

**BEFORE THE STATE BOARD OF EQUALIZATION**

**FOR THE STATE OF WYOMING**

IN THE MATTER OF THE APPEAL OF )  
WESTMORELAND KEMMERER, LLC ) Docket No. 2017-35  
FROM A DECISION BY THE )  
DEPARTMENT OF REVENUE (Minerals) )

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION, AND ORDER**

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**STATEMENT OF THE CASE**

Westmoreland Kemmerer, LLC appeals a decision of the Wyoming Department of Revenue. Westmoreland asked the Department whether coal mined using the ADDCAR Highwall Mining (HWM) System is “underground coal” as that term is defined in statute. The Department answered in the negative. That answer matters because the severance tax rate on mined underground coal is much lower than the rate on mined surface coal.

An aggrieved taxpayer may file an appeal with the Wyoming State Board of Equalization within 30 days of the Department’s final decision. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(e) (2006). The Department issued its final decision on February 21, 2017. (Ex. 100). Westmoreland filed its appeal with the State Board 20 days later. (Notice of Appeal). The appeal was timely and we have jurisdiction to decide this matter.

The State Board, Chairman Martin L. Hardsocg, Vice-Chairman David Delicath, and Board Member E. Jayne Mockler, held an evidentiary hearing. After considering the evidence and the parties’ post-hearing briefs, the Board reverses and remands the Department’s decision.

**APPEARANCES**

Walter F. Eggers, III and Samuel R. Yemington, Holland & Hart LLP, appeared on behalf of Westmoreland.

Karl D. Anderson and Megan L. Pope, Senior Assistant Attorneys General, Wyoming Attorney General’s Office, appeared on behalf of the Department.

## ISSUE

Westmoreland identifies the issue as:

[W]hether the coal that Westmoreland is extracting at the Kemmerer Mine with the HWM System qualifies under Wyo. Stat. § 39-14-101(a)(xiii) as underground coal.

(Westmoreland Opening Br. 1).

The Department phrases the issue this way:

[W]hether the Department properly interpreted Wyoming Statute § 39-14-101(a)(xiii), which defines “underground coal” as “coal mined by methods of man-made excavation underneath the surface of the earth utilizing shafts, tunnels or lifts, including planes connected with excavations penetrating the mineral stratum[.]” Specifically, whether the Department correctly determined that coal extracted by Westmoreland’s HWM System is not “underground coal” because: (1) it does not utilize tunnels and (2) it does not include planes connected with excavations penetrating the mineral stratum.

(Dep’t Response Br. 2).

## FINDINGS OF FACT

The following facts are undisputed:

1. Westmoreland operates a coal mine near Kemmerer, Wyoming. (Ex. 500 at 1).
2. The mine has operated as a surface mine since the 1950’s, which has exposed a highwall<sup>1</sup> with 600 to 800 feet of overburden above the coal seam. (Tr. 21, 30). That depth of overburden precludes conventional surface mining because the cost of removing the overburden would exceed the value of the coal extracted. (Tr. 24-25, 57).
3. To extract more coal without removing overburden, Westmoreland turned to the ADDCAR System, a large machine that bores directly into the highwall, follows the coal seam, and extracts coal via a series of conveyor cars. (Tr. 20-21; 34). After reaching its maximum distance, ADDCAR backs out of the highwall and moves laterally to the next spot to be mined. (Tr. 38-39).

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<sup>1</sup> A “highwall” is a vertical surface of exposed earth.

4. The ADDCAR system extracts coal that Westmoreland could not otherwise mine profitably. (Tr. 21-22, 26, 79-80). Westmoreland estimates that, using ADDCAR, it can mine about eight million tons of coal that would otherwise remain in the ground. (Tr. 50).
5. The ADDCAR system leaves a series of horizontal, or nearly horizontal, entries or voids. (Tr. 60-62). Those entries are 11.5 feet wide, between 3.5 and 24 feet high, and up to 650 feet long. (Tr. 34-35). Westmoreland later seals those entries and they are never used again. (Tr. 39).
6. As permitted by Wyoming Statutes section 39-14-109(a) (2015), Westmoreland asked the Department for an interpretation of Wyoming Statutes section 39-14-101(a)(xiii) (2015). (Ex. 101). Westmoreland specifically asked whether coal mined with the ADDCAR system was “underground coal” as that term is statutorily defined at Wyoming Statutes section 39-14-101(a)(xiii) (2015). (Ex. 101).
7. The Department determined that coal mined with the ADDCAR system was not underground coal because “the excavations made by the ADDCAR system do not utilize ‘shafts,’ ‘tunnels’ or ‘lifts’ as contemplated by the statute. Nor do these excavations include ‘planes connected with excavations penetrating the mineral stratum.’ ” (Ex. 100).

## CONCLUSIONS OF LAW

### A. State Board’s review function and burdens of proof

8. This Board shall “review final decisions of the department upon the application of any person adversely affected.” Wyo. Stat. Ann. § 39-11-209(b)(i) (2015). Our role in such matters is to adjudicate the dispute between the parties.

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 for review can be resolved successfully without invading the statutory prerogatives of the Department. The statutory mandate to the Board is not to maximize revenue or to punish nettlesome taxpayers, but to assure the equality of taxation and fairly adjudicate disputes brought before it.

*Amoco Prod. Co. v. Wyo. State Bd. of Equalization*, 12 P.3d 668, 674 (Wyo. 2000).

9. As the adjudicating body, we “[d]ecide all questions that may arise with reference to the construction of any statute affecting the assessment, levy and collection of taxes, in accordance with the rules, regulations, orders and instructions prescribed by the department[.]” Wyo. Stat. Ann. § 39-11-102.1(c)(iv) (2015).

10. “[T]he 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, Wyo. State Bd. of Equalization, ch. 2 § 20 (2006).

11. None of the facts are disputed. (Westmoreland Opening Br. 7; Dep’t Response Br. 2). This case presents only issues of statutory construction, so our standard of review is de novo. *Town of Pine Bluffs v. Eisele*, 2017 WY 117, ¶ 9, 403 P.3d 126, 128 (Wyo. 2017) (quoting *Bates v. Chicago Lumber Co. of Omaha*, 2016 WY 58, ¶ 27, 375 P.3d 732, 739 (Wyo. 2016)).

B. Application of the law to the facts

12. “ ‘Underground coal’ means coal mined by methods of man-made excavation underneath the surface of the earth utilizing shafts, tunnels or lifts, including planes connected with excavations penetrating the mineral stratum[.]” Wyo. Stat. Ann. § 39-14-101(a)(xiii) (2015).

13. The Department has not promulgated rules or issued guidance regarding the statutory definition of “underground coal.” (Tr. 124-25).

14. The Department concedes that the ADDCAR system mines coal using “man-made excavations underneath the surface of the earth.” (Ex. 100). It maintains, however, that ADDCAR does not use “shafts, tunnels or lifts” and, therefore, does not mine “underground coal.” (Ex. 100). The Department also contends that Westmoreland must show (and has not shown) that ADDCAR uses “planes connected with excavations penetrating the mineral stratum.” (Dep’t Response Br. 8-10).

15. Westmoreland agrees that ADDCAR does not use shafts or lifts, but contends that it does use tunnels. (Westmoreland Opening Br. 9).

16. Westmoreland further contends that Wyoming Statutes section 39-14-101(a)(xiii) (2015) does not require it to show that ADDCAR uses “planes connected with excavations penetrating the mineral stratum.” (Westmoreland Reply Br. 13-16).

17. Two questions will determine the outcome of this case: 1) Does ADDCAR use tunnels? 2) If so, must Westmoreland also show that ADDCAR uses “planes connected with excavations penetrating the mineral stratum”?

i. Does ADDCAR use tunnels?

18. We must determine the meaning of “tunnel” as that word is used in Wyoming Statutes section 39-14-101(a)(xiii) (2015).

19. The Department has not promulgated rules or issued guidance regarding the statutory definition of “tunnel.” (Tr. 124-25).

20. We subscribe to the “usual rules of statutory interpretation.”

We begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute *in pari materia*. When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation.

*Anderson v. State*, 2018 WY 6, ¶ 12, 408 P.3d 1148, 1151 (Wyo. 2018) (quoting *Sikora v. City of Rawlins*, 2017 WY 55, ¶ 23, 394 P.3d 472, 479 (Wyo. 2017)).

21. In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

*Kelsey v. Taft*, 263 P.2d 135, 138 (Wyo. 1953) quoting *Gould v. Gould*, 245 U.S. 151, 153, 38 S.Ct. 53 (1917).

22. Our first step in statutory interpretation is to determine whether the statute is ambiguous. *Garwood v. Garwood*, 2010 WY 91, ¶ 35, 233 P.3d 977, 985 (Wyo. 2010) (quoting *Exxon Mobil Corp. v. Wyo. Dep’t of Revenue*, 2009 WY 139, ¶ 11, 219 P.3d 128, 134 (Wyo. 2009)). A statute is ambiguous if it is “vague or uncertain and subject to varying interpretations.” *Parker Land & Cattle Co. v. Wyo. Game & Fish Comm’n*, 845 P.2d 1040, 1043 (Wyo. 1993) (quoting *Allied-Signal, Inc. v. Wyo. State Bd. of Equalization*, 813 P.2d 214, 219-20 (Wyo. 1991)). If we determine that a statute is ambiguous, we must look to extrinsic aids. *Id.* at 1042-45.

23. If, on the other hand, we determine that the statutory language is unambiguous, we must give effect to the clear meaning of that language without further construction. *BP Am. Prod. Co. v. Dep’t of Revenue, State of Wyo.*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo.

2005) (quoting *Loberg v. Wyo. Workers' Safety & Comp. Div.*, 2004 WY 48, ¶ 15, 88 P.3d 1045, 1048 (Wyo. 2004)).

24. Westmoreland contends that “utilizing shafts, tunnels or lifts, including planes connected with excavations penetrating the mineral stratum” in Wyoming Statutes section 39-14-101(a)(xiii) (2015) is unambiguous. (Westmoreland Reply Br. 2).

25. The Department has not articulated a position on whether the statutory language is ambiguous, but argues in favor of the statute’s “plain and ordinary meaning.” (Dep’t Response Br. 4-5). We read that as a contention that the language is unambiguous.

26. Although Wyoming Statutes section 39-14-101(a)(xiii) (2015) unambiguously requires “shafts, tunnels or lifts,” it does not define any of those words. Because reasonable people can (and the parties here do) disagree about the meaning of “tunnel,” we conclude that the statute is ambiguous as to the meaning of the word “tunnel.”

27. When a word in a statute is not statutorily defined, we must give that word its “ordinary and usual” meaning. Wyo. Stat. Ann. § 8-1-103(a)(i) (2017); *Craft v. State*, 2012 WY 166, ¶ 14, 291 P.3d 306, 310 (Wyo. 2012). The “ordinary and usual” meaning of a word generally can be found in a standard dictionary. *Id.* (“In the absence of a statutory definition, this Court infers that the legislature intended no special meaning for the word but, instead, intended that it be given its ordinary meaning—its common dictionary definition”).

28. Rather than give “tunnel” its common dictionary meaning, the Department urges us to apply a definition from a mining dictionary that the federal government published. (Tr. 117; Dep’t Response Br. 7).

29. At the hearing, the Department relied on two of the nine alternative definitions of “tunnel” in the 1968 edition of *A dictionary of mining, mineral, and related terms*. (Tr. 117). Those definitions are: “[a] long, narrow subterranean passageway” and “[a] horizontal or nearly horizontal underground passage that is open to the atmosphere at both ends. The term is loosely applied in many cases to an adit.” (Ex. 502 at 12).

30. In its post-hearing brief, the Department cites a third definition that appears in both the 1968 and 1997 editions of the same dictionary: “[a] horizontal or inclined stone driveway for development or to connect mine workings, seams, or shafts.” (Dep’t Response Br. 7).

31. If a word in a statute has a common meaning and also has a “peculiar and appropriate meaning in law,” the latter is to be used unless doing so would be contrary to legislative intent. *Penny v. State, ex rel., Wyo. Mental Health Professions Licensing Bd.*, 2005 WY 117, ¶ 44, 120 P.3d 152, 174 (Wyo. 2005) (citing *Amoco Prod. Co. v. State*, 751 P.2d 379, 383 (Wyo. 1988)). “Tunnel” has no such peculiar meaning in law, so we will look to its

common dictionary definition instead of the mining dictionary definition that the Department suggests.

32. While “tunnel” has multiple common dictionary definitions, we believe the one most applicable here is “[a] subterranean gallery (as in a mine)[.]” Merriam-Webster’s Collegiate Dictionary, 1347, (11th ed. 2003).

33. A gallery is “a working drift or level in mining[.]” and a drift is “a nearly horizontal mine passageway driven on or parallel to the course of a vein or rock stratum[.]” Merriam-Webster’s Collegiate Dictionary, 512, 381 (11th ed. 2003).

34. ADDCAR creates entries parallel to the coal seam and uses those entries to extract coal. We conclude those entries are tunnels.

ii. *Must Westmoreland also show that ADDCAR uses “planes connected with excavations penetrating the mineral stratum”?*

35. The Department contends that the coal mined with ADDCAR is not underground coal because ADDCAR does not use “planes connected with excavations penetrating the mineral stratum[.]” (Dep’t Response Br. 8-10). The key to the Department’s argument is the word “including” in Wyoming Statutes section 39-14-101(a)(xiii) (2015). The Department reads the statute to mean that coal is not underground coal unless it is mined using “shafts, tunnels or lifts[.]” which must “include” “planes connected with excavations penetrating the mineral stratum[.]”

36. Westmoreland disagrees, and maintains that the phrase “including planes connected with excavations penetrating the mineral stratum” does not create a separate requirement. (Westmoreland Reply Br. 13-16).

37. In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

*Kelsey v. Taft*, 263 P.2d at 138, *supra* ¶ 14.

38. We find the statutory language in question means that “planes connected with excavations penetrating the mineral stratum” are included in the universe of things that can be “shafts, tunnels or lifts.”

## **CONCLUSIONS**

39. The ADDCAR system Westmoreland uses at its Kemmerer coal mine uses tunnels.
40. Wyoming Statutes section 39-14-101(a)(xiii) (2015) does not require Westmoreland to prove that ADDCAR uses “planes connected with excavations penetrating the mineral stratum.”
41. The coal Westmoreland extracts from its Kemmerer coal mine using ADDCAR is underground coal.

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**ORDER**

The decision of the Department of Revenue is **reversed and remanded** for issuance of a decision in keeping with the findings and conclusions of this Decision and Order.

**Pursuant to Wyoming Statutes section 16-3-114 (2017) and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days after the date of this decision.**

DATED this 23<sup>rd</sup> day of August, 2018.

**STATE BOARD OF EQUALIZATION**

  
\_\_\_\_\_  
Martin L. Hardsocg, Chairman

  
\_\_\_\_\_  
David Delicath, Vice-Chairman

  
\_\_\_\_\_  
E. Jayne Mockler, Board Member

ATTEST:

  
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Nadia Broome, Executive Assistant

## CERTIFICATE OF SERVICE

I certify that on the 23<sup>rd</sup> day of August, 2018, I served the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION, AND ORDER by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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