SONAT EXPLORATION CO., ET AL.

IBLA 85-915, et al. Decided October 24, 1988

Appeals from decisions of the Director and Acting Director, Minerals Management Service, requiring payment of royalties for gas used or flared on leases maintained under section 6 of the Outer Continental Shelf Lands Act. MMS-83-0034-OCS, et al.

Affirmed.

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

   The holder of an oil and gas lease of lands on the Outer Continental Shelf issued by the State of Louisiana and maintained under sec. 6 of the Outer Continental Shelf Lands Act, 43 U.S.C. | 1335 (1982), must pay royalties in accordance with the provisions of the lease. When the lease provides for royalties on "all gas produced and saved or utilized," the lessee is obligated to pay royalties on gas used or flared on the lease.

2. Outer Continental Shelf Lands Act: Refunds

   A request for a refund of royalties paid under the Outer Continental Shelf Lands Act must be made within 2 years of the date of payment in accordance with sec. 10 of the Act, 43 U.S.C. | 1339 (1982).

3. Contracts: Construction and Operation: Generally--Oil and Gas Leases: Royalties--Outer Continental Shelf Lands Act: Generally--Outer Continental Shelf Lands Act: State Leases: Generally

   Where there are divergent views of state officials concerning the interpretation of a provision of a lease maintained under sec. 6 of the Outer Continental Shelf Lands Act, 43 U.S.C. | 1335 (1982), the Board will interpret the provision in accordance with general rules for construing contracts. When a royalty clause provides the lessee pay "sums equal to the value [of gas produced and saved or utilized] at the well, provided no gathering or other charges are made chargeable to lessor," the lessee may not deduct the cost of compressor fuel from royalties paid for gas used or flared on a sec. 6 lease.

4. Administrative Procedure: Administrative Procedure Act--Administrative Procedure: Adjudication--Administrative Procedure: Rulemaking

A MMS decision that interprets a Notice to Lessees as excluding a category of leases is an adjudication, and need not be adopted in accordance with notice-and-comment rulemaking procedures in accordance with 5 U.S.C. | 553 (1982).

5. Administrative Authority: Estoppel--Estoppel--Federal Employees and Officers: Authority to Bind Government

Failure to specifically exclude a category of leases in a Notice to Lessee or Notice to Payors stating that royalties were not required for "oil and gas used for production purposes on OCS oil and gas leases" is not affirmative misconduct that will support estoppel against the Government.

6. Outer Continental Shelf Lands Act: Oil and Gas Leases--Payments: Generally

MMS does not abuse its discretion in failing to waive payment of interest charges for late payments of royalties where a Notice to Lessees concerning those payments is not so confusing as to make imposition of the charges inequitable.

APPEARANCES: Philip C. Wrangle, Esq., Senior Vice President and General Counsel, J. Colleen Campbell, Esq., Assistant Secretary, Sonat Exploration Company, Deborah Bahn Price, Esq., and Stevia M. Walter, Esq., New Orleans, Louisiana, for Sonat Exploration Company; Craig H. Walker, Esq., New Orleans, Louisiana, for Shell Offshore, Inc.; R. Carol Harvey, Esq, and Amy Ng, Esq., Houston, Texas, for Conoco Inc.; Salvatore J. Casamassima, Esq., Houston, Texas, for Exxon Corporation; Richard R. Myers, Esq., Houston, Texas, for Union Oil Company of California; Charles R. Shockey, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

I. Factual and Procedural Background

Although the nature of the Minerals Management Service (MMS) decisions involved varies, these six appeals all present the question whether the holder of a lease maintained under section 6 of the Outer Continental Shelf

Lands Act, 43 U.S.C. | 1335 (1982), is required to pay royalty for natural gas used or flared on the lease, and the appeals have been consolidated for decision at the request of the parties for that reason.

The leases involved in these appeals were issued by the State of Louisiana before the Outer Continental Shelf Lands Act (OCSLA) was enacted in 1953 as a consequence of the Supreme Court's decisions in United States v. California, 332 U.S. 19 (1947), United States v. Louisiana, 339 U.S. 699 (1950), and United States v. Texas, 339 U.S. 707 (1950). These leases all provided that, should gas be produced in paying quantities, "the lessee shall deliver to the lessor as royalty * * * one-eighth of all gas produced and saved or utilized." (Emphasis added.)

Section 6 of OCSLA applied to an Outer Continental Shelf lease issued by a state if the lease provided "for a royalty to the lessor on oil and gas of not less than 12-1/2 per centum * * * in amount or value of the production saved, removed, or sold." 43 U.S.C. | 1335(a)(8) (1982). A lessee meeting this and several other requirements of section 6(a) could, under section 6(b), maintain the lease in accordance with "(1) its provisions as to * * * rentals and, subject to the provisions of paragraphs (8), (9) and (10) of subsection (a) of this section, as to royalties and as to the term thereof * * *" and in accordance with "(2) such regulations as the Secretary may under [43 U.S.C.] | 1334 * * * prescribe." 43 U.S.C. | 1335(b) (1982).

Sonat Exploration Company (Sonat) appeals the June 28, 1985, decision of the Acting Director, MMS, in MMS-83-0034-OCS affirming an October 24, 1983, denial by the Regional Manager of the Houston Regional Compliance Office of a request for a refund of $91,899.10 for royalties paid for gas used as a fuel on leases OCS-0345, OCS-0346, OCS-0347, and OCS-0384 (IBLA 85-915).

Shell Offshore Inc. (Shell) appeals the June 28, 1985, decision of the Acting Director, MMS, in MMS-83-0041-OCS affirming the November 15, 1983, denial by the Regional Supervisor of the Metairie Compliance Suboffice of a request for a refund of $265,102.71 in royalties paid for gas that was flared or used for fuel on leases OCS-0016, OCS-0353, and OCS-0367 (IBLA 85-916).

Conoco Inc. (Conoco) appeals the April 17, 1986, decision of the Director, MMS, in MMS-85-0106-OCS affirming a May 22, 1985, order of the Regional Manager of the Tulsa Regional Compliance Office requiring Conoco to "report, calculate, and pay royalties on OCS fuel-use gas produced for past months and years where such royalties were not paid * * * for all Conoco Section 6 leases originally issued by the State of Louisiana" and to pay $22,972.73 in royalties on fuel-use gas produced during specified months in 1982, 1983, and 1984 on leases OCS-0129, OCS-0137, and OCS-0138 (IBLA 86-1445).

Conoco also appeals the July 8, 1986, decision of the Acting Director, MMS, in MMS-86-0196-OCS affirming the March 31, 1986, decision of the Regional Manager of the Tulsa Regional Compliance Office assessing interest charges totalling $675,490.17 on the late payment of the royalties due for the lease-use gas on leases OCS-0159, OCS-0090, OCS-0160, OCS-0161, OCS-0163, OCS-0184, OCS-0187, OCS-0190, OCS-0191, OCS-0193, OCS-0016, OCS-0137, OCS-0138, OCS-0146, OCS-0147, OCS-0126, OCS-0128, OCS-0129, OCS-0130, OCS-0133, OCS-0134, OCS-0131, OCS-0174, OCS-0175, OCS-0176, OCS-0180, OCS-0181, and OCS-0182 (IBLA 87-35).

Exxon Company, U.S.A. (Exxon) appeals the June 19, 1986, decision of the Director, MMS, in MMS-85-0183-OCS affirming the July 17, 1985, denial by the Regional Manager of the Houston Regional Compliance Office of a request for a refund of $843,212.38 for royalties paid for lease-fuel gas on leases OCS-0018, OCS-0019, OCS-0020, OCS-0028, OCS-0016-7, OCS-0367-11, OCS-0032, OCS-0033, OCS-0026, OCS-0367-1, OCS-0016-1, OCS-0016 and OCS Units OCS-91-002932, OCS-008948, and OCS-91-03444A (IBLA 86-1514).

Union Oil Company of California (Union) appeals the June 6, 1986, decision of the Director, MMS, in MMS 85-0066-OCS affirming the April 5, 1985, denial by the Regional Manager of the Houston Regional Compliance Office of a request for a refund of $320,133.03 for royalties for lease-use gas for leases OCS-0196, OCS-0204, OCS-0205, OCS-0206, OCS-0207, OCS-0208, and OCS-0297 and the June 19, 1986, decision of the Director, MMS, in MMS-85-0247-OCS affirming the September 4, 1985, assessment by the Regional Manager of the Houston Regional Compliance Office of $61,753.25 interest charged for the late payment of the royalties for lease-use gas on these leases (IBLA 86-1526).

Appellants based their requests for refunds on a Notice to Lessees (NTL) dated May 5, 1982, see 47 FR 20672 (May 13, 1982), amended on July 26, 1982, see 47 FR 36717 (Aug. 23, 1982). That NTL was issued "to conform to a recent court decision relating to royalty payments on oil or gas lost, vented, flared or used in lease or unit operations." 47 FR 20672 (May 13, 1982). That court decision, Amoco Production Co. v. Andrus, 527 F. Supp. 790 (E.D. La. 1981), invalidated MMS' collection of royalties for oil or gas used in leasehold operations pursuant to a 1980 NTL. See 45 FR 81670 (Dec. 11, 1980). The May 5, 1982, NTL superseded the 1980 requirement that royalties were due for "oil or gas used for purposes of production from and operations within or outside the lease or unit area" and authorized applications for refunds from lessees and unit operators for royalties paid "under prior NTL's, to the extent that those provisions are contrary to this NTL." 47 FR 20672 (May 13, 1982). 1/

1/ The May 5, 1982, NTL was effective June 1, 1982, and provided:

"Effective June 1, 1974, royalty is not due on (1) any oil or gas that is leaked, spilled, vented, flared, or otherwise lost, or (2) on oil and gas used for purposes of production from and operations within or outside the lease or unit area. Gas and associated liquids used for reinjection in a reservoir within the same lease or unit will be subject to a royalty obligation at the time they are finally produced. Royalty is due on all other oil and gas production."

The July 1982 amendment of the NTL deleted the words "or outside" from the uses for which royalties would not be paid. See Exxon Company, U.S.A., 98 IBLA 218, 94 I.D. 329 (1987).

II. Arguments of the Parties and the MMS Decision

The arguments of the several appellants and MMS' responses to them are quite similar. Therefore, we fully summarize the arguments and responses set out in Sonat's appeal, following which we present the additional arguments of other appellants and MMS' responses to those arguments.

A. Arguments of Appellant Sonat

Sonat submitted its request for refund on September 2, 1982. MMS conducted an audit and denied the request for certain of the amounts requested with the following explanatory note: "The amount denied represents fuel royalties paid on a lease maintained under section 6 of the OCSLA, as the NTL did not exclude fuel use from royalty obligations for such leases" (Exh. A to May 19, 1983, Audit Report on Sonat Exploration Company's Request for Refund).

When Sonat asked MMS to reconsider its denial of these amounts, the MMS regional manager explained in his October 24, 1983, decision that the major reason the court declared the 1980 NTL invalid in Amoco Production Co., supra, was because of the inconsistency resulting from the fact that the 1980 NTL had required royalty payments for leases issued after July 1, 1974, but did not for those issued before that date. The regional manager stated:

> The State of Louisiana, pursuant to the specific terms of the lease agreement, has always required and collected royalties on gas used as fuel for leases issued by that state. Therefore, for leases issued by the state and maintained under section 6, an inconsistent treatment of royalties on fuel gas has never occurred and should not be influenced by the Court's decision, * * *.

Quoting the language of section 6(b) of OCSLA, the regional manager reasoned that "the provisions of a lease issued by a state, including the provision that royalty shall be paid on all gas utilized, remains [sic] in force if the minimum requirements specified in section 6(a) are satisfied." Section 6 of OCSLA, governing leases issued by states before it was enacted, and section 8 of the Act, governing leases issued by the Secretary of the Interior subsequent to enactment, provide for the same minimum royalty of "not less than 12 1/2% * * * in amount or value of the production saved, removed, or sold," the regional manager observed. He then noted that Federal leases issued under section 8 require a minimum royalty of 16-2/3 percent, and the Department "has accepted a lower royalty rate as well as a slightly different base for application" when applying the roy-alty provisions of section 6 leases.

Sonat appealed to the Director of MMS in accordance with 30 CFR Part 290. On appeal to the Director, Sonat observed that the May 5, 1982, NTL did not limit refunds to kinds of leases or to specific NTL's previously issued. It argued that the language of the Louisiana leases concerning royalties (i.e., that royalties were due on gas "produced, saved, or utilized") was superseded by the language of section 6(a)(8) of OCSLA (royal-ties due on the production "saved, removed, or sold") because section 6(b) of OCSLA provides that a person holding such a lease could maintain it in accordance with its provisions "subject to" the provisions of paragraph 8 of subsection (a). 2/ Sonat contended that in 1953, when it used the "production saved, removed, or sold from the lease" language in sections 6 and 8 of OCSLA, the Congress intended to extend to OCSLA the practice of exempting oil or gas used in production from royalty that obtained under the "production removed or sold from the lease" language that the Congress employed in 1946 when amending section 17 of the Mineral Leasing Act, 30 U.S.C. | 226(b) (1982) in order to preclude the Department from abandoning that practice for onshore leases. See Gulf Oil Corp. v. Andrus, 460 F. Supp. 15 (C.D. Cal. 1978); Marathon Oil Co. v. Andrus, 452 F. Supp. 548 (D. Wyo. 1978). 3/ Sonat contended further that it is arbitrary to not exempt gas used in production from royalty under section 6 leases when the "saved, removed, or

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2/ "Thus, although many of the provisions of the state leases were adopted by the federal government, the language of the state lease was superceded [sic] by federal statute if there were a conflict between the language of the state lease royalty clause and Section 6(a)(8) of the Act." Notice of Appeal, Written Showing and Argument on the Facts and Law, filed Nov. 25, 1983, at 10.

Sonat also argued that 30 CFR 250.5 provided that the statute would take priority over the specific royalty terms of any validated state lease as to the percentage of royalty paid and as to how such royalty would be assessed. Id. 30 CFR 250.5 provides:

"(a) As provided in subsection 6(b) of the Act, the regulations in this part supersede the provisions of any lease which is determined to meet the requirements of subsection (a) of the Act, to the extent that they cover the same subject matter, with the following exceptions: the provisions of the lease as to area, rentals, and minerals covered; the royalties payable under the lease (subject to the provisions of paragraphs 6(a)(8) and 6(a)(9) of the Act); and the term of the lease * * * shall continue in effect and, in the event of any conflict or inconsistency, shall take precedence over the regulations in this part."

3/ "Congress in enacting the Act made a concerted decision to exempt fuel and flare hydrocarbons from royalty obligations:

"'An important element of sound leasing policy is fixing the terms of a fair lease. This is a matter of legislative determination and the Committee believes it desirable to give consideration to the terms of the leases which have been developed and are in general use in the industry after a long period of trial and error and to the terms of leases granted by the coastal states under which operations in the Continental Shelf had been conducted. "'Under commercial leases and under most leases executed by the States on the Continental Shelf, the normal royalty is 1/8 or 12 1/2% of the amount of value of the oil or gas produced and saved * * *.' [Emphasis added.] H.R. Rep. No. 2078, 81st Cong., 2d Sess., at 9-10 (1950).

"It appears then within Section 6(a)(8) of the Act and within Section 8(b)(3) Congress borrowed the phrase 'removed or sold' from Section 17 of the Mineral Leasing Act, supra, and then added an additional term 'saved' which was commonly used within state and commercial leases." Notice of Appeal, Written Showing and Argument on the Facts and Law, supra note 2, at 14.

sold from the lease" language appears in both section 6 and section 8 and the decision in Amoco Production Co., supra, held that the Congress intended to exempt such gas and oil under section 8 leases from royalty. 4/

B. The MMS Decision

The MMS Acting Director's decision of June 28, 1985, incorporated by reference a July 6, 1984, memorandum from the Associate Solicitor, Energy and Resources, to the Associate Director, Royalty Management, MMS, entitled Authority to Collect Royalty on OCS "Lease Use" Gas Produced from Section 6 Leases (Decision at 3). The Acting Director stated that the Department had consistently regarded section 6(a)(8) of OCSLA as establishing a 12-l/2 percent royalty rate "floor." 5/ If a state lease royalty provision fell below this rate, it would conflict with section 6(a)(8) and the provision would be inapplicable.

> However, under section 6, if the State-issued lease provides for a royalty which is higher than the section 6 minimum, then the terms of the State lease apply and such higher royalty must be paid. See Superior Oil Company, 31 IBLA 127, 132 (June 30, 1977). See also, Associate Solicitor's memorandum at pages 4, 10, and 11. This reading of section 6 effectuates the Congressional intent that lessees be left "* * * in roughly the same economic position after their leases had been validated as they had been in prior to passage of the Act * * *." Ocean Drilling & Exploration Co. v. U.S., 600 F.2d 1343, 1346 (Ct. Cl. 1979) * * *. [T]his longstanding application of section 6 by the administrative agency charged by Congress with the administration of the statute is entitled to great deference. Amoco Production Co. v. Andrus, supra, at 794.

(Decision at 4-5).

4/ "The legislative history of the OCS Lands Act also demonstrates Congress' intent to continue exempting Lost and Used Hydrocarbons from royalty obligations. Acting in the context of the legislative history of the Mineral Lands Leasing Act, the Congress enacted the OCS Lands Act * * *. [I]n structuring the royalty provision of the OCS Lands Act, the Congress borrowed the phrase 'removed or sold' from the Mineral Lands Leasing Act. It added to this phrase the term 'saved,' a term commonly used in state and commercial leases. In deciding to use the phrase 'saved, removed or sold' in the royalty provision of the OCS Lands Act, Congress was aware of, and is presumed to have intended that the language be defined consistently with, the long-standing Interior Department interpretation of the 'removed or sold' language used in the royalty provision of its predecessor statute." Amoco Production Co. v. Andrus, supra at 794.

5/ Section 6(a)(8) provides:

"The provisions of this section shall apply to any mineral lease covering submerged lands of the outer Continental Shelf issued by any State * * * if -- * * * (8) such lease provides for a royalty to the lessor on oil and gas of not less than 12 1/2 per centum * * * in amount or value of the production saved, removed, or sold from the lease * * *."

Finding "the royalty requirements in sections 6 and 8 are entirely different," because "section 6 expressly incorporates the more stringent royalty requirements of the original State leases while section 8 leases, not being based on prior leases, do not incorporate any prior lease provisions," the Acting Director held that the May 5, 1982, NTL applied only to section 8 leases and did not apply to section 6 leases because the Amoco Production Co. decision was applicable only to section 8 leases (Decision at 5).

The Acting Director noted that the decisions of the Bureau of Land Management determining that the leases met the requirements of section 6 continued the leases "under and pursuant to section 6(b) of the Act subject to compliance with the covenants in the lease." 6/ Because the State of Louisiana leases provided for royalties based on the value of "all gas produced and saved or utilized," the Acting Director held that royalties were properly paid for gas used or flared on those leases. "[T]o the extent that a royalty above the subparagraph 6(a)(8) floor is required by an express provision in the leases, the lessee is obligated to pay royalties in accordance with the more demanding provisions of the leases" (Decision at 5).

The Acting Director concluded with the observation that even if Sonat's arguments had merit, "the 2-year limitation in section 10 of the OCSLA (43 U.S.C. | 1339 [(1982)]) would bar most, if not all, of the refund requested" (Decision at 6).

C. Sonat's Arguments on Appeal

In its statement of reasons and the supplement to its statement of reasons for its appeal to the Board, Sonat iterates some of the arguments it made to the Director that were rejected in the Acting Director's decision, elaborates upon others, and responds to the statement that its request for refund would be barred by 43 U.S.C. | 1339 (1982). As to arguments it elaborated, Sonat added that the NTL's preceding the May 5, 1982, NTL (upon which it based its request for refund) referred to both section 6 and section 8 leases. Sonat contends that the May 5, 1982, NTL addressed "lessees * * * on the Outer Continental Shelf," did not distinguish between section 6 and section 8 leases, but superseded the earlier NTL's that referred to both kinds. Thus, according to Sonat, the May 5, 1982, NTL applied to all OCS leases. In support of this argument, Sonat points to the statement in a report of the MMS Royalty Valuation and Standards Division entitled "Findings and Conclusions on Royalty Requirements for Used, Flared or Lost Gas

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6/ See, for example, Decision of the Acting Director, BLM, dated Aug. 23, 1954 (and concurred in by the Acting Solicitor on Sept. 29, 1954), issued to The California Company for State Lease 1068, now OCS Lease 0384 (held by Sonat). As Sonat notes in its statement of reasons, the rest of this sentence in the decision is "and with the requirements of the law and regulations and to the payment of the additional royalty on all production from the lease after Aug. 7, 1953, prescribed by Section 6(a)(9) of the Act" (SOR, Written Showing and Argument on the Facts and Law, filed Sept. 11, 1985, at 9-10.)

Produced from Section 6 OCS Leases" (Exh. A to Supplement to Statement of Reasons) that the failure to exclude section 6 leases from the May 5, 1982, NTL may have been an "additional mistake" in that NTL. See note 1, infra.

Next, Sonat argues that although it paid royalties for gas used as fuel on its leases until the May 5, 1982, NTL was issued, that NTL and the decision in Amoco Production Co., supra, caused it to recognize the Department's inconsistent action under the identical "saved, removed, or sold" language in section 6(a) and section 8:

> [A]lthough the language of the lease is dispositive as to the payment of the royalty, it must be read in accordance with the language of Section 6(a)(8) and (9) as to the assessment of royalties. Subsection (a)(8) provides that royalty is to be based on the "value of production saved, removed, or sold from the lease." Subsection (a)(9) creates a bifurcated royalty provision of not only the percentage of royalty expressly stated in the lease, but including any severance taxes that would have been due to the state * * *. Sonat submits that the requirements of the statute in setting a minimum royalty percentage, are mutually exclusive of the express language of the statute which assesses royalty payments on production saved, removed, or sold.

(Statement of Reasons (SOR) at 8-9). 7/

Sonat then addresses the portion of the Associate Solicitor's memorandum incorporated by reference in the Acting Director's decision supporting the conclusion that gas used for fuel on section 6 leases is subject to royalty based on analysis of a "closely analogous issue" (Associate Solicitor's memorandum at 9) in Solicitor's Opinion, M-36322 (Jan. 17, 1956) finding gas from section 6 leases used for fuel in sulfur mining operations subject to royalties. In Sonat's view, this opinion is not dispositive because it dealt not with gas consumed in oil and gas operations but with gas used in sulfur mining operations in the distinct context of the limitations on the continued rights to mine sulfur imposed by section 6(b) of OCSLA.

Finally, Sonat argues that section 10 of OCSLA does not bar its refund request because the May 5, 1982, NTL invited lessees to apply for refunds of royalties paid contrary to its provisions under previous NTL's and because section 10 by implication distinguishes payments lawfully made and those unlawfully made. 8/

7/ "Section 6(a)(8) does not provide for the assessment of royalty based on production that is 'utilized' on the lease. Rather, the express language of the statute provides that royalty will be paid only on the basis of production saved, removed, or sold from the lease." Id. at 14.

8/ Section 10 of OCSLA, 43 U.S.C. | 1339(a) (1982), provides 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

> [W]ere the Acting Director's interpretation of the statute to prevail, a lessee would be required to file a refund request with every royalty payment the lessee made to ensure that the lessee would not be barred from recovering amounts later determined to have been unlawfully required of him. The statute would then, in effect, allow MMS to keep amounts which it had unlawfully required, so long as the agency's own internal appeals processes took at least two years to determine that the money had been unlawfully collected. [9/]

Further, Sonat argues, its refund request was filed on September 2, 1982, within 4 months of the May 5, 1982, NTL, and the statute of limitations has been tolled during the time the request has been involved with the Department's administrative review processes.

D. MMS' Answer to Sonat's Arguments on Appeal

In its answer, MMS argues that the May 5, 1982, NTL did not apply to section 6 leases because it was issued in response to the decision in Amoco Production Co., supra, which involved only section 8 leases. The Louisiana leases in this case require payment of royalties on gas "produced, saved, or utilized," while the court in Amoco Production Co. was interpreting the words "removed, or sold." The basis for the holding in Amoco Production Co. was the change in the Department's long-standing practice of exempting gas used in production from section 8 leases from royalties; since neither Louisiana nor the Department had ever exempted lease-use gas from royalties for these leases, the practice never extended to section 6 leases. The initial NTL leading to the Amoco Production Co. case, NTL 74-14, distinguished between section 6 and section 8 leases as to lease-use gas, so there is no basis for concluding that the May 5, 1982, NTL, which was written to implement the court's decision, would refer to both.

MMS contends there is no conflict between the terms of section 6 of OCSLA and the language of the leases because section 6(a)(8) established a minimum royalty amount in a state-issued lease -- "not less than 12-1/2 per centum in amount or value of the production saved, removed, or sold" -- for such a lease to be validated as a Federal lease. The language of the state-issued leases calling for a royalty of "1/8 of all gas produced and saved or utilized" established a broader base for royalty, which was maintained after the state leases were validated. Because the terms of the Act and the language of the leases do not conflict, both can be and must be given effect, MMS argues, citing Morton v. Mancari, 417 U.S. 535 (1974).

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fn. 8 (continued)
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, or within ninety days after Aug. 7, 1953."

9/ SOR, supra, note 6, at 15.

MMS argues that when enacting OCSLA the Congress was aware of the royalty language in the Louisiana leases and chose to continue those terms. The fact that the general "saved, removed, or sold" language of section 6(a)(8) parallels the language in section 8 does not indicate an intent to exempt lease-use gas for section 6 leases because the specific section 6 language (i.e., "royalty * * * not less than" and when the state-issued lease "provides for a lesser royalty, the holder thereof consents * * * to the increase of the royalty to the minimum herein specified") indicates the Congress intended section 6 to establish a minimum royalty. The parallel language should be understood in that context, MMS argues.

Finally, MMS argues that section 10 of OCSLA requires denial of any refunds for royalties paid more than 2 years before the filing of a refund request "even if appellants were able to establish that such payments were 'unlawful' under section 6."

E. Appellants' Additional Arguments on Appeal and MMS' Answers

In addition to the arguments made by Sonat, Shell argues that MMS was required to employ notice-and-comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. | 553 (1982), when limiting the applicability of the May 5, 1982, NTL to section 8 leases, because the change was one of substance that went beyond merely interpreting that NTL.

MMS responds that the May 5, 1982, NTL was not a legislative rule but merely advised lessees of MMS' acquiescence to the Amoco Production Co. decision, citing Energy Reserves Group, Inc. v. DOE, 589 F.2d 1082, 1092-93 (Temp. Emer. Ct. App. 1978), for the proposition that interpretive rules may interpret judicial decisions. The statement in the MMS Royalty Valuation and Standards Division "Findings and Conclusions" report that the failure of the May 5, 1982, NTL to exclude section 6 was a "mistake" referred to the failure of the 1982 NTL to specifically state it applied only to section 8 leases and was not an admission that MMS had a made a "mistake in law." 10/

Conoco argues in addition that, based on the Royalty Valuation and Standards Division "Findings and Conclusions" report in which MMS "clearly admits it made mistakes in advising Lessees as to MMS' position on Section 6 Lease royalty obligations," and on the May 19, 1982, MMS Note to Payors that stated royalty payments were not required "for oil and gas * * * used for production purposes on OCS oil and gas leases," MMS should be estopped from

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10/ Conoco states that MMS "has previously taken the position that Notices to Lessees would not be issued without the opportunity for notice and comment," citing 47 FR 47760 (Oct. 27, 1982), and suggests such practice is "in the best interests of the public and MMS" and is supported by cases that distinguish interpretive from legislative rules. These statements come under a heading in Conoco's brief that states "MMS is Required to Amend its Federal Register Notice Through Proper Informal Rulemaking Procedures." MMS responds that the Federal Register comments Conoco refers to did not apply to OCS leases and adds that "the notices-to-lessees at issue here were published in the Federal Register and served to implement existing law through claiming royalties for lease-use gas on section 6 leases because Conoco reasonably relied to its detriment on the May 5, 1982, NTL and the Notice to Payors. The NTL said it applied to "federal leases"; a state-issued lease that is validated and maintained under section 6 is a Federal lease; therefore, if MMS intended the NTL to exclude section 6 leases, it should have defined "federal leases" to do so, Conoco argues.

MMS responds that the fact that the leases themselves require royalty on lease-use gas and the fact that both the State and the Department have recognized that requirement for 30 years preclude a lessee from asserting good faith reliance to its detriment, an essential element for maintaining estoppel. Both the "Findings and Conclusions" report and the Notice to Payors support MMS' position that the May 5, 1982, NTL applied only to section 8 leases, MMS adds, because the former indicated it so applied and the latter referred to the decision in Amoco Production Co., supra, which was limited to section 8 leases.

As to the decisions charging interest on the late payment of royalties, Conoco and Union voice the additional argument that, because the royalty obligation NTL's were confusing, MMS should exercise its discretion to waive interest on the grounds that it would be inequitable to impose interest charges when it was not clear royalties were due. In support, they cite an MMS comment made when it promulgated 30 CFR 218.54(a) providing for the assessment of interest charges on unpaid and underpaid royalties that "if a late payment or underpayment is not the fault of the lessee in the judgment of the MMS, assessment of interest will be waived." See 49 FR 37343 (Sept. 21, 1984). MMS responds that it is authorized to impose late payment charges in order to be compensated for the loss of the use of the funds it was due, citing Amoco Production Co., 78 IBLA 93 (1983).

Finally, Exxon argues that if (contrary to appellants' arguments) MMS is correct and the terms of the lease govern the payment of royalties, the amount of gas used as fuel for compressors to boost gas to pipeline pressure should be deducted from the royalty base because the lease provides that the lessee is to pay sums equal to the value of the gas "at the well, provided no gathering or other charges are made chargeable to the lessor." "Other charges" refers to production-related expenses and the cost of gas used to increase pressure is a post-production expense that should be offset against the royalty due for value at the well, Exxon argues. MMS responds that the plain language of the lease is that no "other charges" are to be offset and this language does not admit of the distinction Exxon urges.

III. Legislative History of the Act

As necessary background for evaluating these arguments, we begin with the legislative history of OCSLA. House Report No. 413 that accompanied H.R. 5134 stated the view of the Committee on the Judiciary that holders of existing state leases were entitled to issuance by the Federal Government of "exchange leases" in accordance with the provisions set forth in the

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fn. 10 (continued)
a court order for section 8 leases, not to change substantive requirements under the law or the lease."

bill. 11/ These exchange leases were to be "in accordance with the [sic] terms and provisions except as modified in regard to the payment of additional royalties as later set forth." 12/

In discussing the conditions for exchange the Committee stated that

> no exchange lease shall issue unless * * * (2) the applicant [states] that the lease applied for shall be subject to the same royalty obligations as the lease issued by the State in addition to any taxes imposed by Congress; (3) the applicant pays the United States all rentals, royalties, and other sums payable after June 5, 1950, which have not been paid to the lessor or to the Secretary of the Interior under the old lease * * *. [13/]

The Senate bill adopted a different approach. Rather than provide for the exchange of state-issued leases, it provided that such leases could be maintained if they met specified requirements. The language that is presently section 6(b) of the Act, 43 U.S.C. | 1335(b) (1982), originated with the Secretary of the Interior and was substituted for the original language of section 6(b) of the Senate version of the bill, S. 1901. As introduced, section 6(b) of S. 1901 provided that a qualifying lease could be maintained "in accordance with its provisions" or "under the provisions of such

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11/ H.R. Rep. No. 413, 83d Cong., 1st Sess. (May 12, 1953) at 5, reprinted in 1953 U.S. Code Cong. & Admin. News 2177, 2180.

12/ Id. at 6, 1953, U.S. Code Cong. & Admin. News at 2182. See section 11(a) of H.R. 5134, id. at 10:

"The Secretary is authorized and directed to issue a lease to any person in exchange for a lease covering lands in the outer continental shelf which was issued by any State prior to Dec. 21, 1948, and which would have been in force and effect on June 5, 1950, in accordance with its terms and provisions except as modified as to additional royalties provided later in this section * * *."

The report continues:

"Provision is made that if oil and gas was not being produced under the old lease on or before Dec. 11, 1950, the new lease shall be for a term from the effective date hereof equal to the term remaining unexpired on Dec. 11, 1950, under the terms and conditions of the old lease and it shall cover the same resources and the same portion of the area as the old lease and shall provide for payment to the United States of the same rentals, royalties, and other payments as set forth in the old lease. However, a sum may be charged as an additional royalty equal to any severance tax charged by an abutting State in addition to any taxes imposed by Congress."

Id. at 6.

13/ Id. at 6, 1953 U.S. Code Cong. & Admin. News at 2182. See section 11(b)(ii) and (iii) of H.R. 5134, id. at 11:

"No such exchange lease shall be issued unless * * * (ii) the applicant states in his application that the lease applied for shall be subject to the same overriding royalty obligations as the lease issued by the State * * * in addition to any taxes imposed by Congress; (iii) the applicant pays to the United States all rentals, royalties, and other sums due to the lessor lease." 14/ In a letter to Senator Cordon, Secretary McKay objected, finding the language "is too broad in adopting in effect all the provisions of the State leases" 15/ and proposed an amendment that, with minor changes not material to these appeals, became the present law. 16/ The Senate report states that the "amended subsection spells out more specifically the conditions under which a lease which meets the requirements of subsection (a) may be maintained." 17/

The Senate's report on S. 1901 states concerning maintenance of existing leases:

> In accordance with this uniform policy of recognizing equities and good faith investments in the offshore area, section 6 of this bill authorizes the holders of existing State leases on the outer Continental Shelf to continue to maintain their leases under Federal control and subject to Federal regulation. This authorization, however, is applicable only to such existing leases as meet the 11 requirements of section 6(a) which are designed to safeguard the national interest. [18/]

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fn. 13 (continued)
under the old lease which have or may become payable after June 5, 1950, and which have not been paid to the lessor or to the Secretary under the old lease."

14/ The original section 6(b) in S. 1901 read:

"Any person holding a mineral lease, which as determined by the Secretary meets the requirements of subsection (a) of this section, may continue to maintain such lease, and may conduct operations thereunder, in accordance with its provisions, for the full term thereof and of any extension, renewal, or replacement authorized therein or heretofore authorized by the law of the State issuing or whose subdivision or grantee issued such lease, or, if oil or gas was not being produced from such lease on or before Dec. 11, 1950, then for a term from the effective date hereof equal to the term remaining unexpired on Dec. 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of such State."

S. Rep. No. 411, 83d Cong., 1st Sess. (June 15, 1953), at 25.

15/ Id. at 28.

16/ Id. at 30-31. 43 U.S.C. | 1335(b) (1982) provides in relevant part:

"Any person holding a mineral lease, which as determined by the Secretary meets the requirements of subsection (a) of this section, may continue to maintain such lease, and may conduct operations thereunder, in accordance with (1) its provisions as to the area, the minerals covered, rentals, and, subject to the provisions of paragraphs (8), (9) and (10) of subsection (a) of this section, as to royalties and as to the term thereof * * * and (2) such regulations as the Secretary may under section 1334 of this title prescribe * * *."

(emphasis added).

17/ Id. at 25.

18/ Id. at 9. The "sectional analysis" of section 6 stated:

"Section 6 deals with validation by the Federal Government of State-issued leases. Some 11 or more specific standards which each such lease must meet before it is validated are set forth. If all of these specific

Section 6(a)(4) provided that "all rents, royalties, and other sums payable under such lease" not paid before the effective date of the Act or to be paid after that date would be payable to the Secretary of the Interior. Section 6(a)(5) of the Senate bill corresponded to section 11(b)(ii) of the House bill 19/ and required the holder of a state-issued lease certify "that such lease shall continue to be subject to the overriding royalty obligations existing on the effective date of this Act." 20/ Section 6(a)(8) did not have a corresponding provision in the House bill. It provided:

> (8) such lease provides for a royalty to the lessor **on oil and gas** of not less than 12 1/2 per centum **and on sulphur of not less than 10 per centum** in amount or value of the production saved, removed, or sold from the lease, or, in any case in which the lease provides for a lesser royalty, the holder thereof consents in writing, filed with the Secretary, to the increase of the royalty to the minimum herein specified. [21/]

Both the House bill and the Senate bill also provided for the issuance of new leases by the Federal Government. Section 10(d) of the House bill stated that Federal leases shall provide for a royalty, on or after discovery of oil or gas, "of not less than 12-\ per centum in amount or value of the production saved, removed, or sold from the leasing unit." 22/ Section 10(g) of the House bill made several sections of the Mineral Leasing Act, including section 17, applicable to such leases "to the extent * * * not inconsistent with the terms of this Act." 23/ Section 8(a) of the Senate bill did not originally specify a royalty amount, but was amended "to provide by law more specific standards to govern the issuance of leases by

fn. 18 (continued)
conditions are met, the leaseholder may continue to maintain a lease and to conduct operations under it." id. at 12.

19/ See note 13, supra.

20/ S. Rep. No. 411, supra note 14, at 19.

21/ Id. The boldface language was added to the original language of the bill as a result of amendments to subsection 6(b) providing for leasing for and royalties on sulfur. Id. at 25. "As to the 10 percent sulfur royalty, the committee carefully considered evidence as to the royalties required in current State sulfur leasing programs by Texas and Louisiana and concluded that the 10-percent figure would be consistent with present State practices." Id. at 13. In the Act the royalty rate for sulfur is 5 percent.

22/ H.R. Rep. No. 413, supra note 11, at 9.

23/ Id. at 10. Section 17 of the Mineral Leasing Act had been amended in 1946 to provide for royalties of "not less than 12 1/2 per centum in amount or value of the production removed or sold from the lease" for leases of lands within a known geologic structure and of "12 1/2 per centum in amount or value of the production removed or sold from the lease" for leases of lands not within a known geologic structure. See Sec. 3, Act of Aug. 8, 1946, P.L. 79-696, 60 Stat. 951.

the Secretary of the Interior." 24/ As amended, section 8(a) authorized the Secretary

> to grant to the highest responsible qualified bidder by competitive bidding * * * oil and gas leases on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 6 of this Act. The bidding shall be * * * (2) at the discretion of the Secretary, on the basis of a cash bonus with a royalty fixed by the Secretary at not less than 12-1/2 per centum in amount or value of the production saved, removed or sold, or on the basis of royalty, but at not less than the per centum above mentioned, with a cash bonus fixed by the Secretary. [25/]

Section 8(b) of the Senate bill provided that "[a]n oil and gas lease issued by the Secretary pursuant to this section shall * * * (3) require the payment of a royalty of not less than 12-1/2 per centum, in the amount of value of the production saved, removed, or sold from the lease." 26/

Section 7(b) of the Senate bill also contained a provision approving and confirming the notice entitled "Oil and Gas Operations in the Submerged Coastal Lands of the Gulf of Mexico" issued by the Secretary of the Interior on December 11, 1950, as amended and supplemented. 27/ That notice provided in section II:

> Persons now conducting under State leases oil and gas operations in those areas of submerged coastal lands adjacent to the Texas and Louisiana coasts which are seaward of the ordinary low-water mark and are outside the inland waters of those States (1) are hereby authorized to continue such operations * * * subject, however, to the payment to the United States of the equivalent of such rentals, royalties, and other payments as were provided to be paid the lessor in such State leases * * *. [28/]

That notice also stated that the authorization was not to be construed as "an adoption, confirmation, ratification, or validation of said leases by the United States." 29/

The Senate report contains a letter from Assistant Attorney General Rankin to Senator Cordon comparing the provisions of the House and Senate bills. He observed that the Senate bill contained no definition of the Mineral Leasing Act, as the House bill did, and stated: "[Such a definition] should be added if the Senate adopts the provisions of the House bill, or

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24/ S. Rep. No. 411, supra note 14, at 25.
25/ Id. at 20-21.
26/ Id. at 21. The language in the final clause was added to the original bill with the explanation: "The added words are clarifying." Id. at 25.
27/ Id. at 20.
28/ Id. at 57.
29/ Id.

others referring to the Mineral Leasing Act." 30/ He found the House provision for exchange leases preferable to the Senate provision that existing state leases meeting the specified requirements would remain in effect "from an administrative point of view, and has the advantage of permitting inclusion of new terms and conditions desired by the Secretary." 31/ Assistant Attorney General Rankin noted that the requirements for continuance of a state lease under the Senate bill were "largely different" from those for exchange leases prescribed by the House bill. 32/ He noted that the House bill had no provision corresponding to section 6(a)(8) of the Senate bill requiring "that the lessee consent to pay royalty of 12 1/2% in cases where the lease as originally issued requires less" and commented: "Conceivably, this requirement could work hardship on a lessee who paid a very high cash bonus for his lease, in consideration of a very low royalty; but in practice it is believed that no difficulty will arise." 33/

The committee of conference adopted a compromise bill that closely followed the Senate version. The Mineral Leasing Act was not defined or made applicable. 34/ Existing leases were maintained, if validated, rather than exchanged for Federal leases. 35/ Sections 6(a)(4), 6(a)(5), and 6(a)(8) were retained verbatim, with the exception of the reduced royalty rate for sulfur. 36/

After review of the legislative history of OCSLA we find no explicit statement by the Congress addressing whether the holder of a state lease maintained in accordance with section 6 of the Act should pay royalties for oil or gas that is used or flared on the lease. We are therefore obliged to interpret the Act ourselves. See Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). In that effort, we think the following facts are significant:

1. Beginning in December 1950, persons conducting operations under state-issued leases were authorized to continue if they paid "such * * * royalties * * * as were provided to be paid * * * in such State leases." This authorization was explicitly approved in section 7(b) of the Act.

2. The structure of the Act repeatedly distinguishes between maintenance of existing state leases validated by the Department and new Federal leases to be issued by the Department. See section 4(a)(1); sections 5(a)(2), 5(b)(1), and 5(b)(2); and sections 6 and 8.

30/ Id. at 32.
31/ Id. at 34.
32/ Id. He did regard the certification under section 6(a)(5) of the Senate bill, note 20, supra, and the statement required by section 11(b)(ii) of the House bill, note 13, supra, as similar and regarded the provisions as "desirable." Id. at 35.
33/ Id. at 35.
34/ H.R. Rep. No. 1031, 83d Cong., 1st Sess. (July 29, 1953) at 1, 3.
35/ Id. at 5.
36/ Id.

3. Existing state leases and new Federal leases are accorded different treatment under the Act. Existing state leases could only be validated if 11 "requirements of section 6(a) which are designed to safeguard the national interest" were met, including (1) all royalties "payable under such lease[s]" were paid to the Secretary (section 6(a)(4)); (2) their holders certified "that such lease[s] shall continue to be subject to the overriding royalty obligations existing on the [date of enactment]" (section 6(a)(5)); and (3) their holders consented in writing to an increase in royalties if the state lease provided for less than "12 1/2% of the amount or value of the production saved, removed, or sold from the lease" (section 6(a)(8)). New Federal leases were subject to specific statutory provisions concerning bidding, area, term, minimum royalty, and additional terms to be prescribed at the time of offering for lease. Section 8(b).

4. The Congress retained the requirement that the holder of an existing state lease with a royalty less than 12-1/2 percent of the production saved, removed, or sold consent to an increase in royalties even though Assistant Attorney General Rankin pointed out that this requirement was not contained in the House bill and could work hardship. Further, the Congress chose to authorize maintenance of existing state leases meeting the 11 requirements against the recommendation of the Assistant Attorney General that the Congress provide for exchange leases, which would have allowed the Department to include new terms and conditions.

5. Although the Mineral Leasing Act was clearly considered by the Congress, its provisions were not made applicable to Outer Continental Shelf leases and the royalty language of the Mineral Leasing Act was not adopted in the Outer Continental Shelf Lands Act.

6. The Senate report stated that the equities and investments of the operators holding leases issued by the states "have been fully explained by many witnesses at hearings on submerged lands legislation," citing testimony from the 81st, 82nd, and 83rd Congresses, and the "committee carefully considered evidence as to the royalties required in current State sulfur leasing programs" and "present State practices." 37/

IV. The Provisions of A Lease Maintained Under Section 6 of OCSLA Govern the Payment of Royalties

[1] Under familiar rules of statutory construction, the provisions of OCSLA must be interpreted so that each may be given effect. 38/ Section 6(b), 43 U.S.C. | 1335(b) (1982), provides:

> Any person holding a mineral lease, which as determined by the Secretary meets the requirements of subsection (a) of this

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37/ S. Rep. No. 411, supra note 14, at 9, 13. In light of the reference to the testimony from holders of oil and gas leases, and the attention paid to state programs and practices concerning sulfur leases (see note 21, supra), it is not unreasonable to assume that similar attention was paid to royalty provisions under state oil and gas leasing programs and practices.

38/ See Sutherland Stat Const. | 46.06 (4th Ed.). We therefore cannot agree with Sonat's suggestion, note 7 supra, and accompanying text, that

> section, may continue to maintain such lease, and may conduct operations thereunder, in accordance with (1) its provisions as to the area, the minerals covered, rentals and, subject to the provisions of paragraphs (8), (9) and (10) of subsection (a) of this section, as to royalties and as to the term thereof * * *.

As indicated above, 39/ this language was the result of a Senate amendment designed to specify the conditions under which an existing state-issued lease would be maintained and to avoid adopting all the provisions of the state lease. The Congress specified that state lease provisions concerning area, minerals covered, and rental would apply, and that state lease provisions concerning royalties and term would apply "subject to" subsection (a)(8) concerning royalties, subsection (a)(9) (added by Senate amendment 40/) concerning additional royalties payable in lieu of the state taxes, and subsection (a)(10) concerning the term.

Without the "subject to" clause, subsection (b)(1) plainly provides that the holder of the state lease may maintain the lease "in accordance with (1) its provisions * * * as to royalties." The "subject to" clause does not relieve the lessee from the obligation to pay royalties in accordance with the provisions of the state lease. It is a requirement that the royalty provision contained in the state lease must be consistent with the provisions of subsection (a)(8), and not a provision that the royalty terms are superseded by subsection (a)(8) provisions, as appellants argue. Otherwise, the language in subsection (b)(1) that a state lease may be maintained in accordance with its royalty terms would not be given effect. Consistency of the state lease provisions as to royalties with the provisions of subsection (a)(8) means that the state lease may not provide for a royalty of less than 12-1/2 percent of the amount or value of the production saved, removed, or sold from the lease. If the state lease provides for a lesser royalty, the lessee must consent to an increase to that minimum. Whether the lease provisions provide for such a lesser royalty depends on their terms governing rate and base.

This interpretation of subsection (b)(1) also preserves the consistency among subsections 6(a)(4), (a)(5), and (a)(8) provided by the Congress. When the language of section 6(a)(8) requiring a minimum royalty of "12 1/2 per centum * * * in amount or value of the production saved, removed, or sold from the lease" is considered in the context of the other royalty requirements in that subsection, and in section 6(a)(4) and (5), it means that royalties payable under existing state leases may not be less than the stated minimum but may be more if by the terms of the state lease "all royalties payable under such lease" (subsection (a)(4)) or "overriding royalty obligations existing on the effective date of [the] Act" (subsection (a)(5)) require a higher royalty. The Congress clearly provided in

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fn. 38 (continued)
"the requirements of the statute in setting a minimum royalty percentage, are mutually exclusive of the express language of the statute which assesses royalty payments on production saved, removed or sold."

39/ See notes 15-17, supra.

40/ S. Rep. No. 411, supra note 14, at 19, 25. See Ocean Drilling & Exploration Co. v. United States, 600 F.2d 1343, 1346 (Ct. Cl. 1979).

subsection (a) that the terms of existing state leases would be maintained if they conformed with these subsections, and the fact that the "12 1/2 per centum, in the amount or value of the production saved, removed, or sold from the lease" language is also employed in section 8(b)(3) as a requirement for Federal leases does not call for calculation of royalties for maintained state leases on the same base as that used for Federal leases.

We do not regard our interpretation of section 6 as inconsistent with Amoco Production Co. v. Andrus, supra. We have indeed followed 41/ the court's view in the Amoco case that the Congress intended to have the Department's practice concerning royalties for gas used in production under the Mineral Leasing Act apply to Federal leases issued by the Department pursuant to section 8 of OCSLA. 42/ We find no indication in the legislative history of OCSLA that the Congress had the same intent regarding state leases maintained under section 6. Thus, appellants' suggestion (supra, note 3) that the Congress borrowed the phrase "removed or sold" from the Mineral Leasing Act and added the term "saved" commonly used in state and commercial leases is not persuasive. H. R. Rep. No. 2078, cited by appellants, states that for most Outer Continental Shelf leases executed by the states the normal royalty is 12-1/2 percent of the value of the oil or gas produced and saved. However, the records in these appeals indicate that Louisiana State leases imposed royalties on the oil "produced and saved" but imposed royalties on gas "produced and saved or utilized."

We do not regard our interpretation as arbitrary and capricious in view of the several differences in the treatment of section 6(a) and section 8(b) leases in OCSLA discussed above and in view of the fact that, prior to the issuance of the May 5, 1982, NTL, holders of section 6 leases had always paid royalties on gas used or flared in production. On July 1, 1983, Mary Ellen Leeper, Assistant Attorney General, State of Louisiana, Department of Natural Resources, Office of Mineral Resources (State Mineral Board), wrote MMS:

> On June 21, 1983, you were forwarded copies of the 1942, 1948 and 1966 lease forms which were in use by the State Mineral Board at the time the former state leases presently administered by the Minerals Management Service were executed. Each of these leases provided, in pertinent part, that state royalties would be due on all gas "produced and saved or utilized." The State of Louisiana has consistently required and collected royalties on natural gas produced under leases with this provision based on total volumes produced at the wellhead, if marketed or used as fuel or otherwise by the State's lessee. The State has not interpreted this clause to require payment of royalties on flared casinghead or test gas;

41/ See Exxon Company, U.S.A., supra, note 1.
42/ See note 4, supra. The decision in Amoco Production Co., supra, indicates the court was concerned with "leases executed between the plaintiffs and the Department [that] require[d] the lessees [t]o pay the lessor a royalty of 16 2/3%," (the royalty for new leases issued under section 8). Id., 527 F. Supp 790 at 791.

> however, where gas is utilized in gas lift or other operations and then flared, the State's position is that such gas has been "saved or utilized" and therefore requires royalties to be paid based on such volumes.

Appellants acknowledge they paid royalties in accordance with the provisions of the leases until May 1982 (Sonat SOR filed Sept. 11, 1985, at 7).

Further, we cannot accept appellants' argument that 30 CFR 250.5 takes priority over the royalty provisions of a validated state-issued lease. The regulation in terms is based on section 6(b) and provides that the regulations in 30 CFR Part 250 supersede the provisions of a lease determined to meet the requirements of section 6(a)

> with the following exceptions: The provisions of the lease as to * * * royalties payable under the lease (subject to the provisions of paragraph 6(a)(8) and 6(a)(9) of the Act) * * * shall continue in effect and, in the event of any conflict or inconsistency, shall take precedence over the regulations in this part. [43/]

We therefore hold that under section 6(b) of OCSLA, 43 U.S.C. | 1335(b) (1982), the provisions of the leases issued by Louisiana as to royalties on 12-1/2 percent of all gas "produced and saved or utilized" require payment of royalties on gas used or flared on the leases. Superior Oil Co., 31 IBLA 127, 132 (1977). See Ocean Drilling & Exploration Co., 21 IBLA 137 (1975); Kerr-McGee Oil Industries, Inc., 70 I.D. 464 (1963). This conclusion is required by section 6 of the Act and is necessary to the realization of the purposes of section 5(a) to prevent waste and conserve the natural resources of the Outer Continental Shelf.

V. Requests for Refunds of Royalty Payments Must Be Filed within 2 Years of the Date of Payment under Section 10 of OCSLA

[2] Under section 10 of OCSLA, 43 U.S.C. | 1339 (1982), a refund must be requested within 2 years of making the payment. Kerr-McGee Corp., 103 IBLA 338 (1988); Shell Offshore, Inc., 96 IBLA 149, 94 I.D. 69 (1987). Therefore, even if appellants were entitled to refunds of the royalties they paid for gas used or flared on their section 6 leases, only the amount of those royalties for which refund requests were filed within 2 years of the date they were paid could be refunded.

VI. The Cost of Gas Used as Compressor Fuel May Not Be Deducted From Royalties Owed for Gas Used or Flared on a Section 6 Lease

[3] Exxon argues that if royalties are payable for gas used as fuel under the provisions of the lease, as we have held, there should be a deduction of that portion of royalties paid for gas used as compressor fuel because the lease provides that the lessee pays the lessor "sums equal to the value [of gas produced, and saved or utilized] at the well, provided

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43/ See note 2, supra.

no gathering or other charges are made chargeable to the lessor." Exxon states that 51 percent of the fuel used on its section 6 leases (or $430,038.31 in royalties) was "associated with fuel consumed on the leases to run compressors for the purpose of pressurizing to pipeline pressures the gas sold to purchasers" (SOR at 4). Such "post-production" expenses for marketing should be "netted against the proceeds derived by the lessee to obtain a value of the gas at the wellhead," in Exxon's view, because the "other charges" that may not be made chargeable to the lessor properly include only gathering and production costs. Id. at 14-17. In support of this argument, Exxon attaches an article by Louisiana Assistant Attorney General James E. Phillips discussing the changes made from the 1962 lease form to the 1966 lease form. The article states, as to royalties for gas, that "[t]he [Mineral Board] settled a troublesome question by specifically providing that lessee may deduct costs incurred for compressing gas at a point in or adjacent to the field." 44/ Exxon refers to our decision in Ocean Drilling & Exploration Co., supra, as authority for applying state law in interpreting provisions of section 6 leases.

The difficulty with this argument is that the language of the 1966 lease form is significantly different than the 1942 form, which is involved in these appeals. The 1966 form provides:

> Without regard to classification as production costs or otherwise, Lessee may deduct costs incurred for compression of gas at a point in or adjacent to the field for insertion into a purchaser's line or into a line owned by Lessee or a carrier for transportation to a point of delivery outside the field.

The 1948 form, whose royalty clauses were not substantially different from the 1962 form discussed by Phillips, 45/ only provided that the lessee pay "sums equal to the value [of the gas] at the well." The 1942 form used for the leases involved in these appeals provided, as stated above, that the lessee pay "sums equal to the value [of the gas] at the well, provided no gathering or other charges are made chargeable to lessor." As the Phillips article acknowledges, the determination of what charges were covered by this clause was a troublesome question which was not resolved until the language in the 1966 form was adopted some 13 years after the enactment of OCSLA. Where state authorities hold divergent views concerning the proper interpretation of the provisions of a lease maintained under section 6, we interpret them in accordance with the same rules of construction applicable to contracts. Ocean Drilling & Exploration Co., supra, at 142. Although Exxon's position is that compressor fuel costs should not be included within the "other charges * * * chargeable to lessor," the clear implication of the 1966 amendments to the lease form is that under prior leases they were at least sometimes included. In any event, in our view both the existence of the proviso clause in the 1942 form and its specific language -- "no gathering or other charges" -- persuade us to interpret it according to its terms.

44/ Phillips, "The 1966 State Lease Form," 14 Mineral Law Institute 3, 9 (1967) (Exhibit 6 to Exxon Statement of Reasons).
45/ Id. at 7.

We therefore do not accept Exxon's argument that it should be allowed to deduct the cost of compressor fuel from royalties payable for gas used or flared on section 6 leases.

VII. Notice-and-Comment Rulemaking Was Not Required for the MMS Decisions Denying Appellants' Requests for Refunds of Royalties Paid for Section 6 Leases

[4] Shell and Conoco argue that MMS was required to follow notice-and-comment rulemaking procedures in accordance with 5 U.S.C. | 553 (1982) in implementing "a substantive change from" the May 5, 1982, NTL 46/ because "the exclusion of Section 6 Leases from [the NTL] is a significant and unforeseen departure from the standard of performance originally required" (Shell SOR at 5-6; note 10, supra). Although the May 1982 NTL did not in terms exclude section 6 leases, it referred to Amoco Production Co., supra, as the reason for its issuance. 47/ As indicated above, that decision dealt with section 8 leases. Even if that fact had been overlooked, the May 1982 NTL authorized refunds only "under prior NTL's, to the extent that those provisions are contrary to this NTL." 48/ The previous NTL's distinguished between section 6 and section 8 leases on the subject of royalties for lease-use gas, and reading the May 1982 NTL in the context of the prior NTL's should have made clear the limited effect of the May 1982 NTL. 49/ We would be surprised if holders of leases under OCSLA would not be familiar with the differences in royalty treatment between kinds of leases in the earlier NTL's. 50/ In any event, the clarification of the May 1982 NTL as applying only to the section 8 leases involved in Amoco Production Co., supra, was provided in the MMS decisions under review and did not require notice-and-comment rulemaking under the Administrative Procedure Act because these decisions were adjudications. See 5 U.S.C. | 551(7) (1982).

VIII. The Actions of MMS Do Not Constitute Affirmative Misconduct; There Can Be No Estoppel of the Government

[5] Conoco contends that MMS should be estopped from claiming royalties on section 6 leases because Conoco relied on the May 1982 NTL and a Notice to Payors of the same date that said royalty payments were not required "for oil and gas * * * used for production purposes on OCS oil and gas leases." If MMS intended to exclude section 6 leases from the effect of these notices, it should have defined federal leases to do so, Conoco argues.

46/ See text at note 1, supra.
47/ See 47 FR 20672 (May 13, 1982).
48/ Id.
49/ See, e.g., NTL 74-20, 39 FR 38684, 38685 (Nov. 1, 1974), and NTL 74-14.
50/ In view of the fact that prior to publication of the May 5, 1982, NTL, section 6 lessees, including appellants, had always paid royalties on the gas used or flared, their subsequent failure to pay royalties, and not the NTL, would appear to be the significant and unforeseen departure from past practice.

It is well established that estoppel against the Government in public lands matters must be based on a showing of affirmative misconduct. McKenzie County, 99 IBLA 264, 271 (1987). Even if we were to find the May 1982 NTL or the Notice to Payors were erroneous, which we do not, erroneous statements by Government officials cannot create rights not authorized by law. Hiko Bell Mining & Oil Co. (On Reconsideration), 100 IBLA 371, 397-98, 95 I.D. 1, 15 (1988). In any event, MMS' statements in the May 1982 NTL and the Notice to Payors do not amount to affirmative misconduct.

IX. MMS Did Not Abuse Its Discretion in Declining to Waive Interest Charges for Late Payments of Royalties Due on Gas Used or Flared on Section 6 Leases

[6] Finally, Conoco and Union urge that MMS should have exercised its discretion to excuse interest charges on late payments of royalties for gas used on section 6 leases because its May 1982 NTL was confusing. We cannot agree that the NTL was so confusing that it would be inequitable to assess appellants an interest charge for late payment of these royalties. Four of the six appellants paid the royalties and thus avoided the assessment of interest. We do not believe MMS' failure to waive interest charges was an abuse of its discretion under the circumstances. It is equitable that the United States should be compensated for the loss of the use of the funds due it under the royalty program. Amoco Production Co., 78 IBLA 93, 100 (1983). See Sun Oil Co., 91 IBLA 1, 48-49, 93 I.D. 95, 120-21 (1986), aff'd sub nom. Clark Oil Producing Co. v. Hodel, 667 F. Supp. 281, 292 (E.D. La. 1987).

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Will A. Irwin
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge