

UNION OIL COMPANY OF CALIFORNIA

IBLA 89-489

Decided September 5, 1990

Appeal from a decision of the Director, Minerals Management Service, affirming the denial of requests for refund of rentals paid for eight Outer Continental Shelf oil and gas leases located in the Navarin Basin, Alaska. MMS-88-0216-OCS and MMS-88-0217-OCS.

Vacated and remanded.

1. Oil and Gas Leases: Rentals--Oil and Gas Leases: Suspensions--Outer Continental Shelf Lands Act: Oil and Gas Leases

Where, as a result of a court ordered preliminary injunction and in accordance with 30 CFR 218.154(a), MMS issues an order suspending operations on an Outer Continental Shelf oil and gas lease and directs that no payment of rental will be required during the period of suspension, and the lease anniversary date falls within the period of such suspension, the subsequent termination of the suspension by MMS triggers the requirement of 30 CFR 218.154(c) that MMS compute the prorated rental due and notify the lessee thereof. In computing that prorated rental, MMS must credit advance rentals paid for the period of time operations were suspended against future rentals.

APPEARANCES: Anna L. Lannin, Attorney-in-Fact, Unocal Corporation, Los Angeles, California, for appellant; L. Poe Leggette, Esq., and Christina K. Navarro, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Union Oil Company of California (Union) has appealed from a February 3, 1989, decision of the Director, Minerals Management Service (MMS), affirming the denial by the Chief, Houston Section, Lessee Contact Branch, MMS, of Union's requests for refund of rentals paid for eight Outer Continental Shelf (OCS) oil and gas leases in the Navarin Basin, Alaska. The Director concluded that, since Union's requests were filed approximately 2 years and 11 months after the rentals were paid, refund was barred by the 2-year limit set forth in section 10(a) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1339(a) (1982).

The facts in the case are undisputed. All eight leases were issued with effective dates of June 1, 1984. On or before May 31, 1985, annual advance rental for all eight leases was paid. On May 1, 1986, the Regional Director, Alaska OCS Region, MMS, issued an order suspending operations on the eight leases, among others, retroactive to January 8, 1986, explaining that:

Pursuant to the mandate issued by the United States Ninth Circuit Court of Appeals on October 25, 1985, (The People of the Village of Gambell and Nunam Kitlutsisti v. Donald P. Hodel, Civ. No. A85-201 (D. Alaska, May 23, 1985)(order denying preliminary injunction), reversed and remanded, 774 F.2d 1414 (9th Cir. 1985)) the U.S. District Court for the District of Alaska on January 8, 1986, issued a preliminary injunction. This injunction enjoins the Department of the Interior from directly or indirectly permitting or authorizing any exploratory activities or any drilling on any of the tracts covered by Outer Continental Shelf (OCS) Lease Sales 57 [Norton Basin] and 83 [Navarin Basin].

He also stated therein that "no payment of rental shall be required for or during the period of suspension."

On March 24, 1987, the United States Supreme Court reversed the decision of the United States Court of Appeals for the Ninth Circuit. Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987). As a result, the Regional Director issued an order, dated May 21, 1987, terminating the suspension of operations effective June 1, 1987. That order informed Union that "rental payments were not required for the period between January 8, 1986, and May 31, 1987. However, rental remittances due and payable for all current leases will be computed and notice thereof given the lessee \* \* \*."

On June 22, 1987, MMS issued bills for rentals due, making no adjustment for the amounts which had been paid in advance for the period January 8 through May 31, 1986. On April 4, 1988, Union filed two requests for refunds which together covered all eight leases. <sup>1/</sup>

On appeal, Union argues that under the OCS refund provision, the 2-year limit does not begin to run until the payment made by the lessee becomes excessive. Union claims that the payment of rentals did not become excessive in this case until May 1, 1986, the date the Regional Director issued the order retroactively suspending operations in the Navarin Basin. Union attempts to distinguish the Board's decision in Shell Offshore Inc., 96 IBLA 149, 96 I.D. 69 (1987), on the basis that in that case the royalty payments made were always in excess, while in this case

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<sup>1/</sup> In one refund request, Union sought refund or recoupment of \$40,712.10 for six leases (Y-0578, Y-0586, Y-0587, Y-0596, Y-0654, and Y-0667). In the other request, it claimed \$13,570.70 for leases Y-0637 and Y-0646.

rental payments were not excessive until the issuance of the suspension order.

MMS responds that the statutory provision is clear and that the authority to issue refunds is limited to the situation where the request for refund is filed within 2 years of the tender of the payment.

In Shell Offshore Inc., *supra*, the Board addressed the question of when requests for refunds of royalty payments had to be filed for payments made in accordance with Federal Energy Regulatory Commission (FERC) Order Nos. 93 and 93A, which established and clarified the "dry rule" for measuring the Btu content of natural gas for the purpose of determining its first sale ceiling price. The parties requesting refunds argued that they did not know that payments were excessive until the Supreme Court denied certiorari of the decision of the United States Court of Appeals for the District of Columbia in Interstate Natural Gas Association v. FERC, 716 F.2d 1 (1983), cert. denied, 104 S. Ct. 1616 (1984), which had invalidated FERC's implementation of the "dry rule." The Board rejected that argument, holding that "[p]ayments made by producers under the dry rule were always in excess of the lawful amount, the circuit court decision merely confirmed this fact." Shell Offshore Inc., *supra* at 166, 96 I.D. at 79. The Board concluded that under the refund provision of OCSLA, refund requests had to be filed within 2 years of the date of payment.

Judicial review of the Board's decision by the United States Claims Court resulted in reversal. Chevron, U.S.A., Inc. v. United States, No. 350-87L (July 24, 1989), appeal filed (Fed. Cir. Jan. 31, 1990). The court held that the 2-year period commenced upon the issuance of the circuit court's Interstate Gas Association decision. In a subsequent decision, Conoco Inc., 114 IBLA 28 (1990), the Board declined to follow the Claims Court's Chevron, U.S.A., Inc. decision, reasserting again that the 2-year period established by 43 U.S.C. § 1339(a) (1982) commences upon the making of the payment for which a refund is requested.

For purposes of resolving this appeal, we need not decide whether the date of payment of the rental or the date of MMS' order of suspension of operations would be the proper date for the commencement of the running of the 2-year period of 43 U.S.C. § 1339(a) (1982). The reason is that we do not find that statute to be controlling in this particular situation because there should have been no necessity for Union to file a request for refund in this case.

Union was expressly informed by MMS in May 1986 that no rental would be required for the period commencing January 8, 1986, and continuing until termination of the suspension by the Regional Director or until January 7, 1991, whichever occurred earlier. At the time of the issuance of the order, advance rental for the period June 1, 1985, through May 31, 1986, had been tendered for all eight leases. Thus, when the suspension of operations continued over the June 1, 1986, anniversary date of the leases, it was not necessary to submit the advance yearly rental payments for the leases for the lease year June 1, 1986, through May 31, 1987. Nevertheless, rental for the suspension period January 8 through May 31, 1986, had been paid.

Union stated in its May 18, 1988, appeal to the Director, MMS, that

[s]ince the above rental payment had already been made to the MMS when the Regional Director issued his suspension order, and Union had no knowledge of when the suspension would terminate, Union anticipated that the MMS would apply that portion of the 1985-86 rental payment which is the subject of Union's request, to the annual rental which would become due and payable after termination of the suspension.

(Appeal to the Director at 3).

In his order terminating the suspension of operations, the Regional Director stated:

In accordance with 30 CFR 218.154, rental payments were not required for the period between January 8, 1986, and May 31, 1987. However, rental remittances due and payable for all current leases will be computed and notice thereof given the lessee \* \* \*. The lessee will be required to pay the amount due within 30 days after receipt of such notice. Inquiries regarding rental requirements should be addressed to the Lessee Contact Branch \* \* \*.

In its appeal to the Director, Union asserted that it was not until receipt of the June 22, 1987, notice of rental due from MMS that it realized that "MMS was not going to apply the rental at issue here, as a credit against future rental, as anticipated \* \* \*" (Appeal to the Director at 4, emphasis supplied).

The Director dismissed that contention by Union by concluding that "such an application would have violated the requirement in section 10 that refunds or credits be issued only where a timely request therefor was filed. Thus, Union's 'anticipation' lacked a rational basis" (Director's Decision at 4).

To the contrary, we find that Union's "anticipation" that MMS would credit its rental payments against future payments was not only justified, but, in fact, crediting the payment in question against future rentals was the procedure that MMS should have followed. For that reason, we vacate the Director's decision in this case.

[1] The language of the Regional Director's order terminating the suspension of operations, quoted above, apparently was derived from 30 CFR 218.154(c) (1987), which provides:

(c) If the lease anniversary date falls within a period of suspension for which no rental or minimum royalty payments are required under paragraph (a) of this section, the prorated rentals or minimum royalties are due and payable as of the date the suspension period terminates. These amounts shall be computed and notice thereof given the lessee. The lessee shall pay the amount due within 30 days after receipt of such notice. The anniversary

date of a lease shall not change by reason of any period of lease suspension or rental or royalty relief resulting therefrom.

That regulation applies, according to its own terms, only if the lease anniversary date falls within a period of suspension for which no rental or royalty is due pursuant to 30 CFR 218.154(a). That paragraph, in turn, provided in 1987 that no royalty or rental would be required where the Director, MMS, issued a suspension of operations and/or production "under the provisions of § 250.12(a)(1)(ii), (iii), or (iv) of this title [30 CFR]." <sup>2/</sup> One of those provisions, 30 CFR 250.12(a)(ii), allowed the Director, MMS, to issue a suspension when he determined there was a threat of serious, irreparable, or immediate harm or damage to life, property, any mineral deposits, or the marine, coastal, or human environment. <sup>3/</sup>

In this case, the circuit court ordered the district court to issue a preliminary injunction in order to protect the subsistence needs and cul-ture of Native Alaskans against the harm which might result from OCS leasing. The Regional Director issued the suspension order as a result of that court order and in accordance with the OCSLA and regulations, specifically 30 CFR 250.12 (1987). The lease anniversary date for the leases, June 1, 1986, fell within the period of the suspension. Accordingly, 30 CFR 218.154(c) was applicable and the "prorated rentals" were due following their computation by MMS and notification to the lessee. <sup>4/</sup>

In light of this regulation and the language of the termination order, the reasonable lessee would conclude that MMS intended to credit the January 8 through May 31, 1986, rental against future rentals in its computation. MMS terminated the suspension effective June 1, 1987, the anniversary date of the leases. Therefore, there would have been no reason to compute rentals unless credit were to be given, because on that date advance yearly rental for each of the leases was due. The lessee knew what the rental payment was for each lease; the leases provided that rental was \$3 per acre or fraction thereof. Each lease contained 5,693.18 acres; thus, Union knew that the yearly rental obligation for each lease was \$17,082. That was the amount paid for each lease in May 1985. A reasonable person would assume, under the circumstances of this case, that upon notice that rentals were to be computed, adjustment would be made for those rentals

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<sup>2/</sup> In 1988, the regulations in 30 CFR Part 250 underwent a revision (53 FR 10690 (Apr. 1, 1988)), thereby rendering the regulatory citations in 30 CFR 218.154(a) inappropriate. By a technical amendment in December 1989, the Department corrected 30 CFR 250.154(a) to properly cross reference "30 CFR 250.10(b)(2) through (b)(4) of this title." See 54 FR 50616 (Dec. 8, 1989).

<sup>3/</sup> The 1989 version of 30 CFR 250.10(b)(2) allows the Regional Supervisor, MMS, to direct a suspension for the same reasons.

<sup>4/</sup> It appears from the language of the regulation that the Department was aware that suspensions and terminations thereof would not likely coincide with lease anniversary dates and that adjustments in the amounts due and owing would need to be calculated by the Department and presented to the lessee.

previously paid. Such an assumption was, in fact, consistent with MMS' regulatory obligation. 5/

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

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Bruce R. Harris  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

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5/ Unlike royalty which is "due at the end of the month following the month during which the oil and gas is produced and sold \* \* \*" (30 CFR 218.50(a)), rental is paid in advance. Therefore, where an order suspending operations also suspends the rental obligation, any rental paid, which would otherwise be obligated to the period of suspension, sensibly should be credited against future advance rentals, whether or not the lease anniversary date falls within the period of the suspension. For example, in this case, if the suspension had run only from Jan. 8 through Apr. 30, 1986, it would have been reasonable to credit that part of the advance rental paid on or before May 31, 1985, attributable to the time of the suspension, against the future advance rental due on or before May 31, 1986, even though the period of the suspension did not extend over the anniversary date of the leases. Moreover, we would point out that there is no statutory or regulatory bar to prepayment of annual rentals.