

COASTAL OIL AND GAS CORP. ET AL.

IBLA 87-505, et al.

Decided March 22, 1989

Appeals from decisions of various officials of the Minerals Management Service and the Bureau of Indian Affairs, affirming interest assessments for late payments of oil and gas royalties.

Decision in IBLA 89-60 set aside and remanded; all other decisions affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982: Generally--Oil and Gas Leases: Royalties--Statutory Construction: Generally

Sec. 111(a) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. | 1721(a) (1982), authorizes the collection of interest charges for late payment of oil and gas royalties. Sec. 305 of that Act, 30 U.S.C. | 1701 note (1982), provides that sec. 111 and regulations implemented pursuant thereto apply to oil and gas leases issued prior to the enactment of that Act, unless to do so would be contrary to express and specific provisions of those leases. Where no such provisions exist, the assessment of late payment charges is proper.

2. Oil and Gas Leases: Generally--Regulations: Applicability

When oil and gas leases are issued pursuant and subject to all regulations of the Secretary "now or hereafter in force," the Secretary is not limited to enforcing only those regulations in effect at the time of lease execution.

3. Federal Oil and Gas Royalty Management Act of 1982: Generally--Administrative Procedure: Generally--Statutory Construction: Generally

The procedural safeguards that apply when civil penalties are levied pursuant to 30 U.S.C. | 1719

(1982) are not applicable to late payment interest charges assessed pursuant to 30 U.S.C. | 1721(a) (1982).

APPEARANCES: Hugh V. Schaefer, Esq., Stephen M. Brainerd, Esq., Donna J. Blanchet, Esq., Denver, Colorado, for appellants; Peter J. Schaumberg, Esq., Howard Chalker, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Coastal Oil and Gas Corporation, CIG Exploration, Inc., and ANR Production Company have appealed from various decisions of Minerals Management Service (MMS) and Bureau of Indian Affairs (BIA) officials affirming decisions by the Royalty Management Program, MMS, assessing interest charges for late payment of oil and gas royalties. 1/

Appellants contend that MMS is not authorized to assess these particular late payment charges because the interest charges are inconsistent with the applicable leases and the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. || 1701-1757 (1982); that absent a statutory grant, there is no authority to charge interest; and that the interest charges are actually civil penalties entitling them to the procedural protections of 30 U.S.C. | 1719 (1982). 2/

1/ A total of 11 appeals by these three parties were consolidated by order dated Sept. 8, 1988, following a joint motion for consolidation by the parties. Subsequently, additional appeals were filed and various motions to consolidate were filed. All those motions are granted, except for two received by the Board on Feb. 28, 1989: the motion to consolidate the appeal of a MMS decision dated Oct. 26, 1988, which includes MMS docket numbers MMS 88-0029-O&G, MMS 88-0092-O&G, MMS 88-0098-O&G, and MMS 88-0099-O&G, docketed as IBLA 89-252, and the motion seeking consolidation of a Dec. 22, 1988, MMS decision, which includes MMS docket numbers MMS 88-0230-IND through MMS 88-0234-IND, docketed as IBLA 89-251. Those two motions are denied. The Board will address those two appeals in a separate order or decision. The docket numbers and other information about the individual appeals consolidated herein are provided in the Appendix.

Most of the appealed decisions were issued by the Assistant Director for Program Review, MMS. However, the Deputy Director, MMS, signed the decision being reviewed in IBLA 88-138, and the Deputy to the Assistant Secretary--Indian Affairs (Operations) signed the decisions appealed in IBLA 89-224 and IBLA 89-225. See 30 CFR 290.6. Also that official and the Acting Director, MMS, jointly issued the decision under appeal in IBLA 89-13.

2/ These arguments are set forth in appellants' statements of reasons, as well as in a reply brief, filed on Jan. 27, 1989, which was intended by appellants to supplement the record in each of the appeals. See Reply Brief

Counsel for MMS 3/ argue that FOGRMA provides express authority to assess interest for late payments and that even though the leases in question were issued prior to the effective date of FOGRMA, no express and specific provisions of the leases in question preclude the exercise of that authority. They also argue that even prior to FOGRMA, there was authority to assess late payment charges, and that provisions of 30 U.S.C. | 1719 (1982) are inapplicable to the assessment of late payment charges.

We turn first to appellants' contention that the interest charges in these cases are inconsistent with their leases and with FOGRMA. The section of FOGRMA relied upon for assessment of late payment charges is section 111(a) which provides in relevant part:

In the case of oil and gas leases where royalty payments are not received by the Secretary on the date that such payments are due, or are less than the amount due, the Secretary shall charge interest on such late payments or underpayments at the rate applicable under section 6621 of Title 26.

30 U.S.C. | 1721(a) (1982). Appellants, however, direct our attention to section 305 of FOGRMA, which states:

The provisions of this Act shall apply to oil and gas leases issued before, on or after the date of the enactment of this Act [Jan. 12, 1983], except that in the case of a lease issued before such date, no provision of this Act or any rule or regulation prescribed under this Act shall alter the express and specific provisions of such a lease.

30 U.S.C. | 1701 note (1982).

Appellants then quote from the applicable leases:

This oil and gas lease is issued * * * pursuant and subject to the provisions of the Mineral Leasing Act and subject to all rules and regulations of the Secretary of

fn. 2 (continued)

at 1, n. 1. The reply brief was accompanied by a motion for leave to file the brief. That motion is granted. In addition, since the statements of reasons and answers filed in each of these appeals is similar, references herein to those documents will be to the statement of reasons (SOR) and answer filed in IBLA 87-505.

3/ Although they do not expressly so state, counsel apparently represent BIA to the extent they argue in support of the decisions appealed in IBLA 89-13, IBLA 89-224, and IBLA 89-225.

the Interior now or hereafter in force, when not inconsistent with any express and specific provisions herein, which are made a part hereof
* * *. [4/]

Appellants would have us believe that "[t]he effect of the portion [of the lease] quoted above is to incorporate into the leases all of the provisions of the Mineral Leasing Act and the underlying regulations which were in effect at the time of the lease's execution" (SOR at 2). They contend that no lease provisions authorize the collection of late payment charges, and at the time of execution of the leases, no regulations existed which authorized such collection. Their conclusion is that FOGRMA cannot serve as the basis for imposition of late payment charges.

[1] Clearly, section 111(a) of FOGRMA, 30 U.S.C. | 1721(a) (1982), provides authority for collection of late payment charges. There is no indication that Congress intended to limit that section of FOGRMA to leases issued after its enactment. 5/ Contrary to appellants' position, neither the lease language cited above nor section 305 of FOGRMA preclude application of section 111 of FOGRMA and its implementing regulations. 6/

Appellants have misread the lease language. It does not carry the meaning espoused by them. That section provides that the leases will be subject to all rules and regulations of the Secretary "now or hereafter in force." The limitation on that phrase, "when not inconsistent with any

4/ Although copies of the relevant leases are not part of the record, certain case files (e.g. IBLA 88-560) contain blank copies of lease forms containing the quoted language.

5/ Counsel for MMS point out that if Congress had intended to exempt royalty payments that were due for pre-FOGRMA leases, it would have done so expressly, as it did in section 104 of FOGRMA. Subsection (a) of that section amended 30 U.S.C. | 191 (1982) to provide that certain late payments to the states from MMS would bear interest; however, subsection (c) of that section, 30 U.S.C. | 1714 note (1982), limited its applicability to payments received by the Secretary after Oct. 1, 1983, unless the Secretary prescribed otherwise by rule.

6/ There are three of those regulations: (1) the regulation of general applicability at 30 CFR 218.54(a) which provides: "An interest charge shall be assessed on unpaid and underpaid amounts from the date the amounts are due"; (2) the regulation at 30 CFR 218.102(a), which applies to onshore oil and gas, and provides: "The failure to make timely or proper payments of any monies due pursuant to leases, permits and contracts subject to these regulations will result in the collection by the MMS of the full amount past due plus a late payment charge"; and (3) the provision at 30 CFR 218.150(b), applicable to offshore oil and gas, which reads: "The failure to make timely or proper payments of any monies due pursuant to leases, permits and contracts subject to these regulations will result in the collection of the amount past due plus a late payment charge."

express and specific provisions herein," applies to provisions of the lease only. That construction is consistent with the language of section 305 of FOGRMA which speaks of the "express and specific provisions of the lease."

The fact that no lease provision existed at the time of issuance of the leases authorizing the imposition of late payment charges does not mean that subsequent authority providing for such charges is inconsistent with the leases. An inconsistency could only arise if the leases contained an "express and specific" provision precluding such charges. There is no evidence that they do.

Moreover, appellants' position that the lack of a provision for interest assessments in the regulations in effect at the execution of the leases prohibits MMS from making such charges pursuant to current regulations is unpersuasive. The fact that no regulation existed does not prevent application of a subsequent regulation allowing such charges.

[2] This Department has long recognized that the intent of language such as "now or hereafter in force" is to incorporate future regulations, even though inconsistent with those in effect at the time of lease execution, and even though to do so creates additional obligations or burdens for the lessee. Gilbert V. Levin, 64 I.D. 1, 3-4 (1957). Thus, in determining if current regulatory provisions are inconsistent with any express and specific provisions of the leases (and should therefore not be incorporated therein), we look only at the lease and not at the lease in conjunction with the regulations in effect at the time of its execution. 7/

Appellants would have this Board hold that the statutory and regulatory provisions in effect at the time of lease execution become permanent "express and specific provisions" of the lease. That is just not the case, and even if it were, herein there is no dispute that at the time the leases in question were issued no regulation existed precluding an interest assessment. 8/

7/ Appellants argue in the alternative that if an assessment is authorized, it is limited to a \$10 charge for failure to timely report royalties, as that is all that was allowed under the regulations (30 CFR 221.54(j)(2) (1949)) in effect at the time the leases were executed. This argument also fails because even if the regulation cited by appellants were applicable, such a regulation would not constitute an "express and specific" provision of the lease, and a subsequent regulatory change based on new statutory authority could be applied to the leases.

8/ Aside from the statutory authority of FOGRMA to assess late payment charges, we agree with MMS that prior regulations and case law support the position that the Government had at all relevant times the authority to assess late payment charges. See 30 CFR 221.80 (1980); Billings v. United States, 232 U.S. 261 (1914); Christman Energy Corp., 107 IBLA 179, 182 (1989); Atlantic Richfield Co., 21 IBLA 98, 111, 82 I.D. 316, 322 (1975).

[3] Appellants also argue that the subject late payment charges are without statutory basis unless classified as civil penalties and that, therefore, appellants are entitled to certain procedural safeguards, as described in 30 U.S.C. | 1719 (1982). Despite appellants' allegation to the contrary, the statutory scheme clearly does provide for late payment charges in addition to civil penalties. Interest on late payments is authorized

by 30 U.S.C. | 1721 (1982), entitled "Royalty interest, penalties, and payments," while civil penalties are provided for in 30 U.S.C. | 1719 (1982), entitled "Civil penalties." Significantly, the procedural safeguards delineated in section 1719 are not repeated in section 1721.

This Board has previously acknowledged the distinction between assessments levied pursuant to the oil and gas operating regulations in 30 CFR Subpart 3160 and civil penalties imposed in accordance with section 109 of FOGPMA, 30 U.S.C. | 1719 (1982), and held that the procedural protections afforded for civil penalties do not apply to such assessments. M. John Kennedy, 102 IBLA 396 (1988). In addition, the Board has recognized that interest charges are designed to compensate for the time value of money and not to penalize. Cities Service Oil & Gas Corp., 104 IBLA 291, 295 (1988); Peabody Coal Co., 72 IBLA 337, 348 (1983). We now hold that interest charges assessed pursuant to 30 U.S.C. | 1721 (1982) are not subject to the procedural safeguards outlined in 30 U.S.C. | 1719 (1982) and, therefore, appellants are not entitled to such protections.

There is one final argument raised by appellants which merits consideration and that is appellants' claim that MMS did not consistently apply its operating policy regarding late payment interest charges. That policy is to assess interest charges only where such charges total \$25 or more in order to justify administrative costs of collection. See Royalty Management Program Enforcement Strategy for Assessments and Civil Penalties, approved by the Director, MMS, April 1, 1986, at page 5. ^{9/} In response, MMS claims that its policy relates not to each separate line item on MMS royalty reports, as appellants argue, but to the total interest charge generated on a single bill. We accept MMS' explanation of its policy; however, we note that the bill for collection in IBLA 89-60 is only \$4.66, well below MMS' minimum for collection. MMS has provided no explanation of how this bill is

^{9/} That document has been revised by MMS, as approved by the Director on Feb. 11, 1988; however, the operating policy for late payment assessments remains the same. See the February 1988 revision at page 3.

^{10/} In its reply brief appellants make much of the fact that their obligation for the underlying additional royalties has not been finally decided

in every case. They conclude that "[t]he Board can hardly rule on the propriety of imposing interest without having determined whether interest is necessitated" (Reply Brief at 11). We conclude that no such obstacle exists. Clearly, should it be finally resolved in any particular case that any of the appellants are not liable for the additional royalty, the late payment charge predicated on the additional royalty obligation must necessarily fall. Thus, our affirmation of the assessment of late payment charges is contingent upon final resolution of any challenge to the related additional royalty obligation.

consistent with its operating policy. For that reason, we must set aside MMS' decision in IBLA 89-60 and remand that case to MMS. All the other decisions appealed from are affirmed for the reasons stated above. 10/ To the extent appellants have raised other arguments not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, all the decisions appealed from are affirmed, except the decision in IBLA 89-60, which is set aside and the case remanded.

Bruce R. Harris
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

APPENDIX

<u>IBLA #</u>	<u>Appellant</u>	<u>MMS Docket #</u>	<u>Decision Date</u>	<u>Assessment</u>
87-505	Coastal Oil & Gas Corp.	87-0015-O&G	3-25-87	\$ 182.25
88-138	CIG Exploration, Inc.	87-0330-O&G	10-30-87	\$ 310.99
88-467	CIG Exploration, Inc.	87-0193-O&G	3-4-88	\$15,802.27
88-484	Coastal Oil & Gas Corp.	87-0190-O&G	3-16-88	\$ 951.25
88-490	ANR Production Co.	87-0344-O&G	3-21-88	\$14,984.62
88-518	Coastal Oil & Gas Corp.	88-0032-O&G	3-31-88	\$ 588.16
88-549	ANR Production Co.	88-0048-OCS	5-3-88	\$ 52.24
88-560	CIG Exploration, Inc.	88-0067-O&G	4-27-88	\$ 51.67
88-627	CIG Exploration, Inc.	87-0153-O&G	4-27-88	\$91,656.70
88-657	ANR Production Co.	87-0116-O&G	6-3-88	\$ 3,723.25
89-13	ANR Production Co.	87-0338-IND	7-19-88	\$26,608.79
89-60	ANR Production Co.	88-0114-O&G	9-6-88	\$ 4.66
89-61	ANR Production Co.	88-0115-O&G	9-6-88	\$ 35.02
89-62	ANR Production Co.	88-120-O&G	8-31-88	\$ 7,362.23
89-201	CIG Exploration, Inc.	87-346-O&G	8-18-88	\$35,576.08
89-202	Coastal Oil & Gas Corp.	88-24-O&G	8-31-88	\$ 252.68
89-203	Coastal Oil & Gas Corp.	88-245-OCS	12-20-88	\$22,061.09
89-204	Coastal Oil & Gas Corp.	88-272-OCS	10-21-88	\$ 750.98
89-205	Coastal Oil & Gas Corp.	87-299-O&G	8-18-88	\$ 8,075.50
89-224	ANR Production Co.	88-110-IND	11-30-88	\$ 90.43
89-225	ANR Production Co.	88-111-IND	11-30-88	\$ 25.30