

Editor's note: Appealed -- aff'd, No. 88-4797 (5th Cir. July 24, 1989), 877 F.2d 1243, cert denied, No. 89-454 (Dec. 12, 1989) 110 S.Ct. 561

AMOCO PRODUCTION CO. (ON RECONSIDERATION)

IBLA 84-789

Decided October 9, 1986

Reconsideration of Amoco Production Co., 85 IBLA 121 (1985), upon motions submitted by the Minerals Management Service and Amoco Production Company. MMS 82-0046-OCS.

Affirmed as modified.

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

The Minerals Management Service (MMS) is authorized to issue royalty value determination letters, which will be binding on the Department and the lessee unless and until rescinded or modified by MMS. A royalty value determination letter properly issued by MMS cannot be interpreted in a manner which would result in the delegation of authority for determination of royalty amounts to a lessee. Such a letter must establish the basis for determination in sufficiently specific language to permit the exact basis for determination, and cannot bind the Department to a royalty rate merely because that rate has been approved by the Federal Power Commission.

APPEARANCES: Charles R. Shockey, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service; George J. Domas, Esq., Debora Bahn Price, Esq., and Bruce V. Schene, Esq., New Orleans, Louisiana, for Amoco Production Company.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

This is a reconsideration of this Board's opinion in Amoco Production Co., 85 IBLA 121 (1985). In that case Amoco Production Company (Amoco) had appealed from a decision of the Director, Minerals Management Service (MMS), dated May 17, 1984, affirming an order issued by the Chief, Royalty Compliance Office, MMS, Tulsa, Oklahoma, dated September 20, 1982 (revised October 5, 1982), requiring payment of \$ 1,435,852.97 in additional royalties for natural gas produced under lease OCS-G 1972, East Cameron Block 33, Offshore Louisiana, during the period from September 1977 to October 1981. The facts of the case, which have been set forth in detail in Amoco Production Co., *supra*, are not in dispute.

MMS and Amoco Production Company (Amoco) have filed petitions for reconsideration. By order dated May 31, 1985, the Board agreed to reconsider its prior decision and ordered briefing. Both petitioners seek clarification of four points set forth in Amoco Production Co., supra. These points are: (1) Do the value determination letters dated August 31, 1972, and March 1973 establish the proper value basis under the regulations for computing Amoco's royalty for its share of production from Outer Continental Shelf oil and gas lease OCS-G-1972? (2) Were the value determination letters superseded by 30 CFR 250.64 (1982)? (3) Were the value determination letters contrary to 30 CFR 250.64 (1982)? (4) To what extent, if any, does 30 CFR 250.64 (1982), restrict the MMS discretionary power to set a binding royalty value? This opinion will discuss the first two issues at some length. Because of our holding on the first two questions, we do not deem it necessary to address the arguments presented by the parties with respect to the second two.

The fact that the Florida Gas contract was submitted to the Geological survey on June 29, 1966, is not in dispute. There is also no dispute that, when submitted, it was not the intent of the parties that the Florida Gas contract would be applied to gas produced from OCS-G-1972. In July 1972 Amoco submitted the Columbia Gas contract to MSS for royalty calculation purposes. This contract, which committed 50 percent of the gas produced from OCS-G-1972 to Columbia Gas, was designated as the proper value basis for royalty determinations in the August 31, 1972, value determination letter.

Part of the problem in the analysis of the facts on appeal arises from the fact that Amoco owned 50 percent of the production from OCS-G-1972. The commitment under the approved contract was for 50 percent of the production. Amoco contends that it committed only 50 percent of its share of the production (i.e., 25 percent of all production), leaving the remaining 50 percent of its share of production uncommitted. For 5 years 100 percent of Amoco's share of the production from the well was delivered to Columbia Gas. In 1977 the Federal Power Commission (FPC) approved the Columbia Gulf contract which, according to Amoco, was to cover the remaining 50 percent of its interest which it contends was not committed to Columbia Gas. According to Amoco, the Columbia Gulf agreement was for onshore delivery of gas to Florida Gas in partial satisfaction of the Florida Gas agreement. Amoco then delivered all of its production to Columbia Gulf and calculated the royalty pursuant to the Florida Gas agreement. The stated purpose for doing so was to reduce that portion of the gas produced from the well and sold to Columbia Gas to 50 percent of Amoco's total production. However, even if we were to accept this argument, the value of production (for royalty purposes) is not subject to the accounting adjustment proposed by Amoco. Rather, royalties are calculated and paid monthly, and the effect of the sale to Columbia Gas during the initial 5-year period, for purposes of determining the basis for royalties, would be: (1) For 50 percent of the gas produced--the Columbia Gas agreement; (2) for the remaining gas--the value of equivalent gas as established by the Columbia Gas agreement. See 30 CFR 218.50.

[1] The question we must now consider is whether, during the 1977 through 1981 period, the price actually paid for the product or a higher

price represents the value for royalty computation purposes. It is clear the Secretary is not limited to the actual value received, and we reaffirm the finding made in our initial decision: "[T]he valuation of the gas produced under lease OCS-G 1972 is governed by the August 1972 and March 1973 Survey value determination letters. Neither letter had been challenged or amended and they remained applicable for royalty determinations for gas produced during that time period." Amoco Production Co., supra at 127.

