appeal may not challenge an annual value certification, as that matter is addressed by Wyo. Stat. Ann. §§39-13-102(n) and 39-14-209(b)(iv)(LexisNexis 2001). The County cannot force an audit of a taxpayer through a contested case, as that responsibility is given to the Departments of Audit and Revenue under Wyo. Stat. Ann. §39-14-208(b)(LexisNexis 2001). It follows that the County's appeal must be limited in scope to specific errors allegedly committed by the [Department of Revenue]....

Board of County Commissioners for Sublette County, Wyoming, 55 P. 3d 714, 723, 2002 WY 151, ¶33. So, while we have found it useful to consider the complex history of the County's audit appeals, in large measure due to Exxon Mobil's Motions to Dismiss, our review of the County's issues has a much narrower focus: specific errors committed by the Department when it issued notices of valuation change on the basis of audits of LaBarge production for 1993 - 1996 and 1997 - 1999.

258. As a preliminary matter, we conclude that the issues raised by Howell and Yates in their Closing Brief, including aspects of the legal status of Howell and Yates with respect to the Tax Settlement Agreement and the fact that they do not pay taxes on Helium Proceeds, are beyond the scope of review in this case. In support of this conclusion, we

note that in their final prehearing Summary of Contentions, Howell and Yates did not articulate these issues, and were still contending that they were not a proper party to the consolidated docket. [Howell and Yates Joint Updated Summary of Contentions].

(2) The Board's role

259. Supreme Court has made it clear that the role of this Board is strictly adjudicatory:

> It is only by either approving the determination of the Department, or by disapproving the determination and remanding the matter to the Department, that the issues brought before the Board can be resolved successfully without invading the statutory prerogatives of the Department.

Amoco Production Company v. Wyoming State Board of Equalization, 12 P.2d 668, 674 (Wyo. 2000). The Board's duty is to adjudicate the dispute between the County and the Department, and nothing more.

(3) The burden of proof

260. "The burden of proof is on the party asserting an improper valuation." *Amoco Production Company v. Wyoming State Board of Equalization*, 899 P. 2d 855, 858 (Wyo. 1995); *Teton Valley Ranch v. State Board of Equalization*, 735 P. 2d 107, 113 (Wyo. 1987). The Board's Rules provide that, "the Petitioner shall have the burden of going forward and the ultimate burden of persuasion, which burden shall be met by a preponderance of the evidence. If Petitioner provides sufficient evidence to suggest the Department determination is incorrect, the burden shifts to the Department to defend its action...." *Rules, Wyoming State Board of Equalization, Chapter 2*, §20.

261. Under the analysis which follows, taken in light of our Findings of Fact, we conclude the County has not met its burden.

B. The County's claims of law

(1) The Tax Settlement Agreement and the 1990 statutes

262. The Wyoming Supreme Court has previously determined that Sublette County is bound by the Tax Settlement Agreement. *Exxon Corporation*, 987 P.2d 165-166.

263. The Tax Settlement Agreement became part of stipulation which ended the 1988 cap legislation litigation. Findings, *supra*, ¶86. "As such, it had the force and effect of a judicial decree." *Exxon Corporation*, 987 P.2d at 165. Sublette County could not therefore avoid the Tax Settlement Agreement when new members of the Board of County Commissioners assumed office. *Id.*, at 165-166.

264. Sublette County nonetheless argues that the 1990 statutes (Chapter 54, Wyo. Session Laws 1990) govern the application of the Tax Settlement Agreement. The County finds a major premise for its argument in the words of the Wyoming Supreme Court. The Court recognized that, after August 31, 1991, the Department "had discretion to select a valuation method for post-August 1991 production." *Exxon Corporation,* 987 P.2d 166. The County argues that this discretion "can only occur by DOR applying the plain language of the 1990 statutes to the 1989 Settlement Agreement." [County Closing Brief, p. 3]. The County reasons that the 1990 statutes therefore govern the application of the 1989 Tax Settlement Agreement. *Id.* We conclude that the County has reasoned too broadly.

265. The Wyoming Supreme Court unequivocally held that Tax Settlement Agreement is of continuing force and effect. The Department is therefore bound first and foremost by the Tax Settlement Agreement, which took on the character of a judicial decree. *Exxon Corporation*, 987 P.2d 165. The subsequent 1990 statute governed the actions of the Department only to the extent that the requirements of the 1990 statute were not inconsistent with the requirements of the Tax Settlement Agreement.

266. Plainly, after August 31, 1991, the Department could have opted out of the Tax Settlement Agreement without violating its terms. The Department has never done so. Findings, *supra*, ¶233. As important, none of the parties contends that the Wyoming legislature has passed legislation "that requires Exxon to use valuation methods other than the comparison value method," which would reopen questions of taxability that were resolved by the Tax Settlement Agreement. [Exhibit 804, ¶2.e., fourth sentence].

267. For its part, Exxon Mobil would have us extend the logic of the Wyoming Supreme Court's judicial decree rationale to expand the reach of the Tax Settlement Agreement. We decline to do so. The only subject expressly addressed by either the Stipulation or the Declaratory Judgment was a declaration that the cap legislation was unconstitutional. [Exhibit 805]. We will dispose of the County's issues on grounds that do not oblige us to consider how far the judicial decree might extend beyond the plain language of the Stipulation or the Declaratory Judgment.

268. The Department correctly argues that the 1990 statutes must govern to some extent, because those statutes are now the exclusive source of the Department's authority to function as an agency of the State. Although the Tax Settlement Agreement binds the Department and the County, the Department is an administrative agency, and its authority is limited to powers delegated by the legislature. *Union Pacific Res. Co. v. State*, 839 P.2d, 356, 370 (1992). However, the Department's argument does not contradict our conclusion that the 1990 statutes govern where not inconsistent with the requirements of the Tax Settlement Agreement.

(2) Whether comparison value and comparable value are identical

269. We now turn to a core issue, which we choose to frame in this way: For the audit years at issue, was the comparison value method of the Tax Settlement Agreement, as applied by the Department, identical to the comparable value method defined in Wyo. Stat. Ann. § 39-14-203(b)(vi)(B)? If not, do we find or conclude that the Department has otherwise determined that Tax Settlement Agreement method to be the same as, or an application of, comparable value method defined in Wyo. Stat. Ann. § 39-14-203(b)(vi)(B)? Our answer to both questions is "no."

270. Although the Tax Settlement Agreement is incorporated into a judicial decree, we will interpret it as a contract, because a settlement agreement is interpreted in the same fashion as a contract. *Exxon Corporation*, 987 P.2d 158, 165. Our prime focus in construing a contract is to determine the parties' intent. *Wolter v. Equitable Resources Energy Co.*, 979 P.2d 948, 951 (Wyo. 1999). We look to the plain meaning of the words employed in the contract to determine the parties' intent. *Wolter*, 979 P.2d at 951.

271. The Tax Settlement Agreement identifies the settlement valuation method until August 31, 1991, as "the comparison value method provided in Section 10 of the current Regulations of the Board of Equalization by using the agreements negotiated between Exxon and Howell Petroleum Corp. and Yates Petroleum Corp. as the comparable value." Findings, *supra*, ¶89. [Exhibit 804, ¶2.e., sentence one]. The Tax Settlement Agreement expressly addresses the period after August 31, 1991, using different words. "After August 31, 1991, the State agrees that it will recognize the Howell and Yates agreements as a comparison value and that the comparison value method may be used in conjunction with other recognized appraisal techniques to determine value." Findings, *supra*, ¶89. [Exhibit 804, ¶2.e., sentence five]. Any confusion engendered by a description of the Howell and Yates agreements as a "comparable value" in the first of these sentences must be resolved by the use of the words "comparison value" in the second sentence, since the years at issue are after August 31, 1991. We conclude that the Tax Settlement Agreement method is the same as the comparison value method, and that the Howell and Yates agreements are a comparison value, nothing more.

272. In our Findings, we consulted the Rules and Regulations of the Wyoming State Tax Commission in effect in 1988 when the Tax Settlement Agreement was negotiated, and found that those Rules and Regulations do not expressly refer to a comparison value method. Findings, *supra*, ¶79. We conclude that the pertinent portion of the

Section of the former Rules referenced in the Tax Settlement Agreement is the following:

> Section 10. Recognized Appraisal Techniques.
>
> (a) When the [Mineral Tax] Division [of the Wyoming Department of Revenue and Taxation] is required to appraise or determine the fair cash market value of a mineral by application of recognized appraisal techniques, the Division shall use one or more of the following approaches or a combination thereof:
>
> ***
>
> (ii) Comparison approach. Applied to minerals, the comparison approach is a method of determining the fair cash market value of a mineral by comparison with the sales of minerals similar in quality and characteristics. This approach includes consideration of:
>
> (A) Direct arms length sales of unprocessed mineral at the mine or mining claim, and
>
> (B) Direct sales of processed or transported minerals whether at or away from the mine or mining claim.

Rules and Regulations of the Wyoming State Tax Commission, Chapter XXI, Section 10(a)(ii). Given the broad authority granted by the Rules to apply recognized appraisal techniques, we conclude that the Tax Settlement Agreement's reference to comparison value is consistent with the definition of comparison approach, but not the same. The comparison value method was adopted by agreement of the parties in the Tax Settlement Agreement. Findings, *supra*, ¶89. *Exxon Corporation*, 987 P.2d 158.

273. The initial step in arriving at a correct interpretation of a statute is to examine the ordinary and obvious meaning of the words employed according to their arrangement and connection. *Parker Land and Cattle Co. v. Wyoming Game and Fish Commission*, 845 P.2d 1040, 1042 (Wyo. 1993). This rule of statutory construction also applies to the interpretation of administrative rules and regulations. *State ex rel Department of Revenue v. Buggy Bath*, 18 P.3d 1182, 1185, 2001 WY 27, ¶6 (Wyo. 2001).

274. By scrutiny of: (1) the plain language used to describe the comparison value method in the Tax Settlement Agreement; (2) the plain language used to describe the comparison approach in the Section 10 of the Rules in effect in 1989; and (3) the plain language used to describe the comparable value method defined in Wyo. Stat. Ann. §39-14-203(b)(vi)(B), we conclude that the comparison value method and the comparable value method are not one and the same. Our conclusion is reinforced by our Findings concerning details of the negotiation and construction of the Tax

Settlement Agreement. Findings, *supra*, ¶¶66, 79, 89-92. Our conclusion is supported by our Findings concerning the audit standards applied by the Department of Audit for both of the audits. Findings, *supra*, ¶¶181-182, 218-219.

275. Our analysis does not end here, however, because both the County and Exxon Mobil believe that the Department has taken action under the 1990 statutes to determine that the comparison value method of the Tax Settlement Agreement and the comparable value method of Wyo. Stat. Ann. §39-14-203(b)(vi)(B) are identical. This does not signal consensus, however, because the parties do not agree on the effect of such a determination. Generally speaking, the County argues that if the application of the Tax Settlement Agreement is also an application of the comparable value method, the settlement method must be adjusted to account for restrictions found in the 1990 statutes. In contrast, Exxon Mobil argues that if the application of the Tax Settlement Agreement is an application of the comparable value method, the Department must ignore any restrictions found in the 1990 statutes.

276. The record suggests but does not establish that the Department made the disputed determination. From time to time, Department officials have plainly referred to the Tax Settlement Agreement method as the comparable value method. Findings, *supra*, ¶208. Nonetheless, we have already found that the Department did not determine that the comparison value method and the comparable value method were identical when the Department circulated a general notice of valuation method to the oil and gas industry in 1990, 1993, and 1996. Findings, *supra*, ¶¶231-232. We have also generally found that the Department made no determination that the comparison value method of the Tax Settlement Agreement and the comparable value method of Wyo. Stat. Ann. §39-14-203(b)(vi)(B) are identical. Findings, *supra*, ¶¶122-125, 140, 148.

277. The record also raised the possibility that this Board has ruled that the comparison value method and the comparable value method are identical. We have determined, and conclude for the same reasons addressed in our Findings, that the Board made no such Regulatory Finding as the result of its Section 14 examination. We have also determined that any contrary statement appearing in our Section 14 Examination Report was premature. We withdraw and overrule any contrary indication that appeared in the explanatory remarks in our Examination Report.

278. The possibility remains that the limitations imposed on the Department's authority under the 1990 statutes conflict with the continued force and effect of the Tax Settlement Agreement. We conclude that there is no such inherent conflict. Since 1990, the Department has circulated notices of intended valuation method to the oil and gas industry, as required by Wyo. Stat. Ann. § 39-14-203(b)(vi). Findings, *supra*, ¶¶122, 140, 148. These notices have all contained an exception for mutually acceptable alternative methods of valuation. Findings, *supra*, ¶¶123, 140, 148. The Department relied on its authority to agree to a mutually acceptable alternative valuation method when accepting values determined for the LaBarge production after August 31, 1991. Findings, *supra*, ¶¶231-232.

(3) A Mutually Acceptable Alternative Method

279. The statute authorizing the use of mutually acceptable alternative methods of valuation provides:

> (vii) When the taxpayer and department jointly agree, that the application of one (1) of the methods listing in paragraph (vi) [Wyo. Stat. Ann. § 39-14-203(b)(vi)] of this subsection does not produce a representative fair market value for the....natural gas production, a mutually acceptable alternative method may be applied.

Wyo. Stat. Ann. § 39-14-203(b)(vii). On scrutiny of the plain language of this subsection, taken in light of our extensive findings, we find that the Department's reliance on this provision of the 1990 statutes was not inconsistent with the requirements of the Tax Settlement Agreement because the Tax Settlement Agreement is a mutually acceptable alternative method. The parties have not directed our attention to any inconsistency between the Tax Settlement Agreement and the mutually acceptable alternative method authorized by statute. We will accordingly reserve ruling on whether or not such an inconsistency may exist, and if so, how that inconsistency will be resolved.

280. On its face, the statutory authorization for a mutually acceptable alternative method requires agreement between Exxon Mobil and the Department that one the methods of Wyo. Stat. Ann. § 39-14-203(b)(vi) does not produce a representative fair market value. We are satisfied that this requirement has been met. At a minimum, there is no agreement about the treatment of helium or point of valuation under any of the methods specified in Wyo. Stat. Ann. § 39-14-203(b)(vi), including comparable value.

(4) The taxability of helium and the fair market value standard

281. Two last common threads run through the County's arguments. The first thread is that helium is, in one way or another, escaping taxation. The second is that the application of the Tax Settlement Agreement does not meet fair market value. Both of these issues oblige us to address issues of law.

282. The County takes the view that, "Helium is a natural gas and subject to Wyoming's ad valorem and severance tax requirements," citing *Amoco Production Co. v. State*, 751 P.2d 379, 384 (Wyo. 1988). [County's Closing Brief]. Our Findings cast doubt on the County's position. The Wyoming Attorney General issued a formal opinion on the subject of helium taxability a mere two months after the cited decision was published. Findings, *supra*, ¶53. The Wyoming Attorney General doubted that the State could tax helium throughout the 1988 settlement negotiations. Findings, *supra*, ¶76. The record also shows that even after the cited decision was rendered in 1988, no party to the Tax Settlement Agreement expressed the view that helium was unequivocally subject to Wyoming ad valorem tax requirements. *E.g.*, Findings, *supra*, ¶77. Indeed,

Exxon consistently expressed a contrary view, and did so in documents directed to the Sublette County Attorney without any similarly documented denial. Findings, *supra*, ¶81.

283. On review of *Amoco Production Co. v. State*, 751 P.2d 379, we conclude that the Wyoming Supreme Court did not address the question of whether helium was subject to Wyoming's ad valorem tax requirements. We do not ourselves express a view as to whether helium was or is subject to Wyoming's ad valorem tax requirements. However, we do conclude that the conduct and concerns of the Department and the State's legal officers since 1988 has been consistent with our conclusion that this question has not been resolved.

284. The determination of fair market value in the context of natural gas processing plants presents complex questions of law and fact. *E.g., Whitney Canyon*, Docket No. 2000-147 et al., June 9, 2003, 2003 WL 21774603. In this proceeding, the County has implicitly argued that the 1990 statute requires us to evaluate the taxable value of LaBarge production by the standard of the general statutory definition of fair market value:

> (vi) "Fair market value" means the amount in cash, or terms reasonably equivalent to cash, a well informed buyer is justified in paying for a property and a well informed seller is justified in accepting, assuming neither party to the transaction is acting under undue compulsion, and assuming the property has been offered in the open market for a reasonable period of time, except....fair market value of mine products shall be determined as provided by....W. S. 39-14-203(b)...

Wyo. Stat. Ann. §39-11-101(a)(vi). On its face, the general statutory definition of fair market value is subject to the important exception that "fair market value of mine products shall be determined as provided by" the pertinent provisions of the specific Articles of Chapter 14 related to each mineral. In the case of natural gas, the general statutory definition refers to Wyo. Stat. Ann. §39-14-203(b).

285. Wyoming Statute Annotated Section §39-14-203(b) does not state that, in all instances, the value provided by statutorily specified methods must be fair market value. Wyoming Statute Annotated §39-14-203(b)(i) only states that "....natural gas shall be valued for taxation as provided in this subsection." From there, one must read the statute with care. On appeal by a taxpayer, a taxable value determined by use of the four specified methods is judged by whether it accurately reflects fair market value. *Wyo. Stat. Ann. §39-14-203(b)(viii)*. The Board has had occasion to interpret that "accurately reflect the fair market value" standard. *Whitney Canyon*, ¶¶106-109.

286. The mutually acceptable alternative method provides its own variant on the fair market value standard. The agreed upon taxable value must merely achieve "a representative fair market value." Wyo. Stat. Ann. §39-14-203(b)(vii). The qualifying phrase, "a representative," provides considerable leeway to address the difficulties presented by unusual circumstances, and invites scrutiny by comparison with a variety

of alternative measures. We conclude that this broader measure is consistent with the approach used by Attorney General Meyer, Director Kabeisman, and Denney Wright of Exxon in negotiating the Tax Settlement Agreement. Findings, *supra*, ¶80. It is likewise consistent with the evidence offered during our Section 14 examination, and the evidence offered by Exxon Mobil in this proceeding. Findings, *supra*, ¶¶197-199, 204, 243-245.

287. Our disposition of the foregoing issues addresses most of the questions of law identified by the County in its prehearing pleadings. However, the County has waited seven years for specific answers to its detailed concerns, and the County shall have those answers. To be confident we are addressing the County's questions, we have endeavored to follow the syntax of the County's statement of each issue.

(5) The County's remaining questions of law

288. The County questions whether the "valuation methodology" letters that were sent by the Department to all oil and gas producers, including Exxon Mobil, instructing the producers to use the "comparable value" method to value natural gas required the use of the 1989 Settlement Agreement "formula" as the "sole" measure of comparable value to be applied to the LaBarge Production at issue pursuant to Wyo. Stat. Ann. §39-14-203(b)(vi)(B). [Petitioner's Updated Summary of Contentions, B.1.]. We have found that the Department's 1990, 1993, and 1996 circulars provided for the use of the Tax Settlement Agreement method as a mutually acceptable alternative method. Findings, *supra*, ¶¶122-125, 140, 148. We have concluded that the comparison value method of the Tax Settlement Agreement and the comparable value method of the 1990 statute are not the same. We have also concluded the Department's 1990, 1993, and 1996 circulars did not determine that the comparison value method of the Tax Settlement Agreement and the comparable value method of the 1990 statute are identical. We accordingly conclude that the circulars did not require the use of the Tax Settlement Agreement as a measure of comparable value within the meaning of the comparable value method enacted by the 1990 statutes.

289. The County questions whether the Department erred by permitting Exxon Mobil to use the 1989 Settlement Agreement "formula" in light of the statutory requirement that the comparable value be "for minerals of like quantity" and "taking into consideration the quality, terms and conditions under which the minerals are being processed and transported." [Petitioner's Updated Summary of Contentions, B.2.]. The quoted standards are taken from the definition of the comparable value method found in Wyo. Stat. Ann. §39-14-103(b)(vi)(B). The County incorrectly assumes that this definition from the 1990 statutes governs the Tax Settlement Agreement. The Department did not err by permitting Exxon Mobil to use the Tax Settlement Agreement method.

290. The County questions whether after December 1992, the Department failed to make a proper and informed annual decision to affirmatively direct or instruct Exxon Mobil to use the so called "formula" in the 1989 Settlement Agreement. [Petitioner's Updated Summary of Contentions, B.3.]. We have already concluded that the

instructions provided by the Department in 1990, 1993, and 1996 contemplated continued use of the Tax Settlement Agreement method. Findings, *supra*, ¶¶120-125, 140, 148. To the extent that the County would have had the Department follow some unspecified internal annual review procedure with respect to Exxon Mobil or any other taxpayer, the County has not cited any statute or regulation that constrains the Department's discretion to determine valuations with an obligation to undertake a review procedure. To the contrary, Wyoming's mineral taxation system may generally be described as self-reporting. *Wyo. Stat. Ann. §39-14-207(a).* The taxpayer bears the burden of proper reporting. *Id.* Finally, the Department did in fact certify taxable values to the County each year. The Department did not fail to make any annual decision which it was obliged to make.

291. The County questions whether after December 1992, the Department ever directed or instructed Exxon Mobil to used the "formula" in the 1989 Settlement Agreement to value Exxon Mobil's interest in LaBarge Production for production years 1993 through 1999. [Petitioner's Updated Summary of Contentions, B.4.]. We have found that the Department's 1990, 1993, and 1996 circulars provided for the use of the Tax Settlement Agreement method as a mutually agreeable alternative. Findings, *supra*, ¶¶120-125, 140, 148. To the extent that the County's question is inconsistent with our Finding, we conclude that there has been no error by the Department.

292. The County questions whether the Department violated one or more of the mandates set out in Wyo. Const. Art. 15, §§ 3, 11(a), 11(d), or 14 by passively allowing the 1989 Settlement Agreement "formula" to be used to value the LaBarge Production. [Petitioner's Updated Summary of Contentions, B.5.]. The County has not pursued the details of these constitutional claims with cogent argument or pertinent authority, which would allow us to conclude that the County has failed to carry its burden of proof. *See: Cross v. Berg Lumber Co.*, 7 P.3d 922 (Wyo. 2000). We nonetheless generally conclude that the constitutional valuation issues that are the ostensible subject of this question are met by (1) our disposition of the comparable value method arguments and (2) our conclusion that the taxable values for the audit years at issue achieve a representative fair market value, as the legislature has authorized in Wyo. Stat. Ann. §39-14-203(b)(vii). Further, there has been no evidence indicating that the power of taxation has been surrendered or suspended in violation of Art. 15, §14. The Department has not violated the Wyoming Constitution by continuing the use of the Tax Settlement Agreement method.

293. The County questions whether the Department violated one or more of the mandates set out in Wyo. Stat. Ann. §§39-14-202(a)(i), 39-14-202(a)(ii), 39-14-203, 39-14-207(a), 39-14-208(a) by passively allowing the 1989 Settlement Agreement "formula" to be used to value the LaBarge Production at issue. [Petitioner's Updated Summary of Contentions, B.6.]. The Department certified values to the County for the years at issue, so we find no violation of Wyo. Stat. Ann. §39-14-202(a). We are not certain what issues of compliance in reporting and collection of taxes the County intends to raise, but we find and conclude that any such issues have been addressed in the course of the audits, and conclude there is no merit in reliance on Wyo. Stat. Ann. §39-14-207(a). We

likewise find no specific failure in enforcement, and conclude there is no merit in reliance on Wyo. Stat. Ann. §39-14-208(a). We otherwise take this to be a catch-all for the many arguments that the County has raised under Article 14 of Chapter 39. We believe we have addressed all of these arguments in our Findings of Fact and Conclusions of Law. The Department has not violated the referenced mandates.

294. The County questions whether after August 31, 1991 and for the 1993-1999 production, the Department ever substantively and correctly determined if the Yates or Howell Processing Agreements could properly constitute a “comparable value” as set forth in Wyo. Stat. Ann. § 39-14-203(b)(vi)(B) to value Exxon Mobil’s interests in the LaBarge Production at issue. [Petitioner’s Updated Summary of Contentions, B.7.]. We have found that the Department did not determine that the Yates or Howell Processing Agreements constituted comparable values within the meaning of Wyo. Stat. Ann. § 39-14-203(b)(vi)(B). Findings, *supra*, ¶¶231-232.

295. The County questions whether the Department failed to correctly determine if the Yates or Howell Processing Agreements could properly constitute an “arms’ length sales prices less processing and transportation fees charged to other parties for minerals of like quantity” for the purposes of valuing Exxon Mobil’s interests in the LaBarge Production. [Petitioner’s Updated Summary of Contentions, B.8.]. This question quotes from the definition of the comparable value method found in the 1990 statutes. *Wyo. Stat. Ann. §39-14-203(b)(vi)(B)*. We have concluded that Wyo. Stat. Ann. §39-14-203(b)(vi)(B) does not govern the Tax Settlement Agreement. We have also found that the Department did not determine that the Yates or Howell Processing Agreements could properly constitute a comparable value. Findings, *supra*, ¶¶231-232. The County’s question incorrectly assumes that the Department found the Yates or Howell Processing Agreements were comparable values within the meaning of Wyo. Stat. Ann. §39-14-203(b)(vi)(B).

296. The County questions whether the statutory requirements for valuing processed natural gas which were enacted and effective in 1990 (now codified in Wyo. Stat. Ann. § 39-14-203) control the valuing of the LaBarge Production for production years after August 31, 1991 for ad valorem tax purposes. [Petitioner’s Updated Summary of Contentions, B.10.]. We have already concluded that the 1990 statute governed the actions of the Department only to the extent that the requirements of the 1990 statute were not inconsistent with the requirements of the Tax Settlement Agreement. *Supra*, ¶265.

297. The County questions whether the Department or Exxon Mobil is the entity allowed to choose the valuation methodology for valuing the LaBarge Production in light of the valuation methodology instruction letters sent by DOR to all producers for the tax years at issue. [Petitioner’s Updated Summary of Contentions, B.11.]. We have found and concluded that the Tax Settlement Agreement method is a mutually acceptable alternative method. *Supra*, ¶¶231-232, 279-280. We accordingly deny the factual premise of the County’s question.

298. The County questions whether the Department annually valued the LaBarge Production at its fair market value for any of the production years at issue as required by statute. [Petitioner's Updated Summary of Contentions, B.13.]. We have found and concluded that the Department determined the value for the production years at issue by application of a mutually acceptable alternative method which achieved a representative fair market value and thereby satisfied the requirements of statute. *Supra*, ¶¶279-280.

299. The County questions whether, pursuant to Wyo. Stat. Ann. §§39-14-201(a)(vii) and 39-14-203(b)(ii) the point of valuation for the LaBarge Production at issue is located at the outlet of the Black Canyon Facility, which is the first (initial) glycol dehydrator. [Petitioner's Updated Summary of Contentions, A. 14.]. The Tax Settlement Agreement does not specifically address the point of valuation. Nonetheless, under the Tax Settlement Agreement method, which governs, the effective point of valuation is the wing valve on the well head. Findings, *supra*, ¶100.

C. The County's Claims of Improper Administration

300. The County's remaining issues broadly relate to the Department's alleged failure to properly administer the selected valuation method. We will evaluate these claims against the standard of the Tax Settlement Agreement. The Wyoming Supreme Court has held that the County cannot appeal the Department's selection of a valuation methodology. *Board of County Commissioners for Sublette County, Wyoming v. Exxon Mobil Corporation*, 55 P. 3d 714, 723, 2002 WY 151, ¶33 (2002). Further, "the County's appeal must be limited in scope to specific errors allegedly committed by the [Department of Revenue]." *Id.* Where we conclude that the Department has accepted audit results based upon a calculation of value under the Tax Settlement Agreement method, we must find against the County. This principle will resolve most of the County's remaining issues. We will address the principal issues identified in the County's post-hearing brief, together with all additional specific claims made in the County's prehearing contentions.

(1) Overriding royalties

301. The County argues that Exxon Mobil is liable for payment of taxes on overriding royalties paid by Exxon Mobil to third parties. In the context of the Tax Settlement Agreement method, overriding royalties are associated with leases held by Exxon Mobil, and distinct from the interests of working interest owners who are themselves leaseholders. Findings, *supra*, ¶¶35, 104, 132.

302. The Tax Settlement Agreement provides a deduction from Exxon Mobil's Gross Value "for the actual dollars paid by Exxon during the reporting period for exempt and non-exempt royalties a deduction from Gross Value." [Exhibit 804, ¶2.f.(4)]. In Exhibit C of the Tax Settlement Agreement, the Example Calculation specifically lists a deduction against Gross Value for overriding royalty paid. [Exhibit 804, Exhibit C, item (f)]. Findings, *supra*, ¶93. The value associated with all overriding royalty interest ("ORRI")

payments was properly excluded from Exxon Mobil's taxable value by an authorized deduction from Gross Value.

303. Exxon Mobil established procedures for assuring it did not deduct the value of overriding royalty when Exxon Mobil held the overriding royalty interest in its own leases, because Exxon Mobil had acquired such overriding royalty interests over the years. Findings, *supra*, ¶132. Exxon Mobil's own overriding royalty interest payments therefore remained in Exxon Mobil's taxable value. The audit assured that deductible "dollars paid by Exxon" for overriding royalties did not include dollars paid by Exxon Mobil to itself.

304. This does not dispose of the County's overriding royalty issues, because the County's issues do not relate exclusively to Exxon Mobil's own taxes on its LaBarge production. The County finds fault with the Department because the Department failed to certify the value of taxes owed by third parties who received royalty payments from Exxon Mobil.

305. Specifically, the County argues that Exxon Mobil had a statutory responsibility to collect the taxes due on the overriding royalty payments that have been deducted from gross value. The County relies on the following statutory provision:

> (c) Taxpayer. The following shall apply:
>
> (i) In the case of ad valorem taxes on .... natural gas produced under lease, the lessor is liable for the payment of ad valorem taxes on .... natural gas production removed only to the extent of the lessor's retained interest under the lease, whether royalty or otherwise, and the lessee or his assignee is liable for all other ad valorem taxes due on production under the lease...

Wyo. Stat. Ann. §39-14-203(c)(i). No party disputes that Exxon Mobil is the lessee or assignee with respect to all of the leases for which overriding royalty interest is deducted. The County argues that the plain language of Wyo. Stat. Ann. §39-14-203(c)(i) makes Exxon Mobil liable for all other taxes due on production under the lease.

306. Exxon Mobil does not agree with the County's reading of Wyo. Stat. Ann. §39-14-203(c)(i). The Department's Closing Brief did not address the interpretation or construction of Wyo. Stat. Ann. §39-14-203(c)(i).

307. The Department's witnesses have uniformly testified that the royalty recipients are responsible for reporting and paying taxes on the royalty payments they receive from Exxon Mobil. Findings, *supra*, ¶105. We conclude that the Department's interpretation of the tax statutes is consistent with the statutes.

308. Even under the County's interpretation of Wyo. Stat. Ann. §39-14-203(c)(i), Exxon Mobil's liability must be viewed as alternative or supplementary to the duty of royalty recipients to report and pay taxes. We cannot interpret the statute to mean that both the royalty recipients and the lessee must pay tax on the same mineral production.

309. If a lessee's liability for payment of taxes on overriding royalties is alternative or supplementary, it follows that the Department must at some time notify the lessee that the Department will hold the lessee accountable for the taxes of its royalty recipients. The Department never did so in this case. Moreover, the auditors never proposed to hold Exxon Mobil liable for the taxes of its overriding royalty recipients.

310. Neither the Department of Revenue nor the Department of Audit now claims that Exxon Mobil is liable for the taxes of its overriding royalty recipients.

311. Although not a decisive consideration, the absence of notice to Exxon Mobil undoubtedly impeded Exxon Mobil's ability to protect itself from secondary liability. Exxon Mobil's formidable accounting system capability surely could have provided for some form of withholding arrangement that would, at a minimum, have enabled Exxon Mobil to distinguish between those royalty recipients paying taxes and those royalty recipients not paying taxes.

312. By extension of the argument in its Closing Brief, we understand that the County would argue that the Department <u>should</u> long ago have notified Exxon Mobil that it would be liable for the taxes of its royalty recipients. This position cannot be the premise of our analysis. Instead, we must begin with what actually occurred. Since no notice was ever given, we must then consider whether the royalty recipients paid taxes.

313. From the record, we do not know whether royalty recipients paid taxes or not. The Department cannot say. Findings, *supra*, ¶105. The auditors could not say. Findings, *supra*, ¶184.

314. The record is similarly opaque with respect to Howell and Yates. Although Howell and Yates representatives were listed as potential witnesses, none were called to testify at our hearing. Although Howell and Yates were audited for 1990 - 1994, it is not clear that these audits included an audit of overriding royalty receipts. Findings, *supra*, ¶185. However, the County was in a position to take the initiative to make a record, but did not do so. Because Howell and Yates were parties, their records were more readily available to the County than the records of other overriding royalty recipients. The County nonetheless produced no documented evidence of whether Howell and Yates, or their affiliates, received overriding royalty payments and whether taxes were paid on those payments.

315. Generally, the County's evidence did not directly address our concern for whether taxes were paid. Steve Wilson merely testified to the aggregate amount of all payments made to third party overriding royalty interest owners. Findings, *supra*, ¶239.

316. When we consider the audits that were conducted, we conclude that the absence of information about payments by third parties does not arise from a failure on the part of the auditors. First, the Department of Audit conducts taxpayer-based audits. Findings, *supra*, ¶179. The County has not argued that it was unreasonable or improper for the Department of Audit to conduct audits of a single taxpayer at a time. Second, there has been no demonstration that Exxon Mobil maintained records regarding whether its royalty recipients paid their severance and ad valorem taxes. That is, there is no evidence that records of tax payments by royalty recipients might have been located in Exxon Mobil's files if the auditors had been more diligent in their field work.

317. The record suggests that developing information about the payment of taxes by overriding royalty recipients would be difficult and expensive, because the interest holders are numerous, and the payments to them are small. Findings, *supra*, ¶106. Clearly, the County did not see fit to invest the time and effort to substantiate its concern that deficiencies might be owed by royalty recipients. This leaves the Board in a difficult position, because even if we were to agree with the County's claim, we have no reliable insight into what effort might be required to determine whether the royalty recipients had paid taxes.

318. Taking all of these matters of record into account, we conclude that the County has failed to carry its burden of proof to demonstrate that the Department's determination was incorrect.

(2) Claims related to helium

319. The Tax Settlement Agreement explicitly addresses the treatment of helium revenue and a post-production cost deduction for helium to determine the Gross Value of LaBarge production. Total Gross Revenue includes revenue from the sale of helium. [Exhibit 804, ¶2.f., Sentence (1); Exhibit 804, Exhibit C, items (b) and (c), and formula 1]. The Post-Production Cost Deduction allows for a deduction of 91.67% of the gross revenue for helium. [Exhibit 804, ¶2.f., Sentence (2); Exhibit 804, Exhibit C, formula 2]. Helium is therefore addressed in both revenue, and in the deduction from revenue, to reach Gross Value before further adjustments. [Exhibit 804, ¶2.f., Sentence (3); Exhibit 804, Exhibit C, formula 3].

320. The Tax Settlement Agreement provides for two helium-related adjustments to Gross Value as part of the final computation of Taxable Value. [Exhibit 804, ¶2.f., Sentence (4); Exhibit 804, Exhibit C, formula 4]. Exxon may subtract actual dollars paid "for helium from the federal government." [Exhibit 804, ¶2.f., Sentence (4); Exhibit 804, Exhibit C, item (e), and formula 4]. Exxon may also subtract actual dollars paid to other working interest owners for their respective share of the gas. [Exhibit 804, ¶2.f., Sentence (4); Exhibit 804, Exhibit C, item (g), and formula 4]. Under the Howell and Yates Processing Agreements, a portion of the payments to working interest owners was for Helium Proceeds. Findings, *supra*, ¶96.

321. The County claims the Department failed to require Exxon Mobil, as the only entity with the right to produce, process and sell helium from federal leases, to actually report on and pay taxes on 100% of all value attributable to such helium from the LaBarge Production. [Petitioner's Updated Summary of Contentions, A.3.]. For the purposes of this question, we will assume that the County's reference to "value" means revenue. The County has failed to carry both its burden of proof and its burden of persuasion. The Tax Settlement Agreement accounts for the determination of taxable value in a way that ultimately does not oblige Exxon Mobil to pay taxes on 100% of all revenues from the sale of helium. The Department has properly applied the Tax Settlement Agreement to determine the value of LaBarge helium production.

322. The County claims the Department failed to require Exxon Mobil to report and pay taxes on 100% of the helium produced from State of Wyoming oil and gas leases and attributable to LaBarge Production. [Petitioner's Updated Summary of Contentions, A.4.]. The principal reasons to distinguish between state leases and federal leases are that: (1) the state leases granted lessees the right to take helium from the lease; and (2) the royalty terms differ. Findings, *supra*, ¶¶9, 38-40. The County has not articulated why either distinction makes any difference for the determination of taxable value under the Tax Settlement Agreement. Further, to the extent the question suggests that the negotiators of the Tax Settlement Agreement were in some way obliged to agree to a different set of deductions and adjustments for helium from state leases, the County has failed to provide cogent argument or pertinent authority to support its claim. *Cross*, 7 P.3d 922. Our review of the negotiations persuades us that such a distinction would have been contrary to the simplicity intended by all parties to the Tax Settlement Agreement, which by operation of law includes the County. Findings, *supra*, ¶87, 95. The County has failed to carry both its burden of proof and its burden of persuasion. The Department has properly applied the Tax Settlement Agreement to determine the value of LaBarge helium production.

323. The County claims the Department failed to require Exxon Mobil to report and pay taxes attributable to the full value of helium proceeds payments it made to other working interest owners. [Petitioner's Updated Summary of Contentions, A.5.]. This is true, but it is also precisely what was agreed under the Tax Settlement Agreement. Findings, *supra,* ¶110. Payments to working interest owners are an adjustment to Gross Value to reach Taxable Value, and include Helium Proceeds. *Supra*, ¶¶93, 94, 96, 107, 110-111. The County has failed to carry both its burden of proof and its burden of persuasion. The Department has properly applied the Tax Settlement Agreement to determine the value of LaBarge helium production.

324. The County claims the Department failed to require Exxon Mobil to report and pay tax for any helium that was vented in the absence of a valid venting order from the Wyoming Oil and Gas Conservation Commission. [Petitioner's Updated Summary of Contentions, A.9., A. 10.]. There are several pertinent Findings of Fact. We found that auditor Schoen was unconcerned with the validity of helium venting because that was a matter of the authority of the Wyoming Oil and Gas Conservation Commission. Findings, *supra*, ¶193. The County's expert Wilson closely examined Exxon Mobil's

reports to the Commission, and his conclusions imply that Exxon Mobil discharged its reporting duties within a tenth of a percent of error. Findings, *supra*, ¶237. A 1983 Order of the Commission authorized Exxon Mobil to vent helium. Findings, *supra*, ¶7.

325. We understand the County's claim regarding the venting of helium to rest in part on a general concern for irregularity, arising from such matters as representations apparently made to the Wyoming Oil and Gas Conservation Commission. Findings, *supra*, ¶48. We decline to conclude that there is a general irregularity of sufficient gravity to have implications for Exxon Mobil's taxes. There is nothing in the Tax Settlement Agreement to suggest that application of the settlement method depends upon proper venting authority from the Wyoming Oil and Gas Conservation Commission. With regard to this general concern, the County has failed to carry both its burden of proof and its burden of persuasion. The Department has properly applied the Tax Settlement Agreement.

326. The County's claim regarding helium venting alternatively rests on a specific statutory exemption:

> (j) Natural gas which is vented or flared under the authority of the Wyoming oil and gas conservation commission and natural gas which is reinjected or consumed prior to sale for the purpose of maintaining, stimulating, treating, transporting or producing crude oil or natural gas on the same lease or unit from which it was produced has no value and is exempt from taxation.

Wyo. Stat. Ann. §39-14-205(j). The County directs our attention to the fact that this subsection contains language of limitation, i.e. "on the same lease or unit from which [the gas] was produced," and points out that the helium was not vented on the lease or unit, but rather at the Shute Creek plant. We note that these specified words of limitation apply to "gas which is reinjected or consumed prior to sale;" that clause does not describe helium. However, we conclude that the language of the statute does not apply because the Tax Settlement Agreement, rather than the statutory exemption, governs the determination of helium value. The auditors correctly decided that helium value under the Tax Settlement Agreement is a function of helium revenue. Findings, *supra*, ¶¶192, 224. The County has failed to carry both its burden of proof and its burden of persuasion. The Department has properly applied the Tax Settlement Agreement to determine the value of LaBarge helium production.

327. The County claims the Department allowed the value of nitrogen and helium used by Exxon Mobil for topping, purging or cooling to facilitate the shipment of helium to escape taxation [Petitioner's Updated Summary of Contentions, A.12.]. We are satisfied that the very cold gases used to service the special trucks of Exxon Mobil's customers were not lost in the process of providing that service. Findings, *supra*, ¶20. We also agree that revenue associated with providing that service is not product revenue, but instead related to sale of a service. Findings, *supra*, ¶20. The County has failed to carry both its burden of proof and its burden of persuasion. The Department has properly

applied the Tax Settlement Agreement to determine the value of LaBarge helium production.

(3) The use of methane production for plant fuel

328. The Tax Settlement Agreement expressly relies on the Howell and Yates Settlement Agreements as the source and reference for comparison value. [Exhibit 804, ¶¶2.e. and 2.f]. For methane, the universe of revenue included in Total Gross Revenue under Section 2.f. of the Tax Settlement Agreement is defined by reference to Total Compensation under the Howell and Yates agreements. Findings, *supra*, ¶¶93, 98. The definition of Total Compensation states that the total consideration for products taken in-kind by the Plant Owner, Exxon Mobil, "shall exclude those [products] used in operations." Findings, *supra*, ¶¶98-99. Methane produced at the plant and used for plant fuel fits this description. We conclude that this definition applies to methane used as plant fuel, and that it must not be included in Total Gross Revenue. We also note that there is also no corresponding deduction related to the value of plant fuel, because the percentage of the Post-Production Cost Deduction only applies against revenues. The Department has properly applied the Tax Settlement Agreement by excluding plant fuel from Gross Value, and hence Taxable Value.

329. The County nonetheless claims the Department failed, under Wyo. Stat. Ann. §39-14-205(j) and Rules of the Department of Revenue, Chapter 6, Sections 8(c) and (f), to require Exxon Mobil to report and pay taxes on methane produced from wells located in Sublette County and used as plant fuel at the Shute Creek Plant located in Lincoln County and Sweetwater County. By the County's reference to the exemption statute, we conclude that this is essentially the same point that was raised with respect to application of the same subsection to helium. We resolve it the same way. *Supra*, ¶326. The language of the exemption statute and related regulations does not apply because the Tax Settlement Agreement, rather than the statutory exemption, governs the determination of methane value. The auditors correctly decided that methane value under the Tax Settlement Agreement is a function of methane revenue, and there is no revenue associated with plant fuel. Findings, *supra*, ¶¶192, 224. The County has failed to carry both its burden of proof and its burden of persuasion.

(4) Sulfur netting

330. The definition of Total Compensation under the Howell and Yates agreements bears directly on the issue of payments to third parties for sulfur transportation. See Findings, *supra*, ¶99. Total compensation includes total consideration received from the sales, "less direct costs incurred in marketing and transportation." Findings, *supra*, ¶¶98-99. The auditors correctly approved the exclusion of such costs from Total Gross Revenue. Findings, *supra*, ¶190, 222.

331. The County claims the Department improperly allowed Exxon Mobil to "net out" negative sulfur values when determining whether sulfur production valuation for a particular month. [Petitioner's Updated Summary of Contentions, A.11.]. The auditors, and the Department of Revenue, allowed this monthly netting because the netting period related to the period of the monthly severance tax reports required by the Department. Findings, *supra*, ¶190. The County has not pointed to any statute or rule to demonstrate that the auditors and Department of Revenue did not have the discretion to accept this method of accounting for transactions. We conclude that, under the facts presented to us, this was within the sound discretion of the auditors and Department of Revenue. The County has failed to carry both its burden of proof and its burden of persuasion.

