

ISTHMUS REFINING CORP.

IBLA 81-203

Decided December 22, 1981

Appeal from a decision of the Chief, Conservation Division, Geological Survey, affirming the rejection of appellant's application to purchase Outer Continental Shelf royalty oil. GS-7-Offshore O&G.

Affirmed.

1. Oil and Gas Leases: Contracts for Sale of Royalty Oil or Gas -- Outer Continental Shelf Lands Act: Generally

An application to purchase offshore royalty oil, submitted in response to a notice published in the Federal Register on Jan. 14, 1980, is properly rejected where the refinery capacity presented in the application was not certified by the Economic Regulatory Administration as operable on or before Apr. 1, 1980, as required by the notice of sale.

APPEARANCES: R. Charles Gentry, Esq., Washington, D.C., for appellant; L. Poe Leggette, Esq., U.S. Department of the Interior, Washington, D.C., for Geological Survey.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Isthmus Refining Corporation (IRC) appeals from a decision of the Chief, Conservation Division, Geological Survey (Survey), dated October 14, 1980, affirming the denial of appellant's application to purchase Outer Continental Shelf (OCS) royalty oil for processing in its refinery. The basis for the rejection was the failure of appellant to obtain certification by the Economic Regulatory Administration (ERA) that the refinery capacity asserted in the application was operable as of April 1, 1980. Appellant alleges that it was improper to condition approval of an application to purchase royalty oil upon certification of refinery capacity as operable on or before April 1, 1980, as required by the published notice, 45 FR 2832 (Jan. 14, 1980) announcing the royalty oil sale.

On appeal IRC contends that section 27(b)(2) of the Outer Continental Shelf Lands Act (OCSLA), as amended, 43 U.S.C. § 1353(b)(2) (Supp. II 1978), specifically provides that small refiners shall be the beneficiaries of the OCS royalty oil program and, further, that IRC is an eligible small business refiner. Appellant also states that it knew it would not be capable of processing oil on the operational date or on the contract effective date of July 1, 1980, but believes that failure to be operational on either date should not result in a loss of opportunity to receive OCS royalty oil for the remainder of the 3-year contract period. Finally, appellant restates its contention raised before Survey:

In its appeal to the USGS, IRC made the argument that the operational deadline prescribed in the January 14 Notice was an unfair and unreasonable method by which to ensure that recipient refineries are capable of processing any royalty crude oil allocated. IRC contended that, while an operational deadline is generally an acceptable procedure for determining operational status, one which effectively eliminates an otherwise qualified refiner for the entire three year period is not a rational way to achieve that objective. Since it creates a classification that has no rational basis, certainly with respect to IRC which will be operational for the vast majority of the offering period, IRC contended that the classification which adversely affects it is in violation of its fundamental constitutional rights. Specifically, the operation deadline which eliminates IRC for three years is both capricious and arbitrary and is not founded on a compelling government interest.

Statement of Reasons at 33. Appellant asserts that there is no statutory requirement and no requirement in the regulations at 30 CFR Part 225a of certification of operable refinery capacity by a date prior to the conduct of an OCS royalty oil sale. To the extent such a requirement was embodied in the January 14, 1980, notice of sale, appellant contends that such a requirement must be established as a rulemaking exercise preceded by notice and opportunity for comment. 5 U.S.C. § 553 (1976).

By a notice published on January 14, 1980, 45 FR 2832, the Secretary of the Interior announced his determination, after consultation with the Secretary of Energy, that small refiners did not have access to adequate supplies of oil at equitable prices. In an attempt to remedy this situation, the Secretary of the Interior made available for purchase by small refiners some 91,000 barrels of royalty oil per day pursuant to section 27(b)(2) of OCSLA, 43 U.S.C. § 1353(b)(2) (Supp. II 1978). The Federal Register notice announcing the sale provided, in part, that Survey would entertain applications based on new

or expanding refinery capacity subject to the limitation that such "capacity is certified by the Economic Regulatory Administration (ERA) as operable on or before April 1, 1980." 45 FR 2833 (Jan. 14, 1980).

[1] Section 27(b)(2) of OCSLA authorizes the Secretary of the Interior to dispose of royalty oil from OCS leases by selling it to small refiners where, after consultation with the Secretary of Energy, the Secretary determines that "small refiners do not have access to adequate supplies of oil at equitable prices." 43 U.S.C. § 1353(b)(2) (Supp. II 1978). The Secretary is directed by section 27(b)(2) to publish notice of such sale, at least 30 days in advance, which notice shall include "qualifications for participation" and the amount of oil to be sold. Regulations of the Secretary of the Interior governing disposal of OCS royalty oil are found at 30 CFR Part 225a. The regulations recite the policy that OCS royalty oil shall be sold "only to small refiners for use in their refineries and not for resale in kind." 30 CFR 225a.3.

The Survey decision rejecting appellant's application explains why the certification of operable refinery capacity in advance of the sale is necessary to accomplish this objective:

The demand for royalty crude by small refiners far outstrips the available supply. Appellant seems to recognize that, as a matter of administrative necessity, some cutoff dates and eligibility criteria must be established for each sale. Indeed, section 27 of the Outer Continental Shelf Lands Act contemplates that such procedures be implemented.

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One of the OCS royalty oil sale program objectives is that the oil be used rather than resold by the small refiner to whom an allocation is made. As a practical matter, anticipated project completion dates are often not met. Indeed, IRC states that its refinery completion date is "expected to be about October 1, 1980, with actual refining to begin on or about January 1, 1981" (emphasis added). In contrast, as noted above, the January 14, 1980, Federal Register Notice announced that the anticipated effective date for the contracts disposing of the oil was July 1, 1980.

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It is also an objective of the program to allocate to qualified refiners all of the royalty oil that is available on the date of sale. The requirement that a refiner have a

proven capability of performing refining operations is designed to avoid situations where some available royalty oil is not taken or used because a refiner does not have the capability of using it on the date it is to be delivered. Therefore, there are rational bases to support the requirement that a refinery be operable in advance of the royalty oil sale allocation date. Thus, this requirement is not arbitrary or capricious.

Accordingly, the rational basis for requiring certification of operational capacity of an applicant's refinery prior to the sale date is well established. A classification which is alleged to create economic discrimination violative of the Equal Protection Clause of the Constitution will not be set aside where there is a rational basis therefore. See Laketon Asphalt Refining, Inc. v. U.S. Department of the Interior, 624 F.2d 784 (7th Cir. 1980).

Appellant's challenge to the certification requirement as violative of the rulemaking procedures set forth at 5 U.S.C. § 553 (1976), necessitating notice and opportunity for comment, is similarly without merit. Although the regulations promulgated by the Department of the Interior (DOI) at 30 CFR Part 225a do not set forth a requirement of certification of operable refinery capacity before the date of a royalty oil sale as contained in the published notice of January 14, 1980, such a requirement is contained in the pertinent regulations promulgated by the Department of Energy (DOE) at 10 CFR 391.110. 45 FR 9532-33 (Feb. 12, 1980). 1/ Appellant concedes these regulations were promulgated through appropriate procedures including notice and opportunity for comment. The January 14, 1980, notice announcing the royalty oil sale expressly recognized that the requirement that refinery capacity be certified as operable on or before April 1, 1980, was made in accordance with the anticipated DOE regulations. 45 FR 2833 (Jan. 14, 1980).

Further, the January 14, 1980, notice has been held not to be a new rule or regulation requiring the formal procedures established by 5 U.S.C. § 553 (1976), but rather an administrative implementation of the existing regulations. Little America Refining Co. v. Andrus, Civ. No. 80-00673 (D. Wyo., Mar. 4, 1981); Quitman Refining Co., 57 IBLA 53 (1981). 2/

1/ These regulations supersede the DOI regulations at 30 CFR Part 225a. They were promulgated by DOE pursuant to section 302(b)(5) of the Department of Energy Act, 42 U.S.C. § 7152(b)(5) (Supp. II 1978), which transferred certain authority over the procedures, terms, and conditions for the disposition of Federal royalty interests taken in kind to the DOE. See 45 FR 9527 (Feb. 12, 1980). These regulations were published in proposed form at 44 FR 45900 (Aug. 3, 1979).

2/ Interpretative rules are expressly excepted from the requirements of 5 U.S.C. § 553 (1976).

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

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

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