

WESTERN PRODUCTION CO.

IBLA 90-383

Decided September 21, 1992

Appeal from a decision of the Wyoming State Director, Bureau of Land Management, finding that gas vented or flared was avoidably lost. SDR No. WY-90-17.

Set aside and remanded.

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

A BLM decision that assumes all gas wells connected to a plant were connected because the production rates and distance to an existing pipeline were economically favorable, and therefore gas vented or flared was avoidably lost, will be set aside and remanded when the record is inadequate to determine whether it was uneconomic to capture the gas.

APPEARANCES: John K. Nooney, Esq., Rapid City, South Dakota, for appellant; Lyle K. Rising, Esq., Office of the Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Western Production Company (Western) has appealed the April 23, 1990, decision of the Deputy State Director (Mineral Resources), Wyoming State Office, Bureau of Land Management (BLM), that affirmed with modification the November 14 and 21, 1989, decisions of the Newcastle Resource Area Manager, BLM, which found that gas vented or flared from Federal leases WYW037878A, WYW55013, WYW59547, and WYW82701 was avoidably lost. The Deputy State Director's decision resulted from a request by Western for State Director Review of the Area Manager's decisions under 43 CFR 3165.3(b).

The Deputy State Director determined that 41,610 MCF of gas was avoidably lost from April 1982 - January 1983, and November 1983 - October 21, 1984, from the four leases for which full value compensation was due and 24,005 MCF of gas was lost from October 22, 1984 - December 1985 for which royalty value compensation was due. See 43 CFR 3162.7-1(d) (1989). 1/ His decision

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1/ This regulation provides:

"The operator shall conduct operations in such a manner as to prevent avoidable loss of oil and gas. An operator shall be liable for

assume[d] that all wells connected to the [Newcastle gas] plant were connected because the production rate and existing pipeline were economically favorable. Any gas that was vented in excess of what is authorized under NTL 76600 (Dec. 27, 1979)] after April 1, 1982, and prior to connection, and without approval, was avoidably lost, e period February - October 1983].

(Apr. 23, 1990, Decision at 3). The decision also stated: "Western can be assured that our decision is not based exclusively on economics; vent the gas was granted. Our decision is also based on economics; was it economically feasible to capture the gas." *Id.* at 3.

Western argues in its statement of reasons (SOR) that BLM's decision is inconsistent with IM No. 87-652, "Policy for Avoidable Losses," August 27, 1987 (IM). "This inconsistency exists because the director asserts the position that if at any time a well was connected to a pipeline that it is assumed that it was economically feasible to capture the gas at any time the well was a producer" (SOR at 8).

BLM responds that it did follow the IM, *i.e.*, that there was an avoidable loss because none of the criteria for an avoidable loss of gas was captured before the government sent a notice to the operator allowing it to justify its position that it was uneconomical to capture (BLM Answer at 1). Paragraph II. C. of IM No. 87-652 states: "An

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fn. 1 (continued)

royalty payments on oil or gas lost or wasted from a lease site, or allocated to a lease site, when such loss or waste is due to the operator on the part of the operator of such lease, or due to the failure of the operator to comply with any regulation, order or citation issued in relation to this part.

The second sentence of this regulation was added in response to section 308 of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1756 (1988). *See* 48 FR 41738 (Sept. 16, 1983).

2/ These criteria are:

"1. The gas was being captured on or before the day next following the expiration date of the initial, authorized test period or 50 MMcf, whichever first occurs, unless a longer test period was approved by the authorized officer; or

"2. An application to continue venting or flaring as uneconomical was received on or before the expiration date of the initial test period and was approved; or

"3. A plan was submitted on or before the expiration date of the initial, authorized test period to eliminate the venting or flaring within 1-year of the plan's submittal date, and the commitment was met in a timely manner.

(IM No. 87-652, Paragraph II.A).

3/ IM No. 87-652, Paragraph II.B., provides:

"Where none of the II.A. criteria are [sic] satisfied timely, and no application subsequently is submitted to continue the test period,

avoidable loss has occurred when none of the II.A. criteria were [sic] satisfied timely, but the gas is captured before any not BLM's Answer continues:

We realize that sections I.C. and II.C. [of the IM] make the assumption that if at any time a well is connected to a gathering facility, it was economical to capture the gas from the date of first production. We realize that this is not the case. To avoid this problem, we gave Western an opportunity to state why it was not economical to capture the gas following the expiration date of the initial test period authorized under NTL-4A. Western maintains that the decision to connect a well was not theirs, but rather with the gas plant operator. Western also argues that the decision to connect a well was contingent upon there being sufficient production from surrounding wells, and therefore the decision could not be made on a well by well basis. \* \* \* We did not make our determination on a well by well basis. \* \* \* At some point in time at the end of the authorized test period and prior to connection, Western and/or the gas plant operator determined that it was not economical to capture the gas. We asked Western to establish that point in time. When did it become economic? We did not. Western answered our question.

Id. at 2.

Western filed a response to BLM's Answer iterating its view that "while it may have been economical to connect a particular well to a pipeline at some given point, that does not mean that it was economical from the well's initial production and/or after the time of first production of gas as set forth in NTL-4A" (Response at 3). It stated that BLM had not provided the notice called for by Paragraph II.B. of the IM, supra, note 3, and by Ladd Petroleum Corp. v. BLM, Id. at 3, 5. Western concluded its response by stating that "the economics of capturing the gas should be reviewed by BLM, or alternatively, that "the issues at hand justify . . . granting Western a hearing on all issues of fact." Id. at 6-7. Western concluded its request for Hearing "on the fact issue of the economics relative to the capturing of certain gas as allowed for in 43 C.F.R. § 4.415.

BLM's reply was that at the oral presentation during State Director review it instructed Western that it "needed to know when it was economical to connect a certain well. When did the lessee determine that production rates, commensurate with the investment, were sufficient to justify the cost of capturing the gas?"

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fn. 3 (continued)

uneconomic, the operator shall be sent a notice by certified mail. The notice shall allow 60 days from receipt in which to submit an application to justify its position that it was uneconomic to capture the gas, both at the time of application and as of the expiration date of the test period."

distance to existing pipelines become [sic] economically favorable?"  
 (Reply at 2). BLM added:

Western responded then, and to this day, continues to respond that it is not correct to assume that it was economic to connect a well the day after the end of the authorized test period. Again, we agree that this is not always the case; however, in some situations, it can be. Western's response did not establish the point in time when it became economic to capture the gas. We are not going to assume that the wells became economic to connect only when Western finally connected them. Western argues that the decision to connect a well was not theirs, but rather the decision of the gas plant operator/owner. We will not excuse the lessee (Western) from adhering to our regulations (43 CFR 3162.7-1(d)). \* \* \* It is our opinion that Western has not submitted anything that can help us determine when it became economic to capture the gas. Therefore, in accordance with IM 87-652, we affirmed the Newcastle Area Manager's decision with modification.

Id. at 2. 4/ BLM also opposed Western's request for a hearing.

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4/ Western's response referred to by BLM was by letter dated Apr. 9, 1990. That letter refers to two enclosures and seven affidavits, showing "the wells drilled in the Finn-Shurley field by all producers, first production and gas line connections \* \* \* color copy of the case file forwarded by BLM. Enclosure 2, showing the pipeline connections to the wells located on the four leases was forwarded as exhibit C to Western's SOR.

The attachments are not included with the case file forwarded by BLM, but copies of them are included as pages 160-84 of Western's SOR. Affidavit 1 is included as pages 160-61 of Western's SOR by Western's land manager stating (1) the sales and purchase agreement between Western and MGPC, Inc., operator of the gas plant provided that Western was to notify MGPC which wells producing gas could be hooked up to the plant and left the "decision as to whether the wells be hooked up to the gas plant gathering system solely to MGPC, Inc."; and (2) "the economic analysis involved in determining whether the wells be connected to the gas plant involved MGPC determining whether the economics [i.e., expenditures] of extending the gas pipeline to each well was justified in light of the quantity and quality of prospective gas to be produced by each well."

Attachment 6 (pages 180-81 of the SOR) is a chronology of the wells connected in the Finn-Shurley field for the four leases.

Attachment 7 (page 184 of the SOR) is a spread sheet entitled "Cost Estimates for Well Connects" on the four leases. It was the basis for the statement in Western's Apr. 9, 1990, letter that

"[t]he wells on [Lease No.] WYW82701 (NW Extension) were some of the last to be connected because prior to that time nine wells were producing in the area. Production from those nine wells did not justify the expenditure of approximately \$100,000 per well line (Attachment 7 - Cost Estimates)."

In response to its request for hearing, we requested Western to list what specific issues of material fact require a hearing, what these issues must be presented by oral testimony, what witnesses need to be examined, and what evidence could be presented other than oral, form. Western responded that "the issues have become more focussed on determining when it became economical to extend its April 9, 1990, "effort to explain the analysis utilized by Western and the gas processing plant operator when determining whether to connect vis a vis a gas gathering system" (Support for Hearing at 1-2). Western argues that "providing of factual data in affidavits which have been done does not fully explain, nor can it be expected to explain, the in-depth analysis utilized by the BLM in these decisions," id. at 4, and that this is borne out by BLM's having "misinterpreted when and why the wells were connected to the system." Answer to Western's SOR. Id. at 2. Western proposes to call as witnesses its former president as well as a petroleum engineer to provide information about the "decision making process utilized when determining which wells would be connected to the system and the costs of extending the gas gathering system. It would also call a representative of the gas plant to testify about its response in connection with extending the system.

BLM filed its opposition to Western's request for a hearing, arguing that "the 'economics' it refers to are nothing more than the costs of extending the system. The BLM and the IBLA draw from underlying facts which are not in dispute" (Opposition to Request for Hearing at 1). BLM states:

The appellant concedes it has not adequately explained its position to the BLM or the IBLA even though it has had the opportunity to do so. The BLM would suggest as an alternative to a hearing that appellant be given one more opportunity to state its position in the way of facts, affidavits, and legal arguments in support of its position to which the BLM would have an opportunity to respond.

Id. at 2.

On June 30, 1992, we issued an order that BLM show cause why we should not vacate its April 23, 1990, decision and order of adjudication in accordance with BLM Instruction Memorandum (IM) No. 92-91, a revision of IM No. 87-652 based on Exploration & Producing U.S., Inc., 119 IBLA 76 (1991). BLM responded that although the issue of

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fn. 4 (continued)

Attachment 7 accompanies a copy of an MGPC form (page 182 of the SOR) requesting management approval of a proposed capital expenditure of \$200,000 as MGPC's 50 percent share of the costs of installing "about 15 miles of PE pipeline" in order to "[t]ie-in appurtenant Shurley Field wells to add at least 325 MCF/day capacity to the Newcastle Gas Plant." The form indicates that Western and MGPC will each pay a 25 percent share of these costs, i.e., \$100,000 each.

how much compensation would be due for avoidably lost gas is affected by IM No. 92-91, the underlying issue "is whether the gas was, in fact, avoidably lost because a prudent operator would have marketed this natural gas long before appellant did so" (Response at 1). BLM suggests we

Western replies that BLM "has failed to acknowledge the entire scope and effect of I.M. 92-91. . . . [T]he BLM has an [sic] relative to its dealing with producers for gas which was perhaps improperly ventilated . . . [i.e.,] the operator must be sent a notice and allowed 60 days to respond to the same concerning its reasons why gas was vented relative to the inability to economize

(Reply at 2-3).

Western is presumably referring to Paragraph II.B. of IM No. 92-91, which provides the same as it did in IM No. 87-652, and reply overlook the BLM Newcastle Area Manager's March 9, 1988, letter to Western concerning Federal leases W-03 and W-59547. See SOR at 45-46. This letter stated that a review of the lease files indicated there was a time when gas was out approval; that NTL-4A requires approval; and that Western was required "to submit a request for venting or flaring approval \* \* within sixty (60) days from receipt of this notice." This letter, and the similar March 11, 1988, letter for lease WY following information:

1. The monthly volume of gas flared or vented for each well from thirty (30) days past the completion date of the gas was captured or when sales began.
2. The monthly volume of gas flared or vented for each well from thirty days past the completion date for of gas sales but not yet connected to a sales line.
3. The maximum per day volume of gas flared or vented for each well that is not connected to a sales line.

The information submitted will be supported by engineering, geologic, and economic data which demonstrate that the expenditures necessary to market or beneficially use the gas are not economical. The justification will include that conservation would lead to a premature abandonment of recoverable oil reserves and a greater loss of equivalent if venting or flaring were permitted to continue.

The record states that Western responded verbally to the March 9, 1988, letter "with dates wells were placed on gas sales and converted from gas to electric, and stated the problems that they were having getting approvals from the U.S.G.S. [Geological Survey] due to health problems of the district engineer" (Memorandum of Aug. 17,

1989, from the Newcastle Area Manager to the Wyoming State Director). This memorandum also states that "[a] second requesting documentation on the problems with getting approvals. There was no response to the second 60-day letter."

The second 60-day letter was dated May 17, 1989. It requested "any correspondence relating to the venting or flaring of However, it concluded: "Since the wells were connected to a pipeline, it is assumed that it was economic to connect the wells no economic justification is required." See SOR at 51. 5/ Western in fact did respond to this letter, and included a discussion of the economics of connecting the wells to August 29, 1989. See SOR at 53-55. As a result, BLM's November 14, 1989, decision determining that the gas vented or was avoidably lost stated: "[Y]our response to our second sixty (60) day letter was not incorporated into our analysis since the the sixty (60) day timeframe" (SOR at 56).

[1] We agree with BLM that a determination whether the gas was avoidably lost logically precedes a determination of compensation in accordance with IM No. 92-91. We cannot answer the question whether it was avoidably lost on the present record we are not persuaded either that the submission of additional facts, affidavits, and legal arguments to us would enable us to decide Basin Partnership, 116 IBLA 23, 25 (1990), or that the issue would be most efficiently resolved at this stage by referring it to an Administrative Law Judge for a hearing. As noted above, the BLM Area Manager acknowledged he did not take Western's comments into account in making his November 14, 1989, decision. BLM has also acknowledged that "the assumption that if at any time a well is connected to a gas gathering facility, it was economical to capture the gas from the well \* \* \* is not always the case" (Answer at 2). It is incumbent on BLM to specify in detail what facts it needs, e.g., production and distance to existing pipelines (see BLM Reply at 2), to determine in accordance with the IM whether the gas was avoidably lost, i.e., whether "it was uneconomic to capture the gas at the time of application and as of the expiration of the initial, authorized test period." It is incumbent on Western to provide the facts and any additional information that is relevant. In this case that would include the quantity and quality of gas produced from the given Western's apparent 25 percent participating interest (see SOR at 182), Western's role in deciding when to extend the

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5/ The Aug. 17, 1990, memorandum from the Newcastle Area Manager to the State Director concluded:

"The wells connected to a pipeline are assumed to be economic, so an economic test is not required on those wells. The wells that received approval to vent/flare gas did not receive approval for previously vented/flared gas and no additional economics were required. It was assumed that gas vented/flared in May, 1981 and later was economic and gas was avoidably lost."

160-61. See Wayne D. Klump, 104 IBLA 164, 166 (1988); Ladd Petroleum Corp., supra at 8-9 (1989). We suggest BLM specify in writing the facts and the format necessary for it to determine whether gas was avoidably lost and, if so, what compensation is appropriate in accordance with IM 92-91; provide Western a definite period to respond fully; and then make a decision based on the present record as supplemented.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's April 23, 1990, decision is set aside and the matter is remanded to the BLM Area Manager for adjudication in accordance with the preceding discussion.

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Will A. Irwin  
Administrative Judge

I concur:

124 IBLA 118

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Gail M. Frazier  
Administrative Judge