(5) Exchange agreements

332. The County claims the Department failed to investigate and analyze if one or more exchange agreements concerning methane processed from the LaBarge Production at issue resulted in an understatement or omission of taxable value. [Petitioner's Updated Summary of Contentions, A.9., A. 13.]. We found that the only specific example of such a suspected exchange was included in revenue. Findings, *supra*, ¶136. The County has failed to carry both its burden of proof and its burden of persuasion.

(6) Take-in-kind claims

333. The County claims the Department improperly allowed the working interest owners in the LaBarge Production to report that they took production in kind, although they in fact did not take in kind within the meaning of the Rules of the Department of Revenue, Chapter 6, Sections 4b(s), 6(a)(iii) and/or 7. [Petitioner's Updated Summary of Contentions, A.6.]. We have found that Exxon Mobil's own reporting, which suggested that natural gas was being taken in kind by the working interest owners, reflected nothing more than a constraint in the format of the reporting documents required by the Department, and did not raise any question of omitted revenues related to Exxon Mobil's taxable value. Findings, *supra*, ¶¶137-139. Nor were there any sales by the working interest owners of natural gas taken in kind, since Exxon Mobil sold all of the production of the LaBarge plant. Findings, *supra*, ¶137. The County has failed to carry both its burden of proof and its burden of persuasion.

(7) Prior years and omitted property

334. The County claims the Department failed to certify to Sublette County for production months 9/1991 through 12/1992 taxable value associated with all "ORRI" owners royalty interest, 100% of helium values, and all plant fuel. [Petitioner's Updated Summary of Contentions, A.15.] In view of our disposition of these issues for the audit

years, and because these periods are beyond the periods of the audit which are the subject of the County's appeal, we conclude that this claim is without merit.

335. Finally, the County questions whether the claims of error set forth above result in omitted property which escaped taxation result in the "1989 Settlement Agreement formula" not constituting a comparable value method as required by statute. [Petitioner's Updated Summary of Contentions, B.12.] As we understand this question, its substance rests on other specific claims that we have already addressed. We do not find or conclude that the Department has committed error.

D. Exxon Mobil's Public Meetings Act Claim

336. Exxon Mobil urges us to dismiss the County's appeal for lack of subject matter jurisdiction based on a violation of the Wyoming Public Meetings Act, Wyo. Stat. Ann. §16-4-401 et seq. Exxon Mobil filed a Motion for this purpose shortly before the hearing of this matter. The Department has neither joined in Exxon Mobil's motion, nor seen fit to comment.

337. Exxon Mobil argues the Board of County Commissioners (admittedly an agency within the meaning of the Act) failed to approve the filing of two audit appeals in a public meeting, as required by Wyo. Stat. Ann. §16-4-403(a). The referenced statute states:

> (a) All meetings of the governing body of an agency are public meetings, open to the public at all times, except as otherwise provided. No action of a governing body of an agency shall be taken except during a public meeting following notice of the meeting in accordance with this act. Action taken at a meeting not in conformity with this act is null and void and not merely voidable.

Wyo. Stat. Ann. §16-4-406(a).

338. "Action" is a defined term:

> (i) "Action" means the transaction of official business of an agency including a collective decision of a governing body, a collective commitment or promise by a governing body to make a positive or negative decision, or an actual vote by a governing body upon a motion, proposal, resolution, regulation, rule, order or ordinance;

Wyo. Stat. Ann. §16-4-402(a)(i).

339. We found that the Board of County Commissioners passed resolutions regarding the retention of counsel in 1996, 1997 and 1998. Findings, *supra*, ¶¶150, 155, 174-176. With regard to the last resolution, we found that the Commissioners intended to enable their attorneys to act on a continuing basis, as necessary to see the County's conflict

with the Department and Exxon through to a conclusion. Findings, *supra*, ¶176. Our finding reflected that the Commissioners' resolution authorized their attorneys "to proceed with all actions" stemming from the investigation authorized in 1996. *Id.*

340. We further conclude that there is nothing in the plain language of the Wyoming Public Meetings Act that expressly precluded the County from taking action on a continuing basis, as it did.

341. Exxon Mobil insists that we apply the statute to require approval of individual appeals, including the appeals before us now. In support of their argument, they refer us to two cases which address actions taken by an agency in executive session. *Johnson v. Tempe Elementary School District No. 3 Governing Board*, 20 P.3d 1148, 1150 (Ariz. Ct. App. 2001); *Berry v. Bd. of Governors of Registered Dentists of Oklahoma*, 611 P.2d 628, 632 (Okla. 1980). The citations are not consistent with the facts in this case, however, since we have seen no evidence that the Board of County Commissioners acted in executive session when it retained counsel. See *Wyo. Stat. Ann. §16-4-405.*

342. Exxon Mobil also refers us to a case said to stand for the proposition that a "case cannot remain 'pending' until the problem is fixed." *Meeks v. Town of Hoover*, 240 So.2d 125, 129 (Ala. 1970). We again find the facts, including the Alabama statutes in question, are too remote from this case to support Exxon Mobil's argument.

343. In the absence of authorities directly on point, we must evaluate Exxon Mobil's implicit contention that the facts of this case support a conclusion that the County violated the Wyoming Public Meetings Act. We generally understand Exxon Mobil's argument to be that the 1998 resolution is too remote in time from the present appeals to comply with the Act. Exxon Mobil summarizes the circumstances this way:

> In effect, the Commissioners through their lawyers were deciding to: 1) ignore an adverse decision; 2) ignore the Board's findings; 3) continue to sue the County's largest taxpayer over a deal the County itself had originally accepted; and 4) in doing so put at risk the millions of dollars in helium tax payments already made since 1993, despite the fact that the Commissioners <u>did not even know they were taking that risk</u> by prosecuting theories already rejected by the Board. Exxon Mobil Corporation's Closing Brief, p. 46 (emphasis in the original).

344. From the review of the record as set forth in our Findings, we have a considerably more complex view.

345. When the County adopted its 1998 resolution, both Exxon Mobil and the Department were arguing to the courts that the County could only maintain its appeal rights by an appeal of any certification of value within thirty days. *Supra*, ¶174. We have also found that amendments to reported values were routine. *Supra*, ¶175. The County was therefore obliged to file a large volume of appeals simply to avoid the risk that all of its appellate rights would be lost. Under the circumstances, and because the County's

1996 and 1997 resolutions reassure us that the County was mindful of its statutory responsibility to act in public, we conclude that the County's action was reasonable and in compliance with the Wyoming Public Meetings Act.

346. We find further support for our conclusion when we consider the complex train of events already in motion in April 1998:

- The first of three judicial appeals was pending
- The appeal to the Board of Equalization was stayed, not dismissed
- The Department's annual certification of value for LaBarge production was anticipated
- The audit of 1993 - 1996 LaBarge production was underway
- It was clear that the Department and Exxon Mobil intended to litigate aggressively because they had together initiated two appeals to stop the Board's review

347. By any standard, the County was faced with unusually complex litigation. We see no reason to conclude, with hindsight, that it should have been made even more complex by accepting an argument that additional resolutions were required at each turn in the long road to our hearing of this matter.

E. Exxon Mobil's Unlawful Delegation Claim

348. Exxon Mobil argues that the County's appeals are void as a matter of law because they are not the acts of the Sublette County Commissioners. This argument was initially made in the form of a Motion to Dismiss shortly before the hearing of this matter. The Motion to Dismiss was renewed after the close of evidence. From our review of Exxon Mobil's citations, the applicable principle of law may be summarized as follows:

> The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant.

20 C.J.S. Counties § 82; quoted in *Trustees of Rex Hospital v. Board of Commissioners of Wake County*, 79 S.E.2d 892, 906 (N. C. 1954). Cases applying this principle are few and far between, presumably because modest attention to the form of action taken by a board of county commissioners can forestall any argument of improper delegation. *E.g.*, *County of Los Angeles v. Nesvig*, 21 Cal. App. 603, 41 Cal. Rptr. 918, 926-927 (1965) (adequate control found in provisions of music center operating contract).

349. The Department has not joined Exxon Mobil's argument, nor seen fit to comment.

350. Counsel for the Commissioners has suggested that Exxon Mobil's Motion to Dismiss was merely a ploy to cause public embarrassment to the Commissioners on the eve of the hearing. We prefer to dispose of the Motion on its merits.

351. We have found that the Commissioners exercised control over the actions of their attorneys, and did not delegate the conduct of this litigation to their attorneys. Findings, *supra*, ¶234. We are nonetheless aware that Exxon Mobil points to different evidence than the straightforward affirmations provided to us under oath. We now turn to that evidence.

352. Exxon Mobil argues that its cross-examination of the Commissioners demonstrated a collective ignorance of the allegations, issues and litigation risks in these appeals. This ignorance is said to be of such a profound degree that it gives rise to the inference that the Commissioners abdicated control of the litigation to their attorneys – that the Commissioners failed to "remain knowledgeable, accountable and in control of any litigation they initiate." [Exxon Mobil Closing Brief, p. 47].

353. The Commissioners face a grave practical difficulty in rebutting this argument. Like Exxon Mobil, they have chosen not to waive attorney client privilege. Without such a waiver, they are not in a position to disclose all of the matters that may have been considered in the pursuit of this litigation. The Commissioners also face the problem that in litigation this complex and protracted, it is unlikely that any public official could retain a complete and detailed memory of incremental decisions and considerations over the years.

354. We will decide this matter by evaluating the inferences offered by Exxon Mobil in light of the complete record, and weigh those inferences against other countervailing inferences that may fairly be drawn from the record as a whole. We have already quoted Exxon Mobil's claims of fact. *Supra*, ¶343. We will conclude that the Commissioners were reasonably knowledgeable about the litigation, and that Exxon Mobil overvalues the significance of the testimony it has extracted from the Commissioners on cross-examination.

355. Exxon Mobil argues the Commissioners ignored an adverse decision of this Board, and this Board's findings in that adverse decision. We understand this charge to be related to our Section 14 examination. Our Findings in this case have alluded to the limitations of our Section 14 examination, and to the fact that our Regulatory Findings from that examination looked forward to new information from the audits now under appeal. Findings, *supra*, ¶¶196, 207. The testimony of the Commissioners in this proceeding demonstrated an awareness of those same limitations of our regulatory proceeding, and a conscious resolve to pursue a contested case proceeding that offered the opportunity to thoroughly air the County's concerns. [*E.g.*, Tr. Vol. I, pp. 109, 134, Vol. XIII, p. 2936]. There can be no doubt that the record developed in these appeals is vastly richer and more complex than the record in our Section 14

examination. On these points, Exxon Mobil has failed to demonstrate that the County unlawfully delegated its authority.

356. Exxon Mobil argues the Commissioners were unaware of a risk that their pursuit of these appeals could give rise to a claim for a helium refund. As we shall see, Exxon Mobil's contention that such a risk existed, and the actual existence of the risk, are two different things. Nonetheless, the Commissioners have admitted they were unaware of the risk alleged by Exxon Mobil's counsel. [*E.g.*, Tr. Vol. I, pp. 123-124, Vol. XII, p. 2720, Vol. XIII, p. 2822]. We also note that the alleged risk echoes concerns privately contemplated by the Department in 1997. Findings, *supra*, ¶159.

357. Exxon Mobil did not articulate the source of this risk to the Commissioners on cross-examination, or to us in briefing. We understand the source of the risk to be a remark in the 1999 decision of the Wyoming Supreme Court. *Exxon Corporation*, 987 P.2d 158. After concluding that the County could proceed with the Section 14 examination before the Board, the Court observed that:

> ....If revaluation is ordered and a method other than "the comparison value method based on the Howell and Yates agreements" is used, the terms of the settlement agreement dictate that the questions of helium taxation and valuation would re-open, which could include the possibility of a refund liability.

Exxon Corporation, 987 P.2d at 166-167. So, the risk articulated in 1999 was that the County would precipitate use of a method other than that of the Tax Settlement Agreement, and in so doing open the possibility that for some years, the benefit of including helium in taxable value might be lost.

358. Exxon Mobil overestimates this risk because it has neglected to account for intervening developments in the law since 1999. First, the Board's Section 14 examination did not order either a revaluation or use of another method, and thereby foreclosed that aspect of the risk entirely. Second, the Wyoming Supreme Court held that a County cannot appeal the Department's selection of a valuation methodology. *Board of County Commissioners for Sublette County, Wyoming,* 55 P. 3d at 723, 2002 WY 151, ¶28 (2002). If the County cannot appeal the selection of a valuation methodology, we conclude that the risk associated with use of a method other than the Tax Settlement Agreement has been minimal for more than a year. Exxon Mobil has again failed to demonstrate any valid inference that the County unlawfully delegated its authority.

359. Exxon Mobil next argues that the County continued "to sue [its] largest taxpayer over a deal [that] the County itself had originally accepted." This is not accurate as a matter of law, since the County's appeal is from a final decision of the Department. Jurisdiction, p. 2, *supra*. This argument also contains an unstated premise about why the County's decision to sue was objectionable. We cannot take that premise to be the privileged status of Exxon Mobil. We therefore understand Exxon Mobil to generally

argue that no reasonable Board of County Commissioners would have pursued the litigation. Considering the record as a whole, we do not draw the same inference. The record is replete with evidence of genuine conflicts between the State and County over the determination of taxable value.

360. In Wyoming, the Department determines a taxable value of mineral production for use of the State and its counties. *Wyo. Stat. Ann. §§39-13-102(m), 39-13-103(b)(iv)*. This arrangement assures uniformity in the levy of taxes. At the same time, there are predictable circumstances when a county will look to the Department for assurance that the Department is properly discharging its statutory duty. Such circumstances arose in 1995, when the taxable valuation for Sublette County's largest taxpayer was inexplicably in decline. Findings, *supra*, ¶149.

361. For reasons not in the record, the Department failed to satisfy the County's concerns. The County resorted to this Board for assistance in gaining access to information, then shortly thereafter to a formal proceeding to question the value determination of the Department. Findings, *supra*, ¶¶152, 154. Like many litigants, the Commissioners were prepared to work with the State to resolve their concerns. Findings, *supra*, ¶158. The Governor and the Department responded by taking a hard line. Findings, *supra*, ¶158. After that, the County and the State communicated exclusively through their respective litigators. When litigation became the only avenue for the Commissioners to pursue serious concerns, Exxon Mobil could not complain that the Commissioners pursued that avenue.

362. Our general finding in favor of the Department does not establish that the County's concerns were baseless. To the contrary, our review of the entire record causes us to infer that the County had substantial reasons for pursuing the litigation.

363. First, our record shows that there are serious differences of opinion about the legal authority to tax helium produced from federal leases. The Department is confident in its power to levy a severance tax on federal helium, but apparently doubts the County's power to levy an ad valorem tax. Findings, *supra*, ¶77. The County argues that it, too, can tax helium. [County's Closing Brief]. Exxon Mobil argues that neither the State nor the County has the power to tax federal helium. [Exxon Mobil's Closing Brief]. The parties cannot all be right. Although we have not addressed this question of law, the litigation has advanced at least three related interests of the County.

364. Exxon Mobil was not prepared to disclose the contents of its Helium Sale and Disposition Agreement until this case made it necessary to do so. Perhaps the parties may move toward a common understanding now that Exxon Mobil's Helium Sale and Disposition Agreement has been fully disclosed to the County, and is available to the Department for more than the glimpse allowed Bolles in 2000. *Supra*, ¶202.

365. The County's claim that 5% of helium escapes taxation has surely raised the question of whether the working interest owners should be paying taxes on the Helium Proceeds they receive from Exxon Mobil. The Department has not squarely addressed

this issue. The working interest owners do not appear to stand in the same shoes as Exxon Mobil. However, we express no view as to the correct result, and suggest only that it is a matter worthy of the Department's attention.

366. Most important, as between the Department and the County, there is clearly a danger that the Department may one day choose to determine the value of LaBarge production in a way that risks great injury to the interests of the County. This potential conflict, in and of itself, is worthy of the Commissioner's persistent interest.

367. Second, the uniform testimony of the Department's officials is that, at least through the commencement of these appeals in 2003, the Department has only evaluated the merits of the Tax Settlement Agreement when obliged to do so by litigation. We intend no criticism of the Department, which is lightly staffed for the many demands on its personnel resources. At the same time, since 1997 the Department's evaluations have only occurred while the Department has been aligned with Exxon Mobil in litigation. The County understandably has been concerned that this alignment has skewed the Department's perspective.

368. Should near term improvements in the revenue and cost picture of the LaBarge project come to pass, Findings, *supra*, ¶253, the County is understandably concerned that the 75% Post-Production Cost Deduction will yield a processing and transportation deduction far in excess of any actual measure of current operating and capital costs. [Tr. Vol III, pp. 552-553]. It remains to be seen whether other valuation methods – existing or that may be eventually proposed – prove superior. This is nonetheless a matter worthy of the Department's attention.

369. Third, as of the date when the County's second audit appeal was filed on January 10, 2003, the Department and the Board had yet to establish lasting interpretations of the comparable value method and the statutory point of valuation. The Board's own reference to the comparable value method in its Section 14 Examination Report engendered some of this uncertainty. *Supra*, ¶¶208-211. Even with the Board's recent comparable value decisions in hand, *e.g. Whitney Canyon*, the Commissioners could reasonably have pursued a final resolution of the ostensible conflict between the Section 14 Examination Report and the Board's new decisions.

370. As important, until late in the discovery phase of this proceeding, the Department did not contend that it had not yet determined whether the Howell and Yates Processing Agreements were comparable values. Without pursuing this matter to a decision, the County could not have learned of this position.

371. Fourth, the County was understandably concerned about establishing a lasting conceptual foundation for the practical application of the fair market value standard in the context of the Tax Settlement Agreement method. We are confident about the conclusions we have reached in this proceeding, but the record is replete with testimony from State officials who have wrestled with what fair market value means under the

circumstances described in our Findings of Fact. We take Soderlind's testimony as symptomatic:

> Well, I think that when you have third-party sales, like if you sell your helium to a completely unaffiliated third party, you're going to receive fair cash market value for it. That's hundred percent, but the way I answered that question, why you take 75 percent away from that, then you no longer have fair cash market value. You got some other figure. So if it returns fair cash market value, I don't know if it does or it does not.

[Tr. Vol. VI, p. 1331]. If a Lead Supervisor of the Department of Audit harbors this uncertainty, the Commissioners were not unreasonable in attempting to secure answers from the Board about the standard that remains central to the structure of Wyoming mineral taxation.

372. Fifth, we recognize that a litigant may not be satisfied with information until it has been elicited under oath. One example is the absence of a rationale for the 55% deduction that applies to state royalty on LaBarge production. Findings, *supra*, ¶¶144-145. Another example may be Exxon Mobil's reporting of exchanges, or apparent take-in-kind transactions. Findings, *supra*, ¶¶136-139. A litigant may also wish to have access to contested case discovery procedures to assure itself of an opposing party's records. This was a long-standing concern for the County with respect to Exxon Mobil's reporting of taxable volumes. Findings, *supra*, ¶¶236-237.

373. Sixth, the County understandably sought an opportunity to fully explore the details of how the Tax Settlement Agreement works in practice, through the testimony of Exxon employees and State officials. The County has now had that opportunity. No responsible observer would contend that the interpretation and administration of the Tax Settlement Agreement was self-evident, or that the County's pursuit of a full understanding of the Tax Settlement Agreement was without value.

374. Finally, there is serious doubt that Exxon Mobil's overriding royalty recipients are reporting and paying taxes. Findings, *supra*, ¶105. This apparent gap in the enforcement of Wyoming's revenue and taxation laws deserves the Department's attention.

375. For all of the foregoing reasons, we find and conclude that the issues presented in these appeals provide ample basis for inferring that the Commissioners' continued pursuit of this litigation was the action of public officials who were knowledgeable, accountable and in control of the litigation they initiated. We conclude that Exxon Mobil has failed to carry its burden to show that the County unlawfully delegated its authority. Exxon Mobil's Motion to Dismiss, both as filed in advance of the hearing and as renewed following the close of evidence, is denied.

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ORDER

IT IS THEREFORE HEREBY ORDERED that the Department of Revenue's certification of value following the audits of LaBarge production for production years 1993-1996 and 1997-1999 is hereby **affirmed**; and

Exxon Mobil's Motion to Dismiss for lack of jurisdiction is **denied**.

Dated this 20th day of May, 2004

STATE BOARD OF EQUALIZATION

____
Roberta A. Coates, Chairman

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Alan B. Minier, Vice-Chairman

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Thomas R. Satterfield, Board Member

ATTEST:

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Wendy J. Soto, Executive Secretary

Roberta A. Coates, specially concurring:

I agree with the findings, conclusions and decision of the Board. However, I find it important to comment on other aspects of the long standing dispute that has taken place over many years prior to the Board having the opportunity to hold a full evidentiary hearing and thus issue an Order.

There are many lessons to be learned from the sordid history of this dispute and I believe it is important to memorialize those lessons to try to prevent history from repeating itself.

The first and most important lesson is that communication is important. All entities involved in the levy and collection of taxes should have access to the necessary information to understand those taxes. Counties should be able to communicate with the Department of Audit. Had the Department of Audit known the County's concerns they may have performed a cost audit sooner. The County could have been informed why a cost audit was not important. Both the County and the Department of Audit could have agreed on a modified procedure. The revenue audit performed for this Taxpayer was the only revenue audit performed in the State of Wyoming. In fact, both auditors admitted this was the only mineral producer/processor they personally had audited in this fashion. If the Department of Revenue and the Department of Audit had communicated with the County some of the discovery disputes could have been unnecessary, and the procedural delays would have been minimized. At points in this proceeding the Department of Audit and the Department of Revenue refused to allow the County to view the audit files. The information was kept from the County in the following fashion:

1. The Department of Audit would perform an audit;

2. The Department of Revenue would review the audit, adopt the audit findings and issue an assessment or a Notice of Valuation change;

3. After the Department of Revenue took action on the audit, they did not keep the information in their files to justify the action, but returned the files to the Department of Audit;

4. Then both Departments would invoke the Department of Audit's confidentiality statute to deny the County access to the audit information.

Fortunately, this practice has now changed. Both the Department of Audit and the Department of Revenue have found ways to communicate with county officials and this communication has promoted trust and confidence. In this case, if the Department of Revenue would have adopted the files as their own, as it does now, the County would have been permitted access to information, decreasing the discovery burden on the taxpayer. The many discovery disputes which arose in this matter may not have occurred and all of the parties may have been able to understand the facts and settle their differences.

Another lesson to be learned is that agencies related to a dispute are not the appropriate agencies to act as investigators for the Board. The Board conducted an examination by ordering the Department of Revenue and the Department of Audit to assist in collecting and evaluating information. The

employees who performed the fact gathering for the Board's investigation were loyal to their charge, and did the best work they could in the artificial time frame set by the Board. These employees have testified they were reluctant to do this work but were directed to by the Board. In order to protect the integrity of the information gathering for the Board and remove controversy, this procedure should not be used again. It is not appropriate for the Board to ask an agency to gather facts to investigate itself or its own actions. The Board should not forget the complications this situation created.

The third lesson is that the Board should articulate, in detail, procedural rulings so the courts do not find it necessary to limit the power of the Board and thus delay a efficient procedure. The examination report contained inconsistent messages to the parties. The examination report clearly stated there was contested litigation pending, and the contested proceedings would help the Board to decide the issue fully. However, the examination report also stated that the methodology in the Tax Settlement Agreement reached fair market value. Why then, would you need a contested case proceeding on the issue? This is an inconsistent message. Hopefully, the Board will not fall into the same foxhole in the future and will reserve ruling until the Board has complete information to decide an issue.

Another lesson is that all parties should be made aware of any relationship and alliances of the parties. The joint defense agreement between the Department of Revenue and the Taxpayer created the appearance that data could have been manipulated for the benefit of aligned parties. The late disclosure of the alliance between the Taxpayer and the State had the potential to harm the reputations of honest, competent people. These honest, competent people were doing their jobs to the best of their ability and were called into question because the information they used was filtered by attorneys who chose to hide their alliance. The lesson to be learned is that parties should disclose their alliances so allegations and insinuations of impropriety can be avoided. The lesson is not that communication and cooperation should stop, but should increase so all parties have necessary information.

Throughout the course of the hearing the Board was accused of insinuating there was manipulation of data, documentation, back-up reports, or that reports were altered, or shaded. It was alleged that the credibility of a witness for the Taxpayer was at stake. It should be clearly understood that in a contested case proceeding, the credibility of all witnesses is at stake. To insinuate that a fact finder is questioning credibility is correct. It is the duty of the fact finders to judge the credibility of witnesses' testimony. It was inappropriate to insinuate that the Board, as a fact finder, had prejudged testimony by asking questions and attempting to understand the context of all the data. It is the role of the fact finder to ask questions, especially if the questions are not comfortable for the parties. The only way to discern the truth is by seeking the full information, including information that may not be comfortable for parties to disclose, but which may be

important to fully develop facts. The hope is that in the future all parties are uncomfortable with the questions from the Board. Questioning witnesses does not demonstrate bias but is the real search for the truth.

The final lesson is that due process demands orderly discovery, presentation of evidence and a timely decision. The reality is that the substance of this case and the opportunity for all parties to present evidence did not occur until seven years after it was brought to the Board. The Petitioner did not agree with the amount of value reported for taxation and filed a request for examination with the State Board on January 23, 1997. The Taxpayer and the State filed for a declaratory judgment to stop the Board's examination. The Board did not act while the declaratory judgment was pending, thus suspending all proceedings for over two years. While the Examination was pending, the Petitioner filed appeals on all of the Department's actions concerning the Taxpayer. This included appeals of annual certified values, valuation changes as a result of Taxpayer's amendments or of the Department's review of the Taxpayer's report. There was representation to the Court that such appeals were adversely affecting the Board's docket. The real story was that the appeals by any county for review of any mineral valuation was less than 3% of the Board's docket. With the decision in *Board of County Commissioners for Sublette County, Wyoming, v. Exxon Mobil Corporation*, 2002 WY 151 (2002), the Supreme Court clarified the counties' rights and responsibilities in mineral valuation thus limiting the impact of appeals by counties.

Hopefully, we have all learned a lesson from the protracted procedural litigation, caused in part by the tactics of the parties to the joint defense agreement to limit the Board's review and delay a substantive hearing by the Board. The lesson is that when a party asks for an examination, the Board should take deliberate steps to obtain the necessary information, to make an informed decision, and that in most circumstances that information is best developed in a contested case procedure. We have also learned that a hearing on the substantive issues should be held in a timely fashion because justice delayed is justice denied. In this case the County incurred litigation expenses and suffered from uncertainty, the state incurred expenses and suffered from lost litigation time and, and the Taxpayer incurred litigation expenses and suffered from uncertainty, all caused by protracted procedural litigation instead of substantive presentations.

STATE BOARD OF EQUALIZATION

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Roberta A. Coates, Chairman

ATTEST:

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Wendy J. Soto, Executive Secretary