IN THE

Supreme Court of the United States

BP AMERICA PRODUCTION COMPANY, SUCCESSOR IN INTEREST TO AMOCO PRODUCTION COMPANY, *et al.*,

Petitioners,

v.

REBECCA W. WATSON, ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

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

BRIEF OF AMICUS CURIAE, THE AMERICAN PETROLEUM INSTITUTE, SUGGESTING REVERSAL

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TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Cited Authorities

I. INTEREST OF AMICUS CURIAE

The American Petroleum Institute ("API") submits this amicus brief in support of Petitioner, BP America Production Company ("BP"), to address an issue that is critical to the federal oil and gas leasing program: to wit, whether the Department of the Interior ("Interior"), after having taken no action whatsoever for more than six years, can initiate legal proceedings to collect lease royalties notwithstanding the six-year statute of limitations that bars "every action for money damages brought by the United States or an officer or agency thereof which is founded upon contract." 28 U.S.C. § 2415(a).[1] Interior contends that the statute has no application where the agency initiates its collection action by issuing an administrative royalty payment order. Thus, according to Interior, the United States has *carte blanche* to assert claims for additional royalties going back forever. Interior's position is more than patently unfair – it is erroneous as a matter of law.

API is a non-profit, nationwide trade association that represents over four hundred companies engaged in all aspects of the oil and gas industry, including exploration and production, refining, marketing and transportation. API members and hundreds of other companies and individuals own oil and gas leases administered by Interior covering millions of acres of federal and Indian lands. Pursuant to its

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1. The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or counsel made a monetary contribution to the preparation and submission of this brief. Although Petitioner is a member of API, Petitioner did not make a monetary contribution to the preparation and submission of this brief.

statutory mandate to undertake "enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues," 30 U.S.C. § 1701(b)(3), Interior issues administrative orders directing federal and Indian lessees to pay additional royalties. In contrast to a private mineral lessor's written request for payment of royalties, Interior's royalty payment orders carry the heavy weight of federal law. An order issued by Interior exposes a lessee to civil and criminal penalties, and the lessee's failure to satisfy jurisdictional appeal requirements waives any and all defenses to Interior's claim. Since the enactment in 1982 of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1701 *et seq.* ("FOGRMA"), Interior has issued numerous orders to pay additional royalties, each one of which has placed a lessee's rights in jeopardy.

In hundreds of administrative appeals, API members have asserted that Interior's royalty payment orders were barred by the six-year limitations period. In every case, Interior rejected the lessee's defense on the grounds that "statutes of limitations apply to judicial enforcement of administrative actions, but not to the underlying administrative actions." *Anadarko Petroleum Corp.*, 122 IBLA 141, 147 (1992). Then, Interior's typical practice has been to render a final administrative decision ordering the lessee to pay additional royalties, which forces the lessee either (1) to file suit for judicial review of Interior's administrative decision, or (2) to risk incurring penalties by electing not to comply with Interior's decision, in an effort to cause Interior to file suit to enforce its decision, at which time the lessee would reassert the statute of limitations defense. However, mindful that Interior can impose significant penalties upon a lessee who does not comply with a Departmental order to pay, *see Marathon Oil Co.*, 106 IBLA

104 (1988), lessees have not been willing to assume the risks attendant with refusing to comply with an Interior decision. As a result, federal court litigation over Interior's late-asserted royalty claims has been filed by lessees rather than by Interior. Once in court, Interior has consistently argued that, because the matter is not a "judicial enforcement proceeding" filed by the United States, the statute of limitations still does not apply. Reviewing this precise sequence of events – which has played out repeatedly in cases involving API members – the Court of Appeals for the District of Columbia Circuit agreed with Interior.

API respectfully urges the Court to reverse the decision below by the D.C. Circuit and to adopt the opposing analysis that the Court of Appeals for the Tenth Circuit applied in *OXY USA, Inc. v. Babbitt*, 268 F.3d 1001 (10th Cir. 2001). The result advocated by Interior and accepted by the D.C. Circuit contradicts the clear language of 28 U.S.C. § 2415, it defeats Congress's intent to close stale contractual claims and "equaliz[e] the litigative opportunities between the Government and private parties," *Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 (1967), and it undermines the established principle that statutes of limitation are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980).

II. STATEMENT OF THE CASE

A. API's Experience With Interior's Royalty Collection Program

On behalf of the United States, Interior administers oil and gas leases granted pursuant to the various federal leasing statutes, including, *inter alia*, the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*, and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* Federal and Indian oil and gas leases (whether onshore or offshore) generally obligate the lessee to pay royalties monthly as oil and gas is produced. 30 C.F.R. § 218.50. The amount of royalties paid is determined by the royalty fraction established in the lease, multiplied by the "value of production." *See, e.g.*, 30 C.F.R. § 206.100 *et seq.* Federal and Indian lessees pay the United States billions of dollars in royalties each year and report millions of lines of data on their monthly royalty reports. Due to a variety of factors – including the complexities of royalty accounting, uncertainties inherent in determining the "value of production," disruptions in the economy, and changes in federal regulation – federal courts are frequently called upon to resolve disputes concerning the amount of royalties that a federal or Indian lessee must pay.[2]

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2. *See, e.g., Fina Oil & Chem. Co. v. Norton*, 332 F.3d 672 (D.C. Cir. 2003); *Amerada Hess Corp. v. DOI*, 170 F.3d 1032 (10th Cir. 1999); *In re Century Offshore Mgmt. Corp.*, 111 F.3d 443 (6th Cir. 1997); *Shell Oil Co. v. Babbitt*, 125 F.3d 172 (3d Cir. 1997); *Chevron U.S.A., Inc. v. United States*, 923 F.2d 830 (Fed. Cir. 1991); *Diamond Shamrock Exploration Co. v. Hodel*, 853 F.2d 1159 (5th Cir. 1988); *Marathon Oil Co. v. United States*, 807 F.2d 759 (9th Cir. 1986).

In 1982, Congress passed FOGRMA, which gave Interior extensive investigatory and enforcement powers relating to the collection of royalties from federal and Indian lessees. *See* 30 U.S.C. §§ 1717-1722. As a result, many of API's members house "resident auditors" from Interior's subagency, the Minerals Management Service ("MMS"), who work full time in the lessee's offices conducting royalty audits on behalf of the United States. Using its extensive access to lessee accounting data, MMS verifies the correctness of a lessee's royalty accounting (which is accurate in most cases), and notifies the lessee of findings of payment errors. Based on these audits, MMS issues royalty payment orders to federal and Indian lessees.

MMS's issuance of a royalty payment order immediately and irretrievably places a lessee's legal rights in jeopardy. First, every MMS royalty payment order threatens the lessee with the imposition of penalties for noncompliance. *See* 30 U.S.C. §§ 1719-1720; 30 C.F.R. Part 241; *Marathon Oil Co.*, 106 IBLA 104 (1988). Moreover, although MMS's royalty payment orders are frequently erroneous, the right to assert legal and factual defenses will be waived if the lessee does not file an administrative appeal to the Director of MMS within thirty days after receiving MMS's order. *See* 30 C.F.R. Part 290 (Subpart B); *Santa Fe Energy Co.*, 110 IBLA 209 (1989) (holding that failure to appeal timely waives defenses). If the MMS Director rejects the lessee's appeal (which happens in virtually all cases), the lessee must then exhaust its administrative remedies by appealing the MMS Director's decision to the Interior Board of Land Appeals ("IBLA") pursuant to 43 C.F.R. Part 4. Following proceedings before the IBLA, the IBLA issues Interior's "final" administrative decision. On occasion (as in this case), Interior's Assistant Secretary for Land and Minerals Management takes over

jurisdiction of the appeal and issues Interior's final decision. If Interior's final decision rejects the lessee's appeal of MMS's royalty payment order (which happens in most cases), the lessee then may seek judicial review in federal district court.

Critically, Interior does not have to proceed by issuing an administrative order to pay. Rather, like any other mineral lessor, Interior could file suit in federal court asserting the United States' royalty claim. However, because Interior has chosen to initiate administrative proceedings, the normal sequence of events forces the lessee, rather than Interior, to file suit for judicial review in federal court.

B. The Procedural Catch 22: Interior Refuses To Apply 28 U.S.C. § 2415(a) In Administrative Proceedings, But Never Commences Its Royalty Collection Actions By Filing Suit In Court

Starting in the mid-1980s, and especially in the period 1989-1995, Interior became increasingly aggressive in its royalty collection efforts, with MMS issuing numerous royalty payment orders. Because so many of MMS's orders sought additional royalty payments allegedly owed more than six years before the orders were issued, federal and Indian lessees repeatedly raised 28 U.S.C. § 2415(a) as a defense (in addition to any substantive defenses to Interior's royalty claim). The IBLA's response in *Shell Oil Co.*, 150 IBLA 298 (1999), a case involving one of API's members, is illustrative of the agency's position:

> *28 U.S.C. § 2415*(a) (1994) provides that "every action for money damages brought by the United States * * * which is founded upon any contract

> express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues." We have consistently ruled that statutes establishing time limitations for the commencement of judicial actions for damages on behalf of the United States do not limit administrative proceedings within the U.S. Department of the Interior. *Santa Fe Minerals, Inc., 145 IBLA 317, 323-4 (1998); W.A. Moncrief, Jr., 144 IBLA 13, 15 (1998); Texaco Exploration and Production, Inc., 134 IBLA 267, 270 (1995); Chevron U.S.A., Inc., 129 IBLA 151, 154 (1994).* Moreover, we have specifically declined to rule that MMS demands for additional royalty are barred by that provision. *Marathon Oil Co., 128 IBLA 168, 170-71 (1994); Anadarko Petroleum Corp., 122 IBLA 141, 147-48 (1992).* As we stated in *Alaska Statebank, 111 IBLA 300, 311 (1989)*, a Departmental proceeding requiring payments that accrued more than 6 years before the proceeding was initiated "is not an action for money damages brought by the United States, but rather is administrative action not subject to the statute of limitations."

150 IBLA at 306.

As in many decisions, the IBLA in *Shell Oil Co.* relied on its prior decisions in *Alaska Statebank*, 111 IBLA 300 (1989), and *Anadarko Petroleum Corp.*, 122 IBLA 141 (1992). In both of those cases, the IBLA clearly acknowledged Interior's ability to file a judicial complaint to enforce the government's royalty claims. In *Anadarko* – which Interior relied upon in rejecting Amoco Production Company's

reliance on the statute of limitations in this case – the IBLA stated:

> We are without authority to decide whether the statute of limitation [28 U.S.C. § 2415] would bar a judicial suit to collect royalty deemed owing on a lease; such a determination would be made by the court before which any collection proceeding is brought.

122 IBLA at 147.

In the experience of API's members, Interior's rote deferral of the lessee's statute of limitations defense to "the court before which any collection proceeding is brought" creates a classic "Catch 22," because Interior never initiates a judicial proceeding to collect royalties. Rather, Interior's issuance of a royalty payment order always leads to the lessee filing suit to challenge Interior's final decision upholding its own order. Interior then contends that the lessee's lawsuit is not, in the words of the IBLA, a "judicial suit to collect royalty," but is instead a proceeding for judicial review of final agency action in which the court must defer to the agency ruling. Time and again, API's members have asserted the statute of limitations as a defense to a royalty payment order, only to have Interior side-step the issue.

C. Amoco Production Company's Appeal

The royalty dispute before this Court is typical of many of the royalty disputes that have arisen between the United States and API's members. In a royalty payment order dated May 27, 1997, MMS asserted that BP's predecessor-in-interest, Amoco Production Company, had improperly

deducted certain post-production costs from the value on which it paid royalty on coalbed methane gas produced during the period January 1989 through December 1996. As is common, the substantive dispute involved a disagreement over the royalty valuation consequences of applying new gas production technologies. And, as in so many other cases, a portion of the royalties that MMS sought to collect were originally due more than six years before MMS issued its order.

III. SUMMARY OF THE ARGUMENT

The language, structure and legislative history of 28 U.S.C. § 2415 are clear: absent an express exception, the statute imposes a six-year statute of limitations applicable to "every action" in which a federal agency asserts a contract claim, regardless whether such actions are initiated as administrative or judicial proceedings. By holding that Interior's royalty payment order was not time-barred because it was not a "complaint," the D.C. Circuit's decision impermissibly rewrites the language that Congress carefully selected. Restricting "every action" to encompass only judicial proceedings contradicts the text and structure of the statute, and it undermines Congress's intent to promote fairness and efficiency in government disputes with private parties. Finally, notwithstanding Interior's attempt to characterize its claim for additional lease royalties as a statutory action seeking an equitable remedy, Interior's claim is plainly one founded on contract, seeking money damages.

IV. ARGUMENT

A. The D.C. Circuit's Decision Impermissibly Rewrites The Statute.

Section 2415(a) provides:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later . . . .

The D.C. Circuit commenced its statutory analysis by observing that "[t]he threshold question is whether an administrative order assessing additional royalties can reasonably be understood to be an 'action for money damages' initiated by the filing of a 'complaint.'" Pet. App. at 16a. Reasoning that an "action for money damages" only includes "a suit in a court of law," the Court concluded that Interior can issue an "administrative compliance order" without regard to the six-year statute of limitations. *Id.* at 16a-17a. API respectfully urges the Court to reverse the D.C. Circuit's decision, under which Interior's ability to pursue additional royalty monies is subject to no time limit whatsoever.

API does not dispute that the requisite analysis must consider Congress's use of the term "complaint." Whether or not a complaint has been filed within six years after the United States' right of action accrues is plainly a critical question under the statute. As BP correctly argues in the Brief for Petitioner, numerous judicial, legislative, and administrative authorities support the conclusion that the term "complaint" as used in Section 2415(a) encompasses an administrative order, including an order issued by Interior to commence an action seeking payment of additional royalties. Moreover, as API has shown herein, a royalty payment order by Interior is certainly the functional equivalent of a judicial "complaint": such an order commences an adjudicative proceeding, it triggers a jurisdictional appeal period in which defenses must be formally asserted or be deemed waived, and its ultimate resolution lies in a suit for judicial review.

Because the Brief for Petitioner so thoroughly addresses the numerous authorities that support interpreting the term "complaint" to include an administrative royalty payment order, API will not repeat that argument in this amicus brief. However, API points out that it is not essential to characterize an Interior royalty payment order as a "complaint" to conclude that the six-year statute of limitations bars the royalty payment order at issue here. That is because Interior did *nothing* within the six-year period after Amoco Production Company made its original royalty payments. Having failed to take any action whatsoever, the result is clear: "*every* action . . . [is] barred," including Interior's administrative action seeking to collect additional royalties.

In its effort to avoid "strain[ing] legal language" by "constru[ing] this administrative compliance order as a

'complaint' for money damages," the D.C. Circuit twisted the clear language of the statute and committed the very error that it sought to avoid. Pet. App. at 17a. Tellingly, the D.C. Circuit's forced reading of the statute required it to constrict language – "every action" – that Congress clearly crafted to achieve an expansive reach. The D.C. Circuit's analysis is wrong because it effectively rewrites the statute so that "complaint" replaces the all-inclusive "every action." Under the D.C. Circuit's approach, the statute would read as follows:

> . . . except as otherwise provided by Congress, a complaint for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . .

Neither Interior nor the courts are authorized to recast what Congress has written.

B. Application Of Section 2415(a) To Interior Orders To Pay Royalties Respects Congress's Choice Of Language And Promotes A Consistent Interpretation Of All Subsections Of The Statute.

On its face, Section 2415(a) requires the following analysis when Interior issues a royalty payment order. If the Court agrees with BP that "complaint" includes such an administrative order, then Interior's order is barred if it is issued more than six years after the alleged royalty underpayment occurred. As noted above, however, even if the Court finds that the term "complaint" means a judicial filing, it still must be determined whether the United States

has filed a judicial complaint during the six-year period. If the United States has not filed a judicial complaint during that six-year period, then the statutory consequences are both sweeping and unavoidable: "*every action*" is barred, including Interior's administrative royalty collection action. In this case, which is typical of dozens of royalty disputes between API members and Interior, there is no question that Interior failed to file a judicial complaint, or take any action whatsoever, within the six-year period after the royalty payments were due. Having failed to file a complaint (whether administrative or judicial) within six years, the United States' action to recover additional royalties is time-barred.

An Interior order to pay royalties plainly commences an "action." The order places the lessee at risk of incurring penalties if the lessee fails either to pay or to protect itself by filing an appeal. The issuance of an order triggers a jurisdictional appeal period that subjects the lessee to the preclusive effects of waiver if the lessee fails to assert its defenses in a timely fashion. *Santa Fe Energy Co.*, 110 IBLA 209, 210 (1989). Interior itself has repeatedly recognized that its royalty payment orders are themselves "administrative actions." *E.g.*, *Marathon Oil Co.*, 149 IBLA 287, 291 (1999) (MMS demand for recalculation and payment of royalties "is not a judicial action for money damages brought by the United States, but is an administrative action not subject to the statute of limitations"); *Navajo Refining Co.*, 147 IBLA 253, 256 (1999) ("This is an administrative action initiated after completion of a contract reconciliation which found that the account had a balance due."); *W. A. Moncrief, Jr.*, 144 IBLA 13 (1998) (holding that demands for royalties and interest are "administrative actions"); *Anadarko Petroleum Corp.*, 122 IBLA 141, 147 (1992) (same).

Moreover, interpreting Section 2415(a) in the manner urged by API gives meaning to the entirety of Section 2415(a), as well as the remainder of Section 2415. For example, although Interior could file a judicial complaint to assert the United States' royalty claim, if Interior instead issues an administrative payment order within the six-year period, then the lessee's administrative appeal rights trigger the tolling of the six-year period for "applicable administrative proceedings required by contract or by law." 28 U.S.C. § 2415(a). In this provision of Section 2415(a), Congress expressly contemplated that an administrative appeal would toll the running of the limitations period. *See* S. Rep. No. 89-1328, at 2504 (1966). Obviously, for an administrative appeal to toll the limitations period, the order that is the subject of the administrative appeal must have been issued *within* the limitations period; otherwise there would be nothing left to toll. If Section 2415(a) does not apply to administrative orders to pay, this tolling provision would be meaningless. As this Court has long recognized, it is an "elementary canon" of statutory construction that a statute "should be interpreted so as not to render one part inoperative." *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994); *see also Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Similarly, including Interior's royalty payment orders within the scope of "actions" that are barred gives meaning to Section 2415(i), which provides:

> (i) The provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of title 31.

If Section 2415(a) is construed not to apply to an administrative order to pay issued more than six years after the contractual

payment was due, there would have been no need for Section 2415(i) to exempt administrative offsets from the limitations period. Section 2415(i) was enacted precisely because Congress recognized that the statute has the meaning asserted by API – *i.e.*, that, absent an express exception, the statute of limitations prevents the government from pursuing alleged debts over six years old through any means. S. Rep. Nos. 97-378 & 97-287 (1982); *see also United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1055 (Fed. Cir. 1996) ("Administrative offset is not a judicial action."). As with the tolling provision for "applicable administrative proceedings," the D.C. Circuit's statutory interpretation renders this section of the statute meaningless.

Finally, interpreting the six-year limitations period to apply to *every* action, administrative as well as judicial, not only gives meaning to all subsections of Section 2415, but such an interpretation is also compelled by the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)); *see also Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989) (noting the principle that two federal statutes should be read to make each effective). The overall statutory scheme for the royalty payments at issue here calls for "enforcement practices that ensure the prompt and proper collection" of royalties, 30 U.S.C. § 1701(b)(3), and imposes a six-year record keeping requirement on federal lessees. 30 U.S.C. § 1713(b). Given that Congress both directed Interior to act "promptly" and created a six-year period for a federal lessee to maintain accounting records after royalty payments were due, it defies logic to suggest that the six-year limitations period does not apply to a collection action that Interior commences by issuing a royalty payment order. *See Brown & Williamson*, 529 U.S. at

133 (noting that "the meaning of one statute may be affected by other Acts" and that the Court also must be guided by common sense).[3]

C. Reading "Every Action" To Include "*Every* Action" Advances Congress's Purpose In Enacting The Statute Of Limitations.

The legislative history of Section 2415 further supports interpreting the statute to bar *all* untimely actions for money damages brought by the federal government, without carving out untimely actions initiated by administrative order. *E.g.*, S. Rep. No. 89-1328, at 2503-04 (1966) (noting that the statute was intended "to improve claims procedures" and that the statute of limitations would be applicable to "all Government actions based on contracts"); H.R. Rep. No. 89-1534, at 3-4 (1966) (same).[4]

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3. In 1996, Congress enacted the Federal Oil and Gas Royalty Simplification and Fairness Act, ("FOGRSFA"), which established a seven-year statute of limitations period for the government to assert royalty claims against federal lessees. 30 U.S.C. § 1724(b)(1). As the D.C. Circuit accurately observed, because FOGRSFA was made prospective only, the seven-year limitations period does not apply to the government's claim for additional royalties in this case. Pet. App. at 16a n.1. However, it is notable that, consistent with API's argument herein, in FOGRSFA Congress amended the record-keeping requirement to match the new seven-year limitations period for asserting royalty claims. *See* 30 U.S.C. § 1724(f) (requiring federal lessees to retain records for "the same period of time during which a judicial proceeding or demand may be commenced under subsection (b) this section.").

4. Certainly, the legislative history contains references to courts, litigants, and lawsuits. Yet, it also refers to the limitations period as being applicable to "monetary claims," "government claims for money," and simply "government claims." S. Rep. No. 89-1328, at 2503, 2513 (1966); H.R. Rep. No. 89-1534, at 3 (1966).

The legislative history makes clear that the central purpose of Section 2415 was to promote fairness by protecting private parties who contract with the federal government from exposure to stale claims and by making the federal government "more nearly equal to [the position] of private litigants." S. Rep. No. 89-1328, at 2513 (1966); H.R. Rep. No. 89-1534, at 10-11 (1966). Indeed, the Senate Report on the proposed statute explained:

> The *emphasis on fairness* . . . is a very important consideration and the *principal basis* for the bill.

S. Rep. No. 89-1328, at 2508 (1966) (emphasis added).

The concerns to which Section 2415 was addressed were further explained as follows:

> Many of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government. Therefore it is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals. The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity.
>
> . . . The committee feels that the prompt resolution of the matters covered by the bill is necessary to an orderly and fair administration of justice. *Stale claims can neither be effectively presented or adjudicated in a manner which is fair to the parties involved.* Even if the passage of time does

> not prejudice the effective presentation of a claim, the mere preservation of records on the assumption that they will be required to substantiate a possible claim or an existing claim increases the cost of keeping records. As time passes the collection problems invariably increase. The Government has difficulty in even finding the individuals against whom it may have a claim for they may have died or simply disappeared. These problems have been brought to the attention of the committee previously in connection with other legislation. This bill provides the means to resolve these difficulties.

S. Rep. No. 89-1328, at 2503-04 (1966) (emphasis added); H.R. Rep. No. 89-1534, at 4 (1966) (emphasis added); *see also Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 863 (10th Cir. 1993) (stating that, in enacting Section 2415(a), "Congress was motivated in part by notions of fairness and equity in government dealings with private litigants, and further motivated to reduce the costs of record keeping and encourage prompt agency actions on claims"). The Senate and House Reports also noted that:

> enactment will reduce unnecessary litigation and court congestion, speed up meritorious settlements and cut down on unproductive paperwork. At the same time, the private litigants can be assured of a more fair and balanced treatment when dealing with the Government.

S. Rep. No. 89-1328, at 2503 (1966); H.R. Rep. No. 89-1534, at 3-4 (1966). The clearly expressed goal of assuring private litigants a "more fair and balanced treatment when dealing

with the Government," *id.*, provides compelling support for applying the six-year statute of limitations to all government collection claims, regardless whether such claims are commenced as administrative or judicial actions. *Cf.* 28 U.S.C. § 2401 (imposing six-year limitations period on contract claims by private parties against the government). This result is particularly called for when, as here, the government agency has the choice whether to commence its collection action in the judicial or administrative arena.

The problems associated with adjudicating old claims are especially pronounced in royalty collection matters. The complexities of royalty accounting, turnover of personnel with relevant factual knowledge, and changes in lease ownership and control of historical payment data combine to create tremendous difficulties for a lessee attempting to challenge the merits of an outdated royalty claim. These problems are exacerbated when Interior proceeds by issuing an administrative order to pay, because in the judicial review proceeding that inevitably follows, Interior uniformly asserts that it is entitled to judicial deference to its substantive royalty determination. The unfairness of this is obvious when the lessee's typical experience is considered: (1) first, the lessee makes its monthly royalty payment and Interior does nothing to challenge the accuracy of that payment for more than six years; (2) Interior then issues an administrative order to pay, and the lessee finds itself unable to develop the data necessary to challenge fully the merits of Interior's claim; (3) when the lessee files the administrative appeal that is essential to protect its defenses and avoid penalties, Interior's IBLA rejects the lessee's reliance on 28 U.S.C. § 2415(a) as being inapplicable to "underlying administrative actions" and renders a final agency decision upholding Interior's original order to pay; (4) when the lessee seeks judicial review,

Interior continues to assert that the statute of limitations does not apply, and Interior further asserts that the lessee must overcome the presumptive correctness of its substantive royalty determination, based on the rule of judicial deference to agency decisions; and (5) if Interior's claim is upheld on judicial review, the interest that the lessee owes often exceeds the principal amount of any alleged underpayment.

In view of the foregoing, it is actually to Interior's benefit to wait to issue its administrative order to pay until more than six years after the original royalty payment was owed: delay impairs the lessee's ability to defend the substance of Interior's claim, and it increases the government's ultimate monetary recovery. However, this sort of "coercive agency action[] predicated upon an otherwise time-barred claim," *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1055 (Fed. Cir. 1996), simply cannot be reconciled with Congress's clearly expressed concern for precluding stale claims and promoting fairness for private parties who contract with the government. Nothing in either the wording or the legislative history of the statute reasonably can be read to suggest that Congress authorized agencies to circumvent the limitations period through the "procedural gimmickry" of substituting administrative proceedings for government-initiated litigation. *OXY USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006 (10th Cir. 2001). Interpreting "every action" to include "*every* action" – regardless whether commenced by an administrative order to pay or by a lawsuit – is the only interpretation that advances Congress's intent to promote "modern standards of fairness and equity." S. Rep. No. 89-1328, at 2503 (1966); H.R. Rep. No. 89-1534 at 4.

D. Interior's Royalty Payment Orders Seek "Money Damages" And Are "Founded On Contract."

Contrary to Interior's protestations, Interior's administrative action to collect additional royalty payments clearly constitutes an "action for money damages," which is "founded upon a contract" for purposes of Section 2415.

Interior relies heavily on *Bowen v. Massachusetts*, 487 U.S. 879 (1988), in which the State of Massachusetts sued the United States for declaratory and injunctive relief from an order disallowing Medicaid reimbursement. Holding that the federal district court had jurisdiction, this Court concluded that the suit was not an action for "money damages" under the Administrative Procedure Act, 5 U.S.C. § 702. *Id.* at 893-900. In so holding, the Court opined that the phrase "relief other than money damages," as used to waive sovereign immunity under the Administrative Procedure Act, encompassed suits for the enforcement of statutory mandates, even though the mandate "happens to be one for the payment of money." *Id.* at 900. Grasping this language, Interior contends that its claim as a mineral lessor to recover additional lease royalties is a claim for equitable monetary relief rather than for "damages."

The holes in Interior's position are readily apparent. Neither the result nor the reasoning in *Bowen* can be stretched to reach the question before this Court because the posture of *Bowen* was so dramatically different from that of the present case. Unlike the action at issue in *Bowen*, Interior does not seek to enforce a statutory mandate in a dispute between two public bodies, but instead has initiated a lessor's royalty collection action against its lessee. *See OXY USA, Inc. v. Babbitt*, 268 F.3d 1001, 1008 (10th Cir. 2001)

(distinguishing *Bowen* and concluding that an MMS action to collect royalty payments is an action for money damages, founded upon a contract within the meaning of Section 2415). It is well recognized that federal oil and gas leases are contracts, under which the government's rights, as lessor, are generally governed by the law of contracts applicable to private parties. *E.g.*, *Mobil Oil Exploration & Prod. Southeast, Inc. v. United States*, 530 U.S. 604 (2000).

Further, that the federal leasing program is a creature of statute does not convert an Interior order to pay from an action "founded on contract" to an action founded on statutory mandate. As the Tenth Circuit correctly concluded:

> The fact that the Secretary of the Interior administers federal oil and gas leases through the MMS, applying applicable royalty assessment (valuation) and collection regulations promulgated in accordance with the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1701 *et seq.*, and other mineral leasing statutes, simply does not change the contractual underpinnings of the lessee/lessor relationship or the legal source of the royalty payment obligation MMS seeks to enforce.

OXY, 268 F.3d at 1007. Under Interior's theory, *all* government claims for monies allegedly past due under a contract could be characterized as "equitable monetary relief," and Section 2415 would be inoperative as to the vast majority of government contract actions. Such a reading of the statute is patently untenable.

V. CONCLUSION

For the reasons stated herein, the Court should reverse the D.C. Circuit decision.

Respectfully submitted,

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