

Appeal from a decision of the Assistant Director for Program Review, Minerals Management Service, denying in part appeals from the Chief, Payor Accounting Branch, Royalty Management Program, Minerals Management Service, assessing late payment charges. MMS-85-0199-O&G et al.

Affirmed as modified.

1. Oil and Gas Leases: Royalties: Interest

MMS was authorized to assess interest charges for the late payment of royalty owed with respect to onshore and offshore oil and gas leases prior to enactment of sec. 111(a) of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1721(a) (1982).

2. Administrative Procedure: Administrative Procedure Act--Administrative Procedure: Rulemaking--Oil and Gas Leases: Royalties: Interest

Appellant's argument that promulgation of late payment interest assessment regulations failed to comply with the notice and comment provisions of 5 U.S.C. § 553 (1982) is moot as the appropriate remedy has already been provided.

3. Oil and Gas Leases: Royalties: Interest

MMS properly assesses interest charges for the late payment of royalty where the lessee fails to establish that no late payment occurred because overpayments exceeded underpayments with respect to a particular lease account.

APPEARANCES: Jerry E. Rothrock, Esq., and Mary M. Munson, Esq., Washington, D.C., and Bruce Wolitarsky, Esq., Amarillo, Texas, for appellant; Howard C. Chalker, Esq., Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Mesa Petroleum Company (Mesa) has appealed a decision of the Assistant Director for Program Review, Minerals Management Service (MMS), dated March 24, 1987, denying in part its appeals from the assessment of late payment charges by the Chief, Payor Accounting Branch, Royalty Management Program (RMP), MMS, in the amount of \$130,467.42.

Between August 23 and November 13, 1985, Mesa filed appeals to the Director, MMS, from four bills for the collection of interest charges, totalling \$130,467.42, for the late payment of royalties due between December 1980 and February 1985 with respect to various onshore and off-shore oil and gas leases. ^{1/} In its appeals, Mesa challenged the assessment of late payment charges on a number of grounds, asserting in part that MMS either did not have statutory authority to assess late payment charges or, assuming that it had such authority, Departmental regulations providing for the assessment of such charges were void because they were not promulgated in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §§ 500-576 (1982), or did not apply to many of the subject late payments.

In response to Mesa's appeals, the Chief, Fiscal Accounting Division, RMP, prepared a field report which analyzed each of the challenges raised by Mesa and recommended to the Chief, Division of Appeals, Office of Program Review, MMS, that Mesa's appeal be denied as to \$125,881.90 in late payment charges. The report subtracted from the original assessment \$4,585.52 in late payment charges which were deemed to have been improperly assessed in view of a recalculation of the amount of royalty outstanding after its due date. Mesa was provided with a copy of the field report and submitted comments on it.

In his March 1987 decision, the Assistant Director denied Mesa's appeal as to \$125,881.90 in late payment charges, addressing each of Mesa's objections to that assessment. He specifically concluded that the assessment of late payment charges was undertaken pursuant to appropriate statutory and regulatory authority. Mesa has appealed from the Assistant Director's March 1987 decision.

Initially, appellant challenges the assessment of late payment charges with respect to royalty which became due prior to January 12, 1983. While

^{1/} The four bills for collection (Invoice Nos. MMS-85-0199-O&G, MMS-85-0203-O&G, MMS-85-0204-O&G, and MMS-85-0311-OCS) were issued on July 18 and 24, Aug. 7, and Oct. 7, 1985. Accompanying each of the bills was a cover letter from the Chief, Payor Accounting Branch, which stated: "The enclosed Bill for Collection represents an invoice issued under [MMS'] automated exception processing system. The exceptions are generated by comparing what a payor reports and pays to what our system expects the payor to report and pay. * * * Late payments are those exceptions where the payment was made after the due date of the transaction being paid. The interest billed is assessed at the lease level based upon the sales month of the transactions reported."

acknowledging that MMS had statutory authority after January 12, 1983, by virtue of enactment of section 111(a) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1721(a) (1982), to assess interest charges for the late payment of royalty, appellant contends that MMS lacked the statutory authority to assess interest charges with respect to royalty which became due prior to that date. Appellant points to the fact that there is no express authority in the Outer Continental Shelf Lands Act (OCSLA), as amended, 43 U.S.C. §§ 1331-1356 (1982), for the assessment of late payment charges, and maintains that section 111(a) of FOGRMA cannot be applied retroactively.

Furthermore, appellant contends that the oil and gas leasing regulations with respect to the assessment of late payment charges are void because MMS' predecessor, the Geological Survey (Survey), failed to comply with the applicable rulemaking provisions of the APA. ^{2/} Specifically, appellant argues that the regulations are void because the notice and comment provisions of 5 U.S.C. § 553 (1982) were not followed during promulgation of the interest regulations. Furthermore, Mesa contends that even if the regulations were promulgated in accordance with the APA, the interest regulation pertaining to onshore leases was not effective until February 1, 1981, and that, therefore, we must reverse MMS as to interest assessed prior to that date for those leases.

[1] We begin with appellant's arguments that interest assessments prior to FOGRMA lack statutory authority and that assessments for onshore leases prior to February 1, 1981, lack regulatory authority. Regardless of the absence of any express authority for the assessment of interest charges for the late payment of royalty, it is well established that MMS has the "authority, independent of any specific statutory, regulatory, or contractual authority, to make a unilateral determination of interest owed where equity requires that it be imposed." Sun Oil Co., 91 IBLA 1, 48, 93 I.D. 95, 120 (1986), aff'd sub nom. Clark Oil Producing Co. v. Hodel, 667 F. Supp. 281, 292 (E.D. La. 1987). Without an interest assessment, appellant "would enjoy substantial profit realized by its years of appeals. Such a windfall could also create an incentive in the future for parties to unduly prolong litigation." Clark Oil Producing Co. v. Hodel, supra at 292. Thus, prior to the enactment of FOGRMA or the promulgation of the interest

^{2/} In its answer to appellant's SOR, MMS contends that the question of whether Survey properly promulgated the challenged regulations cannot be considered by the Board as we have no authority to declare invalid a duly promulgated regulation of the Department. It is well established that the Board has no authority to declare invalid a duly promulgated regulation of the Department. Alternate Fuels, Inc. v. OSMRE, 103 IBLA 187, 190 (1988). However, the Board clearly has the authority to declare invalid a Departmental regulation which has not been duly promulgated. Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981). See George E. Krier, 92 IBLA 101, 103-106 (1986).

Thus, we are clearly authorized to consider whether the regulation is duly promulgated and the Director's decision is modified to the extent it conflicts with this finding.

regulations, MMS and Survey had the authority to assess interest charges for the late payment of royalties. ^{3/} Mesa Petroleum Co., 108 IBLA 149, 150 (1989).

Despite preexisting authority to assess interest on late payments, Survey promulgated regulations explicitly recognizing that authority. On March 12, 1979, Survey proposed for offshore leases new regulations which did not specifically mention late payment interest charges. Comments were received until May 11, 1979. 44 FR 13527 (Mar. 12, 1979). The final regulations, which became effective on December 13, 1979, expressly required collection of late payment interest charges at 30 CFR 250.49. 44 FR 61886, 61902 (Oct. 26, 1979). The change between the proposed and the final regulations was explained in this manner: "The section has also been clarified to show that interest is due and payable on the late payments of rentals, royalties, or net profit shares." 44 FR 61890 (Oct. 26, 1979).

Subsequently, Survey issued interim rules including late payment interest charges applicable to both onshore (30 CFR 221.80) and offshore (30 CFR 250.49) leases, and requested comments thereon. 45 FR 84762, 84824 (Dec. 23, 1980). As originally published, comments were to be received until February 23, 1981, and the regulations were to have become effective February 1, 1981. In the explanation for the method of promulgation, reference is made to the fact that Survey "could assess interest on all late payments and most underpayments on a case-by-case basis." 45 FR 84763 (Dec. 23, 1980). The effective date of these regulations was subsequently postponed until March 30, 1981. 46 FR 10707 (Feb. 4, 1981).

These interim rules became final effective June 1, 1982. 47 FR 22524 (May 25, 1982). With the publication of the final rules is a discussion of the comments received concerning the interest charge regulations. Changes in the final regulations were made in response to opinions expressed by commentators.

[2] Appellant argues that promulgation of the interest regulations failed to follow the notice and comment provisions outlined in 5 U.S.C. § 553 (1982). If Mesa were to prevail on this claim, the appropriate relief in this case would be to require effective notice and comment. See Hedge v. Lyng, 689 F. Supp. 898, 910 (D. Minn. 1988); United States Steel Corp. v. Environmental Protection Agency, 649 F.2d 572 (8th Cir. 1981); Western Oil & Gas Association v. Environmental Protection Agency, 633 F.2d 803 (9th Cir. 1980). ^{4/} We find that because MMS provided effective notice and comment after the adoption of the interest rules (47 FR 22524 (May 25, 1982)), the

^{3/} In addition we note the Assistant Director asserts that no interest was assessed for periods before the respective regulations became effective. Appellant has failed to show any instance where interest was assessed prior to the effective date of the relevant regulation and our review of the record supports the Assistant Director's allegation.

^{4/} In other circumstances, courts have found other remedies to be appropriate. See Mobil Oil Corp. v. Department of Energy, 610 F.2d 796, 804 (Temp. Emer. Ct. App. 1979), cert. denied, 446 U.S. 937 (1980); American

only appropriate remedy has already been provided. Thus, it is unnecessary for us to determine whether Survey complied with 5 U.S.C. § 553 (1982) during initial promulgation of the interest regulations as the issue is moot. Hedge v. Lyng, *supra* at 910; Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1494 (Temp. Emer. Ct. App. 1983), *cert. denied*, 467 U.S. 1255 (1984).

Appellant contends that it should not be charged any interest because its overpayments more than offset its underpayments, thus resulting in no late payment of royalty. Appellant states that the overpayments occurred on various leases, but does not identify the leases or the time periods involved (SOR at 2).

[3] We have held that MMS may not offset overpayments against under-payments between leases, but rather solely in the course of an audit of a particular lease account. Mesa Petroleum Co., *supra* at 150. There is no evidence that an audit of any lease account involved here would have resulted in the recognition of any such offset, thereby eliminating any portion of the late payments which formed the basis for the assessment of the interest charges involved here. The burden of establishing the basis for offsetting royalty overpayments and underpayments rests with appellant; therefore, we must conclude that it is not entitled to any offset. See Sun Exploration & Production Co., 106 IBLA 300, 303 (1989).

Referring to the case of Atlantic Richfield Co., 21 IBLA 98, 111, 82 I.D. 316, 322 (1975), in which Survey only assessed interest charges accruing after it had demanded payment of royalties past due, appellant objects to MMS' assessment of such charges as they accrued after the due date, citing "discriminatory treatment" (SOR at 10-11). However, Atlantic Richfield Co., *supra*, clearly supports the proposition that MMS is authorized to assess prejudgment interest (*see also Phillips Petroleum Co.*, 109 IBLA 4, 17, (1989); Sun Oil Co., *supra* at 47-49, 93 I.D. at 120-22), and we have specifically upheld the assessment of interest for time periods prior to a demand letter for the underlying debt. (*See Full Circle, Inc.*, 35 IBLA 325, 340-42, 85 I.D. 207, 215-16 (1978)). Consequently, we conclude that appellant has not established "discriminatory treatment" as a basis for reversing the MMS bills for collection.

Appellant has requested a hearing; however, it has not demonstrated a material question of fact which would justify a hearing. Therefore, Mesa's request is denied. See Woods Petroleum Co., 86 IBLA 46, 55 (1985).

fn. 4 (continued)

Frozen Food Institute v. Train, 539 F.2d 107, 135 (D.C. Cir. 1976). *See also Venlease I*, 99 IBLA 387, 395 n.18 (1987). However, two important factors distinguish this case. First, undesirable and unpredictable consequences could flow from invalidation of these regulations. *See Western Oil & Gas Association v. Environmental Protection Agency*, *supra* at 813; Hedge v. Lyng, *supra* at 909. Second, as was the case in Hedge v. Lyng, *supra* at 909-10, the notice and comment period which followed promulgation of these regulations provided the public with an effective opportunity to comment on the interest charges. *See* 47 FR 22524 (May 25, 1982).

Accordingly, we conclude that Assistant Director properly denied appellant's appeals from the assessment of late payment charges in the amount of \$125,881.90.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Assistant Director's decision is affirmed.

John H. Kelly
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge