

TAYLOR ENERGY CO.
PHILLIPS PETROLEUM CO.

IBLA 97-583

Decided May 3, 1999

Appeal from a Minerals Management Service determination that neighboring Federal oil and gas leases did not contain a common and competitive reservoir requiring the establishment of a unit. MMS-97-0008-OCS.

Affirmed.

1. Oil and Gas Leases: Production—Outer Continental Shelf Lands Act: Oil and Gas Leases—Outer Continental Shelf Lands Act: Unit Plans—Rules of Practice: Appeals: Burden of Proof

A challenge to a Minerals Management Service determination that two producing wells within separate outer continental shelf leases are competitive and a third is not will be sustained when there is substantial and persuasive evidence to supporting its findings. When the record establishes that the MMS technical expert has made a reasoned analysis, the Department is entitled to rely upon that expert's professional opinion. Absent a showing of error by a preponderance of the evidence, a mere difference of opinion will not suffice to reverse the reasoned opinions of the Department's technical staff.

2. Administrative Procedure: Hearings—Evidence: Sufficiency—Hearings—Rules of Practice: Hearings

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter.

APPEARANCES: Richard G. Morgan, Esq., and William F. Demarest, Esq., Washington, D.C., for Appellants Taylor Energy Company and Phillips Petroleum Company; J. Berry St. John, Jr., Esq., and Craig Wyman, Esq., New Orleans, Louisiana, for F-W Oil Interests, Inc.; Scott Lansdown, Esq., Exxon Corporation, Houston, Texas; Peter J. Schaumberg, Esq., and Frank A. Conforti, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Taylor Energy Company and Phillips Petroleum Company (collectively referred to herein as "Taylor") 1/ have appealed from a July 30, 1997, Decision issued by the Acting Associate Director, Minerals Management Service (MMS), affirming an earlier finding by the MMS Regional Supervisor for the Gulf of Mexico Region that Matagorda Island (MI) Blocks 664 and 665, leased by Taylor, were not in competition with MI Blocks 632, 656, and 657, leased and operated by Exxon Company U.S.A. (Exxon), or with MI Block 631, operated by F-W Oil Interests, Inc. (F-W Oil).

Following a meeting with MMS to discuss natural gas production issues arising in the area surrounding its Federal Lease Blocks 664 and 665, on March 4, 1996, Taylor formally requested a competitive reservoir determination in accordance with 30 C.F.R. § 250.191(b) (1995). MMS issued a preliminary determination letter on April 16, 1996, advising affected parties that the area comprising MI Blocks 631, 632, 656, 657, 664, and 665 was deemed competitive and providing a 30-day period to comment. Exxon, F-W Oil, and Taylor all submitted comments and technical data (including proprietary information) for review.

The Regional Supervisor, Gulf of Mexico Region, MMS, issued a final determination on August 1, 1996, concluding that the reservoir identified by Taylor as No. 3(3/3A) Sand in Blocks 664 and 665 was not competitive within the definition of 30 C.F.R. § 250.191(a) (1995). The Regional Supervisor, however, ruled that a reservoir was common and competitive for Blocks 631, 632, 656, and 657, and ordered Exxon and F-W Oil to operate under a joint development and production plan. 2/ Taylor appealed this decision to the Office of the Director, MMS, pursuant to 30 C.F.R. § 290.3.

Taylor presented four primary arguments to the Director's Office. See August 20, 1996, Brief on Appeal. First, it argued that "Taylor had demonstrated by a preponderance of the evidence that the reservoir is common and competitive." Taylor next asserted that "MMS's failure to impose unitization upon notice that the reservoir was competitive violated the OCSLA [Outer Continental Shelf Lands Act]" and "the failure of the Regional Supervisor to order bottom-hole pressure testing was contrary to his statutory obligations." Finally, it argued generally that "the August 1 order violates the OCSLA and MMS regulations." Taylor requested a Director

1/ Whether Phillips has affirmatively participated in this appeal is not evident from the record. In the notice of appeal, counsel relates that it is jointly representing Taylor and Phillips. However, in other appeals found in the same case file involving different issues, Phillips is represented by other counsel. In subsequent documents filed with the Board, counsel does not include Phillips and merely refers to Taylor, as if Taylor and Phillips are one in purpose. Phillips is a minority co-lessee (33 percent) of the leases at issue, and Taylor is the operator.

2/ MMS delineated this reservoir as embracing the areas then labeled by Exxon as M-10N Sand and M-10S Sand and by F-W Oil as 3/3A Sand.

determination that "the 3/3-A Sand underlying Blocks 631, 632, 656, 657, 664, and 665 is common and competitive, with an effective date retroactive to October 1995," and, in the absence of such a determination, that "the Director order a seven-day shut-in to analyze the bottom-hole pressure."

In his July 30, 1997, review, the Acting Associate Director for Policy and Management Improvement (Associate Director), MMS, stated that his decision and MMS' action were based on the regulations set out at 30 C.F.R. Subpart M (§§ 250.190-250.194) (1996), implemented under authority of statutes enacted for the prevention of waste, conservation of the natural resources of the outer continental shelf (OCS), protection of correlative rights, and other conservation matters. He then reasoned that under those regulations unitization cannot be required or approved until the delineation of a reservoir has been reasonably established. He explained that under "30 CFR 250.191 (1996), a competitive reservoir is defined as a reservoir containing one or more producing or producible well completions on each of two or more leases, or portions thereof, in which the lease operating interests are not the same. Whether a reservoir is competitive is a factual determination based on the available data." (Decision at 6.) After relating that Taylor, Exxon, and F-W Oil had submitted evidence and that the Exxon, and F-W Oil interpretation and supporting proprietary data conflicted with that submitted by Taylor, the Associate Director gave the following summary of the evidence he had reviewed:

After an exhaustive review of the available data, the MMS findings were as follows (for a more elaborate technical discussion on these findings, See Field Report at 19):

- a. Well log correlations do not reasonably indicate that the reservoir sand is continuous throughout the subject area as represented by Taylor.
- b. The seismic data do not support the continuity of the 3/3A Sand across the structure.
- c. The well pressure data do not support Taylor's conclusion that all of the wells completed in the M-10(N), 3/A Sand are in one pressure-continuous reservoir system.
- d. A pressure build-up test, as requested by Taylor, was determined to be unnecessary and would not give any definitive data as to the commonality of the reservoir based on the engineering calculations presented by Exxon.
- e. Isopachous maps can be prepared honoring the available data to provide reasonable volumetric reserve estimates that comport with the original

in-place reserves without the necessity that the reservoir be common and continuous as to the Taylor acreage.

f. The lack of subsurface well data in the area between the Exxon Well No. 2 in MI Block 657 and the Taylor Well B-2 in MI Block 665 questions the validity of Taylor's data extrapolations on which they base their position that the sand is common and continuous as to their acreage.

g. The water encroachment in Taylor's Well B-2 does not indicate that the 3/3A Sand reservoir is continuous across the field.

h. The MMS has no evidence of drainage as to Taylor's leases by either Exxon or F-W [Oil] in the blocks in question.

(Decision at 8.) He concluded that the Regional Supervisor correctly found that the data did not support Taylor's assertion that the reservoir was competitive as to Taylor's leases. He also agreed with the determination that Taylor's correlative rights had not been impaired, establishing that drainage is not a recognized harm, consistent with the rules of capture applicable to OCS operations. Taylor appealed to this Board.

During the course of the appeal to the Director, MMS, and in initial briefing before this Board, Taylor sought access to proprietary information submitted by the other operators. F-W Oil objected, thus engendering a debate over whether proprietary information submitted is releasable to Taylor pursuant to 43 C.F.R. § 4.31(c)(1) and (2). In Taylor Energy Corp., 143 IBLA 194 (1998) we held: "the data should be released, unless F-W [Oil] wishes to exercise its option under 43 C.F.R. § 4.31(d)(3) to withdraw the data at issue, thereby requiring remand to MMS to reconsider the evidence concerning the competitiveness of Taylor's Blocks 664 and 665 with Block 631 leased by F-W [Oil]." 143 IBLA at 195. Accordingly, we provided that "[e]ach of those parties [who submitted proprietary information] shall have 10 days following receipt to withdraw that data, pursuant to 43 C.F.R. § 4.31(d)(3)." 143 IBLA at 197. The same order gave Taylor an opportunity to file a supplemental statement of reasons following inspection of the record, and gave MMS and F-W Oil an opportunity to respond.
3/

In its supplemental statement of reasons for appeal (SSOR), Taylor argues that the confidential data it reviewed confirms its opinion that MMS

3/ Exxon filed a petition to intervene and an answer. Exxon is a party who will be affected by our decision and we accepted its answer for consideration.

relied on erroneous data to improperly deny Taylor's request for a bottom-hole pressure build-up test. Taylor asserts that MMS' "misplaced reliance on Exxon's invalid evidence rendered MMS' denial of Taylor's request * * * arbitrary, capricious, and an abuse of discretion." (SSOR at 13.) Taylor contends that it had no previous opportunity to review the formula used to determine field competitiveness, but that it can now pinpoint flaws in the data used and conditions which taint MMS' decision not to order the requested tests. It urges the Board to remand the matter MMS. Taylor claims:

Because MMS' ultimate decision on competitiveness was inextricably linked to denial of Taylor's request to conduct this test, the defect in the denial of this test afflicts all MMS' subsequent decisions. Remand to MMS is required to enable the agency to reassess its decision whether to grant Taylor's request for a bottom-hole pressure build-up test based upon relevant considerations rather than the inapplicable calculations supplied by Exxon.

(SSOR at 21.)

In its answer, MMS pointedly argues that Taylor has not demonstrated that the decision appealed is incorrect. It asserts that Taylor merely asserts that "if only MMS could be forced by this Board to take another look over this off-traversed ground, it might conclude that Taylor is correct." (MMS Answer at 1.) MMS further contends that Taylor has merely stated a difference in opinion regarding conflicting evidence and asserts that MMS' conclusions regarding the geology of the reservoir are based upon reasonable interpretations.

In its answer, F-W Oil argues that Taylor's drainage complaint is not a recognized harm, clear preponderance of data supports a separation between the F-W Oil and Taylor reservoirs, and Exxon's calculations are sound and supportable. Exxon additionally argues that the declaration of William D. McCain, Jr., which Taylor relies on heavily, misapplies Exxon's calculations and does not contradict MMS' ruling not to order a build-up test. Exxon asserts that the shut-in tubing pressures were reliable enough.

The Secretary of the Interior is authorized under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1994), to lease OCS tracts for the exploration and development of mineral resources, including oil and gas. In section 5(a) of the Act, 43 U.S.C. § 1334(a) (1994), Congress expressly directs the Secretary to prescribe rules and regulations relating to mineral resources management which provide for the prevention of waste and conservation of the natural resources of the OCS and for the protection of correlative rights therein. The Congressional mandate specifically includes provisions for unitization, pooling, and drilling

agreements. 43 U.S.C. § 1334(a)(4) (1994). In 1996, the applicable regulations were codified in 30 C.F.R. Part 250, Subpart M (1995).^{4/}

The provisions addressing required or compulsory unitization are found at 30 C.F.R. §§ 250.190(a) and 250.193(a) (1995). The Regional Supervisor, MMS, may "require development and production operations in a competitive reservoir * * * to be conducted under either a voluntary joint Development and Production Plan or unitization agreement." 30 C.F.R. § 250.191(a) (1995). A competitive reservoir is one "in which there are one or more producing or producible well completions on each of two or more leases, or portions thereof, in which the lease operating interests are not the same." *Id.* The regulation at 30 C.F.R. § 250.191(b) (1995) provides that a lessee may seek a determination that a reservoir is competitive:

Lessees may request at any time that the Regional Supervisor make a preliminary determination as to whether a reservoir is competitive. The Regional Supervisor shall notify the lessees upon making such determination. The lessees, within 30 days of such notice or such time as approved by the Regional Supervisor, shall advise the Regional Supervisor of their concurrence or submit an objection with supporting evidence. The Regional Supervisor will make a final determination and notify the lessees.

The above outlined process was followed by MMS and resulted in the decision on appeal. After being given notice of the preliminary determination, Taylor, Phillips, Exxon, and F-W Oil submitted data designed to assist MMS in the determination regarding whether the reservoir was competitive. When Taylor did not agree with the final determination, it appealed to the Office of the Director, MMS.

We agree with the Associate Director's assessment that the issue of "whether a reservoir is competitive is a factual determination based on the available data." (Decision at 6.) In his two-part notice to Taylor, the Regional Supervisor offered only a brief explanation of the data used to support the MMS decision. Apparently it was that brevity which persuaded Taylor to appeal to the Director. In response to Taylor's appeal, MMS prepared a 28-page Field Report which it forwarded to Taylor. However, the proprietary data submitted by others was excluded from the material sent to Taylor. The Associate Director summarized the Field Report in his decision.

Taylor objected to the Associate Director's summary because it did not include the proprietary data upon which MMS relied, and filed an appeal to

^{4/} The Subpart M regulations dealing with unitization in OCS tracts were formerly found at 30 C.F.R. §§ 250.190-250.194, but have been amended and redesignated. 62 Fed. Reg. 5331 (Feb. 5, 1997); 63 Fed. Reg. 29479 (May 29, 1998). They may now be found at 30 C.F.R. §§ 250.1300-250.1304.

this Board. After this Board issued the above described decision addressing the issue of disclosure of confidential information, Taylor inspected the record, and supplemental pleadings were filed by the parties.

In its SSOR, Taylor explains that it had commissioned the Ryder Scott Company, "an internationally-recognized independent petroleum engineering consulting firm," "to perform an independent, unbiased analysis to determine the competitiveness of the 3/3-A Sand reservoir." (SSOR at 4.) That study, along with data produced by Taylor's "in-house" engineers, was presented to MMS in response to the preliminary determination as evidence supporting the competitiveness of the reservoir. MMS confirms that it thoroughly reviewed the data submitted by Taylor prior to rendering its determination.

Taylor alleges that the evidence it submitted in response to MMS' request for information "was more than adequate and, indeed, far outweighed any contrary evidence presented by Exxon and F-W [Oil]." (SSOR at 7.) However, Taylor acknowledges that, despite its strong disagreement with MMS' interpretations and conclusions, MMS could reasonably reach its conclusions by employing the proprietary information supplied by Exxon and F-W Oil.

In its SSOR, Taylor focuses on action taken by MMS when making its final determination which Taylor believes has tainted the decision process. Taylor relates that

[i]n response to the data submissions from and meetings with the lessees, MMS issued a letter on June 13, 1996 ordering curtailment of hydrocarbon production in excess of 2.5 MMcf per day per well for all wells producing from the 3/3-A Sand in the [subject] Blocks. This action if implemented would have protected the rights of all parties pending a final resolution on competitiveness. However, following a meeting on June 21 with F-W [Oil] only and receipt of a letter threatening a challenge to the June 13, 1996 letter, MMS reversed itself on June 27, 1996.

(SSOR at 5.) Taylor further reports that

[i]n connection with the submission of the Exxon data, a substantial question of procedural irregularity is raised by the detailed chronology of events given in MMS' Field Report and by the contradictory evidence contained on the face of the documents themselves. Wholly unexplained by MMS' chronology is how Exxon came to know of Taylor's request for a bottom-hole pressure build-up test. The cover letter to Field Report Exhibit 1.JJ states that the formula and calculations supplied by Exxon were submitted in opposition to Taylor's request for a bottom-hole pressure build-up test. * * * Yet nowhere in the MMS chronology is there any indication that MMS advised Exxon of Taylor's request or invited Exxon to submit evidence in opposition to Taylor's request.

(SSOR at 12.) In its SSOR, Taylor also asserts that MMS' claim in the Field Report at 20 that "Taylor was asked to provide support for their request [for a pressure build-up test], but failed to do so" is unsupported by the record and inconsistent with the facts. (SSOR at 12; see also SSOR Exhibits B and C.) Taylor avers that, had the request been made, it would have promptly complied. Taylor also argues that once the Exxon calculation had been submitted, it should have been discussed with F-W Oil and Taylor, because the calculation itself is not confidential. Hal L. Bettis, Chief Operating Officer for Taylor, and John A. Pope, Manager of Engineering for Taylor, both declare:

MMS did not ask for Taylor's views on the Exxon formula or for additional support for the requested test. The formula, submitted by Exxon, and relied on by the MMS in denying the requested test, is not applicable to this competitive reservoir determination. It does not have any relevance and provides no basis at all for the MMS rejection of Taylor's request. Had the MMS informed Taylor of its acceptance of the erroneous formula, Taylor would have explained its inapplicability.

(SSOR Exhibits B and C.)

To emphasize the significance of allowing Taylor an opportunity to respond to MMS' use of Exxon's formula, Taylor has submitted the declaration of William D. McCain, Jr., an acknowledged expert on reservoir pressure data analysis. (SSOR Exhibit A.) He states that the application of the Exxon equation to determine whether a competitive reservoir exists in these Blocks is absolutely wrong and therefore meaningless for that purpose. (SSOR Exhibit A at 2.) He also contradicts MMS' conclusion that this is not a depletion driven reservoir where a p/z cumulative production plot cannot be used. And he insists that MMS relied too heavily on wellhead shut-in pressures and suggests that many of those pressures are suspect. Id.

In response, MMS has submitted the declaration of J. Michael Melancon, Regional Supervisor, Gulf of Mexico Region, MMS. (Exhibit to MMS Answer at 1.) He explains the use of the Exxon formula and wellhead pressures used and rebuts McCain's statements regarding how MMS used them. He emphatically declares that the "Exxon-derived equation and calculations are correct applications of reservoir engineering methodology." (Exhibit to MMS Answer at 2.) He further reports that MMS' "analyses of the Exxon and F-W P/Z vs. cumulative production data clearly indicate communication between the F-W [Oil] and Exxon wells * * * consistent with an isolated reservoir not in communication with Taylor's wells." Id. at 3. He also addressed other opinions expressed by McCain and others. F-W Oil has submitted the declaration of Kim McCullough, a geological engineer who has extensively worked on this project for F-W Oil, and Exxon has submitted the declaration of Thomas M. Snow, an Exxon Division Staff Engineer. (Exhibits to F-W Oil Answer and Exxon Answer, respectively.) Both affiants conclude

that Taylor's reliance on McCain's expert testimony is wrongfully placed and offer their own explanations why MMS' approach is correct. Id. Both affirm Melancon's statements.

[1] There is no doubt that there is a disagreement among the experts who have submitted affidavits in this case. They all present plausible analyses supportive of their positions. As we said in Animal Protection Institute of America, 122 IBLA 290, 295 (1992):

In circumstances such as those presented here, we are unwilling to overturn a [Departmental] decision if the appellant merely presents some other course of action which may be theoretically as correct as that chosen by BLM [Bureau of Land Management]. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. In cases involving an expert's interpretation of data, it is not enough that the party objecting to the interpretation of data demonstrates that another course of action or interpretation is available or that the party's proposed course of action is also supported by the evidence. The appellant must demonstrate by a preponderance of the evidence that the * * * expert erred when collecting the underlying data, when interpreting that data, or in reaching the conclusion.

See Animal Protection Institute of America, 131 IBLA 175, 179 (1994); Edward R. Woodside, 125 IBLA 317, 325 (1993); Champlin Petroleum Co., 86 IBLA 37 (1985). It is well settled that where the record establishes that the Department's technical expert has made a reasoned analysis of the available geological data, the Department is entitled to rely upon such professional opinion, absent a showing of error by a preponderance of the evidence. Susan J. Doyle, 138 IBLA 324, 327 (1997); Bill Armstrong, 131 IBLA 349, 351 (1994). Thus, it is not enough to show a possibility of error or that reasonable minds may differ in their interpretation of the data or in the formulation of the conclusions. What must be shown is that error, in fact, occurred. Sun Oil Co., 91 IBLA 1, 93 I.D. 95 (1986), aff'd, sub nom. Clark Oil Producing v. Hodel, 667 F. Supp. 281 (E.D. La. 1987).

We find it unfortunate that MMS did not permit Taylor an opportunity to review the data it relied upon and the debated "Exxon" equation before it rendered the final determination. However this failure is not fatal. We find that the expert testimony and evidence presented by Taylor to be credible. However, that evidence cannot be said to preponderate on the issues. It merely illustrates the differing opinions. The record supports the final determination even though Taylor may disagree with the merit of the conclusions made by MMS' experts. Thus, we cannot find that Taylor has shown an error.

Taylor urges the Board to consider evidence it has developed since the initial MMS decision was issued, arguing that this new data conclusively

demonstrates that Taylor's wells are being drained. In weighing the two opinions, we do not find that this new evidence demonstrates the MMS determination was incorrect based upon the evidence existing at the time it was issued. If Taylor is convinced that this additional data is compelling, it may approach MMS and request a new determination regarding whether its well is within a competitive reservoir. See 30 C.F.R. § 250.1302(b) (1998).

In a motion filed December 4, 1998, Taylor has requested a hearing in accordance with 43 C.F.R. § 4.415. It grounds its request on an argument that a full hearing before the Board will cure the previous denial of its due process rights and contends that genuine issues of fact exist which require a hearing. The other parties jointly oppose the request, asserting that it is untimely and lacks merit.

[2] We do not find merit in Taylor's request at this time. As Taylor is now before the Board in this appeal setting, it cannot be said that there has been a denial of due process rights. Taylor has the opportunity to present evidence or arguments challenging MMS' actions and does not demonstrate that oral argument would permit a fuller presentation of its case than the briefs already submitted. We further find the record does not reflect sufficient factual issues to warrant a hearing. Under § 4.415, the Board has discretion whether to conduct a factual hearing or refer a case to an administrative law judge for a hearing on an issue of fact. We have held, in response to a request for a hearing, that

[a] hearing is not necessary in the absence of a material issue of fact, which if proven, would alter the disposition of the appeal. * * * This Board "should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." * * * [T]his Board has refused to grant a hearing where Geological Survey had reviewed the same information submitted to this Board and the dispute did not involve facts, but involves the proper application and interpretation of those facts.

Woods Petroleum Co., 86 IBLA 46, 55 (1985). See Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971); Kim C. Evans, 82 IBLA 319, 323 (1984). This Board "should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." Stickelman v. United States, supra at 417. The Board has directed: "A hearing is necessary only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. In the absence of such an issue, no hearing is required." KemCo Drilling Co., 71 IBLA 53, 56 (1983).

Appellant has not submitted sufficient probative evidence indicating that a hearing might be productive. As noted above, Taylor has merely presented a differing point of view. Therefore, the request for a hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

R.W. Mullen
Administrative Judge

I concur.

James P. Terry
Administrative Judge

