

Appeal from a decision of the Director, Minerals Management Service, denying request for refund of royalties on Outer Continental Shelf oil and gas lease. MMS-89-0197-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Refunds

Sec. 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1988), authorizes the issuance of refunds for royalty overpayments only where the request for a refund is made within 2 years of the date that the overpayment is made. A subsequent court ruling on the liability of Federal lessees for royalty on take-or-pay proceeds will not extend the statutory time for filing a request for refund.

2. Outer Continental Shelf Lands Act: Refunds

Sec. 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1988), expressly bars the Department from paying interest on refunds for royalty overpayments.

3. Administrative Authority: Generally--Constitutional Law: Generally

IBLA has no authority to declare sec. 10(a) of OCSLA, 43 U.S.C. § 1339(a) (1988), or any other act of Congress unconstitutional. If an enactment of Congress is in conflict with the U.S. Constitution, it is for the Judicial Branch to so declare.

APPEARANCES: Michelle L. Gilbert, Esq., and Daniel Joseph, Esq., Washington, D.C., for Amerada Hess Corporation; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

## OPINION BY ADMINISTRATIVE JUDGE GRANT

Amerada Hess Corporation appeals from a September 17, 1990, decision of the Director, Minerals Management Service (MMS), denying a request for a refund of royalty overpayments. The refund request totaling \$1,269,721.40 included overpaid royalties in the amount of \$683,333.33 on proceeds from a take-or-pay settlement entered into between appellant as lessee/producer and Transcontinental Gas Pipe Line Corporation as purchaser of gas production from OCS-G 2563, West Cameron 540 Field, Offshore, Louisiana. The balance of the refund requested was for interest paid as a result of the late payment on those royalties in the amount of \$586,388.07.

The facts are undisputed. On February 24, 1989, appellant sought a refund of \$683,333.33 in royalty paid in April 1983 by the operator on its behalf, for production months June 1981 and June 1982, and \$586,388.07 in interest paid as a consequence of the late payment. Gas production from OCS-G 2563 was subject to a gas sales contract containing a "take or pay" provision requiring the purchaser of gas to take certain volumes of gas or pay for gas volumes if not taken. In April 1983 at the time royalties were paid MMS required royalties to be paid on take-or-pay proceeds (even though gas may not have been produced or taken). On August 17, 1988, in Diamond Shamrock Exploration Co. v. Hodel, 853 F.2d 1159 (5th Cir. 1988), the U.S. Court of Appeals, Fifth Circuit, rejected MMS' position that royalties were due at the time take-or-pay payments were made, concluding that royalties are only due on gas when it is actually produced and taken. Six months later, appellant, relying on Diamond Shamrock, submitted its refund request.

The Royalty Management Program, MMS, in a June 30, 1989, decision denied appellant's refund request on the grounds that it was barred by section 10 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1339(a) (1988), as the royalty payment identified by appellant as the amount to be refunded was the royalty for the production months of June 1981 and June 1982, which was paid on appellant's behalf by the operator in April 1983. Since appellant filed the refund request on February 24, 1989, the request was filed more than 2 years after the royalty was paid. This decision was consistent with the holding of the Board regarding application of the refund provisions of section 10 of OCSLA, *i.e.*, that in order to be eligible for a refund pursuant to the statutory provision a request for refund must be made within 2 years of the date of the overpayment and not the date the producer becomes aware a refund is due. Shell Offshore Inc., 96 IBLA 149, 94 I.D. 69 (1987). <sup>1/</sup>

Appellant challenged this decision on appeal to the Director, MMS, relying *inter alia* on the 1989 Claims Court decision in Chevron. The MMS Director noted that an appeal had been filed in Chevron (No. 90-5053 (Fed. Cir. Jan. 31, 1990)), and, seeking to distinguish Chevron, concluded

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<sup>1/</sup> Rev'd sub nom. Chevron U.S.A., Inc. v. United States, 17 Cl. Ct. 537, (1989), rev'd, 923 F.2d 830 (Fed. Cir. 1991), cert. denied sub nom. Phillips Petroleum Co. v. United States, \_\_ U.S. \_\_, 112 S. Ct. 167 (1991).

the precedent was not controlling in any event. In addition to denying the request for royalty refund as untimely, MMS rejected the interest claim, observing that interest is generally not recoverable against the United States in the absence of a statute authorizing its payment. MMS found that no statutory or contractual provision exists authorizing the Department to pay interest on royalty refunds involving Outer Continental Shelf leases. Relying on Getty Oil Co. v. United States, 767 F.2d 886 (Fed. Cir. 1985), MMS concluded section 10 of OCSLA expressly precludes the United States from paying interest on royalty refunds involving Outer Continental Shelf leases. Amerada challenges this decision on appeal to this Board.

On appeal to the Board, appellant argues that the Claims Court decision in Chevron is controlling and, hence, the request for refund was timely. With respect to the refusal of MMS to pay interest on the royalty overpayment, Amerada contends this is an unconstitutional denial of equal protection of the laws under the Fourteenth Amendment since lessees refusing to make the excess royalty payments are not deprived of interest on their funds when the royalty payments are subsequently held to be in excess. 2/

Counsel for MMS has noted in its answer that the Claims Court decision in Chevron has been reversed subsequent to the filing of appellant's brief. Regarding payment of interest to the lessee, MMS observes that the statutory language of section 10(a) of OCSLA precludes MMS from paying interest on royalty refunds, stating that amounts "shall be repaid without interest" (MMS Answer at 2).

[1] Disposition of this appeal is governed by the provisions of section 10 of OCSLA which 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 under this subchapter in excess of the amount he was lawfully required to pay, such 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 making of the payment  
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43 U.S.C. § 1339(a) (1988). In Shell Offshore, Inc., the lead case applying the 2-year limit on requests for refunds, we found that:

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2/ Appellant states:

"Under the OCSLA statutory scheme, [appellant] and other similarly situated companies, who pay royalties that are later found to be unlawfully demanded, are denied the recovery of interest on their substantial overpayments; however, if a company does not pay royalties when demanded and it is later determined that such royalties were never due, the company has continued to enjoy the value of the use of its money" (Statement of Reasons (SOR) at 15).

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 Federal Circuit decision reversing the decision of the Claims Court found the "IBLA's opinion [in Shell Offshore] was well reasoned," observed that section 10 of OCSLA requires lessees to request the refund of any excess payment "within two years after the making of the payment," and stated:

To qualify for a refund, a lessee must make a timely request. The phrase "within two years after the making of the payment" defines the timeliness of a refund request. By its terms, this phrase requires a request within two years from the time a lessee makes its original royalty payment.

The context of this phrase underscores its clear meaning. The statute does not use the phrase "making of the payment" solely to condition a refund upon a timely request. Rather, the phrase--in a slightly different grammatical form--also appears in an introductory clause: "when it appears \* \* \* that any person has made a payment to the United States in connection with any lease under this subchapter \* \* \* 43 U.S.C. § 1339(a) (emphasis added). Thus, the "payment" phrase defining timely requests refers to the original excessive royalty payment. This context further links the refund request to the original royalty payment.

The Federal Circuit continued:

The statute does not state that a lessee must request a refund "within two years after discovery that a payment was excessive." Nor does the statute state that a lessee must request a refund "within two years after a judicial determination rendering a payment excessive." The statute requires a request "within two years after the making of the payment." By interpreting the OCSLA otherwise, the Claims Court erred.

Chevron U.S.A., Inc. v. United States, 923 F.2d at 833. This precedent is controlling in the present case and, in view of the fact that appellant's payment was tendered more than 2 years prior to the filing of the refund request, requires rejection of the refund request. See OXY USA, Inc., 125 IBLA 7 (1992) (Upholding application of the 2-year limit to requests for refunds of royalty on take-or-pay payments).

[2] It is well established that interest does not accrue on a claim against the United States Government in the absence of express provision therefor in a statute or in the terms of a contract. United States v. Louisiana, 446 U.S. 253, 264-65 (1980); Marathon Oil Co. (On Reconsideration), 103 IBLA 138, 142 (1988). <sup>3/</sup> Section 10(a) of OCSLA expressly bars the Department from paying interest on royalty refunds. Getty Oil Co. v. United States, *supra*. A fortiori, no interest is payable where, as in this case, a refund is barred by the failure to file a timely request for repayment.

[3] Appellant also challenges the constitutionality of the statutory denial of interest under section 10(a) on equal protection grounds. This Board has no authority to declare section 10(a) of OCSLA or any other act of Congress unconstitutional. If an enactment of Congress is in conflict with the U.S. Constitution, it is for the Judicial Branch to so declare. Ptarmigan Co., 91 IBLA 113 (1986), *aff'd sub nom.*, Bolt v. United States, No. A87-106 (D. Ak. Mar. 30, 1990), *aff'd*, 944 F.2d 603 (9th Cir. 1991). Appellant's assertion of equal protection violations appears misguided in that all lessees are obligated to make royalty payments when due. The failure to pay royalty when due subjects the lessee to sanctions which may be more severe than the loss of interest on amounts ultimately found to be refundable. Thus, section 109(c) of FOGRMA provides that any person who knowingly or willfully fails to make any royalty payment by the due date shall be liable for a penalty of up to \$10,000 per violation for each day such violation continues. 30 U.S.C. § 1719(c) (1988).

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.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge

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<sup>3/</sup> In Marathon we found no authority under sec. 104(a) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 191 (1988), for payment of interest to the lessee/payor on any challenged royalty payments which are ultimately found to be refundable to the lessee/payor. 103 IBLA at 142.