

**Editor's Note: Reconsideration denied by order dated Feb. 5, 1997.**

SHELL OIL COMPANY

IBLA 94-558

Decided August 12, 1996

Appeal from a decision of the Deputy Director, Minerals Management Service, finding that a transportation allowance previously approved in writing was terminated on November 12, 1990. MMS-92-0039-046.

Reversed.

1. Minerals Management Service: Generally--Minerals Management Service: Appeals to Director--Oil and Gas: Generally--Oil and Gas: Pipelines--Regulations: Generally--Regulations: Interpretation

Departmental regulation 30 CFR 206.157(c)(2)(v) did not confer authority on MMS to revoke an approved gas transportation allowance in effect when the regulation was promulgated on Mar. 1, 1988, in the absence of changed circumstances which caused the allowance to terminate because the allowance, which was previously approved in writing by MMS, contained no time limitation and none was provided by the rule.

APPEARANCES: William G. Riddoch, Esq., Houston, Texas, for Shell Oil Company; Peter J. Schaumberg, Esq., Howard W. Chalker, Esq., Geoffrey Heath, Esq., and Sara L. Inderbitzin, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Shell Oil Company (Shell), on behalf of its subsidiary Shell Western E & P, Inc. (SWEPI), has appealed from a March 1, 1994, decision of the Deputy Director, Minerals Management Service (MMS), that granted in part and denied in part Shell's December 10, 1990, appeal of a Royalty Valuation and Standards Division (RVSD) letter dated November 5, 1990. Shell has appealed that part of the decision holding that Shell's previously approved gas transportation allowance was terminated under 30 CFR 206.157(c)(2)(v), and that after November 12, 1990, Shell became subject to the reasonable cost provisions of 30 CFR 206.157(b) (covering cases where a company furnishes transportation services for itself).

SWEPI produces carbon dioxide that is transported through the Cortez Pipeline to oil fields in West Texas for use in enhanced recovery projects. Shell has an ownership interest in the Cortez pipeline. By letter dated December 9, 1983, Shell requested approval to use a transportation allowance in calculating Federal royalties on the carbon dioxide gas that was based on a tariff procedure derived from a 1941 pipeline consent decree. On March 29, 1984, MMS approved the proposed procedure, but excluded State and Federal income taxes from calculation of the allowance. Shell appealed that decision, which this Board set aside and remanded to MMS in Shell Western E & P, Inc., 112 IBLA 394 (1990). During the pendency of that appeal, MMS promulgated new regulations governing deduction of transportation allowances from the value of production in determining the value of production from Federal leases. These regulations became effective March 1, 1988.

On November 5, 1990, in order to conform to the Board's decision in Shell Western E & P, Inc., *supra*, RVSD approved Shell's transportation allowance calculations based on the 1941 consent decree for the period April 15, 1984, through February 29, 1988. Nonetheless, the RVSD decision concluded that, because SWEPI submitted Form MMS-4295 "Gas Transportation Allowance Report" for the period from March 1, 1988, through December 31, 1988, SWEPI had elected to come under the new regulations when they became effective on March 1, 1988. Shell appealed that decision to the Director. During the appeal to the Director, RVSD conceded that Shell's use of form MMS-4295 did not constitute an election to terminate the allowance in effect on March 1, 1988, and agreed that the transportation allowance was in effect on March 1, 1988. Nonetheless, RVSD contended that because Shell's underlying carbon dioxide purchase contract was for a term of 6 years ending on April 30, 1990, the previously approved allowance terminated when the initial 6-year contract term expired, and the allowance should thereafter have been calculated using the reasonable actual cost standard established by 30 CFR 206.157(b).

The Deputy Director rejected this argument because the prior approval by RVSD of the transportation allowance made no reference to a 6-year limitation; she found that neither the initial approval made on March 29, 1984, nor the revised approval of November 5, 1990, incorporated a 6-year time limit. She also concluded that those two approvals of the Shell allowance recognized a transportation allowance based on the 1941 consent decree that remained in effect until it was revoked by RVSD. The Deputy Director found that, just as RVSD could have limited the period for which the approval was to apply, it could also terminate the open-ended approval prospectively by notification to the lessee, an action she concluded was accomplished by the November 5, 1990, letter.