We again find and hold that MMS has regulatory authority to accept a FPC approved contract for royalty basis determination. If the FPC approved contract is designated as being applicable to production from a specific well, whether by the contract terms or by MMS, the FPC contract price will be binding on MMS, unless and until MMS rescinds or amends its acceptance of such valuation basis. Nothing in the original Amoco decision was intended to limit the discretionary decisionmaking authority of the Secretary or his authorized agents, if that authority is properly exercised. However, a value determination letter cannot be construed in a manner which would result in the delegation to a lessee of the discretionary authority to set the value of gas sold.

The value determination letters provide that the value of production shall be the "FPC approved price, or a higher price, if received." Appellant urged this Board to accept the Florida Gas price, because the Florida Gas contract had received FPC approval and no higher price had been received. Appellant argues the Florida Gas price was binding because it was an FPC approved price, as set forth in the value determination letters. However, the MMS discretionary authority to allow calculation of the royalty pursuant to an FPC approved sales price does not extend as far as appellant would like it to be extended. To do so would be contrary to both the regulation as now in effect, and the regulation in effect prior to the 1979 amendment. 1/ If the royalty determination were made on the basis of the Florida Gas contract, merely because the Florida Gas contract had FPC approval, it would result in a de facto delegation of the MMS responsibility for making a royalty determination (after considering all of the factors found in 30 CFR 250.64) and would be contrary to the regulation. The above quoted language in the value determination letters cannot be used as the basis for a finding by MMS or this Board that any FPC approved contract chosen by Amoco would, by reason of Amoco's election, become binding on MMS until such time as MMS would rescind Amoco's determination.

With the above in mind, we make the following observations regarding the prior Amoco opinion. As noted above, 30 CFR 250.64 provides the criteria MMS is to apply when calculating royalty value. Between September 1977 and October 26, 1979, the applicable regulation, 30 CFR 250.64, stated:

§ 250.64 Value basis for computing royalties.

1/ The only basis by which the supervisor (or this Board) could find the Florida Gas contract to be applicable would be pursuant to that language of the regulation in effect until 1979, which states: "In the absence of good reason to the contrary, * * *. 30 CFR 250.64 (1977) (emphasis added).

The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

On October 26, 1979, this regulation was amended, and the following language adopted:

§ 250.64 Value basis for computing royalties.

The value of production shall never be less than the fair market value. The value used in the computation of royalty shall be determined by the Director. In establishing the value, the Director shall consider: (a) The highest price paid for a part or for a majority of like-quality products produced from the field or area; (b) the price received by the lessee; (c) posted prices; (d) regulated prices; and (e) other relevant matters. Under no circumstances shall the value of production be less than the gross proceeds accruing to the lessee from the disposition of the produced substances or less than the value computed on the reasonable unit value established by the Secretary.

30 CFR 250.64 (1980); 44 FR 61886 (Oct. 26, 1979). ^{2/} The above language remained in effect for the balance of the period in question. As we found in Amoco, supra at 127, valuation of gas produced from lease OCS-G-1972 was governed by the value determination letters. We specifically find this to be the case for the 50 percent of Amoco's production committed to Columbia Gas. The Columbia Gas contract submitted by Amoco committed 50 percent of the production from OCS-G-1972 to Columbia Gas, and, for that portion of the production, the 1972 and 1973 letters were binding on MMS and the producer, unless and until rescinded or modified. See 30 CFR 250.47 (1982). While a copy of the Florida Gas contract had been submitted to MMS, there is ample evidence that there was no intent on the part of MMS to be bound by the terms of that contract with respect to the production from OCS-G-1972. This fact

^{2/} This regulation was redesignated as 30 CFR 206.150 in 1983. 48 FR 35641 (Aug. 5, 1983).

133] & is clearly reflected by the conduct of the parties in the 5-year period preceding the audit period. Finally, we find, for the 50 percent of the gas not committed to Columbia Gas, the royalty determination made by MMS was clearly within the discretionary authority of the Secretary as set forth in 30 CFR 250.64. It is based upon a regulated price (pursuant to the Columbia Gas contract) for the product of the well which has been accepted by the parties as being either the "estimated reasonable value" (pre-1979) or "fair market value" (post-1979).

The remaining two questions raised by the parties, as outlined above, point to a problem, which arises not from the Board's holding in the decision cited as Amoco Production Co., 85 IBLA 121 (1985), but from dicta in that decision. Beginning with footnote 3 at page 128, and continuing with the text of the first paragraph on page 129, the Board's discussion of the effect which the amendment of 30 CFR 250.64 may have had upon the 1972 and 1973 value determination letters, and the effect of the regulatory amendment itself, were unnecessary to the decision of this appeal and have been criticized by both parties in their requests for reconsideration of the decision. Both parties have noted the possibility that these portions of the decision can be construed as being inconsistent with the Board's holding in this case. Upon reconsideration we recognize this discussion unnecessarily detracted from the holding by the Board. Accordingly, we hereby strike footnote 3 and the first paragraph on page 128 [129 per errata of Oct. 29, 1986. Ed.] of the decision. The remainder of the Board's decision in Amoco Production Co., *supra*, is affirmed, as clarified by this decision. The Board specifically reaffirms the prior holding that the value of production for all of the gas from lease OCS-G-1972 during the 1977 through 1981 period involved was the price set in the Columbia Gas contract and approved by the August 1972 and March 1973 Survey letters, since no higher price was received.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision in Amoco Production Co., 85 IBLA 121 (1985), is affirmed as modified by this decision.

R. W. Mullen
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING IN THE RESULT:

Our holding holds and our dicta do not: that is all the parties ask us to clarify and all we need to say.

Will A. Irwin
Administrative Judge

