

Appeal from a decision of the Director, Minerals Management Service, denying request for refund of royalties on Outer Continental Shelf oil and gas leases. MMS-89-0159-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds

Sec. 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1988), authorizes the issuance of refunds for royalty overpayments only where the request for a refund is made within 2 years of the date that the overpayment is received.

APPEARANCES: Patricia A. Patten, Esq., Tulsa, Oklahoma for OXY USA Inc; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

OXY USA Inc. appeals from a June 7, 1990, decision of the Director, Minerals Management Service (MMS), denying a request for refund of royalties paid on take-or-pay proceeds in the amount of \$315,428.34. The facts leading up to this appeal are not in dispute.

On November 22, 1983, Cities Service Oil and Gas Corp. (predecessor to OXY) sought a refund of \$1,916,448.50 in excess royalties paid on several Outer Continental Shelf leases, 1/ offshore Louisiana. Gas production from the various leases on which royalties were paid was subject to gas sales contracts containing a "take-or-pay" provision requiring the purchaser to take certain minimum volumes of gas or pay the lessor a certain amount if such gas volumes were not taken. Royalties were paid by lessee, Cities Service Oil and Gas Corp., on gas volumes not produced but paid for under the take-or-pay provision of the gas sales contract. At the time Cities

1/ Issued pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (1988).

made its respective payments MMS required royalties to be paid on take-or-pay proceeds (even though gas may not have been produced or taken). Consequently, on December 9, 1985, MMS denied the entire refund request.

On August 17, 1988, the Fifth Circuit Court of Appeals determined that no royalties were due on "take-or-pay" proceeds, unless and until the gas is actually produced and taken. Diamond Shamrock Exploration Corp. v. Hodel, 853 F.2d 1159 (1988). Pursuant to the Fifth Circuit's decision MMS reconsidered OXY's \$1,916,448.50 refund request and determined that \$315,428.34 of the requested refund was barred by section 10 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1339(a) (1988).^{2/} The denied portion represents royalty payments for the sales months of May, June, and July 1981, that were paid on July 31, August 31, and September 30, 1981, respectively, more than 2 years prior to the November 22, 1983, refund request. OXY appealed to the Director, MMS. The Director, on June 7, 1990, relying on this Board's decision in Shell Offshore, Inc., 96 IBLA 149, 94 I.D. 69 (1987), denied OXY's appeal for refund of the \$315,428.34 in royalties paid more than 2 years prior to the refund request.

This appeal to the Board ensued. In the statement of reasons (SOR) for appeal, OXY urged the Board to reverse MMS, citing the Claims Court decision in Chevron U.S.A., Inc. v. United States, 17 Cl. Ct. 537 (1989), ^{3/} (SOR at 4-5).

[1] Subsequent to the filing of OXY's SOR, the Claims Court decision was reversed by the Federal Circuit in Chevron U.S.A. v. United States, 923 F.2d 830 (Fed Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 167 (Oct. 7, 1991). The Federal Circuit found the "IBLA opinion [in Shell Offshore, supra] was well reasoned." 923 F.2d at 835. The court observed that section 10 of OCSLA requires lessees to request the refund of any excess payment "within two years after the making of the payment" and stated:

To qualify for a refund, a lessee must make a timely request. The phrase "within two years after the making of the payment" defines the timeliness of a refund request. By its terms, this phrase requires a request within two years from the time a lessee makes its original royalty payment.

The context of this phrase underscores its clear meaning. The statute does not use the phrase "making of the payment" solely to condition a refund upon a timely request. Rather, the

^{2/} Section 10 of OCSLA, provides in pertinent part:

"[W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment * * *."

43 U.S.C. § 1339(a) (1988).

^{3/} Reversing the Board's decision in Shell Offshore, Inc., supra.

phrase--in a slightly different grammatical form also appears in an introductory clause: "when it appears * * * that any person has made a payment to the United States in connection with any lease under this subchapter * * * 43 U.S.C. § 1339(a) (emphasis added). Thus, the "payment" phrase defining timely requests refers to the original excessive royalty payment. This context further links the refund request to the original royalty payment.

The Federal Circuit continued:

The statute does not state that a lessee must request a refund "within two years after discovery that a payment was excessive." Nor does the statute state that a lessee must request a refund "within two years after a judicial determination rendering a payment excessive." The statute requires a request "within two years after the making of the payment." By interpreting the OCSLA otherwise, the Claims Court erred.

Chevron U.S.A. v. United States, 923 F.2d at 833. The application of section 10 in this case is no different than that involved in Chevron U.S.A. v. United States. The Federal Circuit's decision is controlling. Thus, the sole inquiry in this case is whether the request for refund was made within 2 years of the making of the original royalty payments on take-or-pay proceeds. Accord Hamilton Brothers Oil Co., 123 IBLA 229, 232 (1992). It is not disputed that the request for refunds were not made within this period. Accordingly, we hold MMS properly denied OXY's \$315,428.34 royalty refund request.

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 affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge