

BOWERS OIL AND GAS EXPLORATION, INC.

IBLA 84-566

Decided November 12, 1985

Appeal from a decision of the Montana State Office, Bureau of Land Management, affirming notice of incident of noncompliance and the levy of an assessment with respect to operation on Federal oil and gas lease M 26807.

Affirmed.

1. Oil and Gas Leases: Civil Assessments and Penalties

Issuance of a valid notice of an incident of noncompliance for failure to segregate topsoil, as required by an approved application for permit to drill, reasonably results in an assessment pursuant to 43 CFR 3163.3(g).

APPEARANCES: James E. Bowers, President, Bowers Oil and Gas Exploration, Inc., Grand Junction, Colorado.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Bowers Oil and Gas Exploration, Inc. (Bowers), has appealed from a decision of the Montana State Office of the Bureau of Land Management (BLM), dated April 24, 1984, which sustained a \$250 assessment for noncompliance levied against Bowers.

On March 20, 1984, an inspector from the Miles City District Office (District Office) of BLM visited the Kreiger Fed Well #1-31 on Federal oil and gas lease M 26807, Fallon County, Montana. During the course of the inspection a notice of incident of noncompliance (INC) was issued for Bowers' failure to stockpile topsoil separately from other excavated material taken from the well pad area, as required by the approved Application for Permit to Drill (APD). The \$250 assessment was levied pursuant to 43 CFR 3163.3(g). Appellant then filed an objection to the assessment with the Montana State Office. BLM conducted a technical and procedural review of the assessment pursuant to 43 CFR 3165.3 and upheld the assessment in the decision on appeal here.

On appeal, Bowers contends the assessment "is unreasonable and reflects an uncompromising attitude among BLM personnel," in view of explanations laid out in previous correspondence with BLM. Bowers also objects to an appeal process perceived as entirely within BLM.

[1] The management of onshore oil and gas lease operations is committed to the Secretary of the Interior, who has the power to delegate certain management functions to BLM. See Riviera Drilling and Exploration, 87 IBLA 357, 364 (1985). 43 CFR 3160.0-2, 3160.0-3. The authorized BLM officer is empowered to assess liquidated damages when a lessee fails to comply with "applicable law, the regulations in this part or promulgated under the cited laws, the lease terms, the approved operating plan, or the written orders or instructions issued by the authorized officer." 43 CFR 3163.1. ^{1/}

In certain instances of noncompliance, the amount of loss or damage to the lessor is difficult or impossible to ascertain. Fixed amounts were established to cover loss or damage to the United States. 43 CFR 3163.3. The supplemental information for this regulation, printed in the Federal Register at the time of its adoption, stated further:

Two comments suggested that certain of the assessments provided for in this section of the existing regulations are de facto penalties and should either be removed by the final rulemaking or applied under the procedures prescribed by section 109 of the Federal Oil and Gas Royalty Management Act [30 U.S.C. § 1701-1757 (1982)] and § 3163.3 of the existing regulations. The final rulemaking does not adopt either of these suggested changes because such assessments do not constitute penalties. While these assessments may appear to be penalties, they are merely compensation to the United States for damages to resources or existing improvements and the added administrative cost to the United States caused by reason of a lessee's failure to comply with the regulations in this part and the resultant need for regulatory action to obtain a correction of the deficiency.

49 FR 37361 (Sept. 21, 1984).

As can be seen, the clear intent of the drafters of the regulations was that an assessment levied as a result of an INC is not to be considered a fine or a penalty. It is established to cover damage and administrative cost to the Federal Government resulting from an incident of noncompliance. Where an INC is detected, the minimum assessment set by regulation may be levied.

If the recipient of a notice of an INC requests, BLM may conduct a technical and procedural review of the decision pursuant to 43 CFR 3165.3. Such reviews are conducted by BLM to determine whether there was, in fact, an INC and, if so, whether such notice was procedurally proper. A technical

^{1/} The regulations pertaining to assessments under 43 CFR Subpart 3163 were amended effective Oct. 22, 1984, to implement the applicable portions of the Federal Oil and Gas Royalty Management Act of 1982. See 49 FR 37356 (Sept. 21, 1984). Appellant was not subjected to the additional assessments for successive days of noncompliance that were eliminated by the amendment. The references in this opinion are to the regulation as it existed prior to amendment.

and procedural review would not consider the amount of an assessment in cases where the amount is equal to the regulatory minimum.

Bowers filed its initial objection to the District Office decision with the Montana State Director, BLM. In response, BLM conducted a technical and procedural review. This procedure comported with the requirements of 43 CFR 3165.3. The decision BLM then issued constituted the final decision for BLM, the managing agency. 43 CFR 3165.3, 3165.4.

By filing this appeal from the technical and procedural review decision, Bowers complied with 43 CFR 4.411, which outlines the procedure for notice of appeal to the Board of Land Appeals. ^{2/} BLM then forwarded the appeal and case record to this Board for consideration pursuant to the authority delegated from the Secretary of the Interior. 43 CFR 4.1(b)(3). Thus, the initial decisionmaking agency, BLM, does not decide the appeal from its own decision.

Appellant's primary argument is that the BLM decision is unreasonable. The inspecting BLM officer detected a violation of the approved APD, a part of the operating plan for this lease. The notice was issued for noncompliance with the following APD requirement:

Prior to construction activities, an average of six (6) inches of the best surface material ("topsoil") shall be removed from all cut and fill areas, including areas where excess cut material and pit material are stockpiled. This "topsoil" estimated to comprise approximately 350 cubic yards, shall be segregated from all other material (excess cut and pit material) and stockpiled off the east end of the well pad.

(BLM Case Record at 9-1). In correspondence with BLM, appellant admitted a failure to abide by the above-quoted portion of the APD but claimed this failure was a result of faulty communication with a contractor. Rather than stockpiling, as required by the APD, the topsoil was pushed to the back of the pile of excavated materials. Appellant has admitted its failure to abide by the APD requirement which was imposed to prevent damage to the surface resource.

43 CFR 3163.3(g) imposes assessments for noncompliance ^{3/} "[f]or failure to exercise due care and diligence in preventing undue damage to surface or subsurface resources or surface improvements as required by the regulations in this part and the applicable lease terms, \$250." Thus, this minimum assessment is set by regulation. As the preamble to the regulations stated

^{2/} The Interior Board of Land Appeals is a quasijudicial tribunal unaffiliated with BLM.

^{3/} The levy of assessments, pursuant 43 CFR 3163.3, differs from the imposition of penalties under 43 CFR 3163.4. Although both may result in monetary payments, the appeal procedures differ. See Riviera Drilling & Exploration, 87 IBLA at 359 n.3. A good faith effort to abate an INC has no bearing on the amount of an assessment under 43 CFR 3163.3, although good faith effort to abate can mitigate a penalty imposed under 43 CFR 3163.4.

on September 21, 1984, this assessment is not a penalty but compensation to the United States. Under the terms of the APD, appellant is responsible for compliance. The notice of INC was properly issued and the subsequent assessment was properly imposed. See Yates Energy Corp., 89 IBLA 150, 153 (1985).

We find nothing in the record to indicate this assessment was incorrectly applied. We have reviewed the arguments appellant presented to BLM, as well as the BLM response. We find the BLM response to be reasonable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Montana State Office is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

