

WILLIAM PERLMAN

IBLA 84-371

Decided April 2, 1986

Appeal from a decision of the Acting Director, Colorado State Office, Bureau of Land Management, affirming assessments for noncompliance with oil and gas lease operating regulations. MOO-C-1420-1521, MOO-C-1420-1530.

Affirmed as modified.

1. Bureau of Land Management--Indians: Leases and Permits--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

2. Bureau of Land Management--Indians: Leases and Permits--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to

provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

3. Bureau of Land Management--Indians: Leases and Permits--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

4. Estoppel

Where an oil and gas operator obtains oral permission to do preliminary work at a drilling site for which an application for permit to drill is pending, and then begins drilling without written permission to do so in violation of Departmental regulation, there is no factual basis for finding an estoppel of the Government which would prevent assessment of a penalty for unauthorized drilling operations.

APPEARANCES: Julia Hook, Esq., Denver, Colorado, and John F. Shepard, Esq., Washington, D.C., for appellant; William R. Murray, Esq., and Linda C. Breland, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE ARNESS

Following a Bureau of Land Management (BLM) review hearing on January 12, 1984, William Perlman was assessed penalties in the amount of \$28,750 by the Acting Colorado State Director, BLM, for the conduct of oil and gas drilling operations on four wells located on Indian lands. Penalties were assessed for three Perlman wells, 17-1, 17-2, and 20-1B, located on

lease No. MOO-C-1420-1521. These penalties were assessed against drilling operations commenced prior to BLM approval of Perlman's applications to drill for each of the three wells. In the case of the fourth well (number 1-33), located on lease No. MOO-C-1420-1530, Perlman was assessed penalties for making unapproved plug-backs 1/ and well recompletions into the Mesaverde and Fruitland geologic formations.

Perlman was properly authorized to complete well 1-33 to the Dakota formation, and did so. 2/ When exploration of the Dakota formation failed to produce favorable results, the well was plugged at the Dakota level, and higher strata, (the Mesaverde and Fruitland formations) which were penetrated by the drill hole, were tested. This plugging back was undertaken, however, without notice to Minerals Management Service (MMS), the agency then responsible for management of the lease. 3/

As to the three wells drilled prior to receipt of written approval (17-1, 17-2, and 20-1B), Perlman contends he had obtained oral permission to commence operations which should estop the Department's attempt to

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1/ "Plug-back" is defined by the Bureau of Mines A Dictionary of Mining, Mineral, and Related terms (1968) as: "To cement off lower section of casing; to block fluids below from rising in casing to a higher section being tested."

2/ It appears this well site had been staked upon an oral approval of the location. (See Exh. D to Appellant's Reply Brief).

3/ The supervising agency has twice been changed. On Jan. 19, 1982, the Secretary of the Interior transferred administration of Indian oil and gas lease operations from the Conservation Division, U.S. Geological Survey, to the newly created MMS. Secretarial Order No. 3071, 47 FR 4751 (Feb. 2, 1982). On Dec. 3, 1982, and Feb. 7, 1983, the administrative function was again transferred, this time to BLM. Secretarial Order No. 3087, as amended 48 FR 8982, 8983 (Mar. 2, 1983).

assess penalties for having commenced drilling at these wells. He also contends, even assuming his commencement of operations was not proper, the penalty assessed was improper.

As to well 1-33, Perlman contends the penalty is excessive. He also argues the penalty sought is erroneously computed on the assumption the unauthorized exploration of the Mesaverde and Fruitland were continuing violations of Departmental regulations which took place between February 17 and June 3, 1982. Perlman also contends oral permission to explore the higher strata at well 1-33 was given by an officer of the Department, and that, in any case, those operations conducted between February 17 and June 3, 1982, cannot reasonably be considered to be of a continuing nature. <sup>4/</sup>

At a January 12, 1984, BLM review hearing conducted pursuant to 25 CFR 211.22 evidence was presented regarding all four alleged violations. Testimony by Perlman's landman established that well 1-33 was drilled into the Dakota formation, which formation, consisting of "tight sands," was perforated at depths of from 7,880 to 7,870 feet on February 17, 1982 (Tr. 12). The well was then plugged back to the Mesaverde formation, and, on February 23, 1982, perforation was made in the Mesaverde formation at the 5,850-foot level, again in "tight sands," (Tr. 13). This drilling technique, which involves initial fracture at the deepest formation followed by perforations at successively higher levels, is said by Perlman to be part of a patented

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<sup>4/</sup> Appellant requested oral argument. The Board, however, finds the record on appeal is sufficiently developed to permit decision, and concludes oral argument is unnecessary.

process he developed for exploration of tight-sand formations (Tr. 13). On April 15, 1982, a second perforation of the Mesaverde formation was made at 5,584 to 5,592 feet (Tr. 13). Finally, on June 3, 1982, there was a recompletion of well 1-33 in the Fruitland formation, the highest formation explored (Tr. 14). The approved application for permit to drill allowed completion (in this case fracturing) of well 1-33 only at the lowest level, in the Dakota formation (Tr. 9). The subsequent plugging-back and fracturing of the higher strata encountered in well 1-33 was not approved in advance by BLM (Tr. 9). To perform the unauthorized work, a "workover rig" operated at the well for approximately 3 to 4 days in February 1982, 1 day in April 1982, and 3 days in June 1982 (Tr. 16). All the work required to plug-back to, perforate and explore the Mesaverde and Fruitland formations was conducted during those days, for an actual working time of about 8 days (Tr. 16). Following the review hearing, Perlman amended the testimony concerning unauthorized drilling work to conform to documented work performance; the drilling record indicates 13 days were spent on recompletions of well 1-33. The penalty originally assessed for the unauthorized work done on well 1-33 was \$16,000; the BLM review panel affirmed this assessment.

In the case of wells 17-1, 17-2, and 20-1B, on Southern Ute Tribal Lease No. MOO-C-1420-1521, penalties were assessed in the aggregate sum of \$12,750 for commencement of drilling prior to approval of Perlman's application for permit to drill (Tr. 17). Applications for drilling permits for all three wells were filed on September 1, 1982. In the case of well 17-1, preliminary site preparatory work was begun by the operator on September 15, 1982 (Tr. 18). The well was spudded on September 22, 1982. Perlman's

application for permit to drill was approved on September 30, 1982. Drilling this well required 6 days (Tr. 18).

Site preparation for well 17-2 was begun on September 16, 1982, and the well was spudded on September 28, 1982 (Tr. 18). On October 1, 1982, Perlman's application for permit to drill 17-2 was approved. This well also required 6 days to drill. Road construction and drill-site preparation by Perlman was commenced for well 20-1B on September 13, 1982, the well was spudded on September 18, 1982, and Perlman's application for permit to drill was approved on October 1, 1982 (Tr. 18). Drilling took 6 days.

Appellant was assessed penalties for violations at well site 17-1 at the rate of \$250 per day for 15 days for a total penalty of \$4,000 (Tr. 19). For well 17-2 appellant was assessed \$250 per day for 15 days, or a total penalty in the sum of \$4,000 (Tr. 19). For well 20-1B, appellant was assessed \$250 per day for 18 days, totaling \$4,750 (Tr. 19).

Perlman contends BLM gave oral permission to commence drilling at all four wells and that recompletion at various levels in the case of well 1-33, was begun in the belief that it had been authorized (Tr. 26). Oral permission to commence work was said to have been given to Perlman employee Duke Fennewald by Tim Barrett of the Bureau of Indian Affairs (BIA), Don Englishman of MMS, and Brian Reid, a representative of the tribe (Tr. 29-30). BLM, however, denied that oral approval for commencement of drilling was ever given, while admitting some communication between Departmental employees and Perlman employees did take place concerning well operations (Tr. 31). The BLM review

panel permitted the later filing of an affidavit concerning this issue executed by Perlman employee Fennewald, which was received by BLM on January 18, 1984. The Fennewald affidavit recites that on September 13, 1982, Don Englishman gave Fennewald oral permission to proceed with drilling operations on wells 17-1, 17-2, and 20-1B (Fennewald Affidavit at 2). The Fennewald affidavit describes a conversation which took place at the well-site inspections for wells 17-1, 17-2, and 20-1B between Fennewald and Englishman at which Barrett and Reid were present, when Englishman outlined additional or changed requirements needed before drilling could begin (Fennewald Affidavit at 1, 2). The affidavit concludes: "He [Englishman] told me [Fennewald] \* \* \* Perlman could proceed with drilling operations \* \* \*" (Fennewald Affidavit at 2). Fennewald also observes that staking of several well sites was done with oral permission where changes in site location were made (Fennewald Affidavit at 2). The record further indicates staking for well 1-33 and other Perlman wells was in fact done in reliance upon oral approval (Exh. D to Appellant's Reply).

Subsequent to the filing of the Fennewald affidavit by Perlman, BLM also supplemented the record with an affidavit by Frank Salwerowicz, a member of the BLM review panel (BLM Response to Appellant's Reply Brief at 2). This document offers a definition of the expression "dirt work" which was used at the review hearing to describe preliminary operations at the four Perlman drill sites. The Salwerowicz affidavit offers an explanation of this term as it relates to the drilling of an oil well, ostensibly for the purpose of clarifying the record:

3. In my experience, oral approvals are given for the commencement of "dirt work" when time is a critical factor to the lessee or operator. "Dirt work," however, is limited to road construction and site preparation. "Dirt work" does not include drilling operations.

4. Oral approval for dirt work, if warranted by the circumstances, is only given after the application for permit to drill has been completely reviewed and when written approval of the permit will be issued shortly.

5. Operations conducted pursuant to an oral approval for dirt work must stop short of "spudding in" the well, that is, the first boring of the hole for the well.

(Salwerowicz Affidavit at 2.)

Review of the hearing transcript and the parties' briefs on appeal indicates Perlman has indeed attempted to equate permission to begin preliminary work such as staking, road construction, and site preparation, with permission to do the actual drilling of the wells, which involves spudding the well, drilling, plugging off unproductive levels, and making recompletions at new, unexplored levels. Perlman argues this approach is reasonable and should be accepted as a matter of logic; that is, permission to begin work for any purpose associated with drilling should be treated as approval to proceed with drilling itself. See, e.g., Letter dated Jan. 18, 1984, Hook to Moore at 3, transmitting documents to supplement the record. This analysis is not, however, as logical or compelling as Perlman would make it appear. If, as the Salwerowicz affidavit explains, permission to begin preliminary work does not lead ineluctably to permission to drill, the only possible point to Perlman's argument on this point must be that the time spent on preliminary work or "dirt work" should not be considered part of the time spent drilling

when calculating the number of days during which unauthorized operations took place at the various drill sites. That is, assuming "drilling" cannot be equated to all operations conducted at the drill site, the period of unauthorized drilling should not include time spent in preparatory work.

Certainly, this logic was applied by BLM in the case of well 1-33. Preliminary oral permission for initial work on well 1-33 was apparently obtained. Significantly, however, prior written permission to commence drilling well 1-33 was obtained before actual drilling began. The well was spudded only after written permission to drill was given. Well 1-33 was drilled before wells 17-1, 17-2, and 20-1B. All circumstances considered, if Perlman could reasonably have interpreted oral permission to begin work to encompass drilling, in addition to work preparatory to drilling, there should be a showing on the record such a belief was reasonable. The record on this point is ambiguous. Had Perlman acted in reliance upon his past dealings with the agency, i.e., the drilling of well 1-33, it would be reasonable to assume prior written permission was necessary before spudding wells 17-1, 17-2, and 20-1B, since he did not commence drilling at well 1-33 before written permission was issued. His argument in this respect is therefore inconsistent with his prior conduct.

[1] On appeal, Perlman contends each act of unauthorized drilling is a single discrete act, which merits only a single \$25 penalty under 30 CFR 221.54(c), (d) (1982), for a total cost to Perlman of \$100 instead of \$28,750. Perlman ignores the distinctions between the BIA rule codified at 25 CFR 211.22, which requires a penalty imposition, the former MMS regulations

appearing at 30 CFR Subpart 221 (1982), which imposed punitive measures for rule violations treated as civil penalties, and newer regulations published at 43 CFR Part 3163 which, in part, purport to assess liquidated damages based upon injury to the leasehold. Perlman challenges the BLM determination which finds action properly could be taken to regulate drilling on these Indian leases both under BIA rules in effect in 1982 at 25 CFR Part 211, and by MMS, at 30 CFR Part 221 (1982). In this connection, it should be observed Perlman's lease specifically incorporates the provisions of 30 CFR Part 221 and "all regulations \* \* \* in force." See Lease MOO-C-1420-1521, paragraph 5(g).

The record on appeal indicates there have been prior instances of enforcement of the Indian leasing (or BIA) regulation which were relied upon by BLM when determining provisions of 25 CFR 211.22 controlled decision of these four lease violations. See Memorandum to District Manager from Petroleum Engineer dated Sept. 30, 1983, subject: Appeal of Assessment for Noncompliance. In this case Perlman was twice given actual notice that the penalties provided by 25 CFR 211.22 would be applied against violations of regulations at his drilling operation. First, the lease provisions gave notice of this fact. Second, Perlman was provided with notice and a hearing concerning the four violations at issue; assessments for the violations were made and notice given to Perlman of the reasons for the assessments on August 23, 1983. At the hearing conducted on January 12, 1984, Perlman, represented by counsel, presented witnesses and argument. A verbatim transcript of the hearing was prepared. Subsequently, Perlman was allowed to supplement the record on appeal and brief the issues presented. The fact

violations took place as claimed by BLM is not challenged by Perlman. Nor are the unauthorized drilling starts denied. While Perlman seeks to excuse them as having been orally approved, it is clear they occurred. The principal issue on appeal therefore concerns the proper amount of the penalty assessment, and, as a subsidiary issue, the characterization of the assessment itself - whether it is "penal" or "civil."

The reason for Perlman's objection to the application of 25 CFR 211.22 is practical, since 25 CFR 211.22 provides for penalties not to exceed \$500 "for each and every day the terms of the lease, the regulations, or \* \* \* [the supervisor's] \* \* \* orders are violated." The operating regulations developed by MMS, however, which appeared at 30 CFR 221.54(c), (d) (1982), provided for single penalties of \$25 for each violation. It is clear that past Departmental practice was to apply the Indian leasing rules in cases involving Indian land leases. See Memorandum dated September 29, 1983, from Petroleum Engineer, to District Manager, Montrose.

The general operating regulations appearing at 30 CFR Part 221 have since been revised, and now appear at 43 CFR Part 3160. See 48 FR 36583 (Aug. 13, 1983). As amended in 1983, the general operating regulations provided for increased charges for noncompliance, now denominated "assessments." The rationale for these charges under the revised regulations was changed: certain violations of the regulations were considered to be in the nature of damages to the lessor for which the assessments were a form of compensation akin to damages. See 43 CFR 3163.3. Under the revised rules, drilling irregularities, involving either premature starts without written approval or

departures from approved written permits, merit assessments of \$250 instead of \$25 as was formerly true. Further, these assessments could now, under the revised regulation, be cumulated for each day of violation. 43 CFR 3163.3 (1983). A 1984 amendment of this rule, however, eliminated the provision permitting cumulation of assessments for successive days of the same violation. 49 FR 37365 (Sept. 21, 1984) (and see Proposed Rulemaking at 51 FR 3882, 3885 (Jan. 30, 1986), providing for a uniform imposition of assessments and penalties for oil and gas operations. Application of these operating regulations was partially suspended on March 22, 1985. 50 FR 11517.

Perlman does not seek to obtain the benefit of the later promulgated rules which establish the current (and now suspended) regulatory scheme, but argues, simply, that the general oil and gas lease operating rules in effect in 1982, as published at 30 CFR Part 221, should control his conduct occurring in 1982. He further contends the penalty provisions of the BIA regulations published at 25 CFR 211.22 do not apply to him because they were not violated by his conduct in this case. Perlman argues that, until November 26, 1982, there was no specific BIA regulatory provision requiring a lessee to submit an application for permit to drill, and that therefore drilling begun without written permission was a violation of the MMS operating regulation codified at 30 CFR 221.21(b), which forbids drilling, redrilling, or plug-back operations without written approval.

The issue framed by these arguments concerns which regulations are to be applied, the MMS regulations at 30 CFR Part 221 or the BIA regulation at 25 CFR Part 211. There is a customary rule of statutory construction which

dictates that, where there are two acts which contain conflicting provisions, the specific act controls over the general act. A similar construction logically also applies in the case where conflicting or duplicative regulations must be construed. See generally Davis, Administrative Law Treatise § 30.12 (1958).

As between the BIA oil and gas operating rules and MMS's general operating rules in effect at the time of these leases, the BIA rule at 25 CFR 211.22 specifically requires its provisions be given primary effect so far as concerns impositions of penalties for noncompliance. Thus, the BIA regulation preempts the oil and gas lease operating penalty provisions of any other Departmental regulation, providing:

Failure of the lessee to comply with any provisions of the lease, of the operating regulations, of the regulations in this part, order of the superintendent or his representative [officers of the BIA] or of the orders of the supervisor or his representative, (sic) shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than \$500 per day for each and every day the terms of the lease, the regulations, or such orders are violated; or to both such penalty and cancellation: Provided, That the lessee shall be entitled to notice and hearing, within 30 days after such notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall be held by the supervisor, whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the supervisor's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

25 CFR 211.22. The quoted regulation is promulgated to implement the Act of May 11, 1938, 52 Stat. 348, the Indian Mineral Leasing Act, which authorized leasing on Indian lands (25 U.S.C. § 396d (1982)). This statute also provides

that the Secretary shall promulgate rules respecting oil and gas operations on Indian lands. The provisions of 25 CFR 211.22 implement the Act; they therefore are specific rules promulgated to control the leasing of Indian lands, and control over the general operating rules which apply generally to all leased lands administered by the Department. When Perlman agreed to lease these Indian lands he accepted, as part of his lease, the provisions of 25 CFR 211.22, providing for penalties for failure to comply with lease terms. Having agreed to the lease terms, he cannot now avoid application of these rules.

Appellant also argues in the event 25 CFR 211.22 should be held to apply, that the regulation is impermissible as a penal rule not authorized by law. The authority of the Secretary to administer and to cancel leases of Indian lands in his discretion pursuant to provision of 25 CFR 211.22 in the event of breach of the lease terms is, however, established in law. See Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983); Sessions, Inc. v. Morton, 491 F.2d 854 (9th Cir. 1974). Since the unauthorized drilling, which undoubtedly took place, constituted a breach of the lease terms, cancellation was a possibility here both as an alternative to imposition of the penalty provisions of 25 CFR 211.22 or as an additional sanction. See 25 CFR 211.27. The provision of 25 CFR 211.22 authorizing a daily assessment of up to \$500 was invoked instead, but was further mitigated to recognize Perlman's violations were not considered extreme. As a result Perlman was penalized at the rate of \$250 per day for the number of days during which the violation was found to persist.

Current Departmental policy concerning administrative sanctions for oil and gas operating violations is in flux; <sup>5/</sup> while the BIA regulation at 25 CFR 211.22 establishes a ceiling in the amount of \$500 and speaks in terms of "penalties" for breach of lease terms, it is clear the Departmental policy expressed in the regulation requires the exercise of a degree of discretion in fixing sanctions for violations of operating rules by a lessee on Indian lands. The regulation provides for "a penalty of not more than \$500 per day." As appellant points out, the BIA regulations appearing at 25 CFR Part 211 are silent concerning exactly how this charge is to be calculated. The fixing of the penalty, from zero to \$500, is therefore committed wholly to agency discretion. It is within this context that Perlman complains, first, he was assessed too much for the conduct which he admits took place, and second, that the assessment was a civil penalty imposed pursuant to a regulation which lacks underlying statutory authority for the imposition of such a penalty. To support his position, he cites Gold Kist, Inc. v. U.S. Department of Agriculture, 741 F.2d 344 (11th Cir. 1985).

Gold Kist involved the marketing of peanuts under regulations imposed by the Secretary of Agriculture. Although the 1938 statutory authority for the regulation of peanut marketing which was involved in Gold Kist did not provide specifically for the imposition of civil penalties, the Secretary of

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<sup>5/</sup> See 43 CFR Part 3160. Prior to partial suspension of the regulations governing assessments for noncompliance on Mar. 22, 1985 (see 50 FR 11517) the Department issued Instruction Memorandum No. 84-594, Change 3 (Jan. 4, 1985), establishing a maximum assessment or "cap" for assessments involving on-shore Federal and Indian oil and gas lease operations. Change 4 to this Instruction Memorandum issued Apr. 16, 1985, further limited assessments for offenses said to be continuing in nature. See also proposed rulemaking at 51 FR 3882, supra.

Agriculture had nonetheless imposed civil penalties under regulations implementing the statute. The Gold Kist court found two conflicting positions co-existed in the law on the subject, some authorities permitting imposition of penalties under an agency's general rulemaking authority, the other requiring specific authority for imposition of penalties in the implemented Act. Id. at 347, 348. The Gold Kist opinion cut through this Gordian knot, stating:

To resolve these conflicting lines of precedent we hold that the statute must plainly establish a penal sanction in order for the agency to have authority to impose a penalty but that an agency has broad administrative powers to impose administrative sanctions that are not penalties as long as the sanctions are reasonably related to the purpose of the enabling statute. "'Penal' means punishable; inflicting a punishment; constituting a penalty; or relating to a penalty." Black's Law Dictionary 1289 (4th ed. 1957). The dictionary also defines "penal laws" as "[t]hose which prohibit an act and impose a penalty for the commission of it. . . . Strictly and properly speaking, a penal law is one imposing a penalty or punishment (and properly a pecuniary fine or mulct) for some offense of a public nature or wrong committed against the state. . . ." Id. at 1290 (citations omitted). We conclude the fines imposed on Gold Kist were penalties, not administrative sanctions.

Id. at 348.

As Gold Kist indicates, however, there is no unanimity in court decisions considering the power of agencies to impose administrative civil money penalties. See, e.g., Commissioner v. Acker, 361 U.S. 87, 94 (1959), holding a penalty provided by a tax regulation invalid as an "attempted addition to the statute of something which is not there" in a case where the tax statute did not specifically provide for penalty imposition. In contrast, in Mourning

v. Family Publications Service, Inc., 411 U.S. 356 (1973), the Court, finding a credit regulation providing for penalties to be valid, opined the penalty regulation was a reasonable exercise of administrative authority although penalties were nowhere provided for by the Truth in Lending Act, the implemented statute in that case. In the third case cited by the Gold Kist opinion, West v. Bergland, 611 F.2d 710 (8th Cir. 1979), cert. denied, 449 U.S. 821 (1980), a regulation permitting the Secretary of Agriculture to impose an administrative penalty by withdrawing meat-grading services was approved even though the Court considered the regulation to be penal in nature, and despite the fact the implemented statute did not specifically require such a penalty provision.

These cases, and the Gold Kist case itself, illustrate there is no set formula for determining whether an administrative civil-money penalty is properly imposed by regulation. The cases decide each situation on its own merits, as is illustrated by the Acker case, where the Court's opinion characterized the disfavored penalty provision as an attempt to impose a double penalty for the same conduct already punished by a provision of the tax code. See 361 U.S. at 93.

The regulation under attack in this appeal, 25 CFR 211.22, is part of a comprehensive plan for development of Indian minerals put into motion by the provisions of 25 U.S.C. §§ 396a-396g. This plan is described in Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981):

The 1938 Act provides that an Indian tribe may lease its lands for mining purposes with the approval of the Secretary of the Interior. 25 U.S.C. § 396a. Section 396b provides for the sale of oil and gas mining leases under regulations to be prescribed by the Secretary. The Secretary is authorized to reject all bids and readvertise leases when in the Secretary's judgment that course would be in the Indians' best interests. With the Indians' consent, a lease may be privately negotiated. Section 396b also safeguards the rights of tribes organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), to enter into mining leases in accordance with the provisions of that Act and with their tribal constitutions and corporate charters. Other sections specify the type of bond to be furnished by the lessees and authorize the Secretary to promulgate regulations. 25 U.S.C. §§ 396c, 396d.

The regulations promulgated by the Secretary under authority of the 1938 Act cover many aspects of mineral leasing between tribes and non-Indian lessees, including the procedures for acquiring mineral leases, minimum rates for rentals and royalties and the manner in which payments are to be made, penalties for failure to comply with the terms of leases, information to be supplied by lessees, acreage limitations, inspections of lessees' records by Indian lessors or the Department of Interior officials, and cancellation of leases. 25 C.F.R. §§ 171.1-30 (1980); see also 25 C.F.R. §§ 173.1-29 (1980) (Emphasis supplied.)

(650 F.2d 1112, fn.9). Consistent with the quoted analysis, in United States v. Forbes, 36 F. Supp. 131 (D. Mont 1940), aff'd 125 F.2d 404 (9th Cir. 1942), aff'd 127 F.2d 862 (1942) the imposition of administrative penalties by the Department was approved as a necessary and reasonable exercise of the power of the Secretary exercised incident to mineral leasing under the Mineral Leasing Act of 1920. It is concluded, therefore, the regulation attacked by Perlman, 25 CFR 211.22, was duly promulgated under the authority of the Indian Mineral Leasing Act, and properly provides for penalties for violation of rules implementing the Act. This Board has often observed it lacks the authority to declare invalid such a duly promulgated regulation of the Department. See, e.g., Ahtna, Inc., 87 IBLA 283 (1985).

The record establishes Perlman was in fact authorized to begin the preliminary "dirt work" for wells 17-1, 17-2, and 20-1B. Preliminary staking notices for wells 17-1, 17-2 and 20-1B were signed in August 1982. An onsite inspection of the well sites was held on September 1, 1982. Tr. 30, 31; Fennewald affidavit at 1, 2. The Salwerowicz affidavit submitted by BLM in response to the Fennewald statement admits oral approval for preliminary dirt work was given by BLM employees in the case of well 1-33, on June 2, 1981, substantiating Perlman's claim that such a practice was customary under certain circumstances. Salwerowicz affidavit at 2, 3. <sup>6/</sup> Since, according to Salwerowicz, such permission is given only when written approval of a permit to drill is imminent, the fact that the written approval of the applications for permits to drill wells 17-1, 17-2, and 20-1B was issued less than 20 days after the alleged oral approval for dirt work was said to have been given, gives further credence to the claim that oral approval for dirt work was in fact given. Despite this fact, however, the penalty review panel charged Perlman with a penalty from the date preliminary dirt work began, rather than from the times when unauthorized drilling commenced. The record, as previously summarized, establishes that, for well 17-1, there were 6 days of actual unauthorized drilling prior to issuance of a written permit to drill; for well 17-2, 3 days; and for well 20-1B, 6 days, for a total of 15 days. On well 1-33, unauthorized recompletion or plug back operations occurred over a period of 13 days.

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<sup>6/</sup> According to the dissent, Departmental policy regards surface disturbance without prior written approval to be a serious violation. It is apparent, however, that in Colorado at any rate, the policy was not quite so strict as the dissent believes. At no place in the record is there any mention that the oral approval for work on 1-33 was considered to be a breach of Departmental policy by any Departmental employee. On the contrary, it appears to have been a recognized practice. See Salwerowicz Affidavit at 2.

The BLM review panel apparently calculating all operations, rather than only those operations concerned with drilling without written permission for operations, assessed a penalty for 64 days of continuing violation (Tr. 7). The well log for well 1-33, however, considered with the testimony at hearing and the supplemental material received following hearing, indicates an over-statement of the time actually spent in unauthorized recompletions. The testimony of Perlman's landman, based upon the well log reports, was to the effect that, following initial completion of the well, (which was made with written approval), recompletions without written authorization occurred during a much shorter period (Tr. 14). The well logs indicate actual time spent upon recompletion at 1-33 to be 13 days rather than 64 days, as found by the review panel. This figure, 13 days, is arrived at by counting the number of days actually spent in recompletion activity. This figure does not include days during which no work was done, nor does it continue to assess a penalty for periods between recompletion activity at the various levels, since only unauthorized "operations" are forbidden. See 25 CFR 211.20(b). 7/ This Board therefore finds Perlman conducted unauthorized operations on all four wells for a total of 28 days. The penalty for these violations, computed at \$250 per day (the figure arrived at by the review panel), totals \$7,000, rather than \$28,750.

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7/ If, for example, on Sept. 13, 1982, well 20-1B had been spudded and Perlman then notified the driller to stop work because a permit to drill had not issued, Perlman should be liable for 1 day rather than for the 17 days which elapsed between the 13th and the issuance of a permit on October 1.

[2] While the number of days of violation was overestimated by including other preparatory work under the "drilling" category, the basis for the computation of penalty at \$250 per day remains to be considered. The review panel justified its finding concerning the amount of the penalty assessed in the case of well 1-33, stating:

The maximum assessment that can be levied under 25 CFR 211.22 is lease cancellation or a penalty of not more than \$500 per day for each and every day the terms of the lease or the regulations are violated; or both such penalty and cancellation. Since the operating practices were proper for tight sands, and since the initial assessment was set at \$250 per day rather than \$500 per day, we believe that appropriate discretion was shown in establishing the amount of the assessment.

Panel decision dated January 26, 1984, at 2. Similar logic was applied by the panel in computing the penalty amount and quite clearly, the intention of the panel was to mitigate the penalty to half its potential severity as an exercise of agency discretion. This decision was based upon consideration of the effect of Perlman's operation upon the leasehold, and allowed leniency for the fact the operator had used appropriate drilling techniques.

In an elaborate 1979 case study of agency penalty procedure, the Administrative Conference of the United States arrived at recommendations for civil money penalty administration. See Recommendation of the Administrative Conference of the United States (RACUS) (GPO 1979). Concluding that considerations of due process require a hearing in penalty cases, the conference recommended standards be established for the determination of the amount of penalty to be levied. Recommending the use of penalty formulas as helpful to such determinations the conference opined that:

Penalty standards should, in addition, specify whether and to what extent the agency will consider other factors such as compensation for harm caused by the violation or the impact of the penalty on the violator's financial condition. In order to reduce the cost of the penalty calculation process and increase the predictability of the sanction, simplifying assumptions about the benefit realized from or the harm caused by illegal activity should be utilized.

Recommendation 79-3: Agency Assessment and Mitigation of Civil Money Penalties. RACUS at 24-25.

Quite clearly, in this case, similar considerations entered into the decisionmaking by the review panel, and were part of the rationale for the ultimate penalty assessed.

When it determined mitigation of the penalty was appropriate, the review panel indicated that consideration of the absence of property damage and other circumstantial concerns were taken in account in setting the amount of the penalty to be assessed. The review panel also found "[t]he determination to apply assessments for the total period of noncompliance rather than as a single date violation is consistent with both past and present practices" (Review Decision at 3). The review panel cites 30 CFR Part 221 as support for this proposition. This reasoning is incorrect, since general Departmental regulatory policy since 1984 has clearly been otherwise. See 43 CFR 3163.3 (1984). And see also Instruction Memorandum No. 84-594, Change 4, declaring an end to the collection of charges for successive days of noncompliance with leasing regulations. The conclusion reached, however, is correct, since the controlling regulation here applicable, 25 CFR 211.22, leaves the agency no discretion but requires that the penalty imposed (which is subject to agency discretion) shall apply to "each and every day the terms of the lease, the

regulations, or [the superintendent's] orders are violated." 25 CFR 211.22. Here, therefore, the review panel correctly assessed a penalty for successive days of operation.

[3] So far as concerns the fixing of the penalty assessment at \$250 for each day of drilling operation at each well, we find the review panel and District Director arrived at this amount by mitigation by 50 percent of the maximum penalty which could have been assessed. This mitigation considered Perlman's overall conduct of the drilling operation. It was also a recognition he had violated the Department's regulations requiring written permission to drill, which could have resulted in serious damage to the leasehold and to the Indian lessor. The Board finds, therefore, that under the circumstances, no further reduction in the penalty amount is warranted. So much of the decision as provides for assessment of civil penalty in the amount of \$250 per day for each violation is, therefore, affirmed. The total amount due from appellant, as so computed, is \$7,000; the penalty is reduced accordingly.

In connection with the calculation of penalty for successive days of operation, it should be observed, in calculating the appropriate penalty for the recompletion operation at well 1-33, that even were the total period of 64 days of "continuing" violation as calculated by the BLM review panel to be accepted as a basis for calculating penalty, it would not be possible to penalize equally days during which recompletion operations were under way and days when plug-back activity had halted. Quite clearly, in the case of 1-33,

Perlman could have stopped at any formation explored by him, and need not have gone forward with successive plug-backs at different levels. Presumably, had he been notified his activity was unauthorized prior to completion of the last and highest level, he would have stopped work. Since his lack of prohibited activity between plug-backs could itself have caused no damage, the Board finds that, even assuming a violation during those days of inactivity, no penalty should be assessed for those days in which no activity took place, considering all the factors just described.<sup>8/</sup> Similar reasoning would apply in the case of wells 17-1, 17-2, and 20-B; no penalty at all should be assessed for orally permitted operations or for periods of inactivity. The result reached, therefore, would be the same in either case as is reached by finding only days of actual operation to be violations of the applicable regulation.

[4] When considering Perlman's estoppel argument, that the Government should not be allowed to penalize conduct which it allowed to occur, it must be kept in mind that, although often changed, the Department's Indian mineral leasing regulations have consistently required written approval prior to commencement of drilling. See, e.g., 25 CFR 211.21, previously codified at 25 CFR 171.21 (1981). To invoke estoppel against the Government, four factors must be present: There must be (1) full knowledge of all relevant facts by the Government official who (2) intends his affirmative misrepresentation or concealment of a material fact will be acted upon under circumstances which entitle the party asserting estoppel to believe the misrepresentations,

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<sup>8/</sup> Had his drilling resulted in environmental damage Pearlman would also have been subject to penalties for violation of other provisions of the lease. The amount would, in such case, be based upon the number of days the environmental damage continued.

(3) the party asserting the estoppel must be ignorant of the true facts, and (4) he must rely upon the representation as made by the official. See United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979). This case discloses no evidence of affirmative misconduct by a Federal employee. Further, assuming permission to begin preliminary work could be considered to amount to an affirmative misrepresentation or concealment of the regulatory requirement that written permission to drill was required, because Departmental regulation provides such permission must be obtained in writing, failure to do so could not be excused so easily. Valid regulations may not be avoided by reliance upon claimed lax, uneven, or mistaken administration by governmental employees, since all persons are presumed to know of the existence of valid regulatory requirements. Thus, an essential element of a claim of estoppel, that the party asserting the claim be ignorant of the true facts, is missing when a party asserts he is ignorant of pertinent provisions of a relevant regulation. See, e.g., Tom Hurd, 80 IBLA 107 (1984). Because knowledge of the regulation is imputed to those affected by its provisions, there can be no claim of ignorance of the rule. Tom Hurd, supra. The provisions of 25 CFR 211.20 and 30 CFR 221.21 (1982), requiring written permission prior to drilling, redrilling, or plugging-back and other operations, were binding upon Perlman at the time he conducted drilling on wells 1-33, 17-1, 17-2, and 20-1B.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, therefore, so much of the BLM decision

as provides for a civil-money-penalty assessment in the sum of \$250 for successive days violation for each infraction as modified by this decision is affirmed. The penalty for all violations under review, is assessed in the total amount of \$7,000.

Franklin D. Arness  
Administrative Judge

I concur:

R. W. Mullen  
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I cannot agree that the penalties for the violations on these two leases should be reduced from \$16,000 to \$3,250 (for well 1-33) and from \$12,750 to \$3,750 (for wells 17-1, 17-2, and 20-1B) respectively. At well 1-33, the Bureau of Land Management concluded that "two unapproved plug backs and recompletions to other formations were performed, that is, from the Dakota to the Mesaverde and from the Mesaverde to the Fruitland." <sup>1/</sup> It assessed \$16,000 in penalties for these violations, on the basis of a total of 64 days of violation at \$250/day. Its explanation for the number of days was:

Since these violations have been determined to be continuing, a starting and ending date must be established. The starting date of the violations has been determined to be the date recompletion operations started to test the unapproved formation. The determination of the end of the period of the violations is a judgment. It could be when the BLM approved the recompletion operations or it could be the end of some particular operation determined from reports. It was determined by the Hearing Panel that the ending date should be the Well Completion Date as recorded on the Well Completion Reports, Item 17. This date is interpreted to be the date the well or formation is capable of being produced, which is after stimulation of the formations by acidizing or fracturing. This date could have been established as the date that the final work reports were submitted to our office.

\* \* \* \* \*

Accordingly, the hearing panel sustains the decision of the Montrose District Manager and finds as follows:

<sup>1/</sup> Decision of Jan. 26, 1984, at 1. A "recompletion" in this context is "redrilling the same well bore to reach a new reservoir after production from the original reservoir has been abandoned," (8 Williams and Meyers, Oil and Gas Law 729 (1984)), except that in this case there was no production from the Dakota formation before recompletion was initiated.

Mesaverde Formation:

1. Recompletion operations started on February 17, 1982.
2. The formation was fractured on April 16, 1982.
3. Time frame of violation is 59 days.
4. Assessment: 59 days at \$250 per day - \$14,750

Fruitland Formation:

1. Recompletion operations started on June 1, 1982.
2. The formation was acidized on June 5, 1982.
3. Time frame of violation is 5 days.
4. Assessment: 5 days at \$250 per day - \$1,250.

Total assessment - \$16,000

panel: A fuller technical explanation was provided to the BLM hearing

MR. MOORE: Any questions from the Panel?

MR. SALWEROWICZ: I'd like to try to clarify something. You say the period of ass[ess]ment for recompletion for Mesa Verde started February 17th and ended April 17th?

MR. KENDRICK: Right.

MR. SALWEROWICZ: What was it on February 17th that started it and what happened on April 17th that stopped it?

MR. KENDRICK: I'd have to look at the records. Could you help me with that, Terry?

MR. GALLOWAY: February 17th, that date started when they pulled up the "set packer" and pulled up the hole and perforated the Mesa Verde Formation and they did work for a period of a couple of weeks. I don't have the date off the top of my head. The well was shut-in for a period of time and then the further completion work was done in the Mesa Verde up until April 17th when I believe they fraced and was the end of the assessment period when the formation could reasonably have been expected to produce.

MR. SALWEROWICZ: And then June 1st would be the date that recompletion was --

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2/ Transcript of the Jan. 12, 1984, hearing at 7-8.

MR. GALLOWAY: Yes. The 4 1/2-inch casing was pulled and perforated in the Fruitland Formation and June 5th is when it was fraced or acidized in the Fruitland Formation, at which time the reasoning was the fromation [sic] could reasonably have been expected to be producing. There was further work carried on later, but that was the reason for those periods of time. [2/]

The majority, adopting a suggestion made by Perlman to the BLM hearing panel that "recompletion" should be defined as "when you have the rig on the location," 3/ conclude that he should be penalized only for 13 days "actually spent in unauthorized recompletions." 4/ In my view the purpose of the regulation requiring written permission before starting any operation -- namely, to prevent waste of the oil and gas resource and damage to other resources -- is better served by defining the recompletion operation as BLM did in its January 26 decision, namely beginning when operations started to test the unapproved formation and concluding when the formation is capable of being produced. Since, contrary to the majority's assertion, waste or damage could occur even when drilling is not occurring, it is not unreasonable to impose assessments for the days between unauthorized drilling periods.

At wells 17-1, 17-2, and 20-1B, the violations were "dirt work for pad and road construction and the drilling commenced prior to the approval of the APD." 5/ Penalties of \$12,750 were assessed for a total of 48 days of non-compliance (at \$250/day), computed from the day dirt work began at each site

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3/ Id. at 16.

4/ Majority opinion, supra, at 227.

5/ Decision of Jan. 26, 1984, at 3. Less cement was used for production casing at each well than was specified in the APD.

until the day before each APD was approved. 6/ The majority reduce the number of days of violation to 15 (for unauthorized drilling only) because they believe BLM gave oral approval for the dirt work. They base this belief on an affidavit from one of Perlman's employees 7/ and on the fact that oral approval to commence dirt work was given for well 1-33. 8/ BLM's January 26 decision addresses the issue of oral approval, which was discussed at the hearing:

25 CFR 211.10(b) requires that written approval be obtained by the lessee before commencing operations. At the time of these violations all written approval for drilling operations on Indian leases were made by the Minerals Management Service. Oral approvals were not the policy of the Minerals Management Service in the past and are not the policy of the Bureau of Land Management. During the on-site inspection of the well locations, various statements may have been made as to the completeness or acceptability of the plan, but we find nothing to indicate that these statements should be considered an oral approval to commence earth work or drilling operations. 9/

Neither Perlman's affidavit nor the oral approval for well 1-33 persuade me that oral approval for dirt work on wells 17-1, 17-2, and 20-1B was given. Even if it was given, 25 CFR 211.10(b), which Perlman is presumed to

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6/ Of this amount \$750 was for failure to use the specified amount of cement. See note 5, supra.

7/ Affidavit of Duke Fennewald dated Jan. 13, 1984, Exhibit A to Appellant's Reply to BLM's Response, filed June 13, 1984:

"10. On or about September 13, 1982, Don Englishman (MMS) told me that the stipulations for the Nos. 17-2 and 20-1B Wells and the rehabilitation plans for the Nos. 17-1, 17-2, and 20-1B Wells had been received in the Grand Junction Office of the MMS. He told me at this time that Perlman could proceed with drilling operations on the Nos. 17-1, 17-2, and 20-1B Wells."

8/ Exhibit B to Appellant's Reply to BLM's Response.

9/ Decision of Jan. 26, 1984, at 4.

know, states categorically that "[w]ritten permission must be secured from the supervisor before any operations are started on the leased premises." (Emphasis added.) Reliance by Perlman on contrary information or opinion of a Departmental employee cannot operate to vest any right not authorized by law, nor is the authority of the United States to enforce a public right lost by an employee's neglect of duty. 10/ 43 CFR 1810.3. Contrary to the majority's view, Departmental policy still regards both drilling without approval and surface disturbance preliminary to drilling without approval as serious violations.

11/

I would affirm the January 26, 1984, BLM decision.

Will A. Irwin  
Administrative Judge

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10/ Oral approval of any operation on an Indian lease would have clearly been neglect of duty in September 1982. For the present law, see 43 CFR 3162.3-2; 3165.2. See also the proposed amendment of 3162.3-2 at 51 FR 3889 (Jan. 30, 1986).

11/ See proposed 43 CFR 3163.3(a)(2), 51 FR 3890 (Jan. 30, 1986).

