

ANADARKO PETROLEUM CORP.

IBLA 89-564

Decided July 21, 1992

Appeal from a decision by the Assistant Director for Program Review, Minerals Management Service, denying appeal of an assessment of late payment interest charges for underpayment of royalties due on Federal offshore oil and gas lease Nos. 054-001597-0 and 054-001598-0. MMS 89-0024-OCS.

Affirmed.

1. Oil and Gas Leases: Royalties: Interest--Payments: Generally

Under provision of Departmental regulation 30 CFR 206.152(j), it is a defense to a claim for late payment interest charges that a lessee exercised reasonable business judgment when payment was initially made, albeit that future events caused a deficit in the payment to occur. While 30 CFR 206.152(j) was not in effect in 1986 when the payment at issue was made, it is Departmental policy to give effect to policy changes in pending cases when to do so would not operate to the detriment of any party.

2. Oil and Gas Leases: Royalties: Interest--Payments: Generally

If a Federal lessee contends that the policy established by 30 CFR 206.152(j) should be applied to determine whether late payment charges are owed for royalty payments made before contract modification increased product valuation, the lessee must document that reasonable measures were timely taken to obtain settlement. The burden to show entitlement to the benefit of the regulation rests with the lessee, and the fact that a favorable settlement was ultimately reached is not enough, alone, to establish that reasonable measures were timely taken so as to excuse late payment charges, where payments at the lower rate continued for three years pending resolution of the valuation dispute.

APPEARANCES: J. Stephen Martin, Esq., Houston, Texas, for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., Howard Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Anadarko Petroleum Corporation (Anadarko) appeals from a decision of the Assistant Director for Program Review, Minerals Management Service (MMS), dated June 15, 1989, denying appeal of a bill (No. 05700053) issued by the Chief, Payor Accounting Branch, Royalty Management Program, MMS, assessing late payment interest charges. Although first billed in the amount of \$22,409.52, the charge was reduced during the course of review by MMS to \$19,263.89, for underpayment of royalties for sales months August 1982 through April 1986. By order dated August 13, 1990, this Board granted a motion by MMS for partial remand of so much of this appeal as pertained to late payment assessments in the amount of \$2,335.71, owed due to a reporting error.

Now remaining at issue in this appeal, therefore, is the remainder of the assessment affirmed by the Assistant Director, MMS. This amount, \$16,928.18, arose because Anadarko received a lump-sum payment from the gas buyer, Northern Natural Gas Company (Northern), in August 1986 following settlement of a dispute whether to measure production gas as "wet" or "dry" for purposes of sale. The parties agreed on dry measurement, a result that led to a lump-sum royalty payment by Anadarko to MMS on September 29, 1986, due to the higher price it ultimately received for the production paid at the higher valuation for "dry" gas. Subsequent to receipt of this lump-sum payment, on December 14, 1987, MMS assessed Anadarko late payment charges, finding that Anadarko should have initially valued production as dry gas, and should have paid higher monthly royalties beginning in August 1982. Anadarko appealed this late payment assessment to the Assistant Director, who affirmed these charges in his June 15, 1989, decision.

On appeal to the Assistant Director, Anadarko claimed that it had no right to any additional payment from Northern until it entered into the August 1986 agreement that required retroactive measurement and payment. Anadarko argued that "Anadarko and its customer, Northern Natural Gas Company ("Northern") did not enter into a letter agreement until August 14, 1986 agreeing that gas sold under the relevant gas contract would be measured on a 'dry' instead of a 'wet' basis." The Director rejected this position, stating:

Anadarko claims August 1986 as if it were the "sales" month, therefore, the September 19, 1986, payment was not late.

This argument is without merit. Section 6(c) of the standard Federal Oil and Gas Lease of Submerged Lands under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331-1356 (1982),

provides that royalties on production shall be due and payable monthly on the last day of the month next following the month in which produced. * * *

* * * The fact that there was a dispute between Anadarko and its purchaser as to the proper gas measurement and resulting price does not relieve Anadarko from its duty to pay in accordance with the lease and MMS regulations.

(Decision at 3).

On appeal to the Assistant Director, Anadarko further claimed that it did not have possession of the funds during the time for which interest is being assessed; therefore, it did not have use of the money. After discussing when payment of royalties should be considered to be due under provisions of section 111(a) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1721(a) (1988), Anadarko concluded that because

Anadarko tendered payment on September 29, 1986 for royalties due for the retroactive period August 1982 through May 1986 based on the contract amendment which was not effective until August 18, 1986 there is no basis for any interest penalty since Anadarko did not "hold the money owed and invest it rather than pay it on time."

The Assistant Director rejected this argument as well, stating:

The problem the Appellant has in obtaining timely accurate payments from its purchaser is not a burden that can be transferred to the Government, nor does it justify deferral of payment of royalties beyond the established due date. No penalty is being imposed upon the Appellant. The Government merely seeks to recover the time value of the funds to which it was entitled.

(Decision at 3-4).

Anadarko's statement of reasons on appeal (SOR) relies on arguments made before the Assistant Director, and further argues that the Director erroneously found that "[t]he Appellant had the use of the funds during the period such funds were not timely paid" (SOR at 2, quoting the Assistant Director's Decision at 2). Anadarko states that the decision assumes that "Anadarko had the undisputed contractual right to collect on the basis agreed to in August, 1986 contemporaneous with these [August 1982-April 1986] sales months" (SOR at 3 (emphasis in original)). Anadarko contends that "[h]ad the gas sales contract explicitly provided for payment on a 'dry' basis * * * [as later agreed upon], then the Director's conclusion would have some merit" (SOR at 3). Anadarko argues that although the Assistant Director claims not to have imposed a penalty, that the decision in fact accomplishes this result, stating:

Anadarko received and paid royalties based on "timely accurate payments" in accordance with the purchaser's interpretation of the terms of the gas sales contract prior to the August, 1986 modification. The Director would have Anadarko speculate on whether it will prevail in contract dispute negotiations or litigation * * * and make royalty payments based on such speculation without any assurance that its position will indeed prevail. This is a substantial departure from the concept of the payment of royalties based on gross proceeds absent some evidence that such gross proceeds depart from the value of the production.

(SOR at 4).

Citing this Board's opinion in Cities Service Oil & Gas Corp., 104 IBLA 291, 295 (1988), MMS responds that, where Cities had argued that a dispute with its purchaser over the value of Cities' production should preclude the assessment of interest, this Board held those arguments to be unpersuasive. MMS argues, therefore, that "it is immaterial that the royalties were not timely paid because Anadarko and its purchaser disputed the price" (Answer at 6).

Responding to this conclusion, Anadarko points out that the preamble to new MMS regulations establishing valuation standards in 30 CFR 206.152(j) states:

This section requires a lessee to pay royalty in accordance with the contract price, but also expressly recognizes that contract prices may be amended retroactively. The MMS is aware that often there is a process of negotiation that occurs before the contract is formally amended and that lower payments may be received in the interim. Royalties may be paid on the gross proceeds received by the lessee until all attempts to force the purchaser to renegotiate the contract or to comply with the existing contract are exhausted, provided the lessee takes proper or timely action to receive the prices or benefits to which it is entitled, or to revise the contract retroactively. Thus, the MMS will accept a renegotiated or a revised contract price if the main reason for renegotiating or revising the contract is not solely to reduce royalties.

53 FR 1230-53 (Jan. 15, 1988). Anadarko adds:

While the time period including the dispute [in this appeal] precedes the effective date of the MMS regulations * * * [i]t is contrary to the MMS's assertion that it understands that negotiations occur in the gas business which may involve interim payments that may be increased on a retroactive basis, to now take the position in this case that Anadarko should be subjected to a penalty.

(Reply at 3).

In response to an order issued January 27, 1992, the parties responded that neither MMS nor Anadarko contends that Federal Energy Regulatory Commission (FERC) Order Nos. 93 and 93-A had any effect on the price paid for the gas here at issue, which was "price deregulated" (Anadarko Supplementary Response filed Feb. 26, 1992, at 1). In response to inquiry whether 30 CFR 206.152(j) should be applied in this case, MMS responded that the 1988 regulation does not apply here, but, if it were to be applied, and "if MMS received a lump sum royalty payment for prior periods and determined that reasonable measures were taken to collect the monies and upon their receipt royalties were timely paid, the royalty payment would be timely and no late payment charges would be due" (Supplemental Answer filed Mar. 20, 1992, at 3-4). Nonetheless, MMS contends, Anadarko has offered no evidence to show that "a timely and diligent effort to collect the additional royalties" was made. *Id.* Consequently, even if 30 CFR 206.152(j) should be applied, Anadarko would still be liable for a late payment assessment. Concerning this issue, Anadarko argues that "[w]ithout Anadarko's successful effort in securing a price based on a 'dry' calculation the MMS assessment at issue in this proceeding would not have been made" (Anadarko Supplementary Response at 2).

[1] This case comes to us in the context of a dispute between a lessee and its purchaser concerning whether to measure gas produced from the subject Federal leases as "wet" or "dry." According to the representation of fact made by the parties, the gas was measured as wet gas until the August 1986 settlement of a dispute between Anadarko and its purchaser over how the gas was to be measured. In the settlement, it was agreed that the gas would be measured as dry gas, thus increasing receipts to Anadarko, and precipitating a lump sum royalty payment to MMS.

Section 111(a) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1721(a) (1988), provides, in pertinent part: "In the case of oil and gas leases where royalty payments are not received by the Secretary on the date that such payments are due, or are less than the amount due, the Secretary shall charge interest on such late payments or underpayments * * *." Likewise, 30 CFR 218.54(a) provides that "[a]n interest charge shall be assessed on unpaid and underpaid amounts from the date the amounts are due." The regulation dealing with payment of royalties for oil and gas leases, 30 CFR 218.50(a), provides in part: "Royalty payments are due at the end of the month following the month during which the oil and gas is produced and sold * * *." While these authorities establish that payments untimely paid accrue additional charges, they do not answer the question asked by this appeal about when the increased royalty payment became due from Anadarko for the gas it sold to Northern under their renegotiated contract.

The order we issued on January 27, 1992, approached that question in this way:

[W]e request MMS' view of the merits of this case were it to be decided in accordance with the 1988 regulations rather than Cities Service Oil & Gas Corp., supra. In addition to the

provisions of 30 CFR 206.152(j) and the accompanying preamble referred to by Anadarko, we note that 30 CFR 206.101 currently defines "gross proceeds" for royalty purposes as including "[m]onies * * * to which a lessee is contractually or legally entitled but which it does not seek to collect through reasonable efforts."

See 53 FR 1230, 1241 (Jan. 15, 1988). Id. at 5.

MMS responded, in part, to this inquiry that the revised royalty valuation rules did not become effective until March 1, 1988, and that they were of future effect. In another case where a new rule was given effect in a pending appeal, however, the Board found that discussion about when the rule became effective lacked meaning, because once the policy of the Department had changed, unless application of the rule would injure rights of others, it changed for all purposes, including resolution of pending appeals before this office. See Conoco, Inc., 115 IBLA 105, 107 n.3 (1990), where we observed that the regulation "has now been amended; thus, the law has changed. The only question is whether [the party] whose appeal is pending, should have the benefit of the change. * * * there is ample authority for providing an affected party with the benefits of a regulatory change." See also Mobil Exploration & Producing U.S. Inc., 119 IBLA 76, 79, 98 I.D. 207, 209 (1991); James E. Strong, 45 IBLA 386, 388 (1980). In this case also, where no impediment has been shown to prevent application of current Departmental policy to the facts before us, inasmuch as the law has changed, constancy in adjudication dictates that we follow the current rule.

[2] That rule, 30 CFR 206.152(j), provides:

Value shall be based on the highest price a prudent lessee can receive through legally enforceable claims under its contract. If there is no contract revision or amendment, and the lessee fails to take proper or timely action to receive prices or benefits to which it is entitled, it must pay royalty at a value based upon that obtainable price or benefit. Contract revisions or amendments shall be in writing and signed by all parties to an arm's-length contract. If the lessee makes timely application for a price increase or benefit allowed under its contract but the purchaser refuses, and the lessee takes reasonable measures, which are documented, to force purchaser compliance, the lessee will owe no additional royalties unless or until monies or consideration resulting from the price increase or additional benefits are received. This paragraph shall not be construed to permit a lessee to avoid its royalty payment obligation in situations where a purchaser fails to pay, in whole or in part or timely, for a quantity of gas.

Anadarko has argued that successful negotiation of a higher price established that it is entitled to the benefit of the 1988 rule providing that it "will owe no additional royalties" in the circumstances of this

case. Anadarko explains that "[i]t was only after substantial negotiation that Anadarko was able to secure the purchaser's capitulation on this point and agreement to a modification which provided for unequivocal language" (SOR at 3). Anadarko reiterated this same assertion later in these proceedings, stating that

Anadarko has made the MMS aware of the efforts it made to secure favorable terms for the sale of its gas. While the interim payments from Anadarko's purchaser were less than eventually negotiated, Anadarko promptly remitted payment to the MMS upon Anadarko's receipt of payment pursuant to the more favorable terms. This additional payment was only made possible by Anadarko's diligence.

(Reply at 2, 3). Because determinations under 30 CFR 206.152(j) will depend on the circumstances of each case, we asked Anadarko to tell us when it requested Northern to pay at the dry gas rate, when Northern refused to do so, and what measures Anadarko took to force Northern to accede to its request (Order of Apr. 17, 1992). On May 19, 1992, in response to this order, Anadarko furnished 8 exhibits that indicate collection efforts began in July 1985 and concluded successfully in the payment made on August 19, 1986. Initial production from the lease began in August 1982. The purchase contract between Anadarko and Northern was concluded on on September 21, 1979. The purchase contract provides, concerning "computing payments due [Anadarko]":

6. Heating Value: The total gross heating value of the gas shall be determined by joint tests made by taking separate samples of the gas at the delivery point or points at such times as may be designated by Northern, and having the total gross heating value per cubic foot of gas determined by calorimeter tests at separate independent testing laboratories. Each of the laboratories shall furnish results of the calorimeter test to both Northern and Seller. The average of the two determinations shall establish the total gross heating value of the gas for purposes of computing payments due Seller under Article XIV hereof. Such test results shall apply to all gas sales from date of sampling until the next test is concluded. Should either Northern or Seller disagree with the results of such determinations, then a second test shall be promptly conducted or by mutual agreement backup samples may be exchanged between laboratories for verification of calorimeter procedures. The results of the second test shall be utilized until succeeded by results under the next scheduled test.

The first such test shall be made at the commencement of gas deliveries hereunder at each delivery point and semi-annually thereafter unless more frequent intervals are found necessary in practice. Should the total gross heating value of gas deliveries be changed as a result of production changes from different reservoirs or wells, then Seller shall notify Northern of such change and a new joint test shall be conducted.

If the frequency of such testing or the taking of spot samples [is] deemed by either party not to reflect the total gross heating value of the gas being delivered and purchased hereunder, then Northern agrees to increase the frequency of such testing and/or provide automatic continuous gas sampling equipment at delivery point(s).

We take it from the provision of the contract that Anadarko would have known soon after production started in August 1982 what the results of the first test were. Presumably after a year, or two at most, it would have become clear that the quality of production warranted a "dry gas" price. Yet Anadarko apparently took no action until July 1985 to raise the matter with Northern. 1/ We think that is too long to be a "timely application for a price increase or benefit allowed under [the] contract" under 30 CFR 206.152(j). 2/ We therefore conclude that Anadarko cannot be excused from paying interest on late royalty payments under the circumstances of this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, that part of the MMS decision remaining under review is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

1/ See Exhibit B, Second Supplementary Response:

"Anadarko has been discussing the issue involving the WD [West Delta] 137 contract dispute with various representatives of Northern since October 1984. Initial discussions address[ed] interpretation of the 1983 market-out language[;] however[,] as time progressed, take or pay was added to the discussion in May 1985, along with BTU [British thermal units] refund and the January 1985 payment dispute in July 1985."

As Anadarko explains, "'BTU refund' is another way of referring to the 'dry/wet' issue" (Second Supp. Response at 2).

2/ Cf. Transco Exploration Co. & TXP Operating Co., 110 IBLA 282, 323-26, 96 I.D. 367, 390-91 (1989). Once Anadarko did raise the issue, however, we think it took "reasonable measures, which are documented, to force purchaser compliance," including correspondence and meetings with representatives of Northern and, ultimately, recourse to the arbitration provisions of the contract. See Exhibits D-F, Second Supp. Response.

