

Appeal from a decision of the Utah State Office, Bureau of Land Management, affirming in part four orders issued by the Moab, Utah, District Office, concerning operations conducted under oil and gas lease U-16965.

Affirmed in part; vacated in part and remanded.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Royalties

Where BLM issues a decision that gas may have been vented on a Federal oil and gas lease without prior authorization and indicates that royalty may be due for the vented gas, and where BLM issues an instruction memorandum adopting a significant change in the interpretation of BLM policy concerning determinations of whether gas vented from Federal and Indian leases is subject to royalty and directing BLM to review all prior determinations to conform them to the new policy, BLM's decision will be vacated and the case remanded for further review under the terms of the new policy.

APPEARANCES: Dean H. Christensen, Manager, C. C. Company, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The C. C. Company (appellant) appeals from a December 22, 1987, decision of the Utah State Office, Bureau of Land Management (BLM), generally affirming four orders issued by the Moab, Utah, District Office, BLM. The decision of the State Office was issued following a request for technical and procedural review of the District Office's four orders, which were issued on November 10, 1987.

Appellant is the operator of Federal oil and gas lease U-16965, situated in sec. 11, T. 21 S., R. 23 E., Salt Lake Baseline Meridian, Grand County, Utah. This lease contains the Adak No. 11-1A and the OTHF 7-11 wells.

On September 29, 1987, the District Office notified appellant that lease U-16965 had been randomly selected for a Production Verification

Inspection (PVI), indicating that, pursuant to the applicable regulations and the provisions of Notice to Lessees No. 1 (NTL-1), operators were required to submit any documented evidence the authorized officer may need to verify volumes of oil and gas production. Appellant was required to submit various information, and also was directed to calibrate all gas meters, take samples for analysis, and submit results to BLM. Appellant was directed to make arrangements with BLM's authorized officer to witness all calibrations.

Following the inspection, on November 10, 1987, the District Office issued the four orders at issue here. We shall address each of these orders in turn.

The first order (Order I, identified in the file by Certified Mail-Return Receipt Requested-Article No. 0462) stated that the PVI revealed that appellant had not complied with 43 CFR 3160, identifying noncompliance "centering around unapproved venting of natural gas" in violation of NTL-4A, 44 FR 76600 (Dec. 27, 1979), and 43 CFR 3162.7-1(d). ^{1/} Order I stated that the venting of gas on the lease was not only unapproved, but that gas disposition had not been reported correctly under 43 CFR 3162.4-3.

Order I required appellant to submit amended Monthly Reports of Operations for the months of June 1975 through December 1987 showing total disposition of all gas produced, whether vented, sold, or used on the lease. It also required appellant to submit an application under NTL-4A requesting approval of venting of gas on the lease and directed that the application should include relevant documentation and well test results, as well as a plan to capture the gas for beneficial purposes or data to justify that capturing for beneficial use is not economically feasible. Order I also stated that gas vented without approval prior to October 1984 may be subject to royalty assessment on the basis of the full value, and that gas vented or flared after that date would be subject to assessment of royalty value until such time as approval of venting or flaring is obtained.

The second order (Order II, identified in the record by Certified Mail-Return Receipt Requested-Article No. 0463) stated that the PVI had identified noncompliance with 43 CFR 3160 centering around "unacceptable gas measurement" on Federal Well 7-11 OTHF, in that gas was not being measured in an acceptable manner and gas disposition had not been reported correctly under 43 CFR 3162.4-3. Order II further noted the appellant had been required by BLM's letter dated September 29, 1987, to calibrate this meter and sample the gas stream for analysis, but that appellant had not arranged to have any calibration test witnessed. BLM required appellant to calibrate the gas meter on or before December 14, 1987. Finally, Order II required appellant to resubmit Form 3160-6 for June 1981 through November 1987 showing proper gas disposition of all gas volumes produced, sold, vented, or lost from Well 7-11 OTHF.

^{1/} Order I referred to the lease as a whole rather than to either of the two wells found on the lease.

In the third order (Order III, identified in the record by Certified Mail-Return Receipt Requested-Article No. 0464), BLM noted that recent inspections of lease U-16965 and other leases on the Cisco gathering system had raised questions about operational procedures for that system. In order to clarify some points of the system as they pertain to Federal interests, BLM requested information concerning which meters are used as sales points and which are used strictly for allocation purposes, how often the meters are calibrated and by whom, and how individual wells and leases are allocated production volumes from buyers' purchase statements. BLM requested that this information include a list of all wells connected to the Cisco gathering system and a current map of the entire system. A deadline of December 17, 1987, was established for compliance.

