



DEVON ENERGY PRODUCTION CO., L.P., *ET AL.*

188 IBLA 268

Decided September 15, 2016



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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DEVON ENERGY PRODUCTION CO., L.P., *ET AL.*

IBLA 2014-170, *ET AL.*

Decided September 15, 2016

Appeal from orders, issued by the Bureau of Safety and Environmental Enforcement, directing former lessees to decommission oil and gas facilities located in the Gulf of Mexico. OCS-G-04827.

Affirmed; request for oral argument denied.

1. Outer Continental Shelf Lands Act: Oil and Gas Leases

Where at least one assignee of an Outer Continental Shelf Lands Act (OCSLA) lease has failed to perform its decommissioning obligations under the lease, the Bureau of Safety and Environmental Enforcement (BSEE) does not err in holding former lessees jointly and severally liable. BSEE is not required to order former lessees to decommission in reverse chronological order, waiting for each most recent interest holder to default before taking action against an earlier interest holder.

2. Appeals: Jurisdiction;
Constitutional Law: Due Process;
Notice

As a general rule, the Board--as an administrative body within the Department--does not adjudicate whether constitutional rights have been violated or afford relief from such violations. Therefore, the Board lacks authority to decide whether former lessees of an OCSLA lease have a constitutionally protected property interest in a subsequent lessee's supplemental bond.

3. Outer Continental Shelf Lands Act: Oil and Gas Leases

The Department's alleged breach of the terms of an OCSLA lease does not discharge a lessee from its regulatory decommissioning obligations.

4. Outer Continental Shelf Lands Act: Oil and Gas Leases

The regulations governing assignments of interests in an OCSLA lease do not limit an assignor's liability to a fixed amount of costs of the decommissioning obligations that existed at the time of the Department's approval of the assignment.

APPEARANCES: James E. Wright, III, Esq., David M. Hunter, Esq., and Tyler J. Rench, Esq., of Jones Walker, LLP, New Orleans, Louisiana, for the appellants; Eric Andreas, Esq., U.S. Department of the Interior, Office of the Solicitor, Washington, DC, for the Bureau of Safety and Environmental Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The several appellants in this consolidated appeal of offshore decommissioning orders¹ are: Devon Energy Production Co., L.P. (Devon), Dominion Oklahoma Texas Exploration & Production, Inc. (Dominion), Merit Energy Partners III, L.P., Merit Energy Partners D-III, L.P., and Merit Partners, L.P. (collectively, Merit). They appeal from decommissioning orders dated March 7, 2014, and June 12, 2014, issued by the Bureau of Safety and Environmental Enforcement (BSEE).

Summary

Appellants in this appeal principally argue that BSEE erred by prematurely ordering them, as former lessees, to decommission the facility, instead of seeking satisfaction of decommissioning obligations first from the most recent interest holder and then proceeding in reverse chronological order, as each interest holder defaults on its decommissioning obligations. The Board recently addressed this argument, holding that, pursuant to Departmental regulations providing for joint and several liability, when at least one assignee of an offshore lease has defaulted on its decommissioning obligations, BSEE may order any and all lessees to carry out

¹ IBLA 2014-170, 2014-175, 2014-239, 2014-240, and 2014-241.

decommissioning, without proceeding in reverse chronological order. We adopt for the Board's present decision our reasoning from that case, and reach the same conclusion.

Appellants make three additional arguments. They first assert that due process requires the Department to notify the appellants, as former lessees, that it had decided to approve a supplemental bond waiver request of a subsequent lessee. They next argue that, under Federal case law, the Department's violation of an offshore oil and gas lease relieves appellants of their regulatory decommissioning obligations. Finally, appellants argue that BSEE's decommissioning orders impermissibly imposed decommissioning obligations beyond those for which they are legally responsible. We reject these arguments, finding no factual or legal support for them. We therefore conclude appellants have failed to carry their burden to establish error in BSEE's decommissioning orders, and accordingly affirm those decisions.

Factual Background

Appellants are former lessees of lease OCS-G-04827 (the Lease) for oil and gas facilities located in South Timbalier Block 77 (ST 77), in the Gulf of Mexico, under the Outer Continental Shelf Lands Act (OCSLA). On June 20, 2013, the U.S. Bankruptcy Court for the Southern District of Texas authorized ATP Oil and Gas Corporation (ATP), then current lessee of the Lease, to abandon or relinquish its obligations relating to the Lease.² On July 8, 2013, ATP notified BSEE that it would not perform any required maintenance or decommissioning activities related to the Lease.³ The current lessee at ST 77, Bois d'Arc, operates under a new lease.⁴

On March 7, 2014, BSEE issued a decommissioning order, with respect to the Lease, to Anadarko Petroleum Corporation (Anadarko).⁵ The Board recently affirmed that order.⁶ In that case, we also acknowledged the present consolidated appeal of Devon, Dominion, and Merit.⁷

² Statement of Reasons (SOR), Exhibit (Ex.) 1 (decommissioning orders to the appellants).

³ *Id.*

⁴ *Anadarko Petroleum Corporation [Anadarko]*, 187 IBLA 77, 91 (2016).

⁵ *Id.* at 78; *Anadarko (On Reconsideration)*, 188 IBLA 127, 129 (2016).

⁶ *Anadarko*, 187 IBLA at 93-94.

⁷ *Id.* at 91.

BSEE's Decommissioning Orders to Former Lessees/Assignors Were Not Premature

[1] Appellants principally argue that the current lessee--Bois d'Arc--is liable for decommissioning first, followed by previous interest holders, and therefore BSEE erred when it prematurely ordered appellants to undertake decommissioning responsibilities.⁸ They contend that BSEE should not have issued appellants a decommissioning order until all entities that held interests subsequent to appellants failed to perform.⁹ Like the appellant in *Anadarko*, appellants in this appeal contend the regulations at 30 C.F.R. § 556.62(f) require that BSEE, when seeking performance of decommissioning obligations, move sequentially through the chain of title, beginning with the most recent interest holder and working backward.¹⁰ Appellants argue that the regulatory language in 30 C.F.R. § 556.62(f) is phrased conditionally--*i.e.*, by stating that decommissioning obligations accrue only "if your assignee, or a subsequent assignee, fails to perform"--and thus it establishes contingent, and not joint-and-several, liability.¹¹

The Board rejected this reverse sequential liability argument in *Anadarko*, which concerned the same Lease that is at issue in the present appeal, and where ATP, a lessee subsequent to appellants, previously failed to perform its decommissioning obligations.¹² We held in *Anadarko* that, regardless of when the Lease was issued, former lessees were subject to the current decommissioning regulations, including the regulations imposing joint and several liability for decommissioning obligations.¹³ We further rejected appellant's argument that under the regulations an assignor can be held responsible for decommissioning only if its assignee fails to perform.¹⁴ We noted that the regulatory language in 30 C.F.R. § 556.62(f) provides that an assignor is responsible for decommissioning "if your assignee, *or a subsequent assignee*, fails to perform," and all that is required is for at least one assignee to fail to perform its obligations under the Lease in order for BSEE to issue decommissioning orders to other former lessees and assignors.¹⁵ Because ATP had failed to perform its

⁸ SOR at 7-9.

⁹ *Id.* at 9-13; *id.* at 13 ("BSEE [must] first pursue more proximate former lessees and operating-rights holders in the chain of title.").

¹⁰ *Id.* at 10-13.

¹¹ *Id.* at 10.

¹² 187 IBLA at 91-93.

¹³ *Id.* at 88-90 (citing 30 C.F.R. Part 250).

¹⁴ *Id.* at 91.

¹⁵ *Id.* at 92 (emphasis added).

decommissioning obligations, we held that BSEE properly issued decommissioning orders to Anadarko and other former lessees.¹⁶

We adopt for the Board's present decision our reasoning from *Anadarko*, and conclude here, as we did in *Anadarko*, that BSEE did not err in issuing decommissioning orders to appellants (Devon, Dominion, and Merit), former lessees of the facility at ST 77, instead of deferring issuance of such orders until subsequent interest holders failed to perform decommissioning obligations.

The Board Lacks Authority to Hear the Constitutional Argument of the Lessees Concerning the Department's Waiver of a Subsequent Lessee's Supplemental Bonds

On January 18, 2006, ATP executed a supplemental plugging and abandonment bond for ST 77, to cover all liability associated with four supplemental bonds from a previous lessee/operator (Millennium Offshore Group) in 2004-2005.¹⁷ On July 6, 2006, ATP requested a waiver of its supplemental bond.¹⁸

On August 7, 2008, the Minerals Management Service (MMS), predecessor agency to BSEE and the Bureau of Ocean Energy Management (BOEM), approved ATP's request to waive its supplemental bonds. In doing so, MMS found that ATP qualified for supplemental bonding waiver under the financial criteria established in its procedures at that time, and authorized the cancellation of all of those supplemental bonds.¹⁹ MMS considered those supplemental bonds terminated and cancelled effective March 30, 2006.²⁰

Appellants argue that, as a matter of due process, the Department should not have issued a decision to waive supplemental bonding for ATP without first providing timely notice to appellants.²¹ They contend former lessees, like themselves, benefit from supplemental bonds and that, absent such bonds, they are exposed to millions of dollars of potential liability if a current lessee cannot perform its decommissioning obligations.²² At the heart of appellants' due process argument is the premise that they have a constitutionally protected property interest in a subsequent lessee's

¹⁶ *Id.* at 91-93.

¹⁷ SOR, Ex. 5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ SOR at 13-17.

²² *Id.* at 13-14.

supplemental bond.²³ They claim their due process interests were “offend[ed]” by the failure of the Department to provide notice of deprivation of their alleged property interest in the subsequent lessee’s supplemental bond.²⁴ Their requested remedy is vacatur of the orders, and the opportunity for oral argument.²⁵ BSEE responds that the Board lacks authority to hear appellants’ argument.²⁶

[2] As a general rule, the Board, as an administrative body within the Department, is not the appropriate forum to adjudicate whether constitutional rights have been violated or to afford relief from such violations.²⁷ For instance, we have declined to hear issues concerning equal protection, the right to travel, the right to raise a family, unreasonable searches and seizures, Federal preemption of State law, and takings of private property without just compensation.²⁸ Infrequently, the Board has adjudicated circumscribed matters pertaining to procedural due process, but we have done so only where we otherwise had jurisdiction to hear such issues.²⁹ Such is not the case here.

In the present appeal, we lack authority to decide whether appellants, as former lessees, have a constitutionally protected property interest in a subsequent lessee’s supplemental bond, such that appellants’ alleged due process interests are

²³ *See id.* at 14-15.

²⁴ *Id.*

²⁵ Reply at 18.

²⁶ Answer at 9-10.

²⁷ *Rainer Huck*, 168 IBLA 365, 400 (2006); *Rivers Edge Trust*, 166 IBLA 297, 305 (2005), *aff’d sub nom. Chisum v. U.S. Dept. of the Interior*, CV 05-2830-PHX-JAT, *et al.*, 2007 U.S. Dist. LEXIS 84036 (D. Ariz. Nov. 1, 2007); *United States v. Mack*, 159 IBLA 83, 96 n.10 (2003).

²⁸ *Board of Commissioners of Pitkin County, Colo.*, 186 IBLA 288, 316 n.22 (2015) (Federal preemption of State law); *Maralex Resources, Inc.*, 186 IBLA 34, 50 (2015) (unreasonable searches and seizures; takings); *Atchee CBM, LLC*, 183 IBLA 389, 396 n.7 (2013) (equal protection); *Huck*, 168 IBLA at 400 (right to travel); *Mack*, 159 IBLA at 96 n.10 (right to raise a family).

²⁹ *See, e.g., W&T Offshore, Inc.*, 148 IBLA 323, 357 (1999); *Phillips Petroleum Co.*, 116 IBLA 152, 156 (1990); *Transco Exploration Co.*, 110 IBLA 282, 303-12 (1989); *see also, e.g., Heirs of Rudolph Walton*, 186 IBLA 269, 278 (2015); *Dee W. Alexander Estate*, 131 IBLA 39, 43 (1994).

harmed by lack of notification of the bonding waiver.³⁰ We therefore do not consider this argument, and deny the request for oral argument.

*The Department's Alleged Breach of Appellants' Lease
Does Not Relieve Appellants of Their Decommissioning Obligations*

[3] Appellants allege the Department violated the terms of their OCSLA Leases by waiving supplemental bonding for a subsequent lessee--ATP--and that, pursuant to the common law of contracts, this discharged appellants' regulatory decommissioning obligations.³¹ Appellants hinge their argument on a 2012 District of Columbia (D.C.) Circuit court opinion addressing a lessee's claim that the government's material breach of the lease agreement discharged the lessee from its lease obligations. In that case, the issue was remanded to the Department of the Interior.³² Following remand, the U.S. District Court for the District of Columbia provided detailed and insightful legal analysis holding that the regulatory decommissioning requirements are independent of contractual decommissioning obligations, and thus the common law discharge doctrine provides no relief from those obligations.³³ In 2016, the D.C. Circuit affirmed that decision.³⁴ Because appellants are relying on a case that has been superseded, it provides no legal support for their argument that the Department's alleged breach of their Lease resulted in a discharge of their regulatory decommissioning obligations.

*Appellants' Argument That BSEE Impermissibly Imposed Decommissioning Obligations
Beyond Those Assessed and Monetized by the Government Is Without Merit*

[4] Finally, appellants argue that BSEE's decommissioning orders impermissibly imposed decommissioning obligations beyond those assessed and monetized by the Department.³⁵ Appellants (Dominion, Devon, and Merit) argue that the assignment regulation limits the amount of liability of the assignor to the cost of decommissioning at the time of the Department's approval of each appellant's assignment of its interests.³⁶ They report that Dominion assigned its interests in the

³⁰ See SOR at 15.

³¹ *Id.* at 17-20.

³² *Noble Energy, Inc. v. Salazar*, 671 F.3d 1241 (D.C. Cir. 2012).

³³ See *Noble Energy, Inc. v. Jewell*, 110 F. Supp. 3d 5, 13-15 (D.D.C. 2015).

³⁴ *Noble Energy, Inc. v. Jewell*, No. 15-5202, 2016 U.S. App. LEXIS 7900 (D.C. Cir. Apr. 29, 2016) (unpublished).

³⁵ SOR at 21-24.

³⁶ *Id.* at 21-22.

Lease to Millennium on February 6, 2002, Devon assigned its interests to Merit on March 31, 2003, and Merit assigned its interests to Millennium on January 18, 2005.³⁷

The regulations concerning assignment of interests in an OCSLA lease provide, “[i]f you assign your record title interest, as an assignor you remain liable for all obligations, monetary and non-monetary, that accrued in connection with your lease during the period in which you owned the record title interest, up to the date BOEM approves your assignment.”³⁸ Appellants contend the approach the Department takes by issuing decommissioning orders without dollar limits on liability enlarges the financial measure of accrued obligations, causing former lessees to potentially bear decommissioning costs they never accrued.

However, Departmental assignment regulations do not limit an assignor/former lessee’s obligations to a specific dollar amount which may never increase.³⁹

Appellants state that a different regulation--the rule for supplemental bonds⁴⁰--provides for a determination of accrued liability, and that the Department already determined the accrued amount of liability in those supplemental bond determinations for a subsequent lessee (Millennium) in 2005.⁴¹ Appellants provide no legal support for the argument that a supplemental bond determination limits a lessee or former lessee’s liability for accrued decommissioning obligations, and that the Department may never adjust that amount. Also, the supplemental bond regulations expressly provide the Department may adjust the supplemental bond determinations.⁴² We decline to read into the assignment regulation a limitation not promulgated into rule by the Department, *i.e.*, that the specific amount of an assignor’s liability for accrued obligations may never increase.

³⁷ *Id.* at 23-24.

³⁸ 30 C.F.R. § 556.710 (promulgated Mar. 30, 2016); *accord* 30 C.F.R. § 256.62(d), (f) (2001-2005). As we held in *Anadarko*, pursuant to the Lease’s clause concerning future OCSLA regulations, former lessees are subject to the current assignment regulations at least to the extent those regulations concern decommissioning. 187 IBLA at 89-90.

³⁹ *See, e.g.*, 30 C.F.R. § 556.710 (Mar. 30, 2016); *accord* 30 C.F.R. § 256.62(d), (f) (2001-2005).

⁴⁰ *See* 30 C.F.R. § 556.901(d)-(f) (Mar. 30, 2016) (recodifying, *e.g.*, 30 C.F.R. § 256.53(d)-(f) (2001-2005)).

⁴¹ SOR at 21-24 (citing 30 C.F.R. § 256.53(d)-(e) (2001-2005)).

⁴² 30 C.F.R. § 556.901(f) (2016); *accord* 30 C.F.R. § 256.53(f) (2001-2005).

Conclusion

Appellants have not shown that BSEE erred in issuing the decommissioning orders to appellants and holding them jointly and severally liable.⁴³ Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁴⁴ we affirm BSEE's orders, and deny the request for oral argument.

/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

/s/
Amy B. Sosin
Administrative Judge

⁴³ See *Anadarko*, 187 IBLA at 94.

⁴⁴ 43 C.F.R. § 4.1.