

SOHIO ALASKA PETROLEUM CO.

IBLA 82-619

Decided November 16, 1982

Appeal from decision of the Director of the Geological Survey denying request to participate in certain continental offshore stratigraphic test wells without penalty as an original participant.

Affirmed.

1. Outer Continental Shelf Lands Act: Geological and Geophysical Exploration: Generally

30 CFR 251.6-3(a) directs that a person proposing to drill a deep stratigraphic test well provide an opportunity through a signed agreement for other interested persons to participate on a cost-sharing basis. Where an oil company announces such a proposal, makes itself available to discuss the proposals, and negotiates details of the agreement with interested parties, it has provided the required opportunity. A person that indicates an interest, participates in discussion of the proposal, and thereafter notifies the company that it has decided not to participate has not been denied the opportunity to participate.

2. Outer Continental Shelf Lands Act: Geological and Geophysical Exploration: Generally

Under 30 CFR 251.6-3(d), the Director of Geological Survey will only require republication of exploratory test drilling applications and a period for other persons to join in a venture as original

participants without penalty where the applicant proposes changes to the original application and the Director determines that those changes are significant. Changes negotiated in the cost-share agreement, the correction of an error in the published description of the location of a well, and changed circumstances not affecting the application are not significant changes as contemplated by 30 CFR 251.6-3(d).

APPEARANCES: J. J. Hohler, Senior Vice President, for SOHIO Alaska Petroleum Company; Risher M. Thornton, Esq., Anchorage, Alaska, for ARCO Alaska, Inc.; L. Poe Leggette, Esq., Department Counsel for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On February 9, 1981, ARCO Alaska, Inc. (ARCO), announced its proposal to drill three continental offshore stratigraphic test (C.O.S.T.) wells off the western coast of Alaska and invited interested parties to participate in one or more of the wells. The announcement required that in order to participate without paying any late penalty an interested party must commit itself in writing to ARCO by March 15, 1981. Participating parties would bear a proportionate share of the cost risk and expense of drilling and share the data obtained from the wells. Seventeen companies joined ARCO as original parties. SOHIO Alaska Petroleum Company (SOHIO) did not. By letter dated December 11, 1981, SOHIO requested the Director of the Geological Survey (Survey) 1/ to prohibit issuance of any permits to ARCO and to require republication of the proposal pursuant to 30 CFR 251.6-3(d), thereby affording an additional opportunity for interested parties to participate in all three wells as original members without penalty. By letter dated January 22, 1982, the Director denied the request. SOHIO has appealed that decision to this Board.

Section 11 of the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. § 1340 (Supp. II 1978), permits the Secretary of the Interior to authorize geological and geophysical exploration in the Outer Continental Shelf (OCS) that does not interfere with or endanger actual operations under

1/ By Secretarial Order No. 3071, dated Jan. 19, 1982, the Secretary of the Interior established the Minerals Management Service (MMS) and transferred to MMS the minerals-related functions of the Conservation Division of the Geological Survey. See 47 FR 4751 (Feb. 2, 1982). References in 30 CFR Part 251 and other Departmental regulations to Survey were changed to MMS by final rule on June 30, 1982. 47 FR 28368. Since Survey existed at the time that the decision on appeal was issued, we will refer to Survey for the purposes of this opinion.

any OCS lease and that is not unduly harmful to aquatic life in the area. The Department permits deep stratigraphic testing under section 11. See Solicitor's Opinion M-36922, 87 I.D. 517 (1980). Regulations governing C.O.S.T. wells are found in 30 CFR Part 251. In order to minimize duplicative exploration activities involving penetration of the seabed of the OCS, the Secretary requires that a party proposing to drill a C.O.S.T. well afford all interested parties, in a signed agreement, an opportunity to participate in the drilling on a cost-sharing basis. 30 CFR 251.6-3(a). Departmental regulations provide that the agreement "may include a penalty for late participants of not more than 100 percent of the cost to each original participant in addition to the original share cost." Id.

Both in its December 11, 1981, letter and on appeal SOHIO complains that ARCO violated the intent of and failed to comply with 30 CFR 251.6-3(a). The cited regulation reads:

(a) In order to minimize duplicative geological exploration activities involving the penetration of the seabed of the OCS, a person proposing to drill a deep stratigraphic test shall afford all interested persons, through a signed agreement, an opportunity to participate in the drilling on a cost-sharing basis. The provisions of the agreement for sharing the cost of a deep stratigraphic test may include a penalty for late participants of not more than 100 percent of the cost to each original participant in addition to the original share cost. The participants shall assess and distribute penalties in accordance with the terms of the agreement. If the Director releases a public notice announcing a significant hydrocarbon occurrence, the penalty for subsequent late participants may be raised to not more than 300 percent of the cost of each original participant in addition to the original share cost.

