



DEVON ENERGY PRODUCTION COMPANY, L.P.

176 IBLA 396

Decided February 20, 2009



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

DEVON ENERGY PRODUCTION COMPANY, L.P.

IBLA 2005-222

Decided February 20, 2009

Appeal from a June 20, 2005, decision of the State Director, Wyoming State Office, Bureau of Land Management, on State Director Review, affirming a September 14, 2004, decision issued by the Field Manager, Buffalo Field Office. WYW 130050, *et al.*

Affirmed as modified.

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

Pursuant to 43 C.F.R. § 3162.7-3, all gas production is to be measured on the lease. However, under 43 C.F.R. § 3162.7-3, off-lease measurement or commingling with production from other sources prior to measurement may be approved by the authorized officer. Off-lease measurement and commingling with production from other sources prior to measurement are separate operations, each of which requires approval by the authorized officer; approval of one operation does not automatically authorize the other.

2. Oil and Gas Leases: Production--Oil and Gas Leases: Royalties

Where an operator has reported production volumes for multiple leases using an unapproved alternate off-lease method of measurement, BLM has the authority under 43 C.F.R. § 3162.4-3 to require reports of past production volumes for the leases using the authorized measurement method.

3. Oil and Gas Leases: Production--Oil and Gas Leases: Royalties

Regulation 43 C.F.R. § 3162.1(a) requires compliance with Onshore Oil and Gas Order No. 5, which controls the measurement of gas on Federal onshore leases under the

onshore operating regulations. Section IV of Onshore Oil and Gas Order No. 5 provides that a lessee desiring to use a measurement system different from that authorized in Order No. 5 may request a retroactive variance from the standard. BLM must approve a properly filed retroactive variance request if BLM determines that the proposed alternative meets or exceeds the objectives of the applicable minimum standards, or does not adversely affect royalty income or production accountability.

APPEARANCES: Margo Harlan Sabec, Esq., and Nicol Thompson Kramer, Esq., Casper, Wyoming, for Devon Energy Production Company, L.P.; John S. Retrum, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE M^cDANIEL

Devon Energy Production Company, L.P., (Devon) has appealed from a June 20, 2005, decision of the State Director, Wyoming State Office, Bureau of Land Management (BLM), on State Director Review (SDR), which upheld a September 14, 2004, decision issued by the Field Manager, Buffalo Field Office (BFO). The decision required Devon to begin reporting coalbed methane (CBM) production from the individual well meter volumes and to submit a plan for amending all past production volumes from the date of first production on all Federal oil and gas leases held by Devon.¹ For the reasons set forth below, we affirm BLM's decision as modified.

¹ Because the State Director had not yet issued a final decision on the matter, we dismissed Devon's initial appeal as unripe for review. See Order, IBLA 2005-127 (May 11, 2005). When the State Director issued a decision on June 20, 2005 (SDR Decision), Devon filed a notice of appeal with this Board. By Order, IBLA 2005-222, dated Aug. 15, 2005, this Board granted Devon's petition for stay and, pursuant to Devon's request, directed the parties to engage in settlement negotiations, and removed the case from the active docket. The parties agreed to submit a joint status report every 60 days to advise the Board of the status of settlement discussions. See Joint Status Report (JSR), date-stamped Aug. 22, 2005. No further JSRs were filed, however, and the Board issued a show cause order requiring the parties to explain why the appeal should not be returned to active review status. See Order, IBLA 2005-222 (Apr. 23, 2007). BLM responded, *inter alia*, that Devon had tendered a settlement offer on Apr. 25, 2007. See Unopposed Request for Extension of Time to Respond to Show Cause Order, date-stamped May 8, 2007. The Board again ordered negotiations and required the parties to submit a JSR every 30 days. See Order, IBLA 2005-222 (May 9, 2007). We ordered
(continued...)

BACKGROUND

Devon leases land from the Federal government in Wyoming's Powder River Basin (PRB) from which it locates, extracts, produces, and markets CBM. CBM is a natural gas variety that is trapped in underground coal seams and held in place by hydraulic pressure.² Simply put, the methane gas is extracted by drilling deep into a coal seam and pumping out the water, which lowers pressure and releases the gas. Because CBM production in the PRB initially occurs at both low pressures and volumes during the production process, the gas is piped to a central delivery point (CDP), where it is measured separately at an individual wellhead meter, then piped to a chamber called a header, where it is commingled with gas from a number of other wells (Federal, State and/or fee (private)). There, water vapor is removed, and then the commingled gas is measured again, this time by a sales meter, also referred to as a custody transfer meter.³ Devon calls this gathering system a "spoke and wheel gathering system." See Devon's Statement of Reasons (SOR) at ¶¶ 2, 15; Exhibit (Ex.) 5. The commingled CBM is then transported downstream for further treatment and, ultimately, transfer to the purchaser.

In a letter to BLM dated July 7, 1999, Devon requested in writing:

Devon Energy Corporation requests your approval to utilize McCrometer V-Cone meters for production allocation purposes for our Coal Bed Methane operations on BLM Lands. Devon proposes to meter production from each well at the wellsite, then commingle production downstream of the wells and custody transfer the gas through a central sales meter. Production will be allocated back to individual wells based upon their percent of the total measured volume.

SOR, Ex. 1.

¹ (...continued)

the appeal returned to active review status for resolution after learning from BLM that settlement negotiations had failed. See Order, IBLA 2005-222 (Mar. 12, 2008).

² While it has no direct bearing on the outcome of this case, some information regarding CBM was taken from BLM's Final Environmental Impact Statement (FEIS) regarding Devon's Federal leases within the PRB. See Powder River Basin Oil and Gas Project (WY-070-02-065). The FEIS was followed by a Record of Decision, which BLM's Wyoming State Office issued in May 2003.

³ In the parties' various pleadings and in other documents in the record, the terms "sales meter" and "custody transfer meter" have been used interchangeably to refer to the meter that measures production immediately after commingling at the header.

Devon's proposed alternate measuring method involves an initial separate measurement of production from Federal, State, and/or private wells within the communitization agreement (CA), followed by commingling the individual well streams, and then measuring the total commingled production at a central sales meter by allocating it back to the individual wells contributing to that total production volume based upon their respective percentages of the total volume of gas (as measured before commingling). See SOR at ¶ 3; BLM's Answer (Answer) at 8. "In a typical allocation scenario, each well would have an individual allocation meter measuring the production from that well. . . . The sales meter determines the actual sales volume. The sales volume allocated to each well is the total sales volume multiplied by the percentage determined from each individual allocation meter." Answer at 8.

On August 13, 1999, BLM responded to Devon's request to use McCrometer V-Cone meters. BLM stated:

As you know we have been evaluating the use of this meter for the past several months. Our evaluation has led us to the decision to allow their use subject to the attached conditions of the approval [which are inapplicable to this case]. In order to use these meters for measurement of federal minerals we request that you submit an application specifying the following:

- Well name and number and legal location
- Meter location
- Lease number

With your letter or sundry notice request we will approve the use of the McCrometer wafer style meter for allocation or custody transfer gas measurement

SOR, Ex. 2. BLM deferred action on Devon's proposal to commingle production and allocate production back to the individual wells for royalty determination purposes:

BLM has the responsibility to designate or accept measurement points from where measurements of royalties will be determined. All such designated measurement points are required to meet the minimum standards of Onshore Order #5. The distinction between production allocation meters and custody transfer meters . . . will continue to be a confusing issue to [the] industry, BLM and MMS [Minerals Management Service]. We are currently attempting to resolve these issues, although it will be several months before we will be able to issue clarification.

Id.

After BLM approved certain CAs,⁴ Devon submitted to BLM various Plans of Development (PODs), all of which provided that “[g]as flow from the individual wells will be measured with equipment located at the central delivery points (CDPs).” Administrative Record (AR), Vol. 6, BLM Audit and Inspection records. From 2000 to 2005, BLM approved more than 18 of Devon’s PODs without additional conditions.

The BLM Wyoming State Office issued to its field offices Information Bulletin (IB) No. WY-2001-039, dated March 30, 2001. It is a general guidance document titled “Combining of Production (Commingling) and Off-lease Storage and Measurement,” which states:

[T]he Authorized Officer may authorize the lessee to remove production from a leasehold to a central or off-lease point for purposes of . . . measuring [production]. When moving such production [off-lease], the lessee may combine the production from various wells, leaseholds, pools, fields, and operations, if such “combining of production” is done in accordance with provisions contained in this guidance, and with the prior approval of the Authorized Officer.

The combining of production, or the off-lease measurement and/or storage of production, from Federal or Indian leaseholds with other Federal, Indian, or non-Federal leases may be authorized when it can be demonstrated by the lessee/operator that such action will be in the interest of conservation and will not result in reduced Federal or Indian royalty revenues or improper allocation of Federal or Indian production.

. . . .

⁴ Several wells in Devon’s Federal lease WYW 146043 were committed to CA WYW 151583, approved Dec. 14, 2000, and effective June 17, 1999. Other wells in Devon’s Federal lease WYW 146043 were committed to CA WYW 153768, approved on Aug. 16, 2001, and effective Aug. 21, 2000. BLM approved CA WYW 151032 on Dec. 22, 2000, effective Jan. 5, 1999, which was created from wells in Devon’s lease WYW 044379 and wells on patented land. On Jan. 10, 2001, BLM approved a CA, designated WYW 151916, effective Feb. 2, 2000, which included wells in Devon’s Federal lease WYW 044379 and wells on patented land. On Aug. 13, 2001, BLM approved, effective Aug. 22, 2000, a CA involving 40.91 acres of Federal land in lease WYW 130050 and 40.75 acres of patented land. BLM designated this CA as WYW 153457.

II. DEFINITIONS

Combining of Production: The phrase “combining of production” as used in this guidance means any form of commingling or common storage whereby production from one source is combined with production from other sources prior to sale.

Off-Lease Storage and/or Measurement: The phrase “off-lease storage and/or measurement” as used in this guidance refers to the . . . measurement facility off the leasehold for valid economic [purposes], 43 CFR 3132.1(a) The term “measurement” refers to quantity and quality measurements of production.

See SOR, Ex. 17, IB at 1-2. The IB directs BLM to require lessees/operators to apply for approval of off-lease storage and/or measurement by filing a Sundry Notice with attached information so that BLM could determine whether approving such an application was economically justified (*i.e.*, royalties would not be reduced through approval of the application). SOR, Ex. 17, IB at 5, ¶ 4.

In March 2002, BLM began production accountability audits for reporting dates in August 2001 through January 2002 on six Federal CAs held by Devon: WYW 130050, WYW 151916, WYW 151032, WYW 151583, WYW 153768, and WYW 153457. SOR at 8, ¶ 22. BLM looked for individual, off-lease well meter volumes as the production volumes for lease reporting. The audits found, however, that Devon had submitted to MMS Monthly Reports of Operations (MROs) reporting volumes that were calculated by allocating the production measured at the sales meter described above rather than reporting volumes based on the metered individual well volumes, resulting in a discrepancy between the two.⁵ BLM notified Devon of its findings in a letter dated September 20, 2002, stating that Devon must “either explain these [discrepancies], or amend the MRO’s to reflect the produced volumes and sales volumes” for the individual well reports. AR, Vol. 9, letter from BLM to Devon (Sept. 20, 2002).⁶ In an attempt to clarify its position regarding the correct

⁵ In general, MMS deals with matters relating to royalty calculations and payments, including valuation, while BLM addresses production issues, including the measurement point for royalty purposes. *See, e.g.*, 30 C.F.R. §§ 206.152, 206.154(a)(1).

⁶ It is not disputed that “BLM has the responsibility to designate or accept measurement points (meters) from whose measurements royalties will be determined.” 54 Fed. Reg. 8100 (Feb. 24, 1989); *see also* 43 C.F.R. § 3161.2 (BLM is authorized and directed to approve, inspect and regulate the operations that are

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point of measurement (POM) for reporting purposes *via* its September 2002 letter and subsequent correspondence to Devon, BLM provided a copy of its April 22, 2002, “Dear Operator” letter,⁷ which stated in relevant part:

Our reviews have found that some operators are reporting coal bed methane production volumes based on a sales or a “master meter” allocation system. It appears that an individual well volume (or lease volume) is allocated based on volume measured by a commingled master meter downstream of the individual well/lease meter. . . .

By default, and in most instances, the measurement point for a CBM well is the individual gas meter at the wellhead or at a Central Delivery Point (CDP) building. This measurement point is the BLM inspection point, i.e., the meter must meet the requirements of Onshore Order No. 5, as it pertains to gas measurement. The volume measured at this point is the volume to be reported to [MMS].

Commingling of a federal lease’s production with another federal or non-federal lease is not authorized prior to the lessee’s production being measured at the above indicated measurement point.

This office has in the past authorized off lease measurement proposals. These proposals typically involve production that an operator transports off the lease to a CDP building. These off lease measurement approvals do not authorize commingling of a federal lease’s production with another lease’s production, whether it is federal or non-federal production.

. . . .

Also, our most current applicable guidance from BLM’s Washington Office [is Instruction] Memorandum (IM) No. 90-474 [] dated May 11, 1990 which established that

BLM’s responsibility for a proper accounting of the oil and gas produced from jurisdictional leases ceases once the production is last measured before leaving the leasehold

⁶ (...continued)

subject to the regulations in Part 3160).

⁷ Devon does not dispute that it received the April 22, 2002 “Dear Operator” letter shortly after its issuance.

(except where off-lease measurement is approved) but not past an inlet meter for a gas processing plant. . . . Thereafter, MMS is responsible[.]

SOR, Ex. 15.

While the audits were pending, Devon submitted Sundry Notices for the following CAs, which stated:

[Sundry Notice for lease CA WYW 153457, dated March 20, 2001,] requests a variance from Onshore Order #5 concerning the following wells. . . . Devon requests approval to utilize Control Microsystems Scadapack PLC and Real Flo gas calculation program in conjunction w/ a McCrometer V-cone meter to measure coal bed methane gas. Devon also requests a variance from Onshore Order #5 to measure gas off lease.

[Sundry Notice for CA WYW 151916, dated May 1, 2003,] request[s] a variance from onshore order #5 concerning the following well. Devon request[s] approval to utilize an Electronic Flow Measurement to measure coalbed methane gas. Devon also requests a variance from Onshore Order #5 to measure gas off lease. The measurement point is at the 20 mile CDP 34-1113 in the SW/SE 1/4, 1/4 of section 11, T51N, R73W.

[Sundry Notice for CA WYW 153768, dated May 1, 2003,] request[s] a variance from onshore order#5 concerning the following well. Devon request[s] approval to utilize an Electronic Flow Measurement to measure coalbed methane gas. Devon also requests a variance from Onshore Order #5 to measure gas off lease. The measurement point is at the 20 mile CDP 31-1013 in the NW/NE 1/4, 1/4 of section 10, T51N, R73W.

[Sundry Notice for CA WYW 151583, dated May 12, 2003,] request[s] a variance from onshore order#5 concerning the following well. Devon requests approval to utilize an Electronic Flow Measurement to measure coalbed methane gas. Devon also requests a variance from Onshore Order #5 to measure gas off lease. The measurement point is at the 20 mile CDP 34-1113 in the SW/SE 1/4, 1/4 of section 11, T51N, R73W.

[Sundry Notice for CA WYW 151032, dated May 12, 2003,] request[s] a variance from onshore order#5 concerning the following well. Devon

requests approval to utilize an Electronic Flow Measurement to measure coalbed methane gas. Devon also requests a variance from Onshore Order #5 to measure gas off lease. The measurement point is at the Russell CDP 44-1213 in the SW/SE 1/4,1/4 of section 12, T51N, R73W.

BLM approved all of Devon's Sundry Notices without modification or additional conditions. SDR Decision at 2.

On May 30, 2003, BLM's Wyoming State Office issued IM No. WY-2003-036 to address "unauthorized off-lease measurement, commingling, and allocation . . . and improper reporting of production" for CBM leases. SOR, Ex. 14 at 1. The IM states that when "off-lease measurement has been approved, royalty is due at the approved measurement point. The measurement point is usually synonymous with the royalty determination or royalty settlement point." *Id.* However, BLM did not specifically define or designate where those points might be located in an off-lease facility.

During the auditing process, BLM requested production measurements from individual wells of the leases and CAs under scrutiny. According to BLM, Devon continued to produce reports incorporating its allocation measurement process, but without submitting sufficient information to resolve the apparent gas volume discrepancies. SDR Decision at 3. BLM and Devon met in May 2004 to discuss the audit. Devon stated to BLM that it believed that, through approval of the PODs and Sundry Notices, BLM had effectively given Devon permission to measure the commingled gas stream at the sales meter and to allocate that measurement back to individual well meters based upon their percent of the total measured volume. *Id.* When BLM balked, Devon requested BLM to approve its measurement method for both past and present production. In denying that request, BLM explained that since BLM had no jurisdiction over non-Federal meters, it could not control calibration of those meters or other measurement standards for the meters measuring commingled Federal, State, and fee production.⁸ BLM directed Devon to submit a plan for resolving all outstanding audit issues. *Id.*

As it was not able to resolve the matter informally, BLM issued a final decision letter on September 14, 2004 (Field Manager's Decision), in which it stated that "no allocation or commingling approvals were issued." BLM instructed Devon to "start reporting all federal gas production *from each wellhead meter. . .*," and to "submit a plan, along with a time line," for correcting all Oil and Gas Operations Reports

⁸ BLM subsequently stated that it would not approve Devon's request to commingle and allocate production of CBM because "BLM does not have jurisdiction for the meters on private and State [land and is] not able to enforce changes or assume the liability." See AR Vol. 9, letter from BLM to Devon (June 28, 2004).

(OGOR), MMS-Form 4054-B, to reflect reporting from each individual wellhead meter from first production. SOR, Ex. 6 at 1. On October 13, 2004, Devon filed its request for SDR of the Field Manager's Decision.

On January 14, 2005, Devon presented oral arguments to the Wyoming Deputy State Director, Division of Minerals and Lands. The company contended that BLM granted approval of its commingling and allocation method in its August 13, 1999, letter, and in its approval of Devon's PODs and Sundry Notices. The State Director rejected this argument in his June 20, 2005 decision: BLM "did not approve commingling and allocation of produced gas [in its August 13, 1999, letter]; instead it [left] the request unanswered for future clarification." SDR Decision at 5. The Deputy State Director also held that BLM's "approval of a permit to drill . . . does not provide or include the approval of other 'subsequent well operations,' such as off-lease measurement, commingling, or allocation," *id.* at 6, and that "[t]he sundry notices submitted by Devon . . . do not . . . supply the required information [e.g. maps, schematics, calculations used, specific gravity of each well, etc.,] necessary to evaluate this type of proposal for approval." *Id.* at 7.

Devon further argued before the Deputy State Director that its current gas measurement methods meet or exceed BLM requirements, that BLM has the authority to approve and audit all meters involved in Devon's commingling and allocation system, including meters on State and private land and any meter it designates as the off-lease POM, and therefore, that no change in its measurement methods should be required. The State Director disagreed. Relying on the "Washington Office IM 90- 474, *The Bureau's Oil and Gas Production Accounting Responsibilities . . .*," the Deputy State Director decided that "any measurement past the V-Cone/allocation meters is outside BLM's jurisdiction." SDR Decision at 8. The Deputy State Director also held that

any Devon Federal or non-federal well that is committed to a Federal unit or communitization agreement [is] subject to Federal regulations. However, all other non-federal Devon wells, gas measurement procedures, and commingling and allocation operations are not subject to Federal regulations. The BLM has no jurisdiction on these wells and will not attempt to enforce the Federal regulations at 43 CFR 3160.

Id. Further, the State Director disagreed with Devon's belief that the audits relate only to the six units under audit on the ground that Devon's commingling and allocation measurement system was not authorized for any Devon lease and Devon acknowledged that it uses on all of its leases subject to BLM's jurisdiction. The State Director therefore held that BLM had the authority to require the company to amend its production reports for all of its Federal leases on Federal lands in the PRB. *Id.* Devon appealed.

DISCUSSION

On appeal to this Board, Devon repeats, for the most part, the arguments it made before the Deputy State Director. The gravamen of Devon's initial argument is that BLM explicitly approved its allocation measurement method. According to Devon, in BLM's August 1999 response to Devon's July 1999 request for approval, BLM first "approved Devon's measurement method (measurement of the commingled gas stream at the sales meter, and allocation of that measurement back to the individual well allocation meters based upon their percent of the measured volume) . . ." SOR at ¶ 36. Devon also argues that BLM granted approval of Devon's commingling and allocation process when it accepted Devon's PODs and Sundry Notices. *Id.*, at ¶ 38. In contrast, BLM contends that its August 1999 letter expressed "no approval whatsoever of any 'allocation measurement method' or use of a sales meter as a POM for royalty purposes." Answer at 15. BLM further denies that it permitted Devon to implement its measurement method through approval of PODs or Sundry Notices.

The Mineral Leasing Act (MLA), 30 U.S.C. §§ 181-287 (2000), requires lessees to pay the Government "a royalty at a rate of not less than 12.5 percent in amount or value of the production removed or sold from the lease." 30 U.S.C. § 226(b)(1)(A)(2000). To ensure the Government receives its due royalties, the Secretary of the Interior is directed by statute to establish a comprehensive inspection, auditing, and collection system. *See* section 101(a) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1711(a) (2000). The responsibility for enforcement of the regulations regarding production volume measurements has been delegated to BLM as part of its broad range of duties concerning onshore oil and gas operations under the regulations in 43 C.F.R. Part 3160. So that the Government may fairly reap its royalties, 43 C.F.R. § 3162.4-3 requires an oil and gas lease operator, using Form MMS-3160, to report production data to BLM each month, including "[t]he quantity of oil, gas and water produced." *Id.* § 3162.4-3(d). The regulation states that "[t]he report on this form shall disclose accurately all operations conducted on each well during each month." *Id.* § 3162.4-3.

[1] Finally, 43 C.F.R. § 3162.7-3 prescribes the requirements for measuring gas: "All gas production shall be measured by orifice meters or other methods acceptable to the authorized [BLM] officer on the lease pursuant to methods and procedures prescribed in applicable orders and notices."⁹

⁹ In this case, the "applicable order" referred to in 43 C.F.R. § 3162.7-3 is Onshore Oil and Gas Order No. 5, 54 Fed. Reg. 8100 (Feb. 24, 1989), which controls the measurement of gas on Federal onshore leases. Section I.B. of Order No. 5 sets the minimum measuring standards necessary to promote conservation of natural

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An appellant challenging a State Director decision must “show that the State Director’s decision was arbitrary or against the weight of the evidence.” *Universal Resources Corp.*, 141 IBLA 244, 248 (1997). The primary question here is whether BLM approved, for production reporting purposes, Devon’s proposed allocation method in which it would commingle production, measure commingled production at a sales meter, and then allocate production back to individual wells. The record before us supports the conclusion that BLM never approved Devon’s alternative measurement method. Although BLM’s August 1999 letter did approve Devon’s request to measure production from its leases off-lease and to use V-cone meters for Devon’s individual well meters, it left for later clarification the issues involving the use of production allocation meters and custody transfer meters for royalty measurement purposes. In addition, nowhere in the Sundry Notices or PODs contained in the record did Devon request or BLM approve a different designated POM or grant permission to measure commingled production for royalty determination purposes in the manner Devon argues on appeal.

BLM did not specifically designate a POM until after the time period for which Devon was being audited, *i.e.*, when it issued its April 2002 “Dear Operator” letter, in which it stated that the default POM is the wellhead meter. However, that circumstance does not change our conclusion because the applicable regulation establishes that the measurement point for CBM is at the wellhead meter on the lease unless BLM designates a different POM either by approving a request for an alternative POM or by ordering an alternative POM on its own volition. Under 43 C.F.R. § 3162.7-3, in effect since 1987, “[o]ff-lease measurement or commingling with production from other sources prior to measurement may be approved by the authorized officer.” (Emphasis added.) In the instant case, BLM approved off-lease measurement. But off-lease gas measurement and production commingling before measurement are two separate operations, each of which requires BLM approval. *See Byron Oil Industries, Inc.*, 161 IBLA 1, 5 (2004). Approval of one operation does not automatically authorize the other. Consequently, an operator must obtain BLM’s prior approval both to measure production off-lease and to commingle production. If BLM does not approve an application to commingle production before measurement, it follows that an operator cannot properly commingle production and use a measurement method that allocates the commingled sales volumes back to individual wells for royalty purposes. Thus, in the absence of BLM’s prior

⁹ (...continued)

resources and to ensure proper measurement of gas production for sales and allocation purposes, so that the Federal Government will receive the royalties due under governing oil and gas leases. 54 Fed. Reg. at 8106. Onshore Oil and Gas Order No. 5 was adopted pursuant to the Administrative Procedure Act notice-and-comment rulemaking procedures (5 U.S.C. § 553). *See* 54 Fed. Reg. at 8100.

authorization, the operator is required to measure gas production from each wellhead for royalty reporting purposes (*i.e.*, from the default POM under Order No. 5).¹⁰

Because BLM never approved Devon's commingling and allocation measurement method for royalty determination purposes, Devon's method of reporting was unauthorized. We therefore conclude that BLM properly determined that Devon was not in compliance with established minimum standards.

[2] Devon further argues that BLM cannot order Devon to amend the OGORs of past production volumes from the date of each well's first production for all of its Federal wells located within the PRB but not under audit because such action exceeds the scope of the audits. SOR at 17-18. BLM contends that it is not limited by the scope of the audits it has conducted and Devon has acknowledged that it has used and continues to use its allocation measurement system and its sales meter as the POM for royalty determination purposes on *all* of its Federal leases in the PRB.¹¹ Since Devon's alternate measurement system has not been approved, BLM concludes that "it is appropriate to require Devon to correct all of the unauthorized operations." Answer at 20-21.¹²

BLM is responsible for the accuracy of the volumes which are reported by operators to MMS for royalty computation purposes and thus is obligated to see that those volumes accurately reflect the quantity of oil and gas taken from the Federal wells and eventually sold. *Harvey E. Yates, Co.*, 135 IBLA 373, 377 (1996). As stated above, 43 C.F.R. § 3162.4-3 makes clear that BLM is authorized to demand accurate data from appellant concerning production from the lease by ordering monthly reports of operations, which must accurately disclose all operations conducted on

¹⁰ We also reject Devon's argument that it designed its "spoke and wheel" gathering system and took other action in reliance on BLM's alleged approval of Devon's allocation measurement system. Use of the "spoke and wheel" system is not evidence of, or a substitute for, requesting and obtaining written authorization to use an alternative measuring system and POM. As BLM states, "it was and is common practice of operators of CBNG wells on federal, state, and fee lands in the PRB to employ the 'spoke and wheel' gathering system to commingle gas production downstream of the wells, and to custody transfer the gas through a central sales meter, but still use 'allocation' well meters for wells on the federal lands of the system at the POM for royalty determination purposes." Answer at 13, *citing* affidavit of John Shufflebarger, attached to Answer. Devon offered no rebuttal to BLM's statement.

¹¹ "Devon continues to measure its gas using individual well meters and the sales meter at each CDP." SOR at ¶ 11.

¹² Neither party cites any authority for their respective arguments.

each well during each month, the status of operations on the last day of the month, a general summary of the status of operations on the leased lands, and the quantity of oil, gas, and water produced. Implicit in this authority is the right to take action to ensure that accurate reports have been filed and to require corrective action when errors are found. *Crawley Petroleum Corp.*, 140 IBLA 216, 219 (1997); *C.C. CO.*, 116 IBLA 384, 387 (1990). In addition, in *Union Texas Petroleum Energy Corp.*, 153 IBLA 170 (2000), this Board held:

Section 101(c)(1) of FOGRMA, 30 U.S.C. § 1711(c)(1) (1994), directs the Secretary to “audit and reconcile, *to the extent practicable*, all current and past lease accounts for leases of oil or gas and take appropriate actions to make additional collections or refunds as warranted.” See 30 C.F.R. §§ 217.50 and 217.51 (1990) (emphasis added). This statutory authority entitles MMS to require restructured accounting when MMS has, by sampling a portion of but not all of the producer’s production accounts, discovered a systemic error or deficiency (whether or not amounting to a pattern of error) in the producer’s royalty computations. *Marathon Oil Co.*, 149 IBLA 287, 292-93 (1999); *Amoco Production Co.*, 123 IBLA 278, 282, 285 (1992); *Amoco Production Co.*, 123 IBLA at 294 (Hughes, A.J., concurring). This does not constitute an impermissible “self-audit,” in contravention of FOGRMA. *Marathon Oil Co.*, 149 IBLA at 292 (citing *Phillips Petroleum Co. v. Lujan*, 963 F.2d 1380, 1386 (10th Cir. 1992)); *Amoco Production Co.*, 123 IBLA at 291-94 (Hughes, A.J., concurring). In these circumstances MMS can impose upon the lessee the burden of reviewing the lease accounts in an effort to disclose other instances when royalty computation has been distorted by the identified error or deficiency in order to make the necessary correction and pay additional royalty found due, if any.

153 IBLA at 179. The same statutory authority authorizes BLM to require corrections of acknowledged systemic errors affecting multiple leases in the context of production volume reporting, such as those involved in this case.

Here, Devon has acknowledged that it measures its gas using its alternate allocation measurement method at the CDPs involved here as well as its other CDPs, which includes taking measurements of the individual wellhead gas volumes for each Federal well, and it has a duty to maintain that information pursuant to 43 C.F.R. § 3162.4-1(d).¹³ Also, BLM has found discrepancies between Devon’s measurement

¹³ “All records and reports required by this section shall be maintained for six years from the date they were generated. In addition, if the Secretary, or his/her designee
(continued...) ”

by allocating the production at the sales meter and measurement at the individual well meters. For this reason and because it determined that Devon's alternate off-lease measurement method was unauthorized, BLM has authority to require the reporting of past production volumes using the authorized measurement method.¹⁴

Finally, Devon argues that BLM should retroactively approve its allocation measurement method because it is more accurate, will not adversely affect royalty income or production accountability, would increase the amount of royalties paid, and would serve the public interest. SOR at 14-17. BLM counters on appeal that it cannot determine the accuracy of the allocation because it does not have jurisdiction over all of the meters and non-Federal wells¹⁵ subject to Devon's allocation measurement method, and thus cannot ensure proper accounting of volumes of gas for royalty determination purposes. Answer at 20.¹⁶

We agree that jurisdiction over all wells and meters is necessary in a commingling and allocation measuring system so that BLM can ensure the correct calibration of each meter, proper measurement procedures, and accurate production reports. The record here suggests that Devon's wells on neighboring State or private lands with production flowing to the CDPs are committed to the CAs. Under those CAs, production of communitized substances and the disposal thereof are "subject to all applicable Federal and State laws or executive orders, rules, and regulations." SOR, Ex. 9 at 4. BLM thus has the authority to inspect the private and State well

¹³ (...continued)

notifies the recordholder that the Department of the Interior has initiated or is participating in an audit or investigation involving such records, the records shall be maintained until the Secretary, or his/her designee, releases the recordholder from the obligation to maintain such records." 43 C.F.R. § 3162.4-1(d).

¹⁴ See IM 2003-036, which states: "When unapproved measurement is discovered (including unapproved off-lease measurement, unauthorized commingling of production, or improper claims of beneficially used gas), BLM will immediately contact the operator and request past and present production OGOR reporting volumes be corrected" SOR, Ex. 14 at 3.

¹⁵ BLM does not indicate which wells it are not within its jurisdiction.

¹⁶ The Deputy State Director relied on Washington Office IM 90-474 to hold that "any measurement past the V-Cone/allocation meters is outside BLM's jurisdiction." SDR Decision at 8. The IM stated on its face that it was to expire on Sept. 30, 1991. While it is not clear whether that policy has been reissued or extended, we find that BLM's reliance on it here is misplaced. The 1990 IM does not specifically discuss BLM's jurisdiction for production measurement as it relates to POMs for Federal and non-Federal wells in the context of unitization or communitization agreements.

meters, as well as the sales meter, to ensure compliance with the onshore oil and gas regulations: “Regulations in this part relating to . . . measurement, reporting of production and operations, and assessments or penalties for noncompliance with such requirements are applicable to all wells and facilities on State or privately-owned mineral lands committed to a unit or communitization agreement which affects Federal or Indian interests.” 43 C.F.R. § 3161.1(b); *see Tricentrol United States, Inc.*, 97 IBLA 387, 392 (1987), *aff’d. sub nom. Norfolk Energy v. Hodel*, 898 F.2d 1435, 1440-42 (9th Cir. 1990).

The remaining question is whether BLM must *consider* a request for a retroactive variance. Section IV of Onshore Oil and Gas Order No. 5 provides that a lessee desiring to use a measurement system different from that authorized in Order No. 5 may request a variance from the minimum standards, along with an explanation of the circumstances warranting approval and the proposed alternative means by which the minimum standards will be satisfied. *See* 54 Fed. Reg. at 8110. “BLM shall approve the requested variance(s) if it is determined that the proposed alternative(s) meets or exceeds the objectives of the applicable minimum standard(s), or does not adversely affect royalty income or production accountability.” *Id.* That requested variance may be retroactive. *See* IM 2003-036, SOR, Ex. 14 at 3. (“When requested and justified by the operator (i.e. low pressure and low production volumes pertaining to commingling of production), the authorized officer may, on a case-by-case basis, find it appropriate to grant a retroactive approval of a BLM POM in order to properly account for and satisfy production reporting requirements”).¹⁷

We therefore hold that BLM must consider any such request for a retroactive gas production measurement variance that may be filed by Devon.

Any additional arguments advanced by the parties not specifically addressed herein have been considered and rejected.

¹⁷ *See also Conoco, Inc.*, 164 IBLA 237, 239-40 (2005); IB No. WY-2001-039, SOR, Ex. 17 (“The combining of production, or the off-lease measurement and/or storage of production, from Federal or Indian leaseholds with other Federal, Indian, or non-Federal leases may be authorized when it can be demonstrated by the lessee/operator that such action will be in the interest of conservation and will not result in reduced Federal or Indian royalty revenues or improper allocation of Federal or Indian production.”)

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 decision appealed from is affirmed as modified.

/s/
R. Bryan McDaniel
Administrative Judge

I concur:

/s/
James K. Jackson
Administrative Judge