

**BEFORE THE STATE BOARD OF EQUALIZATION
FOR THE STATE OF WYOMING**

IN THE MATTER OF THE APPEAL OF)	
PACIFICORP)	Docket No. 2023-23
FROM A DECISION BY THE DEPARTMENT)	
OF REVENUE (Excise Tax Division))	

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

APPEARANCES

Bryan Browdy and Ingo Rumohr, Ryan, LLC, appeared on behalf of Merit Energy Corporation.

Senior Assistant Attorneys General, Karl D. Anderson and James Peters, Wyoming Attorney General's Office, appeared on behalf of the Wyoming Department of Revenue.

DIGEST

[¶ 1] PacifiCorp appeals the Department of Revenue's final determination denying a sales tax refund. At the request of Merit Energy Corporation, PacifiCorp asked the Department to refund sales tax that PacifiCorp had collected on electricity sold to Merit between March 2020 and March 2023. The Department denied the refund request, finding that Merit was not "engaged in the transportation business," which is one of the statutory requirements for an exemption under Wyoming law. PacifiCorp appealed that denial to this Board. Merit was soon joined as a party.

[¶ 2] The issue before us is whether Merit is engaged in the transportation business. The Department had previously accepted that Merit was engaged in the transportation business. But we questioned that last acceptance year in a footnote expressing doubt that Merit was engaged in the transportation business. That footnote lead the Department to consider whether Merit truly was engaged in the transportation business. The Department determined that Merit wasn't engaged in the transportation business. Merit contends that it was engaged in the transportation business because it used its pipeline to move production fluids owned by working interest owners, and then billed those owners for doing so.

[¶ 3] Merit’s argument relies on the theory that being engaged in the transportation business requires that Merit 1) transport someone else’s property; and 2) charge a fee for doing so. The Department essentially contends that Merit can’t be engaged in the transportation business because it’s engaged in the oil business. In other words, Merit can be engaged in only one business at a time.

[¶ 4] The Wyoming State Board of Equalization, Chairman Martin L. Hardsocg, Vice-Chairman David L. Delicath, and Board Member E. Jayne Mockler, held a hearing and received evidence and post-hearing briefing from both parties. Finding that Merit is engaged in the transportation business, we will reverse. Chairman Hardsocg dissents.

ISSUES

[¶ 5] Merit identified one issue:

Is Merit Energy Company, LLC engaged in “the transportation business” under Wyo. Stat. Ann. § 39-15-105(a)(iii)(E)?

(Merit’s Issues of Fact and Law and Ex. Index, 1).

[¶ 6] The Department presented this statement of the issues:

- a. Is the Department’s decision correct, proper, and in accordance with the law?
- b. Do the transactions between PacifiCorp and Merit qualify for the use of the sales tax exemption under Wyo. Stat. Ann. § 39-15-105(a)(iii)(E)?
- c. Was Merit actually “engaged in the transportation business” as is statutorily required to receive a sales tax exemption for the purchase of electricity from PacifiCorp, under Wyo. Stat. Ann. § 39-15-105(a)(iii)(E)?

(Dept. Issue of Fact and Law and Ex. Index, 1).

JURISDICTION

[¶ 7] The State Board shall “review final decisions of the department [of revenue] upon application of any interested person adversely affected.” Wyo. Stat. Ann. § 39-11-102.1(c) (2021). An aggrieved taxpayer may file an appeal with this Board within 30 days after the Department’s final decision. Rules, Wyo. State Bd. of Equalization, ch. 2, § 5(e) (2021). The Department issued its final decision on May 16, 2023, and PacifiCorp filed its appeal on June 13, 2023, so the appeal is timely and we have jurisdiction. (Ex. 502; Notice of Appeal).

FINDINGS OF FACT

[¶ 8] Before the hearing, the parties stipulated to these 29 factual statements:

Electricity Consumed by Electronic Submersible Pumps

1. PacifiCorp is a regulated electric power company that conducts business in the State of Wyoming via its Rocky Mountain Power business unit.
2. Merit is engaged in oil and gas production in Wyoming.
3. During the period at issue, March 1, 2020 through March 31, 2023, Merit produced oil and gas from wells in Park, Big Horn, and Hot Springs counties, Wyoming.
4. Generally, these wells do not have enough natural pressure to bring the production fluids – crude oil and water, and some gas – to the surface.
5. To bring the production to the surface, Merit employed a series of electronic submersible pumps in the wellbores to generate the necessary pressure to lift the production fluids to the surface wellhead. (Pet'r's Ex. 116).
6. The electronic submersible pumps consist of an electric motor and a multistage centrifugal pump and run on a production string, connected to a surface control mechanism and a transformer by an electric power cable.
7. Merit also employed functionally similar “pumpjacks” in this process. A pumpjack is the familiar horsehead equipment that creates downhole pressure to aid in lifting fluids to the surface. The pumpjacks at issue are stationed above ground and are powered by electricity. Besides the pumpjacks, Merit also used other electric-powered surface equipment, including transformers, pumps, compressors, and dryers in this process.
8. The electronic submersible pumps and the pumpjacks and other surface equipment convey the production fluids from the bottom of the wellbore up through tubing to the wellhead at the surface. (Pet'r's Ex. 116).
9. After reaching the surface, the production fluids are then conveyed from the wellhead through steel flowlines, or pipes, to the “battery,” or surface facilities, where the oil, gas, and water are separated and impurities in the fluids are removed. (*Id.*).

10. The production fluids then exit the surface facility through additional gathering lines, which convey the fluids to the Lease Automatic Custody Transfer (LACT) Unit. (*Id.*).
11. The LACT Unit is an assembly of equipment used to measure and transfer crude oil from an oil producer to an end user, or to the next step in the refining process.
12. Merit operates the electronic submersible pumps and the pumpjacks and other equipment with enough horsepower to convey the crude oil from the bottom of the wellbore to the surface wellhead, from the wellhead to the surface facilities, and from the surface facilities to the LACT Unit – in one continuous, uninterrupted movement.
13. The electricity utilized and consumed by the electronic submersible pumps is delivered to those pumps inside the wellbore.
14. For the refunds at issue in this case, Merit purchased the electricity used to power the electronic submersible pumps and the pumpjacks and other surface equipment exclusively from Rocky Mountain Power.
15. Rocky Mountain Power charged, and Merit paid, Wyoming excise (sales) tax on the electricity. (*Id.*).
16. Merit sells its production fluids downstream of the wellheads.
17. To determine how much of Merit's overall electricity usage was for this purpose, Merit engaged an engineering firm, Turning Point Co. LLC, to perform an initial special utility study for wells located in the Spring Creek Field for which electricity was purchased exclusively from Rocky Mountain Power. (Pet'r's Ex. 101).
18. The study separately analyzed the amount of electricity used to extract the production fluids to the wellhead and to convey the production fluids to the LACT.
19. The study concluded that of the total amount of electricity Merit purchased from Rocky Mountain Power, approximately 49.3% was attributable to conveying the production fluids from the surface wellhead to the LACT unit at the Spring Creek Field. (*Id.*).
20. Merit engaged Turning Point Co. LLC to perform additional special utility studies for other large fields Merit operates in Wyoming. With respect to these fields, the share of electricity purchased from Rocky Mountain Power and attributable to conveying the production fluids from the surface

wellhead to the LACT varies between 46.1% and 54.8%, or an average of 49.4% of the total purchased from the utility. (Pet'r's Ex. 102 through 105).

Procedural History

21. On April 27, 2023, PacifiCorp filed a sales tax refund claim with the Department, on behalf of Merit, covering the period of March 1, 2020 through March 31, 2023.

22. In its claim, PacifiCorp requested a refund of sales taxes in the amount of \$3,018,675.00 associated with the sales of electricity to Merit.

23. Merit claimed it was entitled to the exemption granted under Wyo. Stat. Ann. § 39-15-105(a)(iii)(E) for that portion of its electricity purchases that it contends was used to convey the production fluids horizontally from the wellhead to the LACT.

24. On May 16, 2023, the Department denied the sales tax refund claim in full, claiming “Merit is not engaged in the transportation business and the exemption requirements under W.S. 39-15-105(a)(iii)(E) were not satisfied in regard to the sales of electricity¹.”

25. On June 13, 2023, PacifiCorp filed a timely appeal with the State Board of Equalization on behalf of Merit.

26. The Department and PacifiCorp filed a Joint Motion for Joinder on behalf of Merit on July 6, 2023. The Board ordered for Merit to join as a party in this matter on July 28, 2023.

27. On January 29, 2024, Merit and the Department agreed to stay two other substantially similar cases related to other electricity providers (Dkt. No's. 2023-26 and 2023-33) pending resolution of this case.

Merit's Position

28. Merit claims electricity, used by the electronic submersible pumps and the pumpjacks and other surface equipment that is attributable to the horizontal conveyance of production fluids from the wellhead to the LACT unit through a gathering system is exempt as sales of power to a person engaged in the transportation business under Wyo. Stat. Ann. § 39-15-105(a)(iii)(E) and its interpretation by the State Board in Dkt. No. 2021-109.

¹ The Department didn't explain its reasoning, it just said “the Department has determined that Merit is not engaged in the transportation business[.]” (Ex. 501).

Department of Revenue's Position

29. The Department claims that Merit does not meet the statutory requirements for an exemption under Wyo. Stat. Ann. § 39-15-105(a)(iii)(E) because Merit is not engaged in the transportation business.

(Ex. 100, 1-6).

[¶ 9] At the hearing, Merit called three witnesses: Matt Watson, a petroleum engineer who works for Merit; Ingo Rumohr, a Certified Public Accountant who works for Ryan LLC, and Bret Fanning, the administrator of the Department's Excise Tax Division. (Hr'g Tr. 18-68, 69-77, 78-90). Mr. Fanning was also the sole witness for the Department. *Id.* at 91-121.

[¶ 10] Mr. Watson testified generally about Merit's Wyoming operations. He specifically testified that Merit doesn't own any of the oil it produces or transports through its pipelines. (Hr'g Tr. 26, 39). Rather, that oil is owned by "the working interest and royalty owners" whom Merit bills for "their share of transportation through the systems." *Id.* at 30, 39. He further testified that Merit Energy Company is not "a working interest owner in any of the units that it operates in Wyoming[.]" *Id.* at 39.

[¶ 11] Mr. Rumohr testified that he is familiar with the financial records of Merit's Wyoming operations. He also testified that more than 35% of Merit's "overall purchases can be associated with post-wellhead transportation activities. (Hr'g Tr. 73).

[¶ 12] Mr. Fanning testified about the Department's view that Merit wasn't engaged in the transportation business. He opined that to be engaged in the transportation business, one must be "hauling somebody else's product." (Hr'g Tr. 104).

CONCLUSIONS OF LAW

A. State Board's review function, burdens of proof, and applicable law

[¶ 13] This Board shall "review final decisions of the department upon the application of any person adversely affected[.]" Wyo. Stat. Ann. § 39-11-102.1(c) (2023). At the request of an adversely affected party, 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 instruction prescribed by the department." Wyo. Stat. Ann. § 39-11-102.1(c)(iv) (2023). Our rules describe a petitioner's burden in this way:

Except as specifically provided by law or in this section, the Petitioner shall have the burden of going forward² and the ultimate burden of persuasion, which burden shall be met by a preponderance of the evidence. If Petitioner provides sufficient evidence to show the Department determination is incorrect, the burden shifts to the Department to defend its action.

Rules, Wyo. State Bd. of Equalization, ch. 2 § 20 (2021).

[¶ 14] This appeal requires us to determine whether Merit is “engaged in the transportation business[:]”

In construing a taxing or revenue statute, courts should attempt to ascertain and give effect to the intention of the legislature, and that intention is to be gathered from a consideration of every word in the statute so as to make it harmonious and reasonable in its operation. *State v. Union Pacific Railroad Co.*, 823 P.2d 539, 541 (Wyo. 1992). As a general rule, tax exemptions are given a strict interpretation against an assertion of a taxpayer and in favor of the taxing power.

E. Laramie Cnty. Solid Waste Disposal Dist. v. State Bd. of Equalization, 9 P.3d 268, 271 (Wyo. 2000). “There is a presumption created against granting exceptions and in favor of taxation.” *Wyo. State Bd. of Equalization v. Tenneco Oil Co.*, 694 P.2d 97, 100 (Wyo. 1985). Therefore, the burden of establishing an exemption falls on the party claiming it. *PacifiCorp, Inc. v. Wyo. Dep’t of Revenue*, 2017 WY 106, ¶ 11, 401 P.3d 905, 909 (Wyo. 2017).

B. Did the Department correctly determine that Merit was not “engaged in the transportation business?”

[¶ 15] “Except as provided by W.S. 39-15-105,” Wyoming law imposes sales tax on:

[t]he sales price paid for all services and tangible personal property used in rendering services to real or tangible personal property within an oil or gas well site beginning with and including the setting and cementing of production casing, or if production casing is not set as in the case of an open hole completion, after the completion of the underreaming or the attainment of total depth of the oil or gas well and continuing with all activities

² The burden of going forward, also called the burden of production, is “[a] party’s duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict.” Burden of Production, Black’s Law Dictionary, 236 (1th ed. 2014).

sequentially required for the production of any oil or gas well regardless of the chronological occurrence of the activity.

Wyo. Stat. Ann. § 39-15-103(a)(i)(K) (2023). Merit contends that Wyoming law exempts its purchases of electricity used to move production fluids horizontally³ through its gathering system. The relevant statute provides:

(iii) For the purpose of exempting sales of services and tangible personal property consumed in production, the following are exempt:

* * *

(E) Sales of power or fuel to a person *engaged in the transportation business* when the same is consumed directly in generating motive power for actual transportation purposes[.]

Wyo. Stat. Ann. § 39-15-105(a)(iii)(E) (2023) (emphasis added). The Department formerly glossed over the “engaged in the transportation business” requirement without analysis. But last year, this Board questioned whether Merit satisfied that requirement:

We aren’t convinced that Merit is “engaged in the transportation business” even though the electricity at issue is used to move production fluids through the gathering system. Just about any business that deals with tangible objects has to transport those objects at some point: a plumber transports materials and tools to a job site; a bakery transports a cake to a wedding reception; an art gallery transports a sculpture for installation in a client’s building. They all transport things in the course of their businesses, but we don’t believe they’re engaged in “the transportation business.” The statute’s definite article “the” before the described noun “transportation business” refers to a specific business type, not a generic activity. The exemption’s purpose is to exempt fuel and power that transportation businesses use or consume when providing a transportation service. Indeed, the operative statutory subsection is but one of several addressing a series of business sectors or types, i.e. manufacturing, processing, agriculture. But, because the Department has conceded the point, that question is not before us and we cannot decide it. *Solvay Chem. Inc. v. Dep’t of Revenue*, 2018 WY 124, 430 P.3d 295 (Wyo. 2018).

³ For a more complete discussion of why electricity used to pump oil horizontally through a pipeline can be exempt, while electricity used to pump oil vertically up the wellbore to the wellhead isn’t exempt, see *In re Merit Energy Co., LLC*, 2023 WL 11227707, Docket No. 2021-109 (Wyo. State Bd. of Equalization March 16, 2023).

In re Merit Energy Co., LLC, 2023 WL 11227707, *5, fn.3, Docket No. 2021-109, ¶ 15 (Wyo. State Bd. of Equalization March 16, 2023). The Department now contends that the exemption doesn't apply here because Merit isn't engaged in the transportation business. This case, therefore, comes down to the meaning of "engaged in the transportation business."

[¶ 16] In reading a statute, our goal is to determine the legislature's intent. *Matter of Longwell*, 2022 WY 56, ¶ 21, 508 P.3d 727, 733 (Wyo. 2022). Our first step toward that goal is to consider whether the statute is ambiguous. If it is, we will employ the rules of statutory construction to discern its meaning. *Id.* But if the statute isn't ambiguous, we must give effect to the legislature's intent without resort to the rules of statutory construction. *Id.*

[¶ 17] Neither party has staked out a position on whether the statute is ambiguous, but they both rely on the plain statutory language without employing the rules of statutory construction, so we infer that they believe it is unambiguous. We agree. The legislature clearly stated its intention to exempt "[s]ales of power or fuel to a person engaged in the transportation business" Because the statutory language is unambiguous, we must abide by it and are not at liberty to expand or restrict it. *Allied-Signal, Inc. v. Wyo. State Bd. of Equalization*, 813 P.2d 214, 219 Wyo. 1991).

[¶ 18] The phrase "engaged in the transportation business" isn't defined in any applicable statute or rule. Neither are "engaged" or "business." But we've been down this road (or one a lot like it) before:

"Engage" means "to employ or involve oneself; to take part in; to embark on." *Engage*, *Black's Law Dictionary* 646 (10th ed. 2014). "Business" means "a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." *Business*, *Black's Law Dictionary* 239 (10th ed. 2014). Combining those definitions, "engaged in the business of" requires a continuing effort to make a profit. Faced with a federal tax statute that used, but did not define, the phrase "attributable to a trade or business carried on by the taxpayer," the United States Supreme Court said: "We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit." *Comm'r of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35 107 S.Ct. 980, 987 (1987).

In re Appeal of Bd. of Cnty. Comm'rs, 2018 WL 818126, *7, Docket No. 2017-42, ¶ 32 (Wyo. State Bd. of Equalization, Jan. 31, 2018).

[¶ 19] Lacking a more relevant definition of “engaged in a trade of business,” we will again rely on the one provided by the Supreme Court: 1) “the taxpayer must be involved in the activity with continuity and regularity;” and 2) “the taxpayer’s primary purpose for engaging in the activity must be for income or profit.” That definition is also consistent with the Department’s reading, as testified to by Mr. Fanning. (*Supra* ¶ 6). Mr. Watson’s uncontroverted testimony addressed both elements of that definition: he testified that Merit is continuously uses its pipeline to move oil owned by others, and charges the oil owners for that service. Therefore, Merit is engaged in the transportation business.

[¶ 20] The Department argues that Merit isn’t engaged in the transportation business because it’s engaged in the oil business. (Dep’t Opening Br. 6-9). It contends, without citation to authority, that the transportation business must be an entity’s “predominant activity.” *Id.* at 8. The plain statutory language contains no such requirement, nor does any applicable rule. We see no reason why Merit cannot simultaneously be engaged in multiple businesses so long as it engages in each business “with continuity and regularity,” and for the purpose of income or profit.

DECISION

[¶ 21] Merit satisfied its burden of showing that the Department’s decision was error, and the Department did not overcome its burden “to defend its action.” We will reverse the Department’s decision and order it to issue the requested refund.

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ORDER

[¶ 22] The Wyoming Department of Revenue's decision is **REVERSED**. It is **ORDERED** that the Department shall issue a refund to PacifiCorp as requested.

[¶ 23] Pursuant to Wyoming Statutes section 16-3-114 (2021) 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 3 day of October 2024.

STATE BOARD OF EQUALIZATION




David L. Delicath, Vice Chairman



E. Jayne Mockler, Board Member

ATTEST:


Jennifer Fujinami, Executive Assistant

DISSENTING

Martin L. Hardsocg, Chairman

[¶ 1] Disputes commonly arise over how to characterize oil and gas industry activities such as production, gathering, transportation. The classification of these activities and their costs may impact the valuation of mineral production for tax or royalty purposes, or an agency's power to regulate. *See infra* Dissenting Op. at ¶¶ 12-18. The present dispute is no different: Merit insists that its well site operation and gathering activities, beginning at the well, are simultaneously its "transportation business" in order to claim an exemption of fuel and power costs pursuant to Wyoming Statutes section 39-15-105(a)(iii)(E) (2023). The problem with this: Neither Wyoming's tax statutes nor the oil and gas industry itself considers these activities to be "transportation." Well operator Merit seeks an exemption to which it is not entitled under Wyoming sales tax law.

[¶ 2] To bolster its position, Merit witness Matt Watson consistently referred to Merit's production of oil and gas, and the oil and gas' movement from wellhead to the LACT unit as "transportation." Merit generally contends that pipelines on the wellsite and in the field are its "transportation systems." (Tr. at 23-24, 26, 30, 33, 40 46-47, 56-60). Indeed, Mr. Watson suggests that "extraction and the transportation" are "really one and the same." (Tr. at 24). When asked to elaborate, Mr. Watson testified that the transportation system began *at the wellhead*. (Tr. at 57). This characterization, as will be explained, is not consistent with Wyoming's sales tax statutes, industry usage, convention, or the legal frameworks within which the oil and gas industry generally operates. Indeed, if Merit is correct, virtually every oil and gas industry participant handling the oil or gas production may claim to be in "the transportation business." Contrary to the majority's holding, "the transportation business" does not include every "business" that happens to "transport" property.

[¶ 3] Merit is incorrect for two reasons. First, the legislature defines "well site" and "production equipment" for sales tax purposes as:

... an area where **production equipment** is installed to store or prepare oil or gas for transportation off the well site. **Production equipment includes**, but is not limited to, wellheads, valves, tanks, dehydrators, heater-treaters, separators, flow lines, meters, flares, vapor recovery units and emission equipment. Except as provided in this paragraph, production equipment for purposes of defining a well site shall not include compressors, off well site gathering lines and processing facilities;

Wyo. Stat. Ann. § 39-15-101(a)(xviii) (2023) (emphasis added). The Department of Revenue's sales and use tax rules correspondingly define "production" as "all work performed *within a well site* to produce an oil or gas well. Production begins with the first

barrel of oil or the first MCF of gas for market and ends once the well is abandoned” Rules, Wyo. Dep’t of Revenue, Ch. 2 § 2(w) (2024) (emphasis added); *see also* definition of “Pipeline,” *Id.* at § 2(t).

[¶ 4] And so, at least a portion of the expenses that Merit claims are exempt are, *by statutory definition*, production—not transportation. Merit’s claimed exemption, i.e. all of the power/fuel expenses for well site pumps, pipe lines, and equipment *on the well site*, are by definition not exempt as they are not “transportation” costs within Wyoming’s sales tax code. Merit does not explain how statutorily designated well-site production is, at the same time, its transportation expense.

[¶ 5] Second, the oil and gas industry, and most statutory/regulatory frameworks addressing oil and gas industry activities in and outside of Wyoming, treat the distance between well sites in the field and varied points downstream as “gathering.” That is, transportation does not begin at the well sites as Merit asserts. The statute and rules just mentioned, *supra*, Dissenting Op. at ¶ 3, are a prime example of legislative and regulatory bodies, i.e. Department of Revenue, adopting industry usage and typical production/gathering/transportation distinctions as a guidepost for administering their intent. This is true even though gathering includes the movement of oil and gas, among numerous other activities. For that reason as well, Merit’s activities between the wellhead and LACT unit do not make it a part of “the transportation business.” As I will explain, our laws and regulatory framework adopt standard oil and gas industry usage; Merit’s argument that common industry applications do not apply under Wyoming’s sales tax statutes lacks merit.

[¶ 6] Before delving into the oil and gas industry’s “transportation business” component, the exemption’s original language makes clear that the words “the” and “business” are contextually significant. The current exemption is nearly unchanged from its 1977 origin, and that year was the first that Wyoming exempted power/fuel purchases consumed by those engaged in the manufacturing and transportation businesses:

§ 39-6-405

(a) The following sales are exempt from the excise tax imposed by this article:

...

(iii) Interstate transportation of:

(A) Sick, injured or deceased persons by ambulance or hearse;

(B) Employees to or from work when paid or contracted for by the employee or employer;

(C) Raw farm products to processing or manufacturing plants.

(iv) Sales of power or fuel to a person engaged in the business of manufacturing, processing or agriculture when the same is consumed directly in manufacturing, processing or agriculture;

(v) Sales of power or fuel to a person engaged in the transportation business when the same is consumed directly in generating motive power for actual transportation purposes;

...

1977 Session Laws 120-121.

[¶ 7] Note that this original enumeration of exemptions *did not* include the current lead-in language: “For the purpose of exempting sales of services and tangible personal property consumed in production, the following are exempt:” *Compare* to Wyo. Stat. Ann. § 39-15-105(a)(iii) (2023), *supra*, Majority Op. at ¶ 15. Examining each of the nine exemptions predicated on a claimant’s “production,” there is in each an expenditure incurred or sale engaged to achieve some categorical business outcome, such as a manufactured product or service.

[¶ 8] Then consider the legislature’s placement of “the” before each business category. The Wyoming Supreme Court explained “ ‘ [t]he [is a] demonstrative adjective used chiefly before a noun to individualize, specialize, or generalize its meaning, having a force thus distinguished from the indefinite distributive force of *a*, *an*, and from the abstract force of an unqualified noun.’ ” *BP America Prod. Co. v. Madsen*, 2002 WY 135, ¶ 8, 53 P.3d 1088, 1091-92 (Wyo. 2002) (quoting *McClanahan v. Woodward Const. Co.*, 316 P.2d 337, 341 (Wyo. 1957)). The Court added “[o]ther courts agree that, in construing statutes, the definite article ‘the’ is a word of limitation as opposed to the indefinite or generalized force of ‘a’ or ‘an.’ ” *Id.* (citations omitted).

[¶ 9] The placement of “the,” therefore, requires that Merit do more than merely transport. Transportation must itself be *the* business, not merely an activity engaged to further a larger or related objective. Merit’s operation of gathering system pipelines does not make it a transportation business—it remains a producer and gatherer, the primary function of which is to operate wells, gather or combine individual sources of production

into larger volumes, meter, separate out water and other components, dehydrate, and prepare extracted production for storage, processing, and/or transportation downstream.⁴

[¶ 10] Courts have interpreted “the transportation business” phrase and distinguish between businesses that exist to transport, versus those that transport as part of a different business. The court in *Ill. Farmers Ins. Co. v. League of Minn. Cities Ins. Trust* 617 N.W.2d 428, 430 (Minn. Ct. App. 2000) looked at different criteria, including the nature of the business’ income stream, and whether transportation was the primary objective, rather than an included activity for a different, more diverse purpose. *See also Ahee v. City of Novi*, 2019 WL 1270646 ** 3-4 (Mich. Ct. of App. 2019) (unpublished).⁵

[¶ 11] Particular to Merit’s oil production and gathering activities, a wide array of industry usage examples confirm the legislature’s intended application of laws, unless the legislature opts for a generic, less nuanced meaning. “When construing technical terms contained within statute, we look to the meaning ascribed to those terms in the applicable field.” *Williams Prod. RMT Co. v. State Dep’t of Revenue*, 2005 WY 28, ¶ 19, 107 P.3d 179, 185 (Wyo. 2005); *Amoco Prod. Co. v. State of Wyo.*, 751 P.2d 379, 383 (Wyo. 1988) (between the usual meaning of a word, and a technical meaning, the technical meaning is preferred, citing Wyo. Stat. Ann. § 8-1-103 (Cum.Supp. 1987); *Chesapeake Operating, LLC v. Dep’t of Revenue*, 2023 WY 107, ¶¶ 42-43, 537 P.3d 1134, 1146 (Wyo. 2023) (“technical words and phrases having a peculiar and appropriate meaning in law *shall be understood according to their technical import.*”) (citation omitted)(emphasis in original).

[¶ 12] Oil and gas production is not interchangeable nor synonymous with oil or gas transportation, and both legislatures and courts have honored the technical difference. For example, mineral royalty payment obligations distinguish between production, gathering, and transportation expenses. *See* Randy Sutton, J.D., Annotation, *Sufficiency of “At the*

⁴ To fully appreciate the context of “the transportation business” within the oil and gas industry, it helps to understand the Federal Energy Regulatory Commission’s Order 636 issued in 1992. Without reviewing the entire complex evolution of natural gas and oil exploration, marketing, production, and transportation under a number of federal laws throughout the 20th century, Order 636 required certain transportation pipelines to “unbundle” from the production and sales component of the industry, to ensure producers and suppliers had access to fair transportation rates with competitors that owned pipelines. Judith M Matlock, *Federal Regulation of the Natural Gas Industry*, 34B Rocky Mountain Mineral Law Special Institute, Ch. 3, Section entitled “FERC Order 636 Description of the Current Structure” (Nov. 1993). The FERC summarized the intended change: “The changes are intended to ensure that pipelines provide transportation service that is equal in quality for all gas supplies, whether the customer purchases the gas from the pipeline or from another supplier.” *Id.*

⁵ The question of whether a business is a “transportation business” is an issue encountered when determining whether such businesses are subject to an agency’s regulatory jurisdiction. Gavin L. Phillips, Annotation, *Incidental provision of transportation services, by party not primarily in that business, as common carriage subject to state regulatory control*, 87 A.L.R.4th 638 (1991). The question may become whether businesses are classified as “common carriers.” *Id.* Here again, the answer generally depends on the business’ fundamental service objective when compared to the activities in question. *Id.*

Well” Language in Oil and Gas Leases to Allocate Costs, 99 A.L.R. 415 (2002 & Cum. Supp. 2024) (Cases resolving whether lessees may deduct post production costs when calculating royalty payments to lessors); Joyce Colson, *Upstream, Midstream, Downstream—The valuation of royalties on federal oil and gas leases*, 70 U. Colo. L. Rev. 563 (1999) (history of Mineral Management Service’s “marketable condition” determinations and whether lessees may deduct gathering, transportation and treatment costs when calculating federal oil and gas royalty obligations); 3A Summers Oil and Gas §§ 33:3-33:4 (3d ed., Nov. 2023 Update) (citing cases addressing the deductibility of transportation, gathering and other costs when calculating royalty obligations).

[¶ 13] Interpreting Wyoming’s Royalty Payment Act, the Wyoming Supreme Court reviewed a certified question from Wyoming’s federal district court: “What is meant by the term ‘gathering’ as that term is employed in Wyo. Stat. Ann. § 30-5-304(a)(vi) in defining ‘costs of production’ ”? *Cabot Oil & Gas Corp. v. Followill*, 2004 WY 80, ¶ 2, 93 P.3d 238, 239 (Wyo. 2004). The royalty owners argued that gathering included collection of oil and transportation to a storage tank (for oil) or market pipeline (in the case of gas). Gathering/production, they argued, included all activities before (upstream of) processing or eventual transportation to the user. *Id.* at ¶ 8, 93 P.3d at 241. Cabot, on the other hand, pushed for an expanded definition of “transportation,” claiming that it included all upstream activities much closer to the wells, thus rendering those deductible transportation costs. *Id.* at ¶ 9, 93 P.3d at 241. The Court agreed with the royalty owners and determined that gathering of gas included all costs to move it to where it could be processed or transported. *Id.* at ¶¶ 3, 12, 93 P.3d at 239, 242. This is another prime example of the Wyoming legislature’s reliance on oil and gas industry terms and usage when terms are not specifically defined.

[¶ 14] A similar differentiation between oil and gas production, gathering, and transportation is drawn in Wyoming’s mineral taxation law. The “production” of oil is complete upon “extracting from the well, gathering, heating and treating, separating, injecting for enhanced recovery, and any other activity which occurs before the outlet of the initial storage facility or lease automatic custody transfer meter (LACT) unit[.]” Wyo. Stat. Ann. § 39-14-203(b)(iii) (2023). “Gathering,” which is a production activity, is the “transportation of crude oil, lease condensate or natural gas from multiple wells by separate and individual pipelines to a central point of accumulation, dehydration, compression, separation, heating and treating or storage[.]” Wyo. Stat. Ann. § 39-14-201(a)(ix) (2023) (emphasis added). The production process may occur over a span of miles as oil and gas are gathered from individual wells in the field, compressed and thereby moved to a central point for processing, storage, or transportation downstream.

[¶ 15] Note that the word “transportation” is varyingly used in describing activities between the wellhead and ultimate sale of oil or gas to the end user. *See e.g.*, the definition

of “gathering,” *supra*, Dissenting Op. at ¶ 14. This is because oil and gas moves from the wellhead through various pipelines, facilities, and processes during gathering, separation, dehydration, treatment, and transportation.⁶ Neither gas nor oil, however, are “transported” for mineral tax purposes until they are produced and reach specified points downstream, typically a storage facility, market pipeline or like transportation loadout system.

[¶ 16] The federal government as well has adopted the oil and gas industry’s activity designations. For example, the Internal Revenue Service issued auditing guidelines for the oil and gas industry containing the following explanation:

F.1 Business Segments

(1) At a high level, the oil and gas industry is often viewed as having only two primary segments – “Upstream” and “Downstream”. The upstream segment explores and produces oil and gas that is used by the downstream segment. The downstream segment transports, processes, and refines oil and gas into desirable products and by-products, and then markets them to industrial, wholesale and retail customers. However, it is more appropriate to describe the general activities of these business segments as follows:

* **Upstream:** companies in this segment explore for crude oil and natural gas; develop oil and gas fields; and produce oil and gas via wells. The **gathering** of those raw products by the producer in the general vicinity of its wells is sometimes considered one of its upstream activities.

* **Downstream:** companies in this segment perform the functions that are not normally considered part of upstream activities. These functions include gathering, processing, transportation, refining, marketing, distribution, and retailing.

...

(2) Generally accepted sectors of the downstream segment are:

* **Midstream and Transportation:** Companies in this sector perform functions such as gathering crude oil and natural gas from well and field sites; treating natural gas to remove contaminants and to recover natural gas liquids

⁶ The movement of natural gas through numerous gathering system processes is detailed in *Williams Prod. RMT Co.*, 2005 WY 28, ¶¶ 9-14, 107 P.3d 179, 183-84 & App. A, ¶¶ 15-16 (Wyo. 2005) (describing movement of gas through facilities and gathering fee and transportation fee allocations for valuation purposes). While coal bed methane gas is not identical to oil, the distinctions between production, gathering and transportation transitions are very similar. See e.g. *Chesapeake Operating, LLC v. Dep’t of Revenue*, 2023 WY 107, ¶¶ 5-6, 38-41, 537 P.3d 1134, 1137, 1145-46 (Wyo. 2023) (describing production and gathering of oil).

(NGLs); and operating natural gas plants to separate natural gas into “pipeline quality gas” (essentially methane) and other gas and liquid components. ... Important transportation functions include moving crude oil from gathering sites to oil refineries. Pipelines are normally used to move significant quantities of crude oil, however, railcars are occasionally used to move significant quantities of crude oil while a pipeline is under construction.

Oil & Gas Audit Technique Guide, Internal Revenue Service, 2023 WL 8283521, § F (Feb. 2023). This detailed procedural guidance consistently distinguishes between gathering and transportation. *Id.* Unlike Merit’s rendition of “transportation” activities, they do not begin at the wellhead.

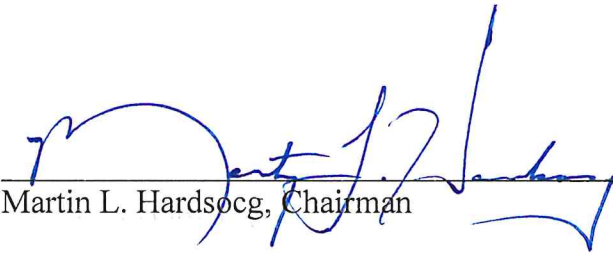
[¶ 17] Another example, the Federal Energy Regulatory Commission (FERC), distinguishes between gathering systems and transmission/transportation systems because it lacks regulatory jurisdiction over gathering systems under the Natural Gas Act. It applies, and has applied, various criteria when determining whether gathering facilities fall within its purview. Adam Rich, Nat. Gas Transp. Info. Serv., Tab 700, ¶ 705 (Aug. 2024). The determination is significant because classifying gathering as transportation allows regulated pipelines to increase transportation rates to recoup expenses. *Id.* at “Classification of Facilities.”

[¶ 18] Finally, the difference between transportation and gathering arose in a case between oil and gas industry members and the Pipeline and Hazardous Materials Safety Administration of the Department of Transportation. *GPA Midstream Assoc. v. U.S. Dep’t of Transp.*, 67 F.4th 1188 (D.C. Cir. 2023). Challengers asserted that they were not required to install remote-controlled or automatic shut-off valves in gathering lines, as the agency had made no findings in support of its intended regulation. *Id.* at 1191. The court agreed, describing the gathering system’s function: “In order to collect raw gas or crude oil from one or more wells, oil and gas companies rely upon so-called gathering pipelines, which pass mostly through rural areas. 49 C.F.R. §§ 192.3, 195.2. Oil and gas companies then rely upon a large network of transmission or ‘main’ lines to transport gas, crude oil, and petroleum products long distances further down the supply chain” *Id.*

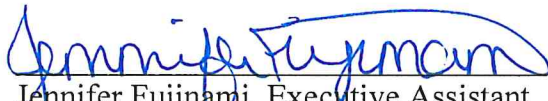
[¶ 19] In sum, the Board’s majority errs in concluding that Merit’s well site equipment is part of its “transportation business,” when Wyoming’s sales tax statutes specify that equipment at the well site is production equipment. *See* Wyo. Stat. Ann. § 39-15-101(a)(xviii) (2023). The sales tax statutes do not allow that “well site” or “production” equipment are “transportation” for other sales tax purposes, and Merit’s argument that their functions are interchangeable finds no support in the sales tax statutes. Well site power or fuel expenses are not, therefore, exempt as transportation business expenditures.

[¶ 20] Second, the majority applies the statutory phrase “engaged in the transportation business” as if each word’s meaning operates independent of the others. It asks whether Merit is a commercial business, which it clearly is. *Supra*, Majority Op. at ¶ 19. It then asks whether Merit engages in transportation, but considers that term out of context, and contrary to the oil and gas industry’s historic usage of that term. *Id.* The majority discards the important limiting definite article “the,” which dictates that it is not enough that Merit move oil or gas from point A to point B—transportation must be Merit’s business. It is not, and I would hold that Merit is not “a person engaged in *the* transportation business” under Wyoming Statutes section 39-15-105(a)(iii)(E) (2023) because its primary function is to produce and gather, not transport, oil and gas between the well and LACT unit. In no other area of Wyoming law, nor in the oil and gas industry generally, is Merit “engaged in the transportation business.”

DATED this 3 day of October 2024.


Martin L. Hardsocg, Chairman

ATTEST:


Jennifer Fujinami, Executive Assistant

CERTIFICATE OF SERVICE

I certify that on the 3 day of October 2024, 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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