The RVSD letter of November 5, 1990, stated that Shell's allowance was "acceptable as a transportation allowance for the Cortez pipeline from April 15, 1984, through February 29, 1988." The Deputy Director found that this language gave Shell notice that the earlier approval was not effective

after February 29, 1988. Finding that the letter could terminate the previously granted allowance prospectively, the Deputy Director concluded that notice of termination was given to Shell on November 12, 1990, when the letter was received. Therefore, starting from November 12, 1990, she determined that Shell's transportation allowance was to be calculated in accordance with the reasonable cost provisions of 30 CFR 206.157(b).

Shell appeals the Deputy Director's decision, arguing the plain language of 30 CFR 206.157(c)(2)(v) indicates that a nonarm's-length transportation allowance meeting the requirements of the regulation could not be terminated prospectively by MMS without further rulemaking, and, even if it could, the November 5, 1990, letter did not constitute such a termination. In a statement of reasons (SOR) filed herein, Shell contends that 30 CFR 206.157(c)(2)(v) plainly states that approved transportation allowances in effect on March 1, 1988, continue in effect until they terminate by their own terms. In support of this contention, Shell points to a statement in the March 29, 1984, RVSD letter of approval that MMS would publish a transportation allowance procedure as proposed rulemaking. Therein RVSD stated that, if and when the new procedure became effective, SWEPI might wish to replace the existing allowance. The March 1984 letter stated that to terminate the existing allowance, "[y]ou would have to make a revised application and any approval by MMS would not be retroactive." Shell interprets this to mean that, in order to change the approved Cortez allowance, Shell needed to submit a revised application and, if MMS approved that application, a new allowance could then take effect.

MMS has filed an answer to Shell's SOR, contending that, pursuant to 30 CFR 206.157(c)(2)(v), MMS may prospectively terminate a previously approved transportation allowance that was in effect on March 1, 1988, and that it did so in this case with the November 5, 1990, letter to SWEPI. Authority for such termination is said to be found in the regulatory language stating that allowances in effect on March 1, 1988, "will be allowed to continue until such allowances terminate." MMS argues that the March 29, 1984, approval letter stated the tariff-based allowance was only to be used on an interim basis and the allowance would terminate when "a final determination [could] be made by MMS regarding the value of the [carbon dioxide] for royalty purposes" (Answer at 6, citing the Mar. 29, 1984, letter at 2). Therefore, MMS maintains, the November 5, 1990, letter was a notification that MMS had made a final determination regarding the value of the carbon dioxide for royalty purposes, and MMS thereby terminated the interim allowance. Because, according to this theory, MMS allowed Shell's allowance to continue until it was terminated, MMS asserts its action was authorized by the 1988 regulation. We reject this argument and reverse the decision here under review.

[1] Both the history and text of 30 CFR 206.157(c)(2)(v) lead to a conclusion that the regulation does not provide authority for unilateral revocation of a transportation allowance that was approved in writing by

MMS and was in effect on March 1, 1988, in the absence of changed circumstances causing the allowance to terminate. The cited rule states:

Non-arm's-length contract or no contract based transportation allowances which are in effect at the time these regulations become effective will be allowed to continue until such allowances terminate. For the purposes of this section, only those allowances that have been approved by MMS in writing shall qualify as being in effect at the time these regulations become effective.

30 CFR 206.157(c)(2)(v).

The regulation was first proposed on February 13, 1987, at 52 FR 4732. In a preamble to the first proposed rulemaking, MMS stated an intention "to terminate all existing transportation allowances with the issuance of final rulemaking. This termination would require all lessees to follow the new reporting requirements to be eligible for the deduction of transportation costs for production months subsequent to the effective date of the final rules." 52 FR 4739 (Feb. 13, 1987). On August 17, 1987, MMS published another notice of proposed rulemaking containing changes made after public hearings and comment. 52 FR 30776 (Aug. 17, 1987). The preamble to the August 17 proposed rulemaking posed the question "[s]hould current approved transportation allowances remain in effect until they expire?" One industry comment was reported to favor making such allowances "continue until the applicable contract or rate terminates, or is modified or amended." In response to the quoted question and comment, MMS stated that 30 CFR 206.157(c)(2)(v) was revised "to provide that any transportation allowances in effect on the date these regulations become effective be allowed to continue until such allowances terminate subject to later audit." 52 FR 30800 (Aug. 17, 1987).

A further notice of proposed rulemaking issued on October 23, 1987, at 52 FR 39792. The preamble thereto reports that agency review of further comments received led MMS to make changes to the draft final regulations, some of which were significant. The regulation at 30 CFR 206.157(c)(2)(v) was amended to add language requiring that allowances be approved in writing by MMS in order to qualify for continuation under the new rules. The reason given for adding this language was that MMS believed "that the intent of the final rules will be best served by having all allowances to be deducted under the new rules documented as of that date." 52 FR 39820 (Oct. 3, 1987). The same explanation was repeated in the preamble to the final regulations published January 15, 1988, at 53 FR 1230, 1260.

This regulatory history shows that MMS decided to allow certain transportation allowances that had written approval from MMS on March 1, 1988, to continue until they expired by their own terms. The revision in the second proposed rulemaking on August 17, 1987, was made in response to questions about allowances remaining in effect until they expire. If MMS intended to reserve authority to itself in the future to revoke approved transportation allowances it could have stated that allowances would continue until terminated or revoked by MMS. It did not do so. Instead,

the regulation was revised to read "until such allowances terminate," in response to the question whether they should remain in effect until they expire (a result obviously different from revocation). Use of the words "until such allowances terminate" does not indicate any action by MMS was contemplated. This phrasing, combined with the history of the regulation as set forth herein, leads us to conclude that, absent further rulemaking, transportation allowances in existence on March 1, 1988, that were previously approved in writing by MMS would continue until they terminated by their own terms, or until the party granted the allowance made application for and received MMS approval of a new allowance.

It is not correct, moreover, contrary to the assertion made by MMS in answer to Shell's SOR, that the March 29, 1984, letter "clearly stated that the tariff-based allowance was only to be used on an interim basis." See MMS answer at 6. As Shell states in reply, what MMS approved on an interim basis was the price of carbon dioxide gas, not the transportation allowance for moving it. The word "interim" is used twice in the 1984 letter. The letter states: "The use of the price cited in the sales contract \* \* \* is acceptable in the interim as a basis for payment of Federal Royalty until a final determination can be made by MMS regarding the fair market value of the carbon dioxide for royalty purposes" (Letter at 2). Price is the subject of the sentence. The entire paragraph in which it appears deals only with the question of fair market value of carbon dioxide. The only other use of the word "interim" in the March 29 letter appears in the third paragraph on that same page. There, MMS states that "during the interim period" until review of the sales price should be complete, MMS would use the contract price in computing "Sales Value" for royalty purposes; the word "interim" again refers to the gas price, not the transportation allowance.

Only the second paragraph on page 2 of the 1984 letter deals with the transportation allowance. Therein, MMS informs Shell of an intention to publish proposed rulemaking governing such allowances and that, if the rulemaking should take place as planned, Shell might want to request that the new rule be applied to the Cortez pipeline. If so, MMS explains, Shell would then need to make an application to apply the new procedure to the Cortez pipeline, and any approved change would not be retroactive. Not only is there nothing in the March 29, 1984, letter to suggest approval of the Cortez tariff was an interim action, there is every indication MMS saw it as an open-ended approval that required action by Shell to terminate.

The Deputy Director's decision here under review implicitly recognizes that the approval of the Cortez allowance was open-ended when she states that an "open-ended" approval could be terminated prospectively. See Decision at 5. The answer filed by MMS in this appeal, however, now treats the terms "interim" and "open-ended" as synonymous, stating that the November 5, 1990, letter gave notice that the "prior interim, or 'open ended,' approval terminated" (Answer at 6-7). The two terms quoted, however, are not synonyms. Used in this context "interim" is an adjective meaning temporary or provisional, that refers to a period

between two known events, whereas "open-ended" means there is no fixed end. See The American Heritage Dictionary, 684, 920 (1976). We therefore conclude that the approval by MMS of the Cortez tariff was not an interim approval, but was open-ended.

The Deputy Director was doubtless correct when she found that MMS could have limited the approval period when it first approved the Cortez tariff. Terminating an open-ended approval by notice to the lessee, however, is not the same as imposing a time limit on an allowance when it is approved. MMS had opportunities to set temporal limits on the Cortez allowance when it was approved in writing, and later, when the 1988 regulation was published, but chose not to do so. The plain language of 30 CFR 206.157(c)(2)(v) fails to provide authority upon which MMS could rely to terminate Shell's approved open-ended allowance in the fashion described in this case; the decision of the Deputy Director finding to the contrary lacks support in the record and must therefore be reversed.

Accordingly, 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 reversed.

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Franklin D. Arness  
Administrative Judge

I concur.

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C. Randall Grant, Jr.  
Administrative Judge

