

Editor's note: Reconsideration denied by Order dated April 30, 1990

FOREST OIL CORP.

IBLA 87-365

Decided October 26, 1989

Appeal from a decision of the Director, Minerals Management Service, affirming assessment of additional royalty. MMS 86-0107-O&G.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Mineral Leasing Act: Royalties--Minerals Management Service--Oil and Gas Leases: Royalties

The assessment of additional royalty due as a result of the improper deduction of a transportation allowance discovered during an audit may be affirmed where the improper deduction commenced prior to the period of the audit in the absence of evidence of a prior audit or adjudication of royalty due under the lease which dealt with the issue.

APPEARANCES: Richard W. Schelin, Esq., Denver, Colorado, for appellant; Peter J. Schaumberg, Esq., and Douglas O. Bowman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by Forest Oil Corporation (Forest) from a decision of the Director, Minerals Management Service (MMS), dated December 10, 1986. The disputed portion of the decision affirmed the assessment of additional royalty in the amount of \$2,950.95 based on an improper deduction for transportation allowance. ^{1/}

^{1/} Although the decision of the Director dealt with eight distinct issues, each involving the assessment of additional royalty, Forest appealed the decision as to only two of the issues and the resulting assessment. By order of the Board dated July 15, 1987, one of these issues was remanded to MMS pursuant to motion of counsel to allow MMS to modify its decision in light of additional evidence tendered with the appeal. Accordingly, the only remaining issue is the liability for the additional royalty for the disallowed transportation expenses.

The royalty assessment at issue was precipitated by an audit conducted by MMS of the royalties paid by Forest on Federal oil and gas leases over a period from January 1, 1977, through December 31, 1983. The final audit report issued by MMS in November 1985 stated in pertinent part:

On August 1, 1975, a notice was issued to all Lessees and Operators in the North Central Region which discontinued all transportation allowances. All new allowances had to be approved as of October 1, 1975. NTL-1 emphasized this point in Section 4 when it stated that:

"Deduction of transportation charges will not be allowed unless justified in writing and approved by the Supervisor." [2/]

Forest did not receive approval for a transportation allowance for the Grieve Unit but deducted an allowance from gross proceeds from October 1975 through May 1981. Forest received 14.7 cents per barrel for a transportation allowance from the Permian Corporation and then deducted this allowance for royalty purposes. Since no allowance was approved, the 14.7 cents per barrel must be considered a part of gross proceeds and royalties must be paid on these proceeds. This error resulted in an underpayment of royalties totaling \$6,782.33.

(Final Audit Report at 47). The final audit report acknowledged the contention of Forest that it should not be held liable for that part of the transportation allowance (\$2,950.95) which was deducted outside the period of the audit (prior to January 1977). The report rejected this assertion on the ground that the unauthorized transportation allowance was detected during the audit review and properly traced back to its origin and that MMS could not disregard such findings of additional royalty due (Final Audit Report at 48).

As a result of the audit, a demand letter was issued to Forest by the Lakewood Regional Compliance Office, Royalty Management Program (RMP), MMS, requiring the payment of \$2,868,517.88 in additional royalties. This demand letter was the subject of the appeal to the Director, MMS. Forest accepted the demand for additional royalties for that portion of the unapproved transportation allowance it had deducted during the audit period, January 1977 through May 1981.

However, Forest appealed the portion of the disallowed deduction applicable to the period before the audit. Appellant argued to the Director that because these charges fell outside the stated audit period of January 1977 through December 1983, they should not be assessed. The Director held otherwise. He stated:

2/ Notice to Lessees and Operators of Federal Onshore Oil and Gas Leases (NTL-1), 42 FR 4546, 4548 (Jan. 25, 1977).

The transportation allowance problem was discovered during the normal course of the audit and traced back to its inception. The additional royalties due cannot be disregarded simply because they predate the initial audit period. Section 101(c) [of the Federal Oil and Gas Royalty Management Act (FOGRMA)], 30 U.S.C. | 1711 [(1982)], requires the Secretary to audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil and gas and take appropriate actions to make additional collections and refunds as warranted. [Emphasis in original.]

(Director's Decision at 5-6).

Appellant argues in the statement of reasons for appeal that MMS can-not recover payments for periods prior to the audit period because such recovery is barred by the statute of limitations established by the Act under which MMS conducted the audit, citing section 307 of FOGRMA, 30 U.S.C. | 1755 (1982). Appellant points out that one reason such statutes are enacted is the difficulty of ensuring that accurate and complete historical records will be retained for long periods of time. "Forest is unable to produce any evidence of prior approval for its transportation allowance and must therefore avail itself of the statute of limitations" (Statement of Reasons at 4).

Counsel for MMS responds that the Mineral Leasing Act, 30 U.S.C. | 226(b)(1) (1982), requires royalty payments on all production. MMS argues that the statute of limitations found at section 307 of FOGRMA, 30 U.S.C. | 1755 (1982), applies only to the collection of civil penalties assessed under FOGRMA and does not govern the obligation to pay royalty. MMS contends that the relevant statute of limitations, should the Department bring suit to recover royalty underpayments, 3/ is found at 28 U.S.C. | 2415(a) (1982), as modified by 28 U.S.C. | 2416(c) (1982). MMS would apply this statute not from the time royalty was underpaid (when the right of action accrued) but when MMS reasonably knew of underpayment, an exception found in 28 U.S.C. | 2416(c) (1982), which MMS claims did not occur before it issued the draft audit report in February of 1985.

[1] As a threshold matter, we note that the statute of limitations cited by appellant found in section 307 of FOGRMA, 30 U.S.C. § 1755 (1982), applies by its express terms to "any action to recover penalties" under FOGRMA. Civil penalties are authorized by section 109 of FOGRMA, 30 U.S.C. § 1719 (1982), and are legally distinct from the underlying royalty obligation. Thus, this statute of limitations would not avail appellant to block any effort to collect royalty due. However, the broader question presented is whether the 6-year statute of limitations at 28 U.S.C. § 2415 (1982) may be construed as a bar to upholding the Director's decision. This Board has previously had occasion to rule on the applicability of this statute of

3/ Counsel for MMS does not concede the applicability of a statute of limitations governing suit in a Federal court to an administrative adjudication concerning the amount of royalty due.

limitations to an adjudication of liability for royalty under the Mineral Leasing Act:

As the Solicitor has pointed out in his brief, the statute is concerned with the filing of claims for money damages by the United States in district courts. Generally, a statute of limitations operates directly on the remedy only but does not affect the merits of the controversy or the underlying right to recover. United States v. Studivant, 529 F.2d 673 (3d Cir. 1976). Thus, when one remedy is barred by a statute of limitations, other remedies may still be available against which the statute of limitations cannot be interposed. * * *

This decision involves the administrative determination of the underlying obligation of the appellant to pay royalty to the United States; such a determination does not automatically trigger a remedy. See, e.g., United States v. Southwest Potash Corp., [352 F.2d 113 (10th Cir. 1965), cert. denied, 383 U.S. 911 (1966)] at 118. To apply the statute at this stage of the proceedings would lead to a determination of the underlying obligation which would compromise the effectiveness of alternative remedies to which the statute of limitations might not apply. * * * Because the statute of limitations relates to remedies rather than underlying obligations, it need only be considered if the need to pursue remedies arises which necessarily occurs after the underlying obligation has been determined in an adjudicative proceeding. Because the purpose of this proceeding is only to determine the underlying obligation for royalty, the statute of limitations raises no issue within the scope of this administrative adjudicative proceeding, as contrasted with settlement negotiations or other actions taken to collect the amounts due.

Footo Mineral Co., 34 IBLA 285, 306-08, 85 I.D. 171, 182-83 (1978). 4/ Accordingly, we must reject appellant's assertion that the statute of limitations requires reversal of the Director's decision. 5/

4/ This decision was reversed on other grounds by the U.S. Court of Claims, 654 F.2d 81 (Ct. Cl. 1981).

5/ Although we find it inappropriate to apply the statute of limitations to the administrative proceedings in this case, we note that the 6-year period of limitation from the accrual of the cause of action for actions on contracts under 28 U.S.C. § 2415 (1982) is subject to a statutory exception where "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." 28 U.S.C. § 2416(c) (1982). In the absence of any previous audit embracing the period from October 1975 through December 1976, there is considerable doubt whether the material facts regarding appellant's deduction of an unapproved transportation allowance were known or could reasonably have been known by a responsible official.

This leaves the question of whether MMS may properly assess additional royalty for a period prior to the audit period where the circumstances which give rise to the obligation, *i.e.*, deduction of a transportation allowance without obtaining approval, originated prior to the term of the audit. We think this question must be answered in the affirmative, since it appears the transportation allowance was improperly taken and this matter was not the subject of a prior audit or adjudication by the Department. ^{6/} *Cf. Conoco, Inc.*, 110 IBLA 232, 243 (1989) (prior nationwide audit covering appellant's leases at time in question not preclusive of liability in absence of showing the audit ruled on the royalty issue).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director, Minerals Management Service, is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

^{6/} In response to an order of this Board, dated Dec. 20, 1988, MMS stated that neither it nor its predecessor, the Geological Survey, had performed a prior formal audit of appellant's oil and gas royalty payments. MMS further stated that it was possible, though unlikely, that Geological Survey may have conducted a "desk audit" in less scope and detail than the audit now before the Board.