

SHELL OIL CO.

IBLA 80-634

Decided January 9, 1981

Appeal from a decision of the Chief, Conservation Division, Geological Survey, affirming an order of the Oil and Gas Supervisor, Accounting, Gulf of Mexico Area, requiring appellant to pay royalties. GS-160-0&G.

Reversed.

1. Appeals--Rules of Practice: Appeals: Dismissal--Rules of Practice:  
Appeals: Timely Filing

Where Geological Survey issues an order directing appellant to pay back royalties attributable to an offshore oil and gas lease, and thereafter schedules a conference with appellant to discuss its order, a notice of appeal filed within 30 days of such conference will be regarded as timely.

2. Oil and Gas Leases: Royalties--Outer Continental Shelf Lands Act:  
Refunds

Where a Geological Survey audit reveals that an offshore oil and gas producer has overpaid royalties in one month and underpaid royalties in the next month, it is proper to offset these two amounts against the other despite the fact that the audit was performed some 4 years after the transactions at issue.

APPEARANCES: John T. McMahon, Esq., Shell Oil Co., New Orleans, Louisiana, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Shell Oil Company (Shell) appeals from a decision of the Chief, Conservation Division, Geological Survey (Survey), dated April 11, 1980, affirming an order of the Oil and Gas Supervisor, Accounting, Gulf of Mexico Area, requiring appellant to pay back royalties.

The facts giving rise to this appeal are not in dispute. An audit by Geological Survey in 1979 revealed that Shell had overpaid royalties by \$11,470.87 attributable to its November 1974 production on lease OCS-G 2116. This same audit disclosed that Shell had underpaid royalties by \$12,035.59 on its December 1974 production on this lease. The cause of the error in each instance was Shell's use of an erroneous transportation allowance. Informed of its error, Shell offset the amount of its overpayment from the amount of its underpayment, and tendered the difference to Survey as full settlement.

By letter of July 6, 1979, the Oil and Gas Supervisor, Accounting, Gulf of Mexico Area, informed Shell that it had improperly reduced the royalties due for December 1974 by the amount of its overpayment attributable to November 1974. Noting that no request for refund had been filed by Shell within the 2-year period of limitations, Survey directed Shell to remit within 30 days from receipt of the subject letter the sum of \$11,470.87.

Shell's response to this letter of July 6, 1979, was to contact Survey in Metairie, Louisiana, by telephone to express its disagreement with the conclusions and order therein. As a result of this telephone call, Survey agreed to confer with Shell representatives on August 17, 1979, in Metairie. According to Shell, the sole purpose for this conference was to discuss Survey's position on the payments in question. At that meeting, Shell maintains that Survey agreed to reconsider its initial position because it had not yet obtained the advice of its counsel. It was agreed, according to Shell, that Shell would set forth its position within a week of the conference, so that its position might be submitted to Survey counsel with any comment by the Oil and Gas Supervisor. At this same conference, the Oil and Gas Supervisor refused Shell's request to defer payment of the \$11,470.87 sum at issue. Accordingly, Shell tendered this sum in protest.

While the file contains no acknowledgment by Survey that it agreed to reconsider its letter of July 6, 1979, Survey took no steps to dispel Shell's belief, openly set forth in several communications to Survey, that the matter was to be forwarded to Survey counsel for reconsideration. By letter of August 24, 1979, Shell provided to Survey a discussion of the legal issues involved as promised. It was not until September 13, 1979, however, that Shell filed a notice of appeal with Survey. Therein, Shell appealed the refusal by the Supervisor on

August 17, 1979, to defer payment of the disputed sum. The timeliness of this notice is one of two issues presented for our resolution on appeal. <sup>1/</sup>

[1] The Chief, Conservation Division, identified the July 6, 1979, order of the Oil and Gas Supervisor, Accounting, as the appropriate decision from which Shell should have taken its appeal. Accordingly, the Chief held that Shell's appeal must be dismissed as untimely. In support thereof, the provisions of 30 CFR 290.3 were set forth. This regulation provides the right to appeal to the Director, Geological Survey, from an order or decision of Survey by filing a notice of appeal within 30 days from service of the order or decision. If service of the July 6, 1979, order began the 30-day appeal period, Shell's filing of its notice of appeal on September 13, 1979, was clearly late.

In its statement of reasons on appeal, Shell argues that the appeal period began on August 17, 1979, when Survey refused Shell's request for deferral of payment of the \$11,470.87 sum. It maintains that the appeals period runs from the service of a final order or decision and cites 30 CFR 290.1 and 290.2 in support thereof. Section 290.1 states in part: "The rules and procedures set forth herein apply to appeals to the Director, Geological Survey \* \* \* from final orders or decisions of officers of the Conservation Division \* \* \*." (Emphasis supplied.) In section 290.2, the right of appeal is granted to "[a]ny party to a case adversely affected by a final order or decision of an officer of the Conservation Division." (Emphasis supplied.) Shell maintains that Survey's willingness to agree to the August 17 conference for the purpose of reconsidering its earlier order of July 6 belies its present assertion that the July 6 order was a final order.

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<sup>1/</sup> We note that some 6 months after being served with a copy of Shell's statement of reasons on appeal, a representative of the Solicitor's Office, U.S. Department of the Interior, has filed an answer to Shell's pleading. By the terms of 43 CFR 4.414, an answer is due within 30 days after service of the notice of appeal or statement of reasons. While this Board has discretion to consider or disregard such tardy pleading, California Portland Cement Co., 40 IBLA 339 (1979), we find the Solicitor's delay of 5 months to be inexcusable. Extensions of time are liberally granted by the Board, but no such request was forthcoming from the Solicitor. We regretfully decline to consider the pleading from the Solicitor.

During the circulation of this opinion amongst the Board, an additional pleading was filed by appellant. No reason appears therein to alter our decision.

The logic of Shell's position is hard to dispute. While Survey's order of July 6 bears all the indicia of a final order, its willingness to schedule a conference with Shell to discuss its position suggests that it may have been inclined to negotiate a solution to the issue at hand. Such a posture is contradictory to the idea of a final decision. While not entirely helpful, the definition of a final decision, as enunciated by the Supreme Court in construing the present 28 U.S.C. § 1291 (1976), offers some insight: "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). Survey's scheduling of its August 17 conference with appellant persuades us that a final decision had not yet been rendered. We need not determine when a final decision was rendered by the Supervisor. What is clear is that it was not rendered prior to August 17. Shell's notice of appeal, filed with Survey on September 13, 1979, was received within a 30 day period of August 17 and hence is timely without need for further precision. See Mesa Petroleum Co., 44 IBLA 165 (1979); Carl Wittman, 16 IBLA 188 (1974).

While we acknowledge the need for clarity in the appeal regulations and our interpretations thereof, we do not believe that our action here will cause future confusion or have a chilling effect on Survey's willingness to confer informally with those affected by its actions. Had Shell immediately appealed from the Survey letter of July 6, 1979, it is likely that such action would have precluded any discussions it may have sought with Survey.

[2] In its second argument on appeal, Shell maintains that the 2-year period of limitations invoked by Survey and set forth in section 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a) (1976), is not applicable to the facts at hand. That section reads in part:

Subject to the provisions of subsection (b) of this section, when 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. [Emphasis supplied.]

Shell points out that Survey's position in the instant case is impractical because of the formalities involved in requesting a refund. In support, Shell refers to 43 U.S.C. § 1339(b) (1976) which states in part:

No refund of or credit for such excess payment shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts upon which the determination of the Secretary was made is submitted to the President of the Senate and the Speaker of the House of Representatives for transmittal to the appropriate legislative committee of each body, respectively.

Shell argues that every royalty payment made to Survey is necessarily an estimate because the producer does not have precise figures setting forth the value of its production until sometime after royalty payments are due. As the precise figures become available, a producer adjusts its current payments to reflect either an underpayment or overpayment in a prior month. According to Shell, this is done by every lessee for every producing property for every month. Given the frequency of offsetting entries each month, Shell argues that an offsetting adjustment in favor of a producer could not be the "refund" or "credit" which 43 U.S.C. § 1339(b) (1976) requires be submitted to the President of the Senate and to the Speaker of the House of Representatives. While we agree with Shell's basic contention, we point out that the inaccuracy in Shell's monthly figures was caused by its use of an improper transportation allowance and not by the time constraints built into the reporting process.

Had Shell initiated a request in 1979 for a refund of its November 1974 overpayment, we believe Survey would have been correct in denying such request as untimely. In Phillips Petroleum Co., 39 IBLA 393 (1979), we so held. Where, however, Survey undertakes to audit a producer some 4 years after the payments at issue have been made, we hold that a sense of fundamental fairness requires Survey to recognize both a producer's underpayments and overpayments of royalty. We believe Survey should have properly offset Shell's underpayment by the amount of its overpayment. We do not believe that the 2-year period of limitations was established to give Survey a procedural advantage in computing royalty payments. The opinion of the Comptroller General of the United States involving an earlier royalty dispute is not inconsistent with the actions we take herein. Opinion B-156603, November 5, 1965.

Accordingly, 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 Chief, Conservation Division, is reversed and the case remanded for action consistent with our views herein.

Douglas E. Henriques

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Administrative Judge

We concur:

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Anne Poindexter Lewis  
Administrative Judge

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Edward W. Stuebing  
Administrative Judge

