



DEVON ENERGY, ET AL.

171 IBLA 43

Decided January 24, 2007

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IBLA 2006-231, etc.

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Consolidated appeals from decisions of the Program Director, Minerals Revenue Management, Minerals Management Service, rejecting appeals from a “Dear Reporter Letter.”

Affirmed.

1. Administrative Appeals--Administrative Procedure:  
Administrative Review--Appeals: Generally--Minerals  
Management Service: Appeals to Director

Parties to agency decisions are given the right to appeal in appropriate circumstances by regulation; failure to include an appeals paragraph in an agency decision does not alter that right.

2. Administrative Appeals--Administrative Procedure:  
Administrative Review--Appeals: Generally--Minerals  
Management Service: Appeals to Director--Oil and Gas  
Leases: Royalties: Generally

A “Dear Reporter Letter” issued by MMS to numerous Federal and Indian oil and gas lessees is not an appealable “order” under 30 CFR Part 290, where the letter, although occasionally cast in mandatory terms, does not “contain mandatory or ordering language” because it does not require immediate and specific action and does not address any specific leases, gas volumes, treatment costs, or additional royalties due. The letter is properly seen only as generalized guidance on how Federal and Indian lessees nationwide are expected to proceed concerning royalty due on coalbed methane.

Unless and until MMS issues specific orders containing specific instructions to specific lessees governing how they must compute, report, and/or pay royalty, among other actions, no appealable order has been issued under 30 CFR Part 290.

APPEARANCES: Deborah Bahn Haglund, Esq., Cedar Hill, Texas, for appellant Devon Energy Corp.; Dennis C. Cameron, Esq., Tulsa, Oklahoma, for appellants Chevron USA Inc., Four Star Oil & Gas Co., and Pure Resources LP; Sarah L. Inderbitzin, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

#### OPINION BY ADMINISTRATIVE JUDGE HUGHES

Devon Energy Corp, et al., (appellants) have appealed from decisions dated February 23, 2006, and signed by the Program Director, Minerals Revenue Management, Minerals Management Service (MMS), rejecting their appeals under 30 CFR Part 290 from a “Dear Reporter Letter” (DRL) dated October 4, 2005, regarding valuation of coalbed methane for purposes of calculating royalty due to the United States on Federal and Indian oil and gas leases. <sup>1/</sup>

The October 4, 2005, DRL was issued on letterhead stating, “United States Department of the Interior[,] Minerals Management Service[,] Washington, DC 20240.” As its name suggests, the DRL was not addressed to any specific party, but bears as its salutation “Dear Reporter.” It discusses in detail royalties on coalbed methane produced on Federal and Indian leases, specifying how to report coalbed methane volumes, value coalbed gas production, and report and pay coalbed methane royalties. It also sets out requirements for putting coalbed gas into marketable condition and the applicability of transportation and processing allowances. It is signed by the Associate Director for Minerals Revenue Management. The DRL does not refer to a right of appeal to the Director, MMS, under 30 CFR Part 290, but instead states that, if recipients “have questions regarding a specific situation involving your coalbed methane production, we recommend you request valuation and reporting advice from Compliance and Asset Management (CAM),” listing CAM’s address in Denver, Colorado, and telephone number.

On November 4, 2005, all four appellants filed notices of appeal of the DRL to the Director, MMS, pursuant to 30 CFR Part 290. On February 23, 2006, in two

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<sup>1/</sup> The appeal of Devon Energy Corp. has been docketed as IBLA 2006-231, that of Chevron USA Inc. (Chevron) as IBLA 2006-232, that Four Star Oil & Gas Co. (Four Star) as IBLA 2006-233, and that of Pure Resources LP (Pure Resources) as IBLA 2006-234.

separate but essentially identical letters to Devon and to counsel for Chevron, Four Star, and Pure Resources, the Program Director, Minerals Revenue Management, MMS, rejected their appeals. The Program Director held that the DRL “was issued as guidance in reporting and paying royalties on coalbed methane produced from Federal and Indian leases”; that it “is non-binding guidance”; and that it is “not an Order” under 30 CFR 290.102. The Program Director concluded that, since “[y]ou may not appeal an action that is not an Order” under 30 CFR 290.104(a), “[t]herefore, you may not appeal the” DRL. The Program Director concluded by explaining that, “[i]f MMS issues an Order regarding your reporting and payment of royalties on coalbed methane produced from Federal and Indian leases, you may appeal that Order to the Director, MMS.”

Chevron, Four Star, and Pure Resources filed separate timely notices of appeal of the Program Director’s February 23, 2006, letter with MMS on March 24, 2006. Devon filed an apparently timely notice of appeal of that letter with MMS on or around March 28, 2006.

Devon argues that the DRL is “arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law” and that Devon “is entitled to protect its interests through an appeal of the [DRL] to the extent that the letter might be considered to be binding on Devon or to affect Devon’s legal interest in any way.” (Devon Notice of Appeal to the Board of Land Appeals (Devon NA) at 1.) Devon states that MMS has indicated in other litigation that it intends to apply the interpretations contained in the DRL to coalbed methane producers generally and that the DRL resolves ambiguities in prior Dear Payor/Operator letters on the same subject:

Although [the Program Director] asserts in his decision that the [DRL] “is non-binding guidance and is not an Order,” the Interior Department has indicated otherwise in pleadings it filed in pending litigation with Devon over a valuation determination issued by the Assistant Secretary for Land and Minerals Management. Devon Energy Corporation v. Norton, No. 1:04CV00821 (D.D.C.).

In that case, Devon argued that it is the only lessee that has been required to follow the instructions contained in the Assistant Secretary’s decision, and that even though the [DRL] contains the same instructions, Interior has said repeatedly that such Dear Reporter Letters are not binding on lessees. In reply, Interior argued that Devon is not the only lessee required to comply with the instructions, specifically stating the [DRL] shows that the Department intends to apply the interpretations contained in that letter to coalbed methane producers generally, and further stating that the [DRL] “resolves”

alleged ambiguities in prior Dear Payor/Operator letters on the same subject. “Praecipe,” filed October 7, 2005, at 2; “Defendant’s Response to Plaintiff’s Praecipe,” filed October 18, 2005, at 1-2.

Devon amplifies this point in its supplemental statement of reasons (SSOR):

Interior cannot have it both ways. Either the [DRL] is evidence that Interior is applying the Assistant Secretary’s Devon decision across the board to all similarly situated lessees -- or it is non-binding guidance, in which case Devon, by virtue of the Assistant Secretary’s decision in its case, is the only lessee that has been ordered to comply with the new rules set out in the [DRL]. To the extent that Interior’s attorneys in Devon Energy Corp. v. Norton are correct, that is, to the extent that the [DRL] requires all lessees to follow the rules set out in the Assistant Secretary’s Devon decision, the [DRL is] not simply non-binding guidance, and Devon must be allowed to maintain its appeal. By contrast, if [the Program Director, Minerals Revenue Management, MMS,] is correct that the [DRL] is non-binding guidance, Devon should prevail in its contention in Devon Energy Corp. v. Norton that it is being unlawfully treated differently than other similarly situated lessees.

(Devon SSOR at 1-2.)

Devon also challenges the Program Director’s finding that the DRL is non-binding guidance and, as such, not subject to appeal to the Director under 30 CFR Part 290. It points to a statement in the DRL at page 6 that “[y]ou may not include in a transportation allowance” certain costs of dehydration and compression as proof that it “is going to be required to calculate its transportation allowance in this way.” It asserts that the definition of “order” at 30 CFR 290.102 provides that “guidance on how to report and pay royalties is appealable if it contains mandatory or ordering language” such as the cited passage and argues that it “must be given an opportunity to challenge the requirement through an appeal.” (Devon NA at 2, SSOR at 2.)

Like Devon, appellants Chevron, Four Star, and Pure Resources, through common counsel, assert that the DRL was an appealable “order,” as defined by 30 CFR 290.102. They point out that it “contained a number of mandatory requirements related to the calculation and payment of royalties on coalbed methane gas produced from Federal properties,” referring to three “you may not” directives in the DRL. (Chevron, et al. Notice of Appeal/Statement of Reasons (NA/SOR) at 1.)

Chevron, et al., also assert that the DRL “reflects an interpretation of MMS’s gas royalty valuation and reporting regulations that is arbitrary, capricious, and otherwise not in accordance with law” and that it

- (1) departs from previous positions taken by the agency with respect to the payment of royalties,
- (2) contains requirements that, if applied, would render certain provisions of the applicable regulations meaningless, and
- (3) represents improper rule making on behalf of the agency without providing royalty payors the required opportunity to comment on the changes embodied in the [DRL].

Id. at 4. They also assert that the DRL adversely affects them because, unless they “begin[] immediate compliance with the directives of the [DRL, they] necessarily risk[] liability for interest on unpaid royalties and, potentially, civil penalties.” Id. at 4.

MMS, through counsel, filed a motion to dismiss these four appeals on September 11, 2006. MMS referred to the DRL as “the Guidance” and characterized it as providing “‘guidelines’ to all reporters of coalbed methane production from Federal and Indian leases \* \* \* , including appellants.” It stated that the DRL “explained MMS’s interpretation of the application of MMS’s regulations to the reporting and payment of royalties on coalbed methane leases generally” and that it “did not apply to specific leases or production, or order the appellants to pay, compute, or compute and pay any ‘obligation’ specific to any of the appellants’ leases.” It suggested that the DRL was not subject to appeal because it “contains no language that allows for appeal.” (MMS Motion to Dismiss at 1.)

[1] Initially, we expressly reject MMS’ suggestion in its motion to dismiss that the DRL was not subject to appeal because it “contains no language that allows for appeal.” Parties to agency decisions are given the right to appeal in appropriate circumstances by regulation; failure to include an appeals paragraph in an agency decision does not alter that right. This Board is the exclusive arbiter of its jurisdiction. Texas Oil & Gas Corp., 58 IBLA 175, 88 I.D. 879 (1981); Fancher Brothers, 33 IBLA 262 (1978). This is not to suggest that MMS was in any way remiss in its treatment of the matter. Thus, the agency determined (correctly, as we have found herein) that its DRL was not appealable under 30 CFR Part 290 Subpart B and did not notify recipients of any right to appeal. When appellants filed notices of appeal anyway, MMS ruled on them. When appellants filed notices appealing that ruling to this Board, MMS forwarded the matter to us. All of this ensured that MMS

was not seen as disregarding an appeal of its decision to entities that are empowered to review it.

[2] We agree with MMS that the DRL was not an appealable order. An order may speak in mandatory terms without requiring any immediate action. Thus, an order directing parties to comply with new accounting techniques can be contrasted to an order to pay additional royalties applying those techniques. The fact that MMS has sent out a DRL facially mandating that steps be taken does not mean that MMS will ever actually enforce such requirements. Moreover, the parties do not lose their right to administratively appeal the imposition of such requirements, but the opportunity to do so is simply delayed until MMS issues an order to pay. Delaying the initiation of the administrative appeal process until after an order to pay has significant advantages in crystalizing and narrowing issues presented by such appeals. Where an adverse impact on a party is contingent upon some future occurrence, or where the adverse impact is merely hypothetical, it is premature for this Board to decide the matter. Phillips Petroleum Co., 109 IBLA 4, 15 (1989); State of Alaska, 85 IBLA 170, 172 (1985); Lone Star Steel Co., 77 IBLA 96, 97 (1983).

Considering numerous decisions holding that policy letters issued by the Bureau of Land Management (BLM) are not appealable, we have specifically determined that MMS policy papers on coalbed methane are also not appealable:

Generally, standing to appeal requires a decision adjudicating the rights of the parties in a given factual context. Thus, the Board dismissed without prejudice as premature an appeal from a BLM form letter returning a mining claim rental fee, finding that the form letter failed to constitute an adjudication of the existence of facts sufficient to support a ruling on the validity of the claim and, hence, no appealable decision had issued. Mesa Sand and Rock, Inc., 128 IBLA 243, 246 (1994); see Joe Trow, 119 IBLA 388, 391-92 (1991). Under this analysis, neither general policy papers nor statements of policy are appealable to this Board. James C. Mackey, 114 IBLA 308, 315 (1990); Headwaters, Inc., 101 IBLA 234, 239 (1988). These precedents are controlling in the context of this case involving appeals of “guidelines” for valuation of coalbed methane gas.

Blackwood & Nichols Co., 139 IBLA 227, 229 (1997). Appellants strenuously object to applying that precedent here, arguing that Departmental regulations at 30 CFR Part 290 imposed a different rule at the time the MMS letters in that case were sent,

and that the current regulations, now set out at 30 CFR Part 290 Subpart B allow their appeals.<sup>2/</sup>

The regulations at Subpart B “tell[] you how to appeal [MMS] or delegated State orders concerning reporting to the MMS Royalty Management Program (RMP) and the payment of royalties and other payments due under leases subject to” that Subpart. 30 CFR 290.100. The Subpart applies to “[a]ll Federal mineral leases onshore and on the Outer Continental Shelf (OCS)” as well as to “[a]ll federally-administered mineral leases on Indian tribal and individual Indian mineral owners’ lands, regardless of the statutory authority under which the lease was issued or maintained.” There is no dispute that the subject matter of the DRL (how to report production and pay royalty on coalbed methane gas) falls under the Subpart.

The regulations bar appeals from any action that is not an “order”: “You may not appeal \* \* \* an action that is not an order, as defined in this Subpart.” 30 CFR 290.104. Accordingly, whether appellants could appeal the DRL depends on whether the DRL is an “order” under the definition of that term set out at 30 CFR 290.102.

That is not an easy question to answer, as that definition is protracted and complicated:

*Order* for purposes of this subpart only, means any document issued by the MMS Director, MMS RMP, or a delegated State that contains mandatory or ordering language that requires the recipient to do any of the following for any lease subject to this subpart: report, compute, or pay royalties or other obligations, report production, or provide other information.

30 CFR 290.102; see also 43 CFR 4.903. By itself, this language would appear to be sufficient to determine whether an MMS action is an appealable “order.” However, the regulation continues, specifying what an “order includes” and what it “does not include”:

- (1) Order includes:
  - (i) An order to pay or to compute and pay; and
  - (ii) An MMS or delegated State decision to deny a lessee’s, designee’s, or payor’s written request that asserts an obligation due the lessee, designee, or payor.

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<sup>2/</sup> The regulations at 30 CFR Part 290 were amended as of May 13, 1999. 64 FR 26257 (May 13, 1999). Those regulations are also set out at 43 CFR Part 4 Subpart J, which applies to MMS “orders that are subject to” the Royalty Simplification and Fairness Act of 1996 (RSFA), 30 U.S.C. §§ 1701 et seq. (2000).

- (2) Order does not include:
  - (i) A non-binding request, information, or guidance, such as:
    - (A) Advice or guidance on how to report or pay, including a valuation determination, unless it contains mandatory or ordering language; and
    - (B) A policy determination;
  - (ii) A subpoena;
  - (iii) An order to pay that MMS issues to a refiner or other person involved in disposition of royalty taken in kind; or
  - (iv) A Notice of Noncompliance or a Notice of Civil Penalty issued under 30 U.S.C. 1719 and 30 CFR part 241, or a decision of an administrative law judge or of the IBLA following a hearing on the record on a Notice of Noncompliance or Notice of Civil Penalty.

30 CFR 290.102; see also 43 CFR 4.903.

The first question presented in interpreting this provision is whether, in stating that an “Order includes” (1) an order to pay or to compute and pay and (2) an MMS or delegated State decision to deny a lessee’s written request asserting that an obligation is owed to it, the regulation provides that an appealable order can contain only those two things and nothing beyond them. Under that view, MMS orders directing lessees to report data would not be subject to appeal unless MMS also ordered the lessee to pay or denied in its order the lessee’s request that an obligation was owed to it. Most appeals do arise from MMS orders to pay or to compute (recalculate) and pay.

Alternatively, the regulation could be read to provide, in effect, that an Order can include, among other things, an MMS order to pay or decision to deny a lessee’s written request, and that MMS actions other than orders to pay or to compute and pay can be appealed, at least in certain circumstances. Under this view, MMS orders directing lessees to report data in a prescribed manner could (if they “contain mandatory or ordering language”) be subject to appeal even if not accompanied by an explicit order to pay. We adopt that view.

If the regulation did provide that only an order to pay or to compute and pay and an MMS decision to deny a written request were appealable “orders,” it would not be necessary to specify examples of non-appealable “orders.” Further, in the preamble adopting the regulation, MMS stressed that whether an order is appealable does not depend not on whether it contains an order to pay, but that, instead, “an order is appealable only when the document ‘contains mandatory or ordering language’—in other words, when the disputed legal issues and the facts involved are sufficiently definite to allow for meaningful adjudication.” 64 FR at 26237.

The preamble refers to two statements in 30 CFR 290.702: (1) that an “order” is “any document \* \* \* that contains mandatory or ordering language,” and (2) that an “order does not include \* \* \* [a]dvice or guidance on how to report or pay, including a valuation determination, unless it contains mandatory or ordering language.” (Emphasis supplied.) From this it is clear that the critical question in determining whether an order is appealable is whether it “contains mandatory or ordering language.”

We conclude that the DRL, although occasionally cast in mandatory terms, does not “contain mandatory or ordering language” within the meaning of the regulations because it does not direct that specific action be taken within a specific time period with specific consequences for failure to take such action. Thus, we generally agree with MMS (Motion to Dismiss at 3-4) that, to be subject to appeal, an order must both (1) contain mandatory or ordering language and (2) require the recipient to report, compute, or pay royalties or other obligations. However, we would note that orders requiring or forbidding action other than reporting, computing, or paying royalties might also be deemed mandatory in circumstances we cannot presently anticipate. Further, we stress the importance of the order’s requiring immediate and specific action, as would be generally shown by the establishment of a timeframe for compliance, an element not present in the DRL. Thus, although the DRL speaks in terms of what the recipient “may not” do, it does not require immediate computation or recomputation of royalty as of a date certain, or enforce any such requirement by directing reporting the results of or the payment of royalty due under such computation.

We also agree with MMS that the fundamental reason that the DRL is not subject to administrative appeal is that “[t]here are simply no specific leases, gas volumes, treatment costs, additional royalties due, or any other facts at issue” to be evaluated in the administrative review process, either by the MMS Director or this Board. (Motion to Dismiss at 5.) This is in keeping with our admonition in Blackwood & Nichols Co., 139 IBLA at 229, that, to be appealable, a letter must “constitute an adjudication of the existence of facts sufficient to support a ruling” on the issues presented. The fact that no such individualized facts are presented is obvious when one realizes that the DRL letter was sent to scores of different parties. The DRL is properly seen only as generalized guidance on how Federal and Indian lessees nationwide are to be expected to proceed concerning royalty due on coalbed methane. Unless and until MMS issues specific orders containing specific instructions to specific lessees governing how they must compute, report, and/or pay royalty, among other actions, no appealable order has been issued under 30 CFR Part 290.

We offer no comment on whether the DRL amounts to improper rulemaking, that is, whether by issuing the DRL MMS put rules into place without providing requisite due process associated with rulemaking; on whether civil penalties or late

payment charges may properly be assessed for failure to comply with the terms of the DRL; or on the effects of any representation by MMS concerning whether the DRL is being applied to parties other than Devon, as those issues are not relevant to whether the DRL was an appealable order within the meaning of 30 CFR Part 290 Subpart B.

Our decision is without prejudice to appellants' rights to appeal any subsequent order issued by MMS that meets the criteria for appealability in 30 CFR Part 290.

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.

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David L. Hughes  
Administrative Judge

I concur:

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Christina S. Kalavritinos  
Administrative Judge