

Appeal from a decision of the Director, Minerals Management Service, denying a refund request for royalty overpayments. MMS 84-0072-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds

Sec. 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), authorizes the issuance of refunds for excess royalty payments only where the request for a refund is made within 2 years of the date that payment is received in the appropriate office.

APPEARANCES: Ernest J. Altgelt III, Esq., and Lisa E. Chismire, Esq., Houston, Texas, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Conoco Inc. (Conoco) has appealed from a decision of the Director, Minerals Management Service (MMS), dated April 18, 1986, disallowing, in part, a refund based on excess royalties paid for gas produced from wells H-2 and H-4 under Lease OCS-G 1888, Eugene Island Block 247, offshore Louisiana.

The Director's decision states that certain royalty payments were received by the Department of the Interior on or about November 1 and December 2, 1977, and January 3 and 31, 1978, for production from the subject lease. Conoco, as lease operator, paid the royalties in question on its own behalf and on behalf of two other oil companies. On April 21, 1982, the Federal Energy Regulatory Commission (FERC) determined that Conoco had overcharged the purchaser and directed Conoco to pay refunds to the extent of any overcharges. Conoco paid the refunds and then requested a refund from MMS in the amount of \$ 161,067.82 for excess royalties paid in 1977 based on the overcharges.

The Regional Manager, MMS, denied the refund request, finding that it was barred by the 2-year limitation established by section 10 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1339 (1982). On review, the Director agreed, stating that the statute "unequivocally requires that refund applications be filed within 2 years of the making of the payment,"

and that "the 2-year limitation in section 10 is not tolled by FERC orders or judicial decisions involving such orders." Therefore, the Director concluded, since Conoco's refund request was made more than 2 years after it had tendered the royalty payments, it was "clearly late" and the Regional Manager had correctly disallowed the refund.

On appeal to this Board, Conoco asserts:

The record reflects that Conoco Inc. timely filed its request for refunds of the subject gas royalty overpayments within the two-year period prescribed by 43 U.S.C. § 1339. * * * Conoco's request for a refund of the subject gas royalty overpayments was filed within two years of Conoco's receipt of instructions from the Federal Energy Regulatory Commission which directed Conoco to make refunds for overcollections resulting from rates in excess of rates allowed * * *.

(Statement of Reasons (SOR) at 2). Conoco also claims that MMS "has favorably acted upon similar claims made by Conoco to recover royalty overpayments due to Orders or instructions from [FERC] on the basis that such claims were timely filed within the two-year period." *Id.* at 2-3.

[1] Conoco's appeal raises the question whether section 10 of OCSLA should be read to require that refund requests must be made within 2 years from the date of actual payment of the royalty to the Government. Section 10 provides in pertinent part:

[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 * * * in excess of the amount he was lawfully required to pay, s 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 reaching the decision that Conoco was not entitled to a refund, the Direc relied on Phillips Petroleum Co., 39 IBLA 393 (1979), wherein the Board stated at page 397: "There is not a scintilla of evidence to demonstrate that Congress intended the 2-year statute of limitations embodied in section 10 to begin to run from the time of determination of entitlement rather than in accord with the plain words from the time of 'the making of the payments [sic].'" Since the filing of the appeal in this case, the Board has further addressed the question raised herein. In Shell Offshore, Inc., 96 IBLA 149, 94 I.D. 69 (1987), appeal filed, Shell Offshore, Inc. v. United States, No. 391-87L (Cl. Ct. July 1, 1987), after an extensive review of the legislative history of OCSLA, the Board found that

[t]he wording "making of the payment" * * *, as the present case makes abundantly clear, does not identify an event which necessarily coincides with the event by which a right to a refund accrues. While Congress may have intended to merely substitute an equivalent term appropriate to the OCS leasing system in order

to grant the Secretary sufficient authority to handle refunds, the language chosen was not adequate for the purpose. The statute conditions the authority of the Secretary to make repayment upon a request being filed "within two years after the making of the payment." A payment is made when it is tendered to the appropriate agency. William E. Phalen, 85 IBLA 151 (1985); Mobil Oil Corp., 35 IBLA 265 (1978). There is no ambiguity in the wording of the statute; the terms of the Act cannot be varied simply because the appellants may for other reasons appear to deserve refunds. See 2A Sutherland, Statutes and Statutory Construction § 46.01 (4th ed., rev. 1984).

96 IBLA at 165, 94 I.D. at 78-79. The Board then concluded: "MMS is correct that, as the plain language of the statute indicates, the 2-year period for requesting refunds begins with the date of 'the making of the payment.' Accordingly, we affirm the result reached in Phillips Petroleum Co., *supra*, that under the statute a right to a refund must be asserted within 2 years of the date of payment." *Id.* at 166, 94 I.D. at 79.

The facts presented in this case show that Conoco's refund request was submitted well after 2 years from the time Conoco made the royalty payments in question. Thus, in accordance with our holding in Shell Offshore, Inc., *supra*, we find that MMS properly found that the refund request should be disallowed. See also Kerr McGee Corp., 103 IBLA 338 (1988).

As to Conoco's contention that MMS "has favorably acted upon similar claims made by Conoco to recover royalty overpayments due to orders or instruction from [FERC]," we note that MMS addressed this contention in the decision under appeal:

One of the 3 "similar" instances cited by Conoco involved an onshore lease. Thus, section 10 of the OCSLA was not involved.

The other two refund requests involved amounts under \$ 50,000 and were apparently approved subject to a later audit. Thus, it does not appear that a determination was made that section 10 permitted payment of these refunds. Accordingly, these refunds do not represent precedents supporting the payment of the refund in issue.

(Director's Decision at 4).

Other than raising the same allegations addressed by MMS, Conoco has provided in the instant appeal no evidence that the MMS information concerning the "similar claims" was in any way erroneous. Moreover, the fact that MMS may have erroneously allowed late refund requests is functionally irrelevant to the issues presented in this appeal. Appellant has not alleged that it relied on this course of conduct to its detriment. Indeed, since its position is essentially that it was impossible for it to be aware of overpayments until FERC ruled, any prior conduct on the part of MMS officials could not have been a causative factor in its failure to seek a refund within 2 years of making the overpayment since FERC did not direct refund of the overcharges until after the 2 years had expired.

In any event, the law is well settled that reliance on the unauthorized advice of Government employees cannot operate so as to vest any right not authorized by law. Since, as the Board concluded in Shell Offshore, Inc., supra, the Department has no authority to issue refunds for excess royalty payments unless the request is made within 2 years of the date of receipt of the payment in question, the fact that subordinate officials of the Department may have authorized such refunds does not vest in appellant any right to have this erroneous policy continued. See Pathfinder Mines Corp., 70 IBLA 264, 90 I.D. 10 (1983), aff'd, Pathfinder Mines Corp. v. Clark, aff'd, Pathfinder Mines v. Hodel, 811 F.2d 1288 (9th Cir. 1987).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge