



STATOIL USA E&P, INC.

183 IBLA 61

Decided November 8, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

STATOIL USA E&P, INC.

IBLA 2012-242

Decided November 8, 2012

Appeal from a subpoena issued by the Office of Natural Resources Revenue.
CP 11-098.

Appeal dismissed.

1. Administrative Appeals: Generally

Once an agency decision has been appealed, the agency loses its authority to modify, rescind, or otherwise change that decision, in the absence of a remand of that decision which would restore that authority. However, the agency may continue to carry out its statutory and regulatory duties even if the agency's actions share a common subject matter with the decision under appeal. In this case, the appeal of a Notice of Civil Penalty did not deprive the agency of authority to issue a subpoena under 30 U.S.C. § 1717 (2006).

2. Administrative Appeals: Generally--Administrative Review:
Generally--Office of Natural Resources Revenue:
Generally--Federal Oil and Gas Royalty Management Act:
Subpoena

This Board is the sole judge of its jurisdiction and, subject to regulation, determines which appeals it will entertain or summarily dismiss. By regulation, subpoenas issued under section 107 of FOGPMA are not subject to administrative appeal. As a result, an appeal of such a subpoena will be dismissed.

APPEARANCES: Peter J. Schaumberg, Esq., David A. Barker, Esq., James M. Auslander, Esq., Washington, D.C., for Statoil USA E&P, Inc.; Lance C. Wenger, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Natural Resources Revenue.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Statoil USA E&P, Inc. (Statoil), has appealed from a June 14, 2012, subpoena issued by the Office of Natural Resources Revenue (ONRR). Counsel for ONRR has filed a Motion to Dismiss for Lack of Jurisdiction (Motion to Dismiss) and Statoil has filed a Response to ONRR's Motion to Dismiss for Lack of Jurisdiction (Statoil Response). Statoil also has filed a Statement of Reasons (SOR) in support of its appeal, and ONRR has filed an Answer to that SOR. Based on the following, we grant ONRR's Motion to Dismiss.

BACKGROUND AND ARGUMENTS

On February 17, 2012, ONRR issued a Notice of Civil Penalty, CP11-098, to Hydro Gulf of Mexico, LLC. Subsequently, Statoil filed a request for a hearing to challenge the Notice.¹ After preliminary proceedings before the Departmental Cases Hearings Division (Hearings Division) of the Office of Hearings and Appeals (OHA), on June 14, 2012, ONRR issued a subpoena to Statoil under section 107 of the Federal Oil and Gas Royalty Management Act (FOGRMA), *as amended*, 30 U.S.C. §§ 1701-1758 (2006), “in connection with [a] . . . hearing’ in enforcement case CP 11-098.” Subpoena at 1. It is the issuance of the subpoena that Statoil now appeals.²

Statoil asserts many arguments in support of its appeal of ONRR's issuance of the subpoena, including, among others, the contentions that the subpoena is effectively a request for written discovery and the ALJ presiding over the proceedings currently pending in the Hearings Division has exclusive authority to control discovery, SOR at 9-11; that the subpoena was not “reasonably necessary,” as required by section 107(a) of FOGRMA, *id.* at 15-16; that the subpoena conflicts with

¹ From the record before the Board, we cannot determine the relationship between Hydro Gulf of Mexico, LLC and Statoil. Counsel for ONRR asserts that the Feb. 17 Notice was issued “to Statoil.” Motion to Dismiss at 2. The Board presumes that Statoil is a successor in interest to Hydro Gulf of Mexico, LLC, and had standing to request the hearing underlying the instant appeal.

² Upon ONRR's issuance of the subpoena, Statoil filed a motion with Administrative Law Judge (ALJ) Harvey C. Sweitzer to quash the subpoena. After ALJ Sweitzer denied the motion based on a lack of jurisdiction, Statoil simultaneously filed two appeals with the Board: an appeal of ALJ Sweitzer's interlocutory order, docketed as IBLA 2012-0241, and the instant appeal. The Board has already dismissed the appeal in IBLA 2012-0241 for Statoil's failure to comply with the procedural rules applicable to interlocutory appeals. Order dated Aug. 14, 2012.

the Federal Rules of Civil Procedure, *id.* at 16; and that the subpoena is premature, unnecessary, vague, overbroad, and unduly burdensome, *id.* at 17-19. Our analysis, however, will focus on only two arguments of Statoil: that upon Statoil's filing of an appeal, ONRR lost jurisdiction over the matter and therefore had no authority to issue the subpoena, SOR at 12; and, that the Board has clear jurisdiction over Statoil's appeal from the subpoena, SOR at 4-8.

In contrast, ONRR asserts that subpoenas issued under 30 U.S.C. § 1717(a) are not appealable to OHA because ONRR's regulations at 30 C.F.R. §§ 102 and 104 specifically exempt such subpoenas from OHA's jurisdiction, and FOGRMA provides for exclusive enforcement of these subpoenas in Federal court. Motion to Dismiss at 1-2.

ANALYSIS

ONRR's Jurisdiction to Issue the Subpoena

Statoil asserts that its appeal of ONRR's Notice of Civil Penalty "divested ONRR of authority to take any further unilateral action with regard to this challenged civil penalty order," citing to a number of previous Board decisions. SOR at 12. Statoil then proceeds further to conclude that "[j]ust as ONRR cannot modify its decision during an appeal, ONRR cannot bolster its determination after-the-fact through imposition of one-sided burdensome subpoenas to the opposing party." *Id.* Statoil's conclusion presumes too much as to ONRR's action, and goes too far as to its legal conclusion.

The Board cases cited by Statoil are distinguishable here because all involved the attempted modification or withdrawal of an agency decision after a notice of appeal had been filed but before the appeal had been decided. *See F. Howard Walsh, Jr.*, 93 IBLA 297, 306 (1986) (after an appeal of a royalty assessment was filed, agency did not have jurisdiction to withdraw and revise the assessment); *Gateway Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 84 IBLA 371, 374 (1985) (after an appeal of a Notice of Violation had been filed, agency had no jurisdiction to vacate the NOV); *Sun Oil Co.*, 42 IBLA 254, 255-56 (1979) (after an appeal of a decision had been filed, agency had no authority to reconsider, supplement, or modify its decision). ONRR has made no such attempt in this case.

[1] The Board has long held that once a notice of appeal of an agency decision has been filed, the agency has no authority to change that decision while the appeal is pending. *See McMurray Oil Co.*, 153 IBLA 391, 393 (2000) (BLM could not alter the State Director's decision approving an oil and gas project while that decision was before the Board on appeal); *Robert L. Snook*, 100 IBLA 151, 153 n.2 (1987) (BLM had no authority to amend its decision because the appeal of that decision

removed that authority in the absence of a remand of the decision by the Board); *Melvin N. Barry*, 97 IBLA 359, 361 (1987) (“[O]nce an appeal is filed, BLM no longer has authority to take further dispositive action in a case.”). However, we have never held that once an agency decision has been appealed the agency can do nothing at all related to the matter.

In fact, we have specifically held that “[t]he effect of 43 C.F.R. § 4.21(a) is only to suspend the authority of the deciding official to exercise jurisdiction directly relating to the subject of the appeal. It does not have the effect of suspending [the agency’s] authority to act on matters that are functionally independent from the subject of the appeal.” *McMurray Oil Co.*, 153 IBLA at 395 (quoting *Robert B. Bunn*, 102 IBLA 292, 297 (1988)); *see, e.g., id.* at 393-94 (BLM “had the authority to continue work contemplated under the Record of Decision (ROD) [authorizing the drilling of wells] BLM could approve individual APD’s for those wells. However, BLM could not amend or rescind the [ROD approval] decision . . . while that decision was on appeal without the specific approval of this Board. . . . BLM could act to *implement* the decision (in the absence of a stay). However, it could not alter the [decision].”); *East Canyon Irrigation Co.*, 47 IBLA 155, 170 (1980) (“Notwithstanding the common subject matter, a temporary use permit is discrete from the right-of-way application. . . . Appeal from rejections of the rights-of-way applications, therefore did not stay action on the former, and no error was committed in proceeding to terminate the [Special Land Use Permit], even though an earlier BLM decision regarding the right-of-way was under appeal.”).

In carrying out its duties under FOGPMA, ONRR may “conduct any investigation or other inquiry necessary and appropriate,” including the issuance of subpoenas. 30 U.S.C. § 1717(a) (2006). The appeal of a Notice of Civil Penalty does not eviscerate that statutory authority, even if the Notice of Civil Penalty and the subpoena share a common subject matter. In this case, despite Statoil’s anticipatory protestations otherwise, ONRR has not sought to modify its decision regarding the Notice of Civil Penalty currently under appeal, nor could it without seeking remand of its decision. And, whether the factual information provided by Statoil in response to the subpoena could bolster or undermine ONRR’s decision, this Board is unwilling to guess, but those possibilities are not relevant to our inquiry here. The agency may continue to carry out its statutory and regulatory duties even if the agency’s actions share a common subject matter with the decision under appeal. In this case, Statoil’s appeal of ONRR’s Notice of Civil Penalty did not deprive ONRR of authority to issue the disputed subpoena.

The Board's Authority To Hear Statoil's Appeal of the Subpoena

Departmental regulations provide two avenues for appeal of ONRR decisions. An internal appeals process³ is governed by 30 C.F.R. Part 1290 – Appeals Procedures. These regulations provide for appeals of “orders” to the ONRR Director, and for a further appeal of the Director’s decisions to the Board.⁴ 30 C.F.R. § 1290.108. The second avenue of appeal is found in 36 C.F.R. Part 1241 – Penalties. Those regulations provide for a hearing on the record for recipients of a Notice of Noncompliance or a Notice of Civil Penalty. *See* 30 C.F.R. §§ 1241.54, 1241.56, 1241.62, 1241.64. The hearing will be conducted by an ALJ from the Hearings Division, who will issue a decision. 30 C.F.R. § 1241.72. The ALJ’s decision may then be appealed to the Board. 30 C.F.R. § 1241.73. As Statoil is not arguing here that it is entitled to a hearing on the record under Part 1241 as the result of its receipt of ONRR’s subpoena,⁵ we instead focus on ONRR’s internal appeals process.

Regulations governing the internal appeals process limit such appeals by stating that you may not appeal “an action that is not an order, as defined in this subpart.”⁶ 30 C.F.R. § 1290.104(a). An appealable order generally is defined as a document “that contains mandatory or ordering language that requires the recipient to . . . report, compute, or pay royalties or other obligations, report production, or provide other information.” 30 C.F.R. § 1290.102 *Order*. In addition, the regulations specifically exclude a subpoena from the definition of order.⁷ *Id.* *Order* (2)(ii).

³ The process involves appeals initially to the Director of ONRR or, in the case of Indian leases, to the Director of the Bureau of Indian Affairs. *See* 30 C.F.R. § 1290.105(a), (g). Here, we focus only on appeals to the Director of ONRR.

⁴ Other regulations identify specific ONRR decisions that may be appealed under 30 C.F.R. Part 1290. *See, e.g.*, 30 C.F.R. §§ 1204.6 (denial of royalty prepayment relief), 1206.107(d)(2) and 1206.364(d)(2) (order requiring payment based on value determination), 1220.034(d) (Director’s decision regarding redetermination of net profit share payment and additional amount to be paid by lessee).

⁵ We note that no regulation under Part 1241 provides for such a hearing for recipients of a subpoena.

⁶ Statoil has helpfully pointed out that in this regulation the reference to “subpart” means Part 1290, as the term subpart was merely a holdover from former regulations and was not revised upon the promulgation of the new regulations. Response to Motion to Dismiss at 6 n.1.

⁷ They also exclude determinations of surety amounts or financial solvency under 30 C.F.R. Part 243, subparts B or C. 30 C.F.R. § 1290.104(b).

ONRR argues that this clear regulatory language precludes Board review of its issuance of the subpoena. Motion to Dismiss at 8. Statoil responds on several fronts. It argues that:

Part 1290 does not preclude direct appeals to the IBLA under 43 C.F.R. Part 4 when the challenged action is not an ‘order.’ . . . 30 C.F.R. § 1290.108 . . . confirms that any party adversely affected by a final decision of ONRR ‘shall have a right of appeal to the IBLA’ under 43 C.F.R. Part 4. . . . [T]here is no regulation that precludes review by the IBLA or other higher-level Departmental officials.

Response to Motion to Dismiss at 6-7. However, Statoil omits crucial language in § 1290.108 that makes its context clear. “Any party to a case adversely affected by a final decision of the ONRR Director . . . *under this subpart* shall have a right of appeal to the IBLA” (emphasis added). The regulation at 30 C.F.R. § 1290.108, by its own language, pertains to appeals from *orders* of the ONRR Director (there are no other final decisions of the Director under Part 1290) and, as a result, subpoenas, not being orders, are not appealable to the Board under § 1290.108.

Statoil also argues that under ONRR’s logic, Part 1290, which excludes both a Notice of Noncompliance and a Notice of Civil Penalty from the definition of “order,” would conflict with the provisions of Part 1241 which affords an appeal of those decisions through a hearing before an ALJ. Response to Motion to Dismiss at 7; *see* 30 C.F.R. § 1290.102 *Order* (2)(iv). However, we see no regulatory inconsistency between excluding such notices from ONRR’s internal appeals process under Part 1290, by omitting them from the definition of “order,” while providing a separate and specific appeal right to a hearing with respect to such notices under Part 1241, as required by 30 U.S.C. § 1719(e). We note again that there is no regulatory provision, under Part 1241 or any other ONRR regulation, that provides for the appeal of a subpoena to the Board.

Finally, Statoil argues that OHA’s adoption of regulatory language identical to that in Part 1290 excluding subpoena’s from the definition of “order” in 43 C.F.R. Part 4, Subpart J – Special Rules Applicable to Appeals Concerning Federal Oil and Gas Royalties and Related Matters, is not relevant to its appeal here because those regulations narrowly apply only to time limits for certain appeals, *see* 43 C.F.R. § 4.901, and do not limit the Board’s jurisdiction to hear this appeal. Response to Motion to Dismiss at 7-8. Statoil is, of course, correct that those OHA regulations pertain specifically to the application of time limits. However, the rules as proposed were not confined to time limits and were intended to generally amend the rules governing appeals of orders by ONRR’s predecessor, the Minerals Management Service. 64 Fed. Reg. 1930 (Jan. 12, 1999). That proposal stated:

Subpoenas are enforceable directly by the United States Government in federal district court under 30 U.S.C. 1717(b), and *are not subject to administrative appeal*. Therefore, they are not appealable “orders.”

Id. at 1935 (emphasis added). We note that these proposed rules were submitted by the Assistant Secretary of the Interior – Land and Minerals Management, the Director, Office of Hearings and Appeals, and the Deputy Commissioner of Indian Affairs. *Id.* at 1969.

Although the final rules relevant to OHA were limited for various reasons to how certain time limits affect appeals, the language excluding subpoenas from the definition of “order” was unchanged from the proposed rules and is identical to the language in 30 C.F.R. § 1290.102. The preamble to the final rules also responded to a comment that subpoenas should be defined as appealable orders. The response stated:

We disagree with the comment that we should define subpoenas as being appealable orders. As we stated in the preamble, subpoenas are enforceable directly by the United States Government in Federal district court . . . and are not subject to administrative appeal. . . . Therefore, they also are not appealable “orders,” and we are not changing the rule as the commenter suggested.

64 Fed. Reg. 26240, 26247 (May 13, 1999).⁸ These final rules were submitted by the Assistant Secretaries of the Interior for Land and Minerals Management, for Policy, Management, and Budget, and for Indian Affairs. *Id.* at 26251. It is clear,

⁸ That comment was preceded by the following discussion:

[I]t is possible for a lessee to first receive a “Dear Payor” letter or valuation determination with general advice, next a request *or subpoena* for documents that would enable the Government to evaluate whether the lessee has followed that advice, and, finally, an order applying the Government’s understanding of the law and facts *that could be tested in an administrative appeal*.

64 Fed. Reg. at 26247 (emphasis added). This discussion makes it clear that the Department did not consider the issuance of a subpoena to be subject to administrative review. It also clearly suggests that the issuance of a subpoena may not even be a “decision” subject to appeal under 43 C.F.R. § 4.410, because a subpoena is an investigative tool that, in and of itself, makes no determinations regarding the individual rights of a party and neither takes nor prevents action. *See Rock Crawlers Association of America*, 167 IBLA 232, 236 (2005).

and persuasive, that the Department has been consistent in its view that subpoenas issued under 30 U.S.C. § 1717 (2006), are not subject to administrative appeal.

[2] This Board “is the sole judge of its jurisdiction and, *subject to regulation*, of which appeals it will entertain or summarily dismiss.” *Headwaters*, 33 IBLA 91, 92 (1977) (emphasis added). Departmental regulations set limits on the Board’s jurisdiction, based on procedural considerations, *see, e.g., Elbert F. Howey*, 15 IBLA 208 (1974), *aff’d*, Civ. No. A74-56 (D. Alaska Oct. 16, 1975) (Board will dismiss untimely filed notice of appeal, pursuant to 43 C.F.R. § 4.411(c)), and subject matter, *see, e.g., High Desert Multiple-Use Coalition, Inc.*, 142 IBLA 285, 289 (1998) (Board has no jurisdiction over approval or amendment of resource management plans, pursuant to 43 C.F.R. § 1610.5-2(b)). In this case, the Department has determined, by regulation, that subpoenas issued under section 107 of FOGRMA are not subject to administrative appeal. As a result, we must dismiss Statoil’s appeal. To do otherwise would effectively invalidate one of ONRR’s regulations, which we have no authority to do. *Bookcliff Rattlers Motorcycle Club*, 171 IBLA 6, 16 (2006).

CONCLUSION

In FOGRMA Congress authorized the Secretary of the Interior, in carrying out his duties under that Act, to conduct investigations and, if reasonably necessary, issue subpoenas as part of those investigations. *See Marathon Oil Co.*, 149 IBLA 287, 293 (1999) (“The purpose of FOGRMA was to enhance and expand the investigatory powers of the Secretary and MMS”). This authority is independent of any authority exercised by OHA, such as the authority of an ALJ to conduct a hearing under 43 C.F.R. § 4.433, and does not conflict with or contradict the purpose of a hearing before an ALJ. The mechanism Congress provided for review of such subpoenas was to require the Secretary to seek enforcement of the subpoenas in the appropriate Federal District Court. 30 U.S.C. § 1717(b) (2006). Thus, a subpoena may be challenged when the government initiates judicial action to enforce it.⁹ *See Mobil Exploration & Producing U.S., Inc.*, 180 F.3d 1192, 1199 (10th Cir. 1999). Further, the Secretary has determined, by regulation, that such review will be exclusive and not within the purview of the Board.

⁹ We understand that in this case, ONRR has already taken that step, and Statoil intends to oppose ONRR’s efforts. Response to Motion to Dismiss at 10. In that forum, Statoil may assert its substantive defenses to the subpoena as Congress intended.

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 appeal is dismissed.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge