

ROBERT L. BAYLESS

IBLA 97-127, 97-128

Decided April 3, 1998

Appeal from two decisions of the New Mexico State Office, Bureau of Land Management, concerning gathering and reporting of natural gas production on Tribal leases. Jicarilla 451, 452, 464, 491, 492; (NM) SDR 97-03, SDR 97-04.

Reversed.

1. Oil and Gas Leases: Production

Under 43 C.F.R. § 3162.7-3, gas production generally must be measured by orifice meters or other methods acceptable to the authorized officer, but off-lease measurement and/or commingling may also be approved. The authorized officer may require recalculation using a different measurement process if BLM determines that off-lease measurement has resulted in underreporting of volumes of gas produced, but such an ordered recalculation, amounting to implicit imposition of a new measurement plan, will not be applied retroactively to require amendment of previously submitted production reports when the operator measured and allocated production in accordance with the approved plan in effect at the time.

APPEARANCES: Tommy Roberts, Esq., Farmington, New Mexico, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Robert L. Bayless (Bayless) has appealed from two Decisions of the New Mexico State Office (NMSO), Bureau of Land Management (BLM), concerning the gathering and reporting of natural gas production on Tribal leases Jicarilla 451, 452, 464, 491, and 492. This Board consolidated the two appeals because they arise from a common factual background and present closely related questions of fact and law.

In two Decisions dated September 10, 1996, the Area Manager of the Rio Puerco Resource Area, BLM, notified Bayless that BLM had completed Production Accountability Reviews (PAR's) on Bayless' Companero Gathering

System and Gasbuggy Gathering System for the period January 1993 through June 1995, and that BLM had determined that Bayless had improperly underreported volumes of gas production on both systems for the PAR period. Both Decisions ordered Bayless to correct the volume information back to the well records as appropriate. By separate letters dated October 7, 1996, Bayless submitted requests to the New Mexico State Director, BLM, for review of the Area Manager's Decisions. In two separate Decisions dated November 19, 1996, the NMSO upheld the September 10, 1996, Decisions of the Area Manager. Bayless subsequently filed separate appeals to this Board, and those appeals have been consolidated, as noted above.

Bayless purchased the Jicarilla 491 and 492 wells, located on tribal lands in Arriba County, New Mexico, from Amoco Production Company in 1988. Subsequent to his acquisition of these wells, Bayless negotiated with Northwest Pipeline Corporation to set a sales meter at a central delivery point on Northwest Pipeline Corporation's existing pipeline system at a location off the Jicarilla Apache Tribal Reservation in sec. 13, T. 27 N., R. 3 W., New Mexico Principal Meridian, Rio Arriba County, New Mexico. These wells and the gathering lines connecting them are owned and operated by Bayless and are commonly known as the Companero Gathering System. (Companero Statement of Reasons (SOR) at 2-3.)

The sales meter was set on the Companero Gathering System in July 1988, and the Jicarilla 491 and 492 wells connected to the gathering system behind the sales meter in that month. In conjunction with the installation of the sales meter at the central delivery point, Bayless installed a small orifice meter at each wellhead. The wellhead meter was utilized by Bayless as a means by which actual aggregate sales volumes as measured at the sales meter could be allocated back to the individual wells. This measurement methodology was documented in the form of a written plan for off-lease measurement and surface commingling and was submitted by Bayless to the BLM for approval on February 12, 1993. This plan was approved by BLM on April 12, 1993, and remains in full force and effect today. (Companero SOR at 3-4.)

Bayless purchased the Jicarilla 451 well, located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  of sec. 4, T. 29 N., R. 3 W., New Mexico Principal Meridian, Rio Arriba County, from Southland Royalty Company, and recompleted it in the Fruitland Coal formation in 1986. At about the same time, Bayless drilled the Jicarilla 452 No. 1 well in the SE $\frac{1}{4}$ SE $\frac{1}{4}$  of sec. 6, T. 29 N., R. 3 W., New Mexico Principal Meridian, also in Rio Arriba County, and completed it in August 1986. Bayless thereafter negotiated with Northwest Pipeline Corporation to set a sales meter at a central delivery point on Northwest Pipeline's existing pipeline system at a location off the Jicarilla Apache Tribal Reservation in sec. 12, T. 29 N., R. 4 W., New Mexico Principal Meridian, Rio Arriba County. The sales meter for the Gasbuggy Gathering System was set in April 1987 and the two wells connected to the gathering system behind the sales meter. In conjunction with the installation of the sales meter at the central delivery point, Bayless installed a small orifice meter at each wellhead. The wellhead meter was utilized by Bayless

as a means by which aggregate sales volumes as measured at the sales meter could be allocated back to the individual wells. (Gasbuggy SOR at 3.)

Subsequent to the installation of the sales meter at the central delivery point, Bayless drilled and completed the Jicarilla 452 No. 2 well and the Jicarilla 464 No. 6 well on Jicarilla Apache Tribal oil and gas leases. These wells were connected to the Gasbuggy Gathering System in January 1989 and September 1988, respectively. In conjunction with the connection of each of these wells to the Gasbuggy Gathering System, a small orifice meter was installed at the wellhead for allocation purposes. (Gasbuggy SOR at 4.)

Since bringing the Gasbuggy Gathering System on line, Bayless has reported sales volumes as measured at the sales meter and has allocated sales volumes back to the individual wells on the basis of measurements at the wellhead meters. This measurement methodology was documented in the form of a written plan for off-lease measurement and surface commingling and was submitted by Bayless to BLM for approval on February 12, 1993. This plan was officially approved by BLM on April 12, 1993, and remains in full force and effect. (Gasbuggy SOR at 4-5.)

In the two BLM Decisions dated September 10, 1996, BLM noted volume discrepancies between the wellhead meters and the sales meter on both the Companero Gathering System and the Gasbuggy Gathering System and advised Bayless that it (BLM) had determined the wellhead meters to represent the correct data that should have been reported on the Form MMS-3160 for the PAR period. (Sept. 10, 1996, Dec. at 1.) In its subsequent October 7, 1996, requests for State Director Review, Bayless argued that the September 10, 1996, Decisions never mentioned the BLM approval of the Bayless plan for off-lease measurement and surface commingling. Moreover, Bayless explained in both submissions, the volume difference between the sum of the individual wellhead allocation meters and the sales meter can be explained by two factors — gas measurement and gas venting. Bayless explained that the real impact associated with the use of wellhead meters to measure low wellhead volumes is the overstatement of the volumes of gas actually produced. Equally important, Bayless claimed, the venting of gas during the winter months is an accepted and allowable practice to unblock gathering lines so that production from the wells can continue. (Bayless Oct. 7, 1996, Req. at 4.)

In affirming the September 10, 1996, Decision of the Rio Puerco Resource Area Manager, the Deputy State Director, in his two November 19, 1996, Decisions, here upon appeal, stated that Bayless had failed to provide any records or documentation of measurement inaccuracies in the individual wellhead allocation meters that would explain the volume discrepancies. The Deputy State Director also determined that Bayless had failed to provide any records or documentation as to the date and duration of time gas was vented to unblock gathering lines that would explain the volume discrepancies. (Nov. 19, 1996, Dec. at 4.)

In Bayless' consolidated appeals of the two November 19, 1996, Decisions to this Board, Appellant first notes that BLM has not, at any time, attempted to rescind, terminate, or otherwise invalidate its prior approval of Bayless' two plans for off-lease measurement and surface commingling. (Companero SOR at 6; Gasbuggy SOR at 6.) Second, Bayless contends, as he had in his request for State Director Review, that volume discrepancies are inherent in a system of off-lease measurement of the type proposed and implemented by Bayless and approved by the BLM. More specifically, Bayless claims that under this system of off-lease measurement, the use of accurately calibrated wellhead allocation meters to measure low wellhead volumes will result in the overstatement of the volumes of gas actually produced. This phenomenon, Appellant explains, is documented in the Report of the Off-Lease Sales, Usage and Measurement Subcommittee of the San Juan Basin Working Committee, which Appellant has submitted on appeal. See Exhibit F to Gasbuggy and Companero SOR's.

Bayless contends that the phenomenon described above adequately explains the volume discrepancies identified by BLM. <sup>1/</sup> Bayless also states that his records show that Williams Field Services, the successor in interest to Northwest Pipeline Corporation, has, at all times material hereto, calibrated the central delivery point sales meters for both systems in accordance with the requirements set forth in Onshore Oil and Gas Order No. 5, Measurement of Gas (Onshore Order No. 5). Furthermore, Appellant states, commencing on or about December 13, 1993, and continuing until the present, Bayless has calibrated the wellhead allocation meters on the Gasbuggy and Companero Gathering Systems in accordance with the requirements set forth in Onshore Order No. 5. (Gasbuggy SOR at 6-7; Companero SOR at 6-7.) Thus, Appellant claims, the period of compliance with the requirements of Onshore Order No. 5 overlaps approximately 18 months of the PAR period. Bayless further claims that his calibration records reflect no history of meter error problems and no history of meter adjustments during this period of time. He claims, therefore, that even though sales meter and wellhead allocation meter calibration has been maintained for at least 18 months of the PAR period, the BLM calculations for each of those months reflects volume deficiencies. Bayless asserts again that he has provided an explanation for the volume discrepancies which has not been challenged or refuted in any way by BLM. He therefore argues that the November 19, 1996, Decisions appealed from are without justification. (Gasbuggy SOR at 7-8; Companero SOR at 7.)

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<sup>1/</sup> In prior submissions to BLM, Appellant had stated that the volume discrepancies could be explained, in part, by the periodic venting of gas from the two systems for operational purposes. In his appeal of the Nov. 19, Deputy State Director's Decisions to this Board, however, Bayless claims to now have reviewed all records concerning the Companero and Gasbuggy Gathering Systems and has concluded that there has been no gas venting on either system during the PAR period. Bayless now contends that such volume discrepancies are fully explained by the phenomenon described herein.

[1] Initially, we reject Bayless' contention that BLM's April 12, 1993, approval of his two surface commingling and off-lease measurement plans precludes BLM from reevaluating that method or from imposing a new measurement system. Gas measurement requirements are set out in 43 C.F.R. § 3162.7-3:

All gas production shall be measured by orifice meters or other methods acceptable to the authorized officer on the lease pursuant to methods and procedures prescribed in applicable orders and notices. \* \* \* Off-lease measurement or commingling with production from other sources prior to measurement may be approved by the authorized officer.

The BLM issued Onshore Oil and Gas Order No. 5, effective March 27, 1989, to implement and supplement this regulation. 54 Fed. Reg. 8100 (Feb. 24, 1989). Part III. D of this Order, which is binding on operators of Federal and restricted Indian oil and gas leases (see 43 C.F.R. § 3164.1), discusses gas measurement by methods other than orifice meters at a location on the lease and requires that prior approval from the authorized officer be obtained before using any alternative method. 54 Fed. Reg. 8109 (Feb. 24, 1989). An operator requesting approval for an alternative gas measurement system and off-lease measurement must demonstrate that the system will meet or exceed the objectives of the applicable minimum standard or will not adversely affect royalty income or production accountability. 54 Fed. Reg. 8109-10 (Feb. 24, 1989).

In the case of the Companero and Gasbuggy Gas Gathering Systems, BLM became aware of a significant difference between allocation meter volumes and sales meter volumes during the PAR period. Such discrepancies raised questions about the adequacy of Bayless' surface commingling and off-lease measurement plan and justified BLM's concern that the volume amounts reported under the plan might not represent an accurate measure of the gas taken from the wells. Although Bayless has attempted to place the burden on BLM to establish the inadequacy of the Companero and Gasbuggy plans, Onshore Oil and Gas Order No. 5 clearly requires the operator to show that the alternative measurement measure will not adversely affect royalty income or production accountability. In that regard, however, Bayless offered the information contained in the San Juan Basin Working Committee's Report of the Off-Lease Sales, Usage and Measurement Subcommittee to explain the disparity between measurements taken at the wellhead from low-producing wells and those more-accurate measurements taken at the sales meter. The BLM has offered no Answer.

In this case, BLM had every right to rescind approval of the Companero and Gasbuggy plans if it determined that production was not being properly reported. Robert L. Bayless, 138 IBLA 210, 222 (1997). As we said in Bayless, "[a]pproval of a plan is hardly immutable since changing circumstances may render inadequate a once acceptable measurement system." Id. Although in Bayless, supra, BLM properly rescinded its plan approval, here it did not choose to do so. Rather, BLM directed recalculation of production volumes based not upon the sales meter readings, but rather on the

wellhead meter readings. This, despite an industry report that wellhead orifice meters in low-producing wells tended to overstate production. In effect, this amounts to the implicit imposition of a new gas measurement plan, without rejection of the existing plan, nor explanation of how the sales meters in the two existing gathering systems were providing inaccurate measurements.

We agree with Bayless that the existing plan has not been rescinded and remains in effect. We also agree that there is no evidence in the record that the central delivery point sales meters on either system has provided inaccurate reports of production. The evidence of repeated calibrations by Williams Field Services on Bayless' sales meters consistent with the requirements of Onshore Oil and Gas Order No. 5 suggests otherwise. We also find that Bayless has provided a reasonable explanation of the disparity between wellhead and sales meter readings which has not been rebutted or otherwise addressed by BLM, despite their opportunity to do so.

Bayless applied for approval of his two surface commingling and off-lease measurement plans on February 12, 1993, as required. The BLM approved the plans on April 12, 1993, based on information Bayless submitted at the time. Bayless reported production volumes after that date in accordance with the approved plans. While BLM's current reevaluation of the two plans implies that the previously approved plans might be inadequate to accurately account for production from the Tribal leases, that conclusion does not negate the fact that BLM originally approved the two plans and Bayless acted in reliance on BLM's approval. Furthermore, nothing in the record establishes that Bayless unjustly profited from the approved plans, or that wellhead orifice measurements are as accurate as the calibrated sales meter measurements. <sup>2/</sup>

Moreover, even if an ordered recalculation and direction to use wellhead measurements is not termed a rescission of the off-lease measurement plan by BLM, it has that same effect. By ordering Bayless to radically change the manner in which it measured volume production during the PAR period despite the continuing legal efficacy of the approved off-lease plan during that time, BLM has done implicitly what it has chosen not to do explicitly. Ordering a recalculation using a different, previously unapproved wellhead measurement system with wellhead meters of uncertain accuracy amounts to a retroactive taking by BLM. Under these circumstances, it would be unfair to penalize Bayless for measuring and allocating production during the PAR period in accordance with the approved plans by requiring him to retroactively adjust his production volumes. See Robert L. Bayless, 138 IBLA 210, 222 (1997) (similarly refusing to penalize

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<sup>2/</sup> While this Decision determines that BLM had not rescinded its prior approval of Appellant's off-lease measurement plan, and thus could not retroactively do so for the period January 1993 through June 1995, nothing precludes BLM from changing the method of gas measurement prospectively, provided the provisions of Onshore Oil and Gas Order No. 5 are met. See Robert L. Bayless, 138 IBLA 210, 222 (1997).

Appellant from measuring production in accordance with the approved plan by requiring him to retroactively adjust his production volumes); Viersen & Cochran, 134 IBLA 155, 166 (1995) (holding that the Government can be bound by an earlier affirmative recognition of a contract's acceptability as a basis for establishing a transportation allowance made by an official authorized at that time to make that determination); Supron Energy Corp., 46 IBLA 181, 191 (1980) (holding that where the Department has specified that a valuation methodology is adequate, it may not later assert that this method is incorrect or incomplete and reassess value retroactively).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the New Mexico Deputy State Director's two November 19, 1996, Decisions on appeal are reversed. The September 10, 1996, Decisions of the NMSO are reversed insofar as they direct Bayless to retroactively recalculate production volumes based on wellhead orifice meters under the Gasbuggy and Companero Gathering System approved plans.

Accordingly, we reverse BLM's November 19, 1996, Decisions affirming the September 10, 1996, Order to recalculate production volumes for the period January 1993 to June 1995 using wellhead orifice meter readings in derogation of the approved volume production reporting plans, and requiring the filing of amended production reports for the period January 1993 through June 1995, as we find the off-lease measurement plan was proper during that time.

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James P. Terry  
Administrative Judge

I concur.

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Gail M. Frazier  
Administrative Judge