The fourth and final order (Order IV, identified in the record by Certified Mail-Return Receipt Requested-Article No. 0465) approved the unlined pit on the Adak No. 11-1A well site as an "emergency pit," allowing it to be used to hold fluids under certain restrictions, including reporting all uses of the pit to BLM within 48 hours, and removal of all fluids within 48 hours after use, unless otherwise approved.

On December 8, 1987, appellant filed a request with the Utah State Office, BLM, for technical and procedural review of the November 10, 1987, orders. On December 22, 1987, the Deputy State Director (DSD), Mineral Resources, affirmed these orders with only minor modifications. Specifically, as to Order I, the DSD held that appellant was "only required to maintain records for 6 years pursuant to 43 CFR 3162.4-1(d)." He also clarified that, under Order III, appellant was only responsible for providing information concerning any of his wells and leases that are involved with the Cisco gathering system.

This appeal followed. Appellant states that it "has been subjected to overt discrimination and harassment," and objects that "BLM is attempting to force [it] to submit 'Amended Reports' that * * * have been correctly submitted." Appellant indicates that, if it is forced to change reports, it will be subject to "further fines and punishments not merited by the facts and circumstances." It states that no previous statement had ever been made in the past to indicate that gas had been vented on the Adak No. 11-1A well, and that, "[w]ith no past incident or claim it is not reasonable to expect that [it] should be subjected to the threat of fine and further actions [it] will not redo records believed to be correct."

Appellant further states:

[A]fter reading NTL-4A, and since the actual updated test data for the operation of the well indicates that the oil being produced only has .603 MCF of gas per Barrel of oil at atmospheric pressure and the fact that said gas would have to be compressed to [approximately] 60 psi to be saleable, that no economic loss has occurred as the gas remaining in solution measurably adds

to the gravity of the oil and is better left in solution as the gravity effect can be as much as 4 degrees (saves .60 cents deduction) and since any gas recovered only has a market value of \$1.19 (Current price in area) and can only be sold when the Cisco Gathering System is operating, precludes any feasibility in attempting to save 12.0 MCF of gas daily (before fuel necessary to run compressor).

We note initially that we are unpersuaded that appellant is the victim of any discrimination in being selected for a product verification inspection. Congress, in the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 through 1757 (1988), generally directed that the Department take steps to ensure enforcement of requirements to pay royalties and other payments due and owing on oil and gas produced from Federal leases. While BLM evidently did select appellant's wells for inspection from among many in the area, there is nothing in the record indicating that it did so other than as part of a random spot check, as it indicated in its September 29, 1987, letter. In the absence of evidence of improper motivation in selecting which operators are to be inspected, we perceive nothing discriminatory in BLM's selection of appellant for a verification inspection.

BLM was also authorized to demand accurate data from appellant concerning production from the lease. Under governing law (which a lessee expressly acknowledges when it enters into a Federal oil and gas lease), BLM has the authority to order monthly reports of operations, which must disclose accurately all operations conducted on each well during each month, the status of operations on the last day of the month, and a general summary of the status of operations on the leased lands. 43 CFR 3162.4-3. Implicit in this authority is the authority to ensure that accurate reports have been filed and to demand correction of any inaccurate reports.

[1] There is no doubt that BLM has the authority to collect royalty for the unapproved venting of natural gas. The applicable regulation, 43 CFR 3162.1(a), requires compliance "with applicable laws and regulations; with the lease terms, Onshore Oil and Gas Orders, NTL's; and with other orders and instructions of the authorized officer" (emphasis added). NTL-4A is specifically directed to the calculation of royalties or compensation for oil and gas lost by an operator. Economically recoverable oil well gas may not be vented or flared unless that activity is approved in writing by an authorized officer. Venting or flaring of such gas without prior authorization, approval, ratification, or acceptance is deemed to be avoidably lost. When produced gas is avoidably lost, the compensation due the United States is computed on the basis of the value of the gas avoidably lost, or the allocated portion thereof attributable to the lease. Mallon Oil Co., 107 IBLA 150 (1989); Lomax Exploration Co., 105 IBLA 1 (1988); F. Howard Walsh, 93 IBLA 297 (1986).

Notwithstanding the above, in Ladd Petroleum Corp., 107 IBLA 5 (1989), we noted that, in August 1987, just before BLM's decision in this case, BLM issued Instruction Memorandum (I.M.) No. 87-652 changing its interpretation of NTL-4A. Under this I.M., in some circumstances, a lessee must be given written notice by certified mail and an opportunity to show the gas was not marketable before he can properly be held liable for royalty for flaring gas. Further, under the new policy announced in the I.M., the gas might not properly be deemed to be "avoidably lost" if the lessee showed, even after the fact, that it was uneconomic to sell the flared gas as of the time that it was flared. We stated in Ladd:

On August 17, 1987, * * * the Director of BLM issued [I.M. No. 87-652] concerning BLM's policy for avoidably lost gas on onshore Federal and Indian oil and gas leases. I.M. No. 87-652, which applies to both past and future determinations of avoidably lost gas, requires that, when no application to flare gas has been submitted by an operator after the expiration date of the initial authorized test period (30 days or 50 MMcf, whichever occurs first), BLM must notify the operator that it has 60 days in which to submit an application to justify its position that it was uneconomic to capture gas both at the time of application and as of the expiration date of the initial authorized test period. Id. at 5.

The rationale for allowing an operator to demonstrate later that it was uneconomic to capture the gas from the time that unauthorized venting commenced is stated [in the I.M.] as follows:

[I]f, in fact, it was not economic to do so at [the time the gas was flared], no monetary obligation should attach solely by reason of a failure to have filed a timely application to continue venting or flaring. In most, if not all cases of unauthorized venting or flaring, operators have reported and con-tinue to report monthly the volumes of gas being vented or flared. In many instances, however, no action was taken [by BLM] to compel compliance with applicable requirements until months or even years after the onset of the unautho-rized venting or flaring. Thus, when it would have been uneconomic to capture the gas as of the critical point in time, the balance weighs on the Bureau's failure to react timely to the monthly reports, rather than on the operator's failure to seek a timely approval to continue venting or flaring as uneconomic, since no economic loss has been suffered. The balance weighs on the operator's failure, however, when it would have been economic to capture the gas at the critical time.

I.M. No. 87-652 at 8. The I.M. further requires BLM to review all prior determinations of avoidable loss that meet the criteria set out and to take appropriate action to conform those determinations to the guidance set out in the I.M. Id. at 6.

* * * * *

* * * We note that this case falls squarely within the rationale for the change in policy: Patrick reported the volume of the gas flared each month for over 3 years without BLM taking action to compel compliance with the applicable requirements. Accordingly, we set aside BLM's determination that gas flared from the well prior to October 31, 1984, was avoidably lost, and remand for further consideration of whether it was uneconomic to capture that gas at that time, consistent with the guidelines announced in I.M. No. 87-652. [Emphasis supplied.]

Ladd at 7-9; see also Willard Pease Oil & Gas Co., 108 IBLA 108 (1989).

Appellant's situation is comparable to that presented in Ladd. Although BLM did not go so far as to require payment in this case, but merely indicated that gas vented without approval on lease U-16965 might be subject to royalty assessment and demanded reporting documentation, BLM evidently did not notify appellant timely that it was improperly flaring gas. Appellant expressly questions whether it was economically feasible to market the gas. Thus, it raises concerns directly addressed by I.M. 87-652. Accordingly, as in Ladd, we deem it appropriate to vacate BLM's determination in Order I that gas was vented from the lease without approval and remand the matter to BLM for further consideration of the question under NTL-4A, as interpreted by I.M. No. 87-652.

Appellant has not shown any convincing reason that the other three orders at issue here should not be affirmed. ^{2/} We note that, during the pendency of his request for technical and procedural review, on December 10, 1987, appellant filed with the District Office a response to all four of the November 10, 1987, orders. This response generally challenged the feasibility of complying with these orders, questioning BLM's determination that gas had been vented, and declining to make changes in gas volumes reported or to formulate any type of plan as directed by BLM. It does not appear that this response was filed with the DSD in connection with his technical and procedural review, or that the DSD considered it in making his TPR decision. As our authority is limited to considering the DSD's decision, we need not directly address this response at this time. However, we note that appellant has raised some questions in this response that deserve consideration by BLM's technical representatives, and BLM is directed to consider these objections, if it has not already done so.

^{2/} It may be that Order II was issued to collect gas measurement data in connection with the alleged unauthorized gas venting. If so, BLM should also re-examine Order II in light of I.M. No. 87-652.

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 affirmed in part, set aside in part, and remanded.

David L. Hughes
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge