

**Editor's note: Reconsideration denied by Order dated Oct. 4, 1990**

CONOCO, INC.

IBLA 90-152

Decided June 27, 1990

Appeal from a decision of the Deputy Associate Director for Budget and Appeals, Minerals Management Service, dismissing a notice of appeal as untimely. MMS-89-0323-OCS.

Reversed and remanded.

1. Appeals: Generally--Regulations: Interpretation--Rules of Practice: Appeals: Notice of Appeal--Rules of Practice: Timely Filing

While during the pendency of an appeal from a decision of the Minerals Management Service dismissing an appeal as untimely, the regulations are amended to provide that a delay in filing a notice of appeal to the Director, Minerals Management Service, will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing by 30 CFR 290.3(a)(1), the Board may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases.

APPEARANCES: Ernest J. Altgelt III, Esq., Houston, Texas, for appellant; Howard W. Chalker, Esq., Peter Schaumberg, Esq., and Geoffrey Heath, Esq., Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Conoco, Inc. (Conoco), has appealed from a decision of the Deputy Associate Director for Budget and Appeals, Minerals Management Service (MMS), dated November 30, 1989, dismissing as untimely Conoco's appeal from an order of the Dallas Area Compliance Office, MMS. This order, dated September 29, 1989, required Conoco to recompute income and expenses previously reported to MMS on biennial reports for "[g]as plants in which Conoco held an ownership interest from October 1977 through February 1988, and at which natural gas was processed from Federal offshore leases owned by Conoco."

The Deputy Associate Director dismissed Conoco's appeal because Conoco's notice of appeal was not filed within 30 days of receipt of MMS' order as required by 30 CFR 290.3(a). The Deputy Associate Director found

that Conoco received MMS' hand-delivered order on October 2, 1989, but did not file 1/ its notice of appeal until November 2, 1989, more than 30 days after receipt.

The regulation relied upon by MMS, 30 CFR 290.3(a), states in part: "An appeal to the Director, Minerals Management Service, may be taken by filing a notice of appeal in the office of the official issuing the order or decision within 30 days from service of the order or decision." (Emphasis added.) To satisfy this standard, Conoco's notice of appeal should have been received by the proper MMS official on or before Wednesday, November 1, 1989. The regulation has been repeatedly construed by the Board to permit no extension of time for filing a notice of appeal. Pennzoil Oil & Gas, Inc., 61 IBLA 308 (1982), and cases cited therein. Failure to file a timely notice of appeal, the Board has held, requires that the appeal be dismissed. Mesa Petroleum Co., 44 IBLA 165 (1979).

[1] During the pendency of the instant appeal (IBLA 90-152), 30 CFR Part 290 was amended to permit MMS to waive a delay in filing a notice of appeal. 54 FR 52796 (Dec. 22, 1989). Specifically, regulation 30 CFR 290.5(b) was revised to state that a "delay in filing will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing." (Emphasis added.) The effective date of this rule change was January 22, 1990.

As set forth in footnote 1, Conoco transmitted its notice of appeal on November 1, 1989, both by mail and by Airborne Express. Its receipt by MMS on November 2, 1989, was clearly within the 10-day grace period authorized by the present 30 CFR 290.5(b). The issue posed by this set of facts is whether Conoco can reap the benefits of this newly amended regulation, even though the amendment was not in effect during the relevant times here.

Numerous cases in the Department have held that where a regulation is amended to bestow a benefit upon an affected party the Department may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases. Jicarilla Archaeological Services, 110 IBLA 57, 60 (1989); Bruce Anderson, 80 IBLA 286, 296, 91 I.D. 203, 208 (1984); James E. Strong, 45 IBLA 386, 388 (1980); Duncan Miller, 28 IBLA 292 (1976); Henry Offe, 64 I.D. 52 (1957).

In the instant case, application of newly amended 30 CFR 290.5(b) will cause the Director, MMS, to examine the merits of MMS' September 29, 1989,

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1/ Department case law makes clear that a document is not filed with MMS until it is received by MMS. See, e.g., Robert B. Ferguson, 23 IBLA 29 (1975). The record contains the affidavit of a Conoco employee who certifies that on Nov. 1, 1989, she mailed Conoco's notice of appeal from Houston, Texas, to the appropriate MMS official in Dallas. The record also contains a receipt issued by Airborne Express bearing the signature of Conoco's counsel and the date Nov. 1, 1989.

order and to address Conoco's arguments. Should Conoco thereafter pursue an appeal to this Board or seek judicial review, the record will contain the Director's expert review of this litigation. Moreover, it is possible that the Director's review might prevent MMS from reaching inconsistent results, as it appears that Conoco may have preserved some of the same legal issues here in another appeal before the Director (MMS-86-0029-OCS). 2/

On the basis of the record before us, we find it clear that application of newly amended 30 CFR 290.5(b) to the present facts will not adversely affect intervening rights or prejudice the interests of the United States. 3/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Deputy Associate Director is reversed and the case is remanded for action consistent with this opinion.

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Gail M. Frazier  
Administrative Judge

I concur:

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Bruce R. Harris  
Administrative Judge

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2/ This docket number also appears in the record as MMS-87-0029-OCS.

3/ The dissent proceeds on the basis that this Board is bound by its prior decisions regarding the timeliness of filing an appeal with MMS to affirm MMS's dismissal of this appeal. The dissent laments that by this opinion the Board would "be overruling an unbroken line of Board decisions construing a rule "10 years in duration." We are not overruling any case. All of the cases cited by the dissent, as being part of the "unbroken line of authority," were decided on the basis of 30 CFR 290.3(a) before it was amended. It has now been amended; thus, the law has changed. The only question is whether Conoco, whose appeal is pending, should have the benefit of the change. As cited above, there is ample authority for providing an affected party with the benefits of a regulatory change, if certain conditions exist. In this case, they do.

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

I do not doubt that, for cases arising after January 22, 1990, the amendment of 30 CFR Part 290 published at 54 FR 52796 (Dec. 22, 1989) should be applied by this Board. This case, however, arises on November 2, 1989. Clearly, the amended regulation was not in effect on that date.

Yet the majority opinion would nonetheless apply the rule, which permits a 10-day "grace" period for filing a notice of appeal, provided that a notice be "transmitted \* \* \* before the end of the time required for filing," although the regulation does not apply to cases arising before January 22, 1990. <sup>1/</sup>

As the rulemaker observes in the "supplementary information" section published with the amendment of 30 CFR Part 290,

The MMS has been strict in its evaluation of timeliness, a policy that has been consistently upheld by the Interior Board of Land Appeals (IBLA). If more than 30 days has elapsed between the date on the return receipt card and the date of receipt by MMS stamped on the notice of appeal, then the appeal was dismissed as untimely.

This assessment is supported by the record of appeals decided by this Board concerning this type of case. We have, by decisionmaking, developed a rigid rule from which, until now, there have been no exceptions: the rule has been as "strict," as the rulemaker would have it. Pennzoil Oil & Gas, Inc., 61 IBLA 308 (1982); Texaco, Inc., 51 IBLA 243 (1980); Union Oil Co. of California, 48 IBLA 145 (1980); Mesa Petroleum Co., 44 IBLA 165 (1979). Further, as counsel for the Minerals Management Service (MMS) point out, these reported cases have been most recently applied in unpublished orders, the principle involved in them having become established beyond dispute.

It was not always so, however. In Mesa Petroleum Co., the Board split three ways on the subject. The lead opinion prevailed as to result, Judge Lewis laying out the rule that was later to be followed in the cases cited above. She took the "strict" approach advocated by MMS:

Unlike the procedures governing appeals to this Board (43 CFR 4.401(a)), the [predecessor to MMS] appeal regulations do not allow a grace period of 10 days beyond the mandatory 30-day time period for filing a notice of appeal. 30 CFR 290.5 authorizes the Director to extend the time for filing any document in connection with an appeal except the notice of appeal. There is

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<sup>1/</sup> For the proposition that this Board lacks power to alter the effective date of Departmental actions published in the Federal Register, see Vincent Barnard, 66 IBLA 100 (1982), where we observed that where the terms of such a notice provided "it was to operate prospectively, not retroactively" we would be bound by the effective date established by the notice. Id. at 104.

no latitude allowed for the filing of this document. The notice of appeal must be received within the 30-day period.

Id. at 166. Judge Goss reluctantly concurred, wistfully suggesting that perhaps "in view of the energy crisis, the Department may wish to reevaluate appellant's drilling proposal on the merits." Id. at 168. But the third panelist, Judge Fishman, dissented, arguing that the reading given to the regulation was "a non sequitur" because it was needlessly illiberal and was grounded in an unnecessarily strict reading of the regulation. Id. at 169.

Nonetheless, the rule stated by the majority opinion in Mesa Petroleum Co. was followed the next year in Union Oil Co. of California, supra, an opinion by Judge Fishman, the dissenter in Mesa Petroleum Co. In a footnote to the Union Oil Co. of California decision, Judge Fishman explained that he was "sympathetic to the appellant's legal posture for the reasons expressed in his dissent in Mesa Petroleum," but because Mesa had established the rule for this class of case "he feels constrained to follow the precedent set by the majority in that case." Union Oil Co. of California, 48 IBLA at 146. We have done so ever since.

To support the refusal to follow the consistent interpretation given to 30 CFR Part 390 since 1979, the majority opinion relies on five decisions, Jicarilla Archaeological Services, 110 IBLA 57 (1989); Bruce Anderson, 80 IBLA 286, 91 I.D. 203 (1984); James E. Strong, 45 IBLA 386 (1980); Duncan Miller, 28 IBLA 292 (1976); and Henry Offe, 64 I.D. 52 (1957). This string of citations is obviously intended to bolster the decision by the majority to apply this 1990 regulation before its time. Such legal anachronism is not so easily explained, however.

In Jicarilla Archaeological Services, supra, the Board found that the record was insufficient to support a decision to deny issuance of a new cultural resource use permit and also refused to extend an existing permit. This finding required further action by the agency. While the case was pending before this Board, new procedural regulations governing such permits were promulgated. The Board found that the further review made necessary by the order remanding the case to develop an adequate record should be conducted pursuant to the newly promulgated regulations. It is not clear from this decision whether any substantive rights were affected by the decision to apply the new procedural rules to the proceedings on remand. Nor is it clear that the procedural rules cited by this opinion ultimately had any application to the subject matter of the appeal. See, e.g., James C. Mackey, 114 IBLA 308 (1990), holding that the procedural rules at 43 CFR Part 7, Subpart B, do not apply to certain issues arising in the course of a permittee's activity on Federal land. Id. at 314 n.5.

Bruce Anderson, supra, a royalty case, considered whether a substantive rule promulgated after the expiration of a Federal lease might be used to revive the lease. The Board found the new rule not to be applicable, even if it had been in effect earlier, and did not apply it. As in Jicarilla, therefore, this case does not directly support the conclusion urged by the majority.

The decision in James E. Strong, *supra*, concerned a mining claim recordation rejected under circumstances indicating that a hardship would result from application of rules in effect in November 1978, when Strong had offered the Bureau of Land Management an incomplete location notice for recordation. Under rules promulgated 4 months later, the notice was adequate. The Board explained how it was able to apply the March 1979 rule to the attempted filing by Strong:

In the absence of countervailing public policy reasons or intervening rights, it may be appropriate to apply the amended version of a regulation to a pending matter where it benefits the affected party to do so. See B. B. Wadleigh, 44 IBLA 11, 15 (1979); Wilfred Plomis, 34 IBLA 222, 228, (1978); Henry Offe, 64 I.D. 52, 55-6 (1957). Such is the case here. Appellant lives in a remote section of Alaska, some 23 miles from the nearest road. Thus, it was very difficult for him to attend personally to the progress of his recordation through the local system, and he could not return to the State Office later owing to winter conditions. He was unable to return to Anchorage until February 1979, 6 weeks after the expiration of 90 days. Had BLM been able to apply the new rule in November 1978, he would have been spared the trouble of this effort. The matter was pending in March 1979, as BLM took no action to reject his notice until after the adoption of the new rule. There is no showing of any conflicting interest. Therefore, we see no reason why appellant should not now be regarded as having complied with the recordation requirement when he tendered a copy of his notice in November 1978, subject to any intervening rights of record. McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). [Emphasis supplied.]

James E. Strong, 45 IBLA at 388. There is, in the emphasized language quoted above, a suggestion that the 1979 rule was actually properly applied to an action pending before the Department in 1979. This approach pays lip-service to the general rule that current regulations apply to current actions, a subject discussed later in this opinion.

Admittedly, this Board has, from time to time, taken the position that it could give early effect to a regulation "in the absence of intervening rights of others or prejudice to the interests of the United States," the rubric used in Duncan Miller. Ultimately, the authority for this position traces to Henry Offe. It is to that case that we must look to understand the genesis of the power assumed by the lead opinion that enables us to disregard Board precedent and current regulations so as to apply a regulation becoming effective in January 1990 to a case arising in November 1989 over the objection of the proponent of the rule.

Henry Offe was a small tract lessee who had applied, for hardship reasons, for an extension of his lease of a small tract in California issued pursuant to the Act of June 1, 1938, 43 U.S.C. § 682(a) (1952). Under regulations in effect on the date his lease was issued, his lease could not

be renewed because he had waited until 4 days before the lease was to expire before seeking renewal. Under regulations in effect on the date the lease expired, however, the lease would have been renewable. The compassionate reasons Offe gave to explain his inability to develop his tract so as to be entitled to purchase the land according to the terms of his lease were considered to be compelling by the decisionmaker. Sickness and poverty had prevented him from completing construction of the house which was required to complete the terms of his lease. The question presented, as phrased by Assistant Secretary Chilson, was whether, if "a change in regulations would relieve a lessee of obligations or extend him a benefit and would not be detrimental to the interests of the United States, such a benefit might well be extended to a lessee even though his lease did not incorporate future regulations." Henry Offe, 64 I.D. at 55. Assistant Secretary Chilson concluded that the regulation in effect at the time the Offe lease expired could be applied. He explained:

The new regulation permits a renewal application to be filed at any time prior to expiration of the lease. Thus, if the new regulation is extended to the appellant's lease, it confers a benefit upon him. As no one else has any rights which would be impaired by giving the appellant the benefits of the new regulation and as it does not appear that any interests of the United States would be adversely affected by such action, I conclude that the appellant was entitled to apply for a renewal in accordance with the new regulation.

Id. at 55-56.

The focus of concern by the Assistant Secretary in Henry Offe was not the propriety of giving retroactive effect to a newly promulgated rule, but was directed instead to giving due regard to the valid existing rights of Offe under the 1938 Act. As was later the case in Strong, the question was stated in terms of benefits to the claimant and detriment to the United States for this reason. These cases, Henry Offe and James E. Strong, suggest that, in certain hardship cases, for compassionate reasons, supported by a desire to protect valid existing rights obtained by partial performance of statutory requirements needed to obtain a benefit from the Government, the Board will enlarge the time for perfecting a right to certain claims. These cases should not be considered a license to give retroactive application to all rules in all cases.

The correct rule, uniformly applied by the Department in deciding when a rule applies, was stated in Union Pacific Ry. Co. 38 L.D. 262 (1909), when First Assistant Secretary Pierce confronted a situation where a choice of three possible regulations was offered the decisionmaker. The Union Pacific Railroad had applied for a refund of fees payable for applications for land, some of which had been canceled. Over time, the Department had adopted different rules respecting payment of fees by railroads for land selections made by the railroads, beginning in 1867. Another rule, less favorable to the railroads was adopted in 1883, and a third rule, most

stringent of all, was adopted in 1905. In deciding which rule should be applied, First Assistant Secretary Pierce observed:

It is true the former rules were more liberal to the railroad companies than the rule now obtaining, and the first rule was more liberal than the one which succeeded it. It will be observed, however, that these rules were issued by the land department and were acceded to by the companies. They constituted the interpretation of the statute by the officers of the Department in control of the matter at that time, and under the circumstances it is not believed that in adjusting an application for repayment of fees paid under former rulings resort should be had to a later and different rule to ascertain the fees which should have been paid.

Id. at 264. Concluding that the current rule should be applied to the final settlement of accounts, it was decided that the "amount of fees required should be determined by the rule in force at the time the selections were made." Id. at 265.

Applying the general rule stated in Union Pacific Ry. Co. to this case would not lead us to apply the 1990 regulation to the 1989 appeal. On the contrary, it would require that we apply the regulation in effect on the day the notice of appeal was received, November 2, 1989. Since 1979 we have applied this regulation strictly, and have limited appellate review to parties filing notices of appeal within the 30-day limit established by the regulation. Most recently, in Arco Oil & Gas Co., IBLA 89-278 (Apr. 13, 1990), we found that:

The regulation governing appeals to the Director, MMS, when the 1987 decision Arco sought to appeal was issued, 30 CFR 290.3(a) (1987), provided that "appeal to the Director may be taken by filing a notice of appeal in the office of the official issuing the order or decision within 30 days from service of the order or decision." No exception to the time fixed for filing of notice of appeal was allowed under the 1987 regulation. 30 CFR 290.5 (1987). Strict compliance with the regulation was required to obtain appellate review. Pennzoil Oil & Gas, Inc., 61 IBLA 308 (1982); Texaco, Inc., 51 IBLA 243 (1980); Union Oil Company of California, 48 IBLA 145 (1980); Mesa Petroleum Co., 44 IBLA 165 (1979). Because notice of appeal was not filed as provided by 30 CFR 290.3 (1987), Arco's appeal was properly dismissed.

This statement should govern the disposition of this appeal as well. As counsel for MMS points out in the answer filed by MMS in this appeal:

The regulations in effect at the time relevant to this dispute did not contain a ten day grace period. Thus, Conoco's appeal which was filed more than 30 days after it received MMS's order was not timely filed. If this Board were to hold otherwise it

would be in effect declaring invalid a duly promulgated rule of the Department of the Interior. It does not have such authority.

(Answer at 3). This is correct as far as it goes. We would also, as pointed out by this opinion, be overruling an unbroken line of Board decisions construing a rule 10 years in duration. The majority wish to apply the 1990 rule to the 1989 action simply by saying that the rule "has now been amended; thus, the law has changed." This simply begs the question: When is "now?" Is it November 1989? The rulemaker says not. If the law has been changed in the past, how did that change occur? If by saying that the law "has now been changed" the majority are simply referring to the time this opinion issues in 1990, the observation made is correct, but without meaning. If however, they mean that the rule was changed in November 1989 in time to apply to this appeal, they must explain the vehicle by which this feat of time travel was accomplished. 2/

To apply a rule prior to the announced effective date of the rule creates the very uncertainty which rules are intended to dispel. If we can apply a rule 3 months early, as we propose to do here, what limit is placed on the application? Can the rule be applied 6 months early? Can any disappointed appellant who was rejected under our former practice with a citation to the Mesa Petroleum Co. line of cases, petition for reconsideration of the decision which rejected his appeal? How far back can this retroactive regulation go? And, if the rule is to be applied early, how does this apply to MMS, to whom falls the primary responsibility for enforcement of the rule? How far back must MMS search its records to give application to this rule, the early application of which it now opposes before us? There are no satisfactory answers to these questions. We should adhere to the rule announced in Union Pacific Ry. Co., that current regulations apply to current actions. This appeal should be dismissed.

Accordingly, I dissent.

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Franklin D. Arness  
Administrative Judge

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2/ One means by which such a result can be achieved is described in AMCA Coal Leasing, Inc., 112 IBLA 103 (1989), aff'd, AMCA Coal Leasing, Inc., (On Reconsideration), 114 IBLA 246 (1990), which held that a lease provision requiring that future regulations were to be incorporated into the lease permitted application of a 1982 rule to actions affecting the lease which occurred in 1981.