SOHIO argues that the phrase "through a signed agreement" implies a process of negotiation culminating in mutual assent and alleges that it was denied the opportunity to participate in the ARCO wells because the participation agreement submitted to SOHIO by ARCO was inadequate and ARCO arbitrarily prohibited meetings to discuss it prior to the commitment deadline. ^{2/} To support its charge SOHIO has submitted its summary chronology of events between announcement of the venture and the commitment deadline and copies of its correspondence and that of other companies with ARCO during the same period. SOHIO particularly directs attention to three matters:

^{2/} The commitment deadline, as originally announced, was 11:59 p.m. Alaska-Hawaii Standard Time on Mar. 15, 1981. By notice to all interested parties, ARCO extended the deadline to the same time on Mar. 16 because Mar. 15 was a Sunday. See telex dated Mar. 9, 1981, from ARCO to SOHIO included in Appendix A, SOHIO letter dated Dec. 11, 1981.

1. SOHIO argues that further negotiation was justifiable because the announced drilling schedule conflicted with the regulation governing well completion, 30 CFR 251.6-5. n3

2. In addition to the three C.O.S.T. wells, ARCO had planned to drill a fourth well on an ARCO lease in the region using the same drilling rig as contracted for the C.O.S.T. wells in order to minimize the per-well cost of the rig. Objections from prospective participants caused ARCO to delete this well from the plans 2 weeks before the participation deadline. SOHIO asserts that the 2-week period was insufficient time to evaluate the impact of this change on the venture, particularly since ARCO refused to schedule additional group meetings.

3. SOHIO notes that there were few, if any, "clear-cut acceptances" of the ARCO proposal and that some companies who had voiced stronger objections to the lack of negotiation opportunity than SOHIO were accepted as original participants. Thus, SOHIO believes it was selectively excluded from the venture.

SOHIO urged the Survey Director to formulate standards to measure the adequacy of C.O.S.T. well agreements and then to determine whether ARCO's agreement met those standards. The Director's decision did not address the above arguments or this suggestion.

SOHIO also argues that ARCO's final agreement reflects changes from the original proposal significant enough to warrant republication of ARCO's proposal pursuant to 30 CFR 251.6-3(d). That regulation reads: "(d) If the applicant proposes changes to the original application and the Director determines that such changes are significant, the Director shall require a republication of the changes and an additional 30 days for other persons to join as original participants."

SOHIO has identified various differences between ARCO's original proposal and the final agreements of the participants that it believes are significant:

1. Zone location descriptions for two of the wells as published contained errors that SOHIO asserts are significant because of its need to know exactly where its capital would be invested.

2. The definition of rig utilization in the final agreement added a rig acquisition deadline that SOHIO characterizes as a critical component of any Alaskan venture.

^{3/} 30 CFR 251.6-5 was revised by final rule effective May 13, 1982. 47 FR 15781 (Apr. 13, 1982). Reference is to the unrevised version (see 30 CFR 251.6-5 (1981)) since that provision was in effect at the time this case arose.

3. ARCO's fourth well, although not included in the published notice, was inextricably linked to the C.O.S.T. wells by the scheduled use of the same drilling rig and thus its deletion constituted a significant change in the proposal.

4. Unlike the proposal, the final agreement included provisions for indemnification and the participation of a management committee in certain decisionmaking.

The Survey Director limited his response to three issues involving alleged errors or lack of information in the published invitation to participate. The first issue addressed was ARCO's failure to identify a specific drilling rig in its announcement. The Director found that ARCO had indicated that negotiations were being undertaken to obtain the necessary rig and that an interested party could commit to the drilling venture contingent upon its approval of the specific rig obtained. Second, although one of the proposed wells could not be timely completed under 30 CFR 251.6-5 as scheduled, the regulation permits the Director to authorize an extension of time, and all parties were aware that ARCO had committed itself to making such a request. Finally the Director determined that certain errors in the alternate location descriptions, which were not apparent until ARCO's drilling plans were reviewed, were not significant as the latitude-longitude descriptions for the locations were correct.

Counsel for Survey directs attention to 30 CFR 251.6-3(c) which defines the procedure an applicant is to follow in providing an opportunity for interested parties to join its venture. The regulation provides:

(c) To allow for group participation in shallow or deep test drilling activities, the applicant shall:

(1) Publish a summary statement describing the proposed activity in a manner approved or prescribed by the Director;

(2) Forward a copy of the published statement to the Director;

(3) Allow at least 30 days from the date of publishing the summary statement for other persons to join as original participants;

(4) Compute the estimated cost to an original participant by dividing the estimated total cost of the program by the number of original participants; and

(5) Furnish the Director with a complete list of all participants under the permit prior to commencing operations, or at the end of the advertising period if operations begin prior to its close. Also, the names of all late participants shall be forwarded to the Director.

Survey argues that ARCO fully complied with these requirements. It notes that on February 4, 1981, ARCO sponsored a meeting for interested parties at which

it explained its proposal and that on February 9, 1981, it published a "summary statement," required by 30 CFR 251.6-3(c)(1) in the Oil and Gas Journal and other trade and general newspapers providing until March 15, 1981, for interested parties to join. Survey indicates that ARCO computed the cost estimates and furnished the required information to the Survey Director. Survey further argues that the correspondence submitted by SOHIO shows that ARCO did negotiate with all interested parties. In particular it identifies messages from ARCO to all potential participants dated February 28 and March 4, 1981, in which it modified its plans in response to inquiries. Survey urges that SOHIO was not selectively excluded but rather decided not to participate, as evidence by a telex SOHIO sent ARCO on March 11, 1981, stating that "[a]fter due consideration" SOHIO had decided not to commit itself to ARCO's program.

Counsel for Survey disputes SOHIO's charge that the ARCO participation agreement was inadequate. Survey urges that 30 CFR 251.6-3(a) regulates only two aspects of the agreement and leaves all other matters to the participants. Those two aspects are (1) that costs must be shared and (2) that limited penalties may be charged to late participants.

Finally, counsel for Survey contends that the Survey Director correctly found that ARCO had not made significant changes to its application. Survey adds that ARCO's fourth well was not a C.O.S.T. well and not included in ARCO's permit applications. Thus, the decision not to drill that well was not a change in the original applications. Counsel also contends that differences between the original and final participation agreements do not constitute changes to the permit applications.

In response to SOHIO, ARCO finds it "difficult to understand" SOHIO's position since "mutual assent" was arrived at with 17 other parties regarding both the concept of its C.O.S.T. well program and the specific written agreement. ARCO reports that at the February 4, 1981, group meeting it discussed its proposal and reviewed the agreement and that a SOHIO representative attended. ARCO notes that although it decided not to hold another group meeting, potential participants had full access to ARCO's staff on the matter. ARCO urges that it did not selectively exclude SOHIO. To the contrary, ARCO was eager to include as many participants as possible and therefore accepted conditional commitments. ARCO submits a copy of SOHIO's March 11 telex indicating SOHIO would not commit but reports that it continued to maintain contact with SOHIO until the deadline. Finally, as to the deletion of the fourth well from its plans, ARCO states that its staff was available during the time before commitment to discuss the matter, that the 17 other participants were obviously able to evaluate this change and that SOHIO has offered no reason for its inability to do so. In summary ARCO urges that the Board affirm the Survey decision because otherwise parties will have little incentive to join as original participants, assuming the inherent risks, and will wait until conditions appear more favorable.

[1] The geological and geophysical exploration activities authorized by section 11 of the Outer Continental Shelf Lands Act are intended to produce information on OCS mineral resources including data directed to possible

exploration and development activity for the benefit of the participants and the Federal Government. The regulatory scheme is intended to promote maximum participation in test wells by all interested parties to avoid duplicative activities on the OCS and to ensure that the risk of a venture is equally shared since participating parties share the resulting information. The penalty provisions encourage early commitment to the drilling projects and protect those who are willing to assume the risk of the venture at the outset. ^{4/}

Examination of the regulations in 30 CFR Part 251 reveals that Survey's primary role in regulating OCS exploration is to oversee the activities undertaken by an operator that are to occur on the OCS. Survey has clearly limited its role in regulating group participation under 30 CFR 251.6-3(a) to providing other interested parties the opportunity to participate and limiting the amount of the penalties for late participation. The details of the cost-sharing arrangement made by the operator with other interested private parties are left to those who are assuming the risk.

SOHIO would apparently prefer that Survey issue additional regulations governing the participation agreement. However, the current regulations do not so provide.

The record reflects that SOHIO was not denied the opportunity to participate in these C.O.S.T. wells, rather it chose not to participate. SOHIO had the same opportunity to negotiate the terms of the agreement with ARCO as did the other companies. The fact that modifications were made to the agreement as a result of ARCO's conversations with prospective participants belies SOHIO's assertions that there was no negotiation leading to

^{4/} In discussing comments to proposed revisions to 30 CFR 251, the Department addressed the penalty provisions as follows:

"We have decided not to change the maximum penalty (i.e., 100 percent of the cost to each original participant in addition to the original share cost) for late entry into a deep stratigraphic test. We feel that this amount is sufficient to encourage the early participation of most interested parties, but is not overly burdensome to others, such as smaller companies, which may take longer to acquire sufficient funds in order to enter the group. We have, however, raised the maximum penalty for late participants who wait until after the Director announces a hydrocarbon occurrence to enter the group to 300 percent of the cost to each original participant in addition to the original share cost. We feel that this provision will protect those involved in the initial drilling consortium from companies that want to buy into the consortium only after hydrocarbon occurrences are detected in a test and will encourage early participation in such a consortium.

"The comment was also made that the penalties should be assessed by the participants and shared by all parties who participated as of the time the hydrocarbon occurrence is announced. We believe that the amount and distribution of monetary penalties should be spelled out in the initial agreement between the participants as a further stimulus for early participation." 45 FR 6342 (Jan. 25, 1980).

mutual assent. Some of the concerns which SOHIO has identified are similar to those raised by others. As ARCO points out, some companies chose to make conditioned commitments because of those concerns, which ARCO accepted, but SOHIO did not. The fact that ARCO declined to hold a second group meeting to discuss the C.O.S.T. well program does not support a conclusion that SOHIO's opportunity to participate was denied. n5

[2] SOHIO also asserts that a second opportunity to join in the ARCO C.O.S.T. wells should be provided based on 30 CFR 251.6-3(d). That regulation requires republication of a well proposal and an additional opportunity to participate without penalty when the Director of Survey finds that the applicant proposes significant changes to its original application. It thus furthers the regulatory goal of encouraging group ventures by permitting a new opportunity for interested persons to participate when the nature of the venture is significantly changed by the applicant.

Under 30 CFR 251.5-1(a), an application for a permit for a C.O.S.T. well must include the following information:

- (1) The name of any person who will conduct the proposed exploration or research activity;
- (2) The name of any person who will participate in the proposed exploration or research activity;
- (3) The type of exploration or research activity and the manner in which the activity will be conducted;
- (4) The location on the OCS where the exploration or research activity will be conducted;
- (5) The purpose for conducting the exploration or research activity;
- (6) The dates on which the exploration or research activity is proposed to be commenced and completed; and,
- (7) Such other relevant information and data as the Director may require.

5/ Candor compels us to ask, if SOHIO actually felt it was denied the opportunity to participate, why it waited for 9 months before complaining to the Survey Director. Such delay only lends credence to the charge that SOHIO, having reassessed the program with the benefit of the passage of time and any change in circumstances that may have occurred, is trying to avoid the late participation penalty designed to equalize the risk undertaken by participating parties.

Thus, for a change to trigger 30 CFR 251.6-3(d) it must first involve one or more of these information categories and second be found significant by the Survey Director. Since the purpose of the penalty provisions is to promote early commitment and ensure that the risk of a venture is shared equally by all participants, the "significant change" contemplated by 30 CFR 251.6-3(d) requires a proposed major change by the applicant to the nature of the venture as outlined in the permit application, not merely the settling or adjustment of the details of the project.

The differences identified by SOHIO between the proposed cost-share agreement and the final agreement are not the type of changes addressed by 30 CFR 251.6-3(d). First, they are changes to the agreement and not the permit application and, second, they reflect the negotiation of the details of the relationship of the participants in the C.O.S.T. wells, not fundamental changes to the venture. 6/

Under 30 CFR 251.5-1(a)(4), information as to the location of a proposed well must be included in a permit application. Arguably, if a change is made in a well location and that change is found to be significant, 30 CFR 251.6-3(d) would be applicable. However, the correction of an error in a part of the description of the location of a well where the actual location has not changed is not a significant change warranting a new participation period. There is no indication that ARCO, in fact, has changed the location of any of the wells. The discrepancies in the descriptions should have been apparent to those reviewing the proposals and clarification sought.

Finally, although the elimination of the well that ARCO proposed to drill on its lease with the same rig as obtained for the C.O.S.T. wells was certainly a factor in assessing the ARCO C.O.S.T. proposals, it was not a significant change in an original application as contemplated by 30 CFR 251.6-3(d). ARCO proposed to use the same rig for its own drilling because it believed it could get more beneficial contract terms on the rig for four wells thereby effecting a savings to all participants in the three C.O.S.T. wells. ARCO eliminated its well from the schedule because of objections expressed by potential participants during discussions preceding the commitment deadline. Although elimination of this well from ARCO's plans might have precipitated changes to the applications for the C.O.S.T. wells, i.e., schedule changes, that Survey might have found significant, there is no evidence in the record that any such changes resulted. It is not sufficient to identify changed circumstances which might be significant; the changes must be made to the original application at the initiative of the applicant. See Shell Oil Co., 66 IBLA 397, 405, 89 I.D. 430, 434 (1982).

6/ We can imagine circumstances where negotiations between an operator and prospective participants as to their agreement might require or result in the operator proposing changes to the permit application which the Survey Director might find significant and invoke 30 CFR 251.6-3(d). In such case he would do so because the applicant/operator had proposed changing the application, not because prospective participants had negotiated changes to the proposed agreement. These are not the circumstances before us, however.

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 Director of the Geological Survey is affirmed.

Will A. Irwin
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Douglas E. Henriques
Administrative Judge

