

EXXON MOBIL CORP.

IBLA 2002-404

Decided July 28, 2005

Appeal from a decision of the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, denying an appeal of an order issued by the Minerals Management Service assessing late payment interest. MMS-98-0052-IND.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982:
Royalties--Indians: Mineral Resources: Oil and Gas: Tribal
Lands--Oil and Gas Leases: Royalties: Interest

Under 30 CFR 218.50, royalty payments for Federal and Indian oil and gas leases generally are due by the end of the month following the month during which the oil and gas is produced and sold. When an appellant's lease and applicable regulations provide for use of major portion analysis in determining the value for royalty purposes and the appellant knew or should have known that its tribal lease gas production was being valued without reference to a major portion analysis, it was on notice of potential responsibility for additional royalties and the obligation to pay the additional royalties accrued on the date the royalties were due, rather than the date MMS provided appellant the major portion analysis.

2. Federal Oil and Gas Royalty Management Act of 1982:
Royalties--Indians: Mineral Resources: Oil and Gas: Tribal
Lands--Oil and Gas Leases: Royalties: Interest

Interest charged to an oil and gas lessee as mandated by the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1721(a) (2000), for late payment of royalty for lease production is compensation to the lessor for the

time value of money lost as a result of the late payment. This obligation applies even when the late payment was not the fault of the lessee.

APPEARANCES: Kip I. Plankinton, Esq., Houston, Texas, for appellant; Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Department of the Interior.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Exxon Mobil Corporation (ExxonMobil), successor-in-interest to Mobil Exploration and Producing U.S., Inc. (Mobil), has appealed the April 30, 2002, decision of the Deputy Commissioner of Indian Affairs (Deputy Commissioner), Bureau of Indian Affairs, denying its appeal of a January 8, 1998, order issued by the Minerals Management Service (MMS) to Mobil.^{1/} The latter order assessed \$18,502.04 in late payment interest charges based upon Mobil's payment of the recalculated royalties for various Navajo Nation tribal oil and gas leases (Invoice No. IBIL 11970258).

By letter dated December 13, 1996 (Attachment C to MMS Field Report dated July 7, 1998), MMS advised Mobil that, as authorized by section 3(c) of Mobil's Navajo Nation tribal oil and gas leases and applicable valuation regulations, it had performed major portion analyses on natural gas production from those leases for the period January 1, 1987, through February 28, 1989, and had determined that Mobil was potentially liable for additional royalties on those leases. MMS explained that it had used gas sales data reported on the Report of Sales and Royalty Remittance (Form MMS-2014) to identify the median value for all gas sold on the Navajo Nation by production month and had compared those median values to the values Mobil had reported to MMS to determine the underpayments. MMS granted Mobil 90 days to review the calculations and identify and document any invalid differences.

On June 25, 1997, MMS issued an Order to Report and Pay (Field Report, Attachment F), directing Mobil to pay an additional \$11,898.98 in royalties based on the major portion analyses. Mobil initially appealed the order to report and pay additional royalties, but by letter dated September 30, 1997 (Field Report, Attachment G) Mobil advised MMS that it would pay the additional royalties and limit its appeal to the issue of liability for any interest assessed for the period before it

^{1/} The original late payment bill was sent to Mobil. On Nov. 30, 1999, Mobil's parent corporation, Mobil Corporation, and Exxon Corporation merged into ExxonMobil. See Notice of Appeal and Statement of Reasons (SOR) at 1 n .1.

was officially notified by MMS of the major portion prices. MMS received the additional royalties on October 9, 1997. (Field Report at 2.)

On January 8, 1998, MMS issued a Bill for Collection and Remittance Advice (IBIL 11970258) (Field Report, Attachment A ^{2/}), assessing Mobil \$18,502.04 in late payment interest. Mobil appealed the bill and the accompanying demand for payment to the Commissioner of Indian Affairs, challenging only the \$17,589.01 in late payment interest charges representing the amount of those charges attributable to the period before December 1996 when MMS advised it of the major portion prices. (Field Report, Attachment B at 4.) Mobil argued that additional royalties based on major portion prices were not due until after MMS determined those prices and notified the lessee of its action because it did not have the information necessary to calculate royalty based on the major portion value before that notification. Id. at 5-9. Alternatively, Mobil requested that MMS waive the charges in accordance with established policy. Id. at 9-11.

The Deputy Commissioner denied Mobil's appeal on April 30, 2002. She observed that interest charges are not penalties, but represent the time value of money and compensate the lessor for the replacement costs of funds due but not timely tendered, noting that MMS has both statutory and regulatory authority to charge interest on late payments, citing the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1721(a) (2000), and 30 CFR 218.54(a). (Decision at 2.) She rejected Mobil's argument that its obligation to pay the additional royalties did not accrue until it received the MMS major portion billing because it could not have known additional royalties were due until then, finding that Mobil's liability for the additional royalties arose when the oil and gas was produced and sold. She pointed out that Mobil's obligation to pay royalty based on a major portion analysis had existed from the inception of the tribal leases, the terms of which included a major portion analysis provision, and that Mobil therefore should have anticipated the possibility that it would be required to pay additional royalty based on the major portion value. Id. at 3. She also noted that interest owed to an Indian lessor could not be waived. Id.

On appeal ExxonMobil argues that it did not have the major portion prices it needed to properly calculate and pay royalties before December 1996 when MMS issued those prices and that it cannot be held responsible for delays caused by MMS. (SOR at 2.) ExxonMobil relies on the Board's decision in Eighty-Eight Oil Co., 115 IBLA 386 (1990), which it asserts supports its position that the obligation to

^{2/} Attachment A replicates only the last page of the invoice, which reflects the total amount due.

calculate and pay Indian royalties based on the major portion prices did not arise until after MMS supplied the necessary major pricing data. (SOR at 2.) ExxonMobil argues that requiring it to pay interest penalties for late payments when the data it needed to calculate and pay the royalties was unavailable is unjust and unreasonable. Id.

In response, MMS contends that, because Mobil's additional royalty payment admittedly was late, MMS properly assessed the late payment interest charges, citing 30 U.S.C. § 1721(a) (2000), 30 CFR 218.54(a), and 30 CFR 218.102(a) and (b). (Answer at 2-3.) ExxonMobil's argument that it is inequitable to charge interest on amounts it did not know were due until MMS provided the major portion analysis is irrelevant, MMS submits, because FOGRMA and the applicable regulations require the assessment of late payment charges. Id. at 3. In any event, MMS contends that Mobil has known since it entered the leases that it was subject to valuation based on a major portion analysis. Id. MMS further maintains that the Board has rejected virtually identical arguments in similar appeals involving late payment charges for additional royalties due as a result of a major portion analysis. Id. at 3-5. According to MMS, ExxonMobil's reliance on Eighty-Eight Oil Co. is misplaced because unlike that case where MMS' notification triggered the obligation to pay additional royalties, MMS' provision of the major portion numbers to Mobil simply quantified an existing obligation. (Answer at 6-7.) Thus, MMS concludes that it properly assessed the late payment charges. Id. at 7.

[1] Royalty payments for Federal and Indian oil and gas leases "are due at the end of the month following the month during which the oil and gas is produced and sold." 30 CFR 218.50(a). ExxonMobil contends that this rule is not immutable, citing the Eighty-Eight Oil Co. case. We find that case, however, to be distinguishable from the present case.

The lease involved in Eighty-Eight Oil Co. contained a variable sliding scale royalty rate based on a percentage of the average daily oil production. Both the regulations and the Conservation Division Manual^{3/} generally equated sales figures with production numbers and allowed the use of sales figures to calculate royalty rates, with the regulatory caveat that if sales did not approximate actual production,

^{3/} Prior to creation of MMS, royalty collection was the responsibility of the Conservation Division of Geological Survey within the Department of the Interior. MMS was created by Secretarial Order No. 3071 (Jan. 19, 1982). 47 FR 4751 (Feb. 2, 1982). Matters relating to royalty and mineral revenue management were subsequently transferred to MMS under Secretarial Order No. 3087 (Dec. 3, 1982). 48 FR 8983 (Mar. 2, 1983).

the Associate Director, MMS, could “require statements of production and royalty to be made on such other basis as he may prescribe.” 30 CFR 202.101 (1984); Eighty-Eight Oil Co., 115 IBLA at 388. Although Eighty-Eight Oil Company (Eighty-Eight) had consistently based the royalty rate on its sales figures, MMS determined that the royalty rate for the March 1985 sales month should have been based on production, not sales, since production that month exceeded sales by over 22 percent. Id. at 387-88. While upholding MMS’ requirement that the royalty rate be computed based on gross production, we nevertheless concluded that Eighty-Eight’s obligation to compute the royalty rate based on gross production did not arise until MMS directed that royalty for March 1985 be calculated on a basis other than sales. Id. at 390.

We explained that, until MMS issued the order assessing additional royalty,

Eighty-Eight had no obligation to account for royalty based on “actual production,” because the regulation required agency action before the customary method of royalty rate calculation could be replaced with another method of computation. Before MMS issued the order * * *, therefore, there was no requirement that royalty rate be calculated using actual production instead of sales. But once MMS found that March 1985 sales and production differed to a degree that made inexpedient the computation of royalty rate using sales, Eighty-Eight was obligated to change the royalty rate calculation method used * * *.

Id. Our holding in that case, therefore, rested on the fact that the regulation at issue required a specific order if an exception to the general rule was to be applied. Id.

ExxonMobil maintains that, in accordance with Eighty-Eight Oil Co., its obligation to pay additional royalty similarly did not accrue until MMS actually performed a major portion analysis. We disagree.

Section 3(c) of Mobil’s tribal leases and the applicable regulations unambiguously provided for the use of the major portion analysis for valuation of Indian gas. See 30 CFR 206.103 (1986); 30 CFR 206.152(a)(3)(i) (1988)^{4/}

^{4/} This regulation provided that:

“For any Indian leases which provide that the Secretary may consider the highest price paid or offered for a major portion of production (major portion) in determining value of production for royalty purposes, if data are available to compute a major portion MMS will, where practicable, compare the value determined in

(continued...)

(unprocessed gas); 30 CFR 206.153(a)(3)(i) (1988) (processed gas); 25 CFR 211.13(a). In contrast to the situation in Eighty-Eight Oil Co., the regulations here did not require an MMS order to trigger the obligation to value royalty based on the major portion analysis. Mobil, therefore, was on notice that its gas production was subject to valuation based on the major portion analysis. Since Mobil knew that its gas production was being valued for royalty purposes by a method other than a major portion analysis and that the royalty value was subject to recalculation based on a major portion analysis, it should reasonably have foreseen the possibility that it could owe more royalty than it had paid at the time of production.^{5/} See Sanguine Limited, 155 IBLA 277, 282 (2001). The obligation to pay royalty is triggered by the production and sale of gas from the leases, not by subsequent actions on MMS' part. See id. at 282-83. Accordingly we reject ExxonMobil's contention that, regardless of the regulatory due date for royalty payments, the additional royalty on its Navajo Nation tribal leases was not due until MMS notified it of the major portion prices.

[2] ExxonMobil characterizes the late payment charges assessed in this case as penalties and avers that the interest assessment here is inequitable because Mobil did not have the data necessary to calculate royalties based on the major portion analysis until MMS supplied the major portion prices. As the Deputy Commissioner noted, however, interest is not charged as a penalty for late payment of the full amount but is assessed to compensate the lessor for the loss of the time value of money which should have been paid earlier. See, e.g., American Central Gas Companies, Inc., 156 IBLA 367, 370 (2002), and cases cited; Sanguine Limited, 155 IBLA at 283. Mobil had the use of the amount of the underpayment throughout the period from the sale of the gas until the additional payment was tendered. Imposition of interest simply compensates the Navajo Nation tribal lessor for that

^{4/} (...continued)

accordance with this section with the major portion. The value of production for royalty purposes shall be the higher of those two values." 30 CFR 206.152(a)(3)(i) (1988).

The term "major portion" means "the highest price paid or offered at the time of production for the major portion of gas production from the same field. The major portion will be calculated using like-quality gas sold under arm's-length contracts from the same field (or if necessary to obtain a reasonable sample, from the same general area) for each month." 30 CFR 206.152(a)(3)(ii)(1988).

^{5/} As a general rule, royalty payments tendered are subject to review or audit by MMS to determine whether the payments properly reflect the value of production in light of other sales within the field or area. See Phillips Petroleum Co., 117 IBLA 230, 237 (1990); Supron Energy Corp., 55 IBLA 318, 321 (1981).

value and puts it in the position it would have been in if the whole amount had been timely paid. American Central Gas Companies, Inc., 156 IBLA at 370.

Since this case involves the late payment of oil and gas royalties, it is directly controlled by the relevant provision of FOGRMA which provides that, if a royalty payment is not received by the due date or is less than the amount due, “the Secretary shall charge interest on such late payments or underpayments.” 30 U.S.C. § 1721(a) (2000) (emphasis added). The regulation implementing that statutory directive similarly provides that interest charges “shall be assessed on unpaid and underpaid amounts from the date the amounts are due.” 30 CFR 218.54 (emphasis added). Thus FOGRMA and the applicable regulation mandate that the Secretary charge interest on late and underpaid royalties. See American Central Gas Companies, Inc., 156 IBLA at 370; see also Amoco Production Co. v. Baca, 300 F. Supp. 2d 1, 17 (D.D.C. 2003) (the mandatory language of the statute and regulations addressing late payment interest charges speaks for itself); Meridian Oil, Inc., 140 IBLA 135, 144 (1997).

The Secretary’s nondiscretionary obligation under FOGRMA to charge interest when royalty payments are late or underpaid may not be waived even if the late payment or underpayment was not the fault of the lessee. See American Central Gas Companies, Inc., 156 IBLA at 370; see also Wexpro Co., 122 IBLA 1, 4 (1991) (“Where applicable statutes and/or regulations require the imposition of interest, this Board must look to the statutory and regulatory language in determining the propriety of Departmental actions, and is not at liberty to dispose of the issue based on equitable considerations.”). Additionally, the Debt Collection Act of 1982, 31 U.S.C. § 3717(a)(1) (2000), independently from FOGRMA, has been found to require the Department to assess interest on late payments and underpayments, regardless of any culpability on the lessee’s part. See American Central Gas Companies, Inc., 156 IBLA at 371, citing Amax Land Co. v. Quartermain, 181 F.3d 1356, 1362 (D.C. Cir. 1999).

Even if interest could be waived in some circumstances, this case involves a tribal lease and, consistent with the Federal Government’s trust responsibility, the Department may not voluntarily forgo the collection of interest on past due royalties payable to Indian tribes. See American Central Gas Companies, Inc., 156 IBLA at 371; Peabody Coal Co., 72 IBLA 337, 348 (1983). In fact, the regulation authorizing an exception to the assessment of late payment charges when estimated payments on minerals production have already been timely made in accordance with MMS instructions, explicitly provides: “However, late payment charges assessed with respect to any Indian lease, permit, or contract shall be collected and paid to the Indian or tribe to which the amount overdue is owed.” 30 CFR 218.102(a)

(emphasis added.) Accordingly, we conclude that the Deputy Commissioner's decision is properly upheld.

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.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge