

Editor's note: Appealed -- dismissed, No. 553-87-L (Cl. Ct. Nov. 5, 1991) (dismissal was due to Fed. Cir. decision in Chevron USA Inc. v. U.S. 923 F.2d 830)

CONOCO INC. ET AL.

IBLA 85-748; IBLA 85-795; IBLA 85-796

Decided April 14, 1987

Appeal from a decision of the Minerals Management Service denying refund requests.

Affirmed in part, set aside in part and remanded.

1. Outer Continental Shelf Lands Act: Refunds

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), authorizes the Secretary of the Interior to approve refunds for overpayments made in regard to Outer Continental Shelf leases. The Secretary's authority is conditioned upon a request being filed within 2 years after the date a payment is made. A payment is made when it is tendered to the appropriate agency.

2. Administrative Practice -- Administrative Procedure: Adjudication -- Outer Continental Shelf Lands Act: Refunds

Standards set forth in an opinion by the Solicitor cannot be applied as substantive requirements governing requests for refunds. The notice which must be filed to request a refund under 43 U.S.C. § 1339 (1982) must be distinguished from the proof necessary to substantiate a refund request.

3. Administrative Procedure: Administrative Record -- Rules of Practice: Generally

In the normal course of review, the Board considers both the legal issues raised by appellants and the specific factual determinations on which the agency's decision was based. Absent a record supporting the agency's factual determinations, the Board cannot sustain a finding applying the relevant law.

APPEARANCES: Ernest J. Altgelt III, Esq., Houston, Texas, for Conoco Inc.; Susan H. Meyers, Esq., and M. Hampton Carver, Esq., New Orleans, Louisiana, for Chevron U.S.A. Inc., and Gulf Exploration and Production Company; Craig H. Walker, Esq., New Orleans, Louisiana, for Shell Offshore, Inc., and Shell Oil Company; Cass C. Butler, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

By a decision dated May 30, 1985, the Director of the Minerals Management Service (MMS) denied requests for refunds filed by eight oil and gas producing companies "because the requests were filed outside of the 2-year time limit imposed by section 10 of the Outer Continental Shelf Lands Act" (OCSLA), 43 U.S.C. § 1339 (1982). Seven of the companies, or their successors-in-interest, filed notices of appeal, four of which are decided in this opinion. 1/

The same statute on which MMS based its decision of May 30, 1985, was also the basis for MMS' denial of refund requests filed following the vacation of Federal Energy Regulatory Commission (FERC) Orders Nos. 93 and 93-A in Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 716 F.2d 1 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984). See 49 FR 47120 (Nov. 30, 1984). Because of the similarity of legal issues concerning the statute, by orders dated August 15 and September 13, 1985, the appeals of the companies affected by the May 30, 1985, decision were consolidated for purposes of briefing and decision with those arising from FERC Orders Nos. 93 and 93-A. It has been subsequently determined that because the appeals of seven of the companies concerned arise from a different procedural and factual background and raise additional issues, they should be ruled upon by several separate decisions. Our opinion concerning the consolidated appeals arising from FERC Orders Nos. 93 and 93-A was issued March 17, 1987, Shell Offshore, Inc., 96 IBLA 149, 94 I.D. ___ (1987). This decision considers the appeals of Conoco, Inc. (Conoco), Chevron U.S.A. Inc. (Chevron), Gulf Exploration and Producing Company (Gulf), and Shell Offshore, Inc. (Shell).

OCSLA requires Federal lessees to pay a royalty of not less than 12-1/2 percent of the "amount or value of the production saved, removed or sold" as fixed by the Secretary of the Interior. 43 U.S.C. § 1337(a) (1982). MMS carries out the duty of the Secretary to establish the value of production. Previously this responsibility was assigned to the Geological Survey.

1/ The appellants, case numbers, and MMS file numbers of the appeals consolidated in this decision are:

IBLA 85-748	Conoco Inc.	MMS-85-0100-OCS
IBLA 85-795	Chevron U.S.A. Inc.; Gulf Exploration and Producing Company	MMS-85-0105-OCS
IBLA 85-796	Shell Offshore Inc.	MMS-85-0112-OCS

In addition to the appeals of the four companies reviewed in the present decision, the requests of Superior Oil Company and TransOcean Oil, Inc., were the subject of the decision in Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (1986). The appeal of Kerr-McGee Corporation raises an issue not shared by the appeals in the present decision and will be decided separately. No notice of appeal was received for Union Oil Company of California, the eighth company whose payments were considered by the May 30, 1985 MMS decision.

Included in the factors considered in establishing the royalty value of natural gas is the regulated price. 30 CFR 206.150. During the period relevant to this appeal, the regulated price of natural gas was set by the Federal Power Commission (FPC) acting under authority of the Natural Gas Act (NGA), 15 U.S.C. §§ 717-717w (1976). The regulation of natural gas is now controlled by FERC under the authority of the NGA and the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301-3432 (1982).

By Opinion No. 598, issued July 16, 1971, the FPC retroactively set a lower price for natural gas produced in the southern Louisiana region than was being paid under rules and contracts then in effect. See 36 FR 13915 (July 28, 1971). As a result, refunds were due to pipelines and other customers of the producer-appellants. FPC Opinion No. 598 also specified the manner in which such refunds were to be made. Producers were given the option of discharging their refund obligations by establishing a system of credits for new gas reserves dedicated to interstate commerce. Id. at 13917. Refund obligations which were not completely discharged by October 1, 1977, were to be paid in full with interest. It appears that in most cases the full amounts due were not paid until the FPC ordered a payoff in 1977. Prior to the issuance of FPC Order No. 598, appellants paid royalties to the Federal Government based on the higher regulated price for natural gas. Following FERC's payoff order, they requested refunds of the royalty share of the amounts they had refunded to their customers. These requests were denied by the MMS decision under review.

[1] The central issue for decision in this appeal is whether MMS correctly determined that 43 U.S.C. § 1339 (1982) precludes approving the requests for refunds of royalty payments made by appellants. In relevant part, the statute provides:

[W]hen 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 * * *.

In Shell Offshore, Inc., supra at 161, 94 I.D. at , we found that section 1339 confers authority upon the Secretary of the Interior to approve refunds for overpayments made in regard to Outer Continental Shelf (OCS) leases and also authorizes the Secretary of the Treasury to make the payments. We also determined that, as the plain language of the statute indicates, section 1339 conditions the authority of the Secretary to make repayments upon a request being filed "within two years after the making of the payment," and that, in accordance with the law governing onshore oil and gas leases, a payment is made when it is tendered to the appropriate agency. Id. at 165, 94 I.D. at .

Applied in the present cases, our holding in Shell Offshore requires that we affirm MMS insofar as it determined that section 1339 precludes granting requests for refunds filed more than 2 years after the date of payment. However, we cannot, on this basis alone, affirm the decisions appealed from.

In the normal course of review, the Board considers both the legal issues raised by appellants and the specific factual determinations on which the agency's decision was based. The two, of course, are not unrelated, as only legal issues raised by the facts of the case need be addressed, and then only insofar as is necessary to dispose of the case on its facts.

In the present cases, such review of the facts of record is not possible. In forwarding the case file for Conoco to the Board, counsel for MMS stated by cover letter that only the Director's decision and the appellant's notice of appeal were being sent because the issue on appeal was purely legal, concerning only the effect of section 1339 on refund requests for retroactive gas rate changes. The letter also stated that the remainder of the file would be forwarded if requested by the Board. Although not accompanied by similar cover letters, the same practice was followed by MMS in forwarding the case files for Chevron, Gulf, and Shell, as these files also contain only copies of the Director's decision and the notices of appeal.

The decision of the Director of MMS is 13 pages. Except for addresses and salutations, it appears that identical copies were sent to all eight lessees affected by it. The first page of the decision lists the names of the eight lessees, the presumed dates of their requests and dates of their last payments, and the amounts requested. It also contains the statement previously quoted denying the requests. The next four pages of the decision discuss the history of natural gas price rates set by FPC, and three more pages present a legal justification of MMS' interpretation of section 1339. The remainder of the decision makes specific findings concerning the cases of each of the eight lessees and addresses the arguments the parties raised in appealing to the Director.

Because, based on our decision in Shell Offshore, we agree with MMS that section 1339 requires refund requests to be filed within 2 years of the date of payment, we turn to review the specific facts of appellants' cases. As noted, our review is limited by the lack of documentation supporting MMS' findings of fact.

MMS' decision states that appellant Conoco's request, filed when its corporate name was Continental Oil Corporation, was dated October 30, 1978, received November 2, 1978, and sought refunds for sales made between October 1968 and December 1970 (Decision at 13). We note that the latter dates are described as the dates of the relevant sales while the first page of the decision states that the last payment was made in December 1970. This difference, however, is not significant as it does not appear to affect the outcome of the appeal, although in other circumstances such a difference could affect the amount of refund a party is due. In any event, Conoco does not expressly dispute MMS' factual determinations. In addition, Conoco states in its notice of appeal that its request was filed October 30, 1978. This date varies from that stated by MMS by a few days. It may be, however, that Conoco is equating the date of its letter with its date of filing. Whichever is the correct date, because the payments at issue were made many years prior to either date, the difference is inconsequential. A refund request filed in 1978 concerning payments made in 1970 clearly cannot be approved under the statute. Accordingly, we affirm MMS' decision as to appellant Conoco.

MMS' decision noted that appellant Chevron had originally sent a letter dated April 4, 1979, giving notice of its intent to file a refund request for the period between April 1969 through July 1971, and that, by letter dated July 29, 1983, MMS had returned Chevron's letter because the request was untimely filed. By an additional letter dated October 25, 1983, MMS informed Chevron that it could resubmit an updated request. MMS' decision stated that the April 4, 1979, letter was not "a sufficient request because no amount was estimated." It also rejected both the letter and the resubmitted request as being filed beyond the statutory 2-year limit.

In the statement of reasons submitted by counsel for Chevron, appellant states that "Chevron notified USGS by letter dated April 4, 1979, received April 11, 1979, that Chevron intended to file a request for refund of royalty payments" (Statement of Reasons at 2). There is little doubt that MMS rejected this letter both by returning it in 1983 and by its decision of May 30, 1985, due to its policy stated in the decision: "The Department requires refund applicants to request specific amounts and explain the basis for the request. The request must give the Director enough information to rule on it." Decision at 6. A Solicitor's opinion, "Refunds and Credits Under the Outer Continental Shelf Lands Act," 88 I.D. 1090 (1981), is cited as authority.

[2] We reviewed the policy described in MMS' decision in Shell Offshore, Inc., *supra*, concluding that principles of administrative law preclude the standards set forth in the Solicitor's opinion from being applied by MMS as substantive requirements governing requests for refunds. *Id.* at 173, 94 I.D. at . We also stated that the notice necessary to meet the 2-year provision of section 1339 must be distinguished from the proof necessary to substantiate a refund request. *Id.* at 174, 94 I.D. at . Thus, under our decision in Shell Offshore, MMS improperly rejected Chevron's request for failure to identify an amount. Because Chevron's letter does not appear in the case file, we are unable to determine whether it gave MMS notice of Chevron's intent to obtain a refund. Nevertheless, accepting that it did, there is no dispute that it was filed more than 2 years after the dates of the payments for which Chevron sought refunds. Accordingly, we affirm MMS as to its denial of Chevron's request.

MMS determined that appellant Gulf's refund request, dated June 15, 1978, was received June 20, 1978, but that because "no amount or time span was stated, the request is viewed as being insufficient" (Decision at 9). The decision indicates that further correspondence ensued and that eventually Gulf submitted legal argument supporting its request. MMS denied Gulf's request because it was filed more than 2 years after the date of payments.

As with the letter from Chevron, under our decision in Shell Offshore, Gulf's request could not be properly rejected for lack of information as to the dates payments were made if doing so substantively affected Gulf's rights. Gulf would bear the legal and evidentiary burdens of showing its entitlement to a refund and MMS could not approve the request until the necessary information had been supplied. *See id.* at 173-75, 94 I.D. at

Thus, the proper course would have been to inform Gulf that its request could not be considered until the necessary information was supplied.

[3] We do not blame MMS for failing to follow a procedure in accord with our recent decision in Shell Offshore. We are surprised, however, that lacking the dates of the relevant payments, MMS additionally rejected Gulf's request for being filed more than 2 years after the payments were made. The decision makes no finding as to the dates of the payments for which Gulf sought refunds, but merely notes that information as to the date of the last payment is "not stated in file" (Decision at 1). Thus, it is unclear how MMS could conclude as a matter of fact that Gulf's request was filed more than 2 years after the relevant payments were tendered. It is, of course, likely that Gulf's payments were made about the same time as those of the other appellants, and therefore likely that its June 15, 1978, letter was filed more than 2 years after such payments. The likelihood, however, does not create a fact of record. Accordingly, we set aside MMS' decision as to Gulf's request and remand the matter for further review.

Finally, we consider the appeal of Shell. MMS' decision found that Shell filed its request by letter dated June 11, 1982, and sent a supplemental submission on May 30, 1983. After rejecting Shell's legal arguments raised in its supplemental submission, the decision rejected Shell's refund request because it was made more than 2 years after the payments for which it sought refunds.

In its statement of reasons Shell raises several arguments concerning the application of section 1339 which are similar to those raised and considered by appellants in Shell Offshore. In addition, Shell has submitted copies of letters dated September 21 and September 30, 1970, and May 21, 1971, written in response to a request from the Geological Survey for data pertaining to possible refunds relating to FPC Order No. 546, which established gas rates for the southern Louisiana region prior to the issuance of FPC Order No. 598. The letter from Geological Survey advised, in part: "We believe that by following the procedure suggested above, you will be protected under the provisions of Section 10 of the OCS Lands Act and that refunds or recoupment may be accomplished without undue delay." Shell has also submitted a copy of a letter dated October 12, 1972, which refers to its prior letters and the issuance of FPC Order No. 598.

Shell notes that in its letter of October 12, 1972, the company asserted it had a "present claim for royalty refund," subject to adjustment based upon the final version of Order No. 598 following judicial review and further FPC action. Shell also notes that FPC Order No. 598 was not completely adjudicated until August 28, 1980, and that the company's formal refund request was made on June 21, 1982. Shell argues that it was led to believe that by providing the data requested by the Geological Survey it would preserve its rights to a full refund of its excess payments and further argues that it is arbitrary and capricious to change the ground rules under which refunds relating to Order No. 598 have been handled (Shell Statement of Reasons at 11). Alternatively, it argues that the notices given by its letters should serve to suspend the application of the 2-year period provided by section 1339. 2/

2/ We cannot accept Shell's argument that its letter suspended the 2-year period established by section 1339. No language in the statute provides for the suspension of the 2 year period or its application from other than "the date of the making of the payment."

Under our analysis in Shell Offshore, it appears that by Shell's letter of October 12, 1972, the company gave the Geological Survey notice of its request for a refund. For this reason we set aside the decision of MMS as to Shell's refund request. The same result is required for the reason we set aside MMS' decision as to Gulf. No finding appears in the decision as to the dates of the payments for which Shell sought refunds. Absent such information, we cannot sustain a finding that Shell's request was filed more than 2 years after the dates of the payments.

In other circumstances we might have chosen to remedy the deficiencies in the record by ordering the agency to produce a proper record. See, e.g., Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (1986). In the present case such an order would not be useful. It would require that copies of the supplemented record be served on appellants and that they be given an opportunity to comment and raise additional arguments. See 43 CFR 4.401. MMS would be allowed an opportunity to respond, and the parties might wish to file replies. Because the decision in question is ultimately based on the application of section 1339, and we have now construed the statute in Shell Offshore in the context of these appeals, it is likely further arguments would arise based on the decision. Given our ruling in that case, it is more appropriate that the parties be given an opportunity to deal with each other rather than perpetuating these appeals of a decision made prior to our ruling.

Accordingly, 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 as to Conoco, Inc., and Chevron U.S.A. Inc., and set aside and remanded as to Gulf Oil Exploration and Production Company and Shell Offshore, Inc.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Kathryn A. Lynn
Administrative Judge, Alternate Member.

