



BRIGHAM OIL & GAS, LP

181 IBLA 282

Decided August 22, 2011



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

BRIGHAM OIL & GAS, LP

IBLA 2011-141

Decided August 22, 2011

Appeal of a decision of the Deputy State Director, Division of Resources, Montana State Office, Bureau of Land Management, affirming, on State Director Review, a Notice of Incidents of Noncompliance issued by the North Dakota Field Office for drilling an oil and gas well without prior approval. SDR No. 922-11-02.

Affirmed; petition for stay denied as moot.

1. Oil and Gas Leases: Civil Assessments and Penalties

Section 336 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 726, codified at 30 U.S.C. § 226(p) (2006), imposes certain statutory time deadlines on the Secretary, acting through BLM, relating to the processing of applications for permit to drill oil and gas wells. The failure of BLM to meet such time deadlines does not allow an operator to assume that its application has been approved and to commence drilling. Drilling an oil and gas well on a Federal oil and gas lease without obtaining the prior approval of BLM is a violation of 43 C.F.R. § 3162.3-1(c), and, under 43 C.F.R. § 3163.1(b)(2), BLM is required to impose an assessment of \$500 a day for each day the violation exists, including the days the violation existed prior to discovery, not to exceed \$5,000.

APPEARANCES: Randal M. Kirk, Esq., Denver, Colorado, for appellant.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Brigham Oil & Gas, LP (Brigham) has appealed from and petitioned for a stay of the effect of a March 23, 2011, decision of the Deputy State Director, Division of Resources, Montana State Office, Bureau of Land Management (BLM), affirming, on State Director Review (SDR) (No. 922-11-02), a February 10, 2011, Notice of Incidents of Noncompliance (INC) issued by the North Dakota Field Office (NDFO),

Eastern Montana/Dakotas District, BLM, for a violation under 43 C.F.R. § 3163.1(b), involving the drilling of the Esther Hynek 10-11 #1-H Well (Well), without prior BLM approval.

Because appellant has failed to show any error in the BLM decision, we affirm that decision, and deny the petition for stay as moot.

### *Background*

The present case involves the drilling of the Well on private surface/Federal minerals in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 10, T. 155 N., R. 93 W., Fifth Principal Meridian, Mountrail County, North Dakota, within Federal competitive oil and gas lease NDM-98083, which also encompasses the remaining acreage in the NW $\frac{1}{4}$  sec. 10.<sup>1</sup> The NW $\frac{1}{4}$  sec. 10 is also included in a 1,280-acre drilling and spacing unit prescribed by the North Dakota Industrial Commission, which combines fee leases in the remainder of sections 10 and 11 for purposes of drilling any horizontal well in the Alger-Bakken Pool of the Williston Basin.

On November 12, 2010, Brigham filed with the Field Office a Notice of Staking (NOS) for the Well, signed by a Brigham representative on that date.

On December 15, 2010, Brigham filed an Application for a Permit to Drill (APD) the Well with NDFO. The APD, which was signed by a Brigham representative on December 14, 2010, sought approval to drill the Well starting on January 14, 2011, and continuing for an estimated 60 days. The Well was to be drilled vertically, starting in sec. 10, to a total depth of approximately 10,460 feet, and then horizontally an additional 9,654 feet, bottoming in the Middle Bakken Formation, underlying sec. 11.

Brigham e-mailed BLM on December 14, 2010, stating that it had overnighted the APD to BLM, and that it believed that everything necessary had been provided, but if BLM needed any additional information, it should contact Brigham. E-Mail to Michael A. Nash, Supervisory Petroleum Engineer, NDFO, from Emeka Madu, Brigham, dated Dec. 14, 2010. Having not heard whether BLM had received the APD, Brigham inquired, by e-mail, on December 20, 2010, and was finally informed on January 12, 2011, that the APD had been received. See E-Mail to Madu from Nash, dated Jan. 12, 2011.

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<sup>1</sup> Oasis Petro North America, LLC (Oasis), a division of Oasis Petroleum Inc., is the current holder of the Federal lease, as a result of an assignment approved effective Jan. 1, 2010, and Brigham is the lease operator. The lease was originally issued, effective Nov. 1, 2008, pursuant to the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (2006), for a term of 10 years, to Oasis' predecessor-in-interest.

Thereafter, Brigham paid the APD processing fee, in the amount of \$6,500, on February 1, 2011. BLM does not dispute the fact that it neither notified Brigham as to the completeness of the APD nor notified Brigham of any action taken on the APD, prior to learning on February 9, 2011, that Brigham had spudded the well on January 24, 2011. On February 10, 2011, the Field Office issued its INC, charging Brigham, pursuant to 43 C.F.R. § 3163.1(b), with having committed a violation by drilling the Well without prior BLM approval, and assessing a total of \$5,000 in liquidated damages, the maximum amount allowed.<sup>2</sup>

Brigham sought SDR of the INC on March 10, 2011, pursuant to 43 C.F.R. § 3165.3(b). It argued that it properly concluded, based on the sequence of events surrounding submission of its NOS in November 2010 and APD in December 2010, that the APD had, in fact, been approved by BLM, and thus it was authorized on January 24 to drill the Well. Brigham contended that it reasonably assumed that its APD had been granted. Brigham asked BLM to rescind the INC entirely, or, absent that, vacate the INC, and issue a new INC, reducing the liquidated damages.

The Deputy State Director rejected Brigham's assertions and upheld the INC and assessment.<sup>3</sup> This appeal followed.

#### *Discussion*

Brigham asserts that the facts of the case support its position, in light of BLM's failure, as the Secretary's representative, to comply with the unequivocal mandatory requirements of section 366 of the Energy Policy Act of 2005, Pub. L. No. 109-58,

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<sup>2</sup> BLM characterized the violation at issue as a "MAJOR" violation in its INC. Brigham thereafter repeatedly refers to the fact that the INC was based on a "major" violation. The characterization in the INC is not supported by the regulations. See 43 C.F.R. § 3160.0-5 ("*Major violation*"). The violation in question constituted the more serious violation that warranted an *immediate* assessment of \$500 per day, up to a maximum amount of \$5,000, rather than an assessment of \$500 per day (major) or \$250 per day (minor) accruing for failure to abate a violation, after the conclusion of an established abatement period. Compare 43 C.F.R. § 3163.1(a)(1) and (2) with § 3163.1(b); e.g., *K2 America Corp.*, 163 IBLA 199, 201 (2004) ("[T]he regulatory scheme provides for the imposition of an immediate assessment without notice or an opportunity to abate").

<sup>3</sup> On May 16, 2011, BLM approved Brigham's APD. However, neither BLM nor Brigham contend that the approval of the APD was retroactive to the drilling of the Well.

119 Stat. 594, 726, codified at 30 U.S.C. § 226(p) (2006), which provide, under the heading “(p) Deadlines for consideration of applications for permits,” as follows:

(1) In general

Not later than 10 days after the date on which the Secretary receives an application for any permit to drill, the Secretary shall--

(A) notify the applicant that the application is complete; or

(B) notify the applicant that information is missing and specify any information that is required to be submitted for the application to be complete.

(2) Issuance or deferral

Not later than 30 days after the applicant for a permit has submitted a complete application, the Secretary shall--

(A) issue the permit, if the requirements under the National Environmental Policy Act of 1969 and other applicable law have been completed within such time[]frame; or

(B) defer the decision on the permit and provide to the applicant a notice--

(i) that specifies any steps that the applicant could take for the permit to be issued; and

(ii) a list of actions that need to be taken by the agency to complete compliance with applicable law together with timelines and deadlines for completing such actions.[<sup>4</sup>]

Thus, that section requires that the Secretary, acting through BLM, notify the person applying for an APD, in general, no later than 10 days after filing either that the APD is complete or that the APD is incomplete, in which case the necessary missing information must be identified. Then, not later than 30 days following submission of a complete APD, the Secretary must issue the permit or defer a decision on the permit, providing notice to the applicant of any specific steps the applicant needs to take for permit issuance and any necessary agency actions with timelines and deadlines for such actions.

Brigham asserts that the Deputy State Director erred in rejecting its position, which was based on BLM’s failure to comply with the mandatory requirements of section 366 of the Energy Policy Act of 2005. Notice of Appeal/Statement of Reasons

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<sup>4</sup> The statutory mandates are set forth in Onshore Oil and Gas Order No. 1 (Approval of Operations) (Onshore Order No. 1) (72 Fed. Reg. 10308, 10328 (Mar. 7, 2007)), which is binding on BLM and, *inter alia*, operators of Federal oil and gas leases. See 72 Fed. Reg. at 10329, 10334; 43 C.F.R. § 3164.1; see also BLM Instruction Memorandum No. 2007-115, dated May 2, 2007, at 1 (“Thirty days after the APD is deemed complete the BLM must approve, defer, or deny the APD”).

for Appeal/Petition for Stay (NA/Petition) at 2. It asserts that BLM was not required by the statute to approve the APD or even to process the APD within a specific time frame, but that BLM was required to determine the completeness of the APD within 10 days of filing, and, absent any deficiency in the APD, to notify Brigham, within 30 days of receipt of the complete APD, whether the APD would be approved or action on it deferred in order to satisfy its obligations under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), and other applicable law. NA/Petition at 2. It rejects BLM's excuse for not so acting, *i.e.*, that it was overwhelmed by the number of APDs filed for processing.

Brigham argues that, given BLM's failures, "it was not unreasonable for Brigham to assume that the BLM was substantively in compliance with the Act," and that it had approved the APD: "[Brigham seeks] a clarification that Brigham's assumption that the permit had been granted was reasonable." NA/Petition at 5, 12. It notes that in many cases, were the operator not to go forward with drilling "on the assumption that the absence of communication of . . . [the] need for deferral indicated the APD had been approved, the NDFO's eventual confirmation of approval . . . would occur after lease expirations or at a time when it might no longer be practicable to drill a well."<sup>5</sup> *Id.* at 5.

In sum, Brigham asks the Board to rescind the violation as inappropriate, or, at least, to recommend an equitable reduction in the gravity of the violation, based, in either case, on the extenuating circumstance that NDFO failed to fulfill non-discretionary legal duties to issue notices regarding APD status to Brigham.

[1] There is no question that section 366 of the Energy Policy Act imposes mandatory duties on BLM, and that BLM failed to satisfy those duties in this case. However, the question presented by the appeal is whether, in the absence of compliance by BLM with section 366 of the Energy Policy Act, an operator may assume approval and commence drilling. Clearly, the answer is no.

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<sup>5</sup> Brigham asserts that, on Nov. 12, 2010, BLM posted notice of the filing of the NOS on the NDFO website, thereby affording members of the public an opportunity to comment on the proposed drilling, on or before BLM's "expected decision date" of Dec. 12, 2010. NA/Petition at 3; *see id.* at 7; Letter to BLM, dated Mar. 9, 2011 (SDR Request), at 6 n.7. It asserts that it "commenced drilling ('spudded') the well on January 24, 2011, more than a month after the 'expected decision date.'" NA/Petition at 3. A copy of the purported posting is provided as Enclosure 3 (NDFO Webpages (NOSs and APDs Filed on Federal Leases), dated Dec. 30, 2010) and Enclosure 4 (NDFO Webpages (NEPA Log FY 2011), dated Dec. 30, 2010), attached to Brigham's SDR request. *See* SDR Request at 6 n.7. Neither enclosure refers to the proposed Well in the *SW*<sup>1</sup>/<sub>4</sub>*NW*<sup>1</sup>/<sub>4</sub> *sec. 10*. Moreover, Brigham did not file its APD until Dec. 15, 2010, after the "expected decision date."

Brigham correctly states that compliance with the “non-discretionary” duty to act on an APD within 30 days of receipt of a complete APD was considered by Congress to be critical to ensuring a “greater degree of predictability” in APD processing, in order that the operator could appropriately plan its drilling activity, thereby, *inter alia*, satisfying contractual commitments to rig operators and others, preventing drainage from adjacent lands, and ensuring the viability of affected private and Federal leases. NA/Petition at 2, 3, 10-11. However, nowhere in section 366 of the Energy Policy Act, Onshore Order No. 1, or other statutory, regulatory, or BLM policy pronouncement is there any provision stating that BLM’s failure to act within the statutory time limits results in approval of the APD.<sup>6</sup>

An operator is required to have an approved APD before drilling any well on Federally-leased land. The applicable regulation, 43 C.F.R. § 3162.3-1(c), states, in full: “The operator shall submit to the authorized [BLM] officer for approval an Application for Permit to Drill for each well. *No drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized officer’s approval of the permit.*” (Emphasis added.)

Where an operator, instead, engages in drilling operations prior to BLM approval, 43 C.F.R. § 3163.1(b) directs BLM to immediately assess \$500 per day, up to a maximum of \$5,000, for the noncompliance.<sup>7</sup> See, e.g., *K2 America Corp.*, 163 IBLA at 201; *Jack Corman*, 119 IBLA 289, 293 (1991); *Jack J. Grynberg*, 114 IBLA 225, 230 (1990). Such an assessment has long been considered to be in the nature of liquidated damages, allowing BLM to recover the administrative and other costs incurred as a consequence of the operator’s noncompliance, where actual damages are difficult or impracticable to ascertain, and regardless of whether there has been any actual threat to public health, safety, property, or the environment. See 52 Fed. Reg. 5384, 5387 (Feb. 20, 1987); *Northland Royalty Operating Co.*, 123 IBLA 104, 106-07 (1992); *Jack Corman*, 119 IBLA at 290-91, 295 (“[W]e must reject Corman’s argument that because the Indian lessors suffered no damage, no assessment may be imposed”); *Benson-Montin-Greer Drilling Corp.*, 92 IBLA 92, 94, 95-97 (1986).

<sup>6</sup> Compare 30 U.S.C. § 1724(h) (2006), which requires the Secretary to issue a final decision on appeals from agency or delegated state orders to pay royalty within a set period of time from the date such proceeding was commenced, and if he fails to do so, a statutory rule of decision is imposed in favor of the appellant or the Secretary, depending on the monetary amount at issue.

<sup>7</sup> Brigham characterizes issuance of an INC and the corresponding assessment as “discretionary” under 43 C.F.R. § 3163.1(b). NA/Petition at 10. That interpretation is contrary to the regulatory language providing that BLM “shall” so act.

In this case, Brigham seeks to shift the blame to BLM for its action to proceed without approval, despite the regulatory requirement for approval. However, the record shows that Brigham was well aware of the necessity for approval.

In the Drilling Prognosis/Multi-Point Surface Use & Operations Plan (Drilling Plan/Surface Use Plan of Operations (SUPO)), attached to the APD, Brigham's representative certified as follows: "All lease and/or unit operations will be conducted in such a manner that full compliance is made with all applicable laws, regulations, *Onshore Oil & Gas Orders*, the approved plan of operations, and any applicable *Notice to Lessees*." Drilling Plan/SUPO at 20. He also certified that "the work associated with the operations proposed herein will be performed in conformity with this APD package and the terms and conditions under which it is approved." *Id.* In addition, Brigham stated in the same document that "[t]he spud date will be reported orally to the North Dakota Field Office *24 Hours Prior to Spud*, unless otherwise required in the site specific conditions approval." *Id.* at 6. There is no evidence in the record that Brigham provided such notice to BLM.

Moreover, Brigham recognizes that it was not without a remedy for BLM's failure to act, since it could have instituted a "court action" to require BLM to fulfill its statutory obligation, "either through a mandamus action or through provisions of the Administrative Procedure[] Act authorizing actions to compel a [F]ederal official to perform a non-discretionary duty." NA/Petition at 5, 13. While clearly a court could order BLM to perform its nondiscretionary duties,<sup>8</sup> Brigham does not cite any case in which a court has held that an agency's failure to fulfill a nondiscretionary duty constitutes a *de facto* approval of the action sought to be approved.<sup>9</sup>

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<sup>8</sup> See NA/Petition at 9 ("[W]hen Congress . . . sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld." (quoting *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 (10th Cir. 1999))).

<sup>9</sup> We note that in *Ensco Offshore Co. v. Salazar*, No. 10-1941, 2011 WL 692029 (E.D. La. Feb. 17, 2011), which is currently on appeal to the U.S. Court of Appeals for the Fifth Circuit, the Federal district court only ordered the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) (successor to the Minerals Management Service) "to act" on five pending APDs for offshore drilling within 30 days of the court's order, where BOEMRE had failed, contrary to section 3 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1332 (2006), to act on the APDs within a reasonable time frame. 2011 WL 692029, at \*7; see *id.* at \*3-\*4, \*6 ("OCSLA's text infers that delays beyond thirty days are unreasonable; that a decision regarding all drilling activities should be made during a thirty-day period

(continued...)

Further, while Brigham asserted in a letter to BLM, dated March 3, 2011, at 2, that it was “understandably . . . confused regarding the actual processing status of the APD,” there is no evidence in the record, nor does Brigham assert, that it attempted to contact BLM prior to drilling the Well to ascertain the status of its APD, or that, absent notification, it intended to construe BLM’s silence on the APD as approval of the APD and seek BLM’s response. Rather, whatever may be said about BLM’s failure to communicate, we agree with the Deputy State Director that, having communicated with BLM prior to drilling the Well, it is “disturbing” that Brigham “did not utilize this point of contact to confirm whether or not its APD had been approved prior to drilling this well and instead ‘assumed’ the permit had been approved.” Decision at 6. Finally, Brigham offers no explanation of why, in the face of no word from BLM regarding its APD, other than the communication that it had been received, it needed to proceed with drilling on January 24, 2011.

Finally, Brigham contends that BLM should have reduced its liquidated damages, given the substantial “equitable considerations” associated with Brigham’s “reasonable conclusion” that BLM had approved its APD. NA/Petition at 6; *see id.* at 10, 11-12.

Brigham cites the case of *Hanna Oil & Gas Co.*, 142 IBLA 56 (1997), wherein we noted that 43 C.F.R. § 3163.1(b) clearly provided for an immediate assessment of liquidated damages in the amount of \$500 per day, up to a maximum of \$5,000, for drilling without approval, which was sustained by the facts of that case, but that BLM had failed to consider whether to reduce that assessment, pursuant to 43 C.F.R. § 3163.1(e). *See* 142 IBLA at 59-60. We affirmed the finding of drilling without approval, but set aside the assessment, remanding the case to BLM for a decision, pursuant to 43 C.F.R. § 3163.1(e), whether to reduce the assessment. Brigham seeks similar action by the Board here, but there is no basis for it.

The facts in *Hanna* are clearly distinguishable. Therein, the Board stated that during a verbal communication between Hanna and BLM prior to drilling, BLM “may have used the word ‘approved’ which was incorrect.” 142 IBLA at 58. Even in that circumstance, however, the Board made clear that “[t]he only issue requiring review by BLM is whether the relief provisions of 43 C.F.R. § 3163.1(e) apply here. *We have not prejudged that question.*” *Id.* at 60, *emphasis added.*

In this case, while BLM did not expressly reference 43 C.F.R. § 3163.1(e) in addressing Brigham’s SDR request, it considered a reduction, stating at page 6 of the

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<sup>9</sup> (...continued)

of scrutiny. The Court concludes such delays contravene . . . OCSLA’s overriding policy of expeditious development.”). Nowhere in its Order did the court declare that BOEMRE’s failure to timely act on the APDs constituted approval of the APDs.

decision: “Brigham’s request that the assessment be reduced has also been considered. Based on the discussion above, a reduction of the assessment is not warranted.” Clearly, BLM concluded that the facts in the case did not support Brigham’s assertion that it had made a reasonable assumption that its APD had been approved. Brigham has failed to demonstrate any error in BLM’s determination not to reduce the assessment.

Accordingly, 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, and the petition for a stay is denied as moot.

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/s/  
Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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/s/  
H. Barry Holt  
Chief Administrative Judge