

BENSON-MONTIN-GREER DRILLING CORP.

IBLA 85-115

Decided May 28, 1986

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, affirming assessment of liquidated damages for incident of noncompliance. NM-33013.

Affirmed as modified.

1. Oil and Gas Leases: Civil Assessments and Penalties -- Regulations: Generally

BLM may properly assess liquidated damages pursuant to 43 CFR 3163.3(c) where an oil and gas lessee fails to obtain BLM approval of an application for a permit to drill prior to commencing drilling operations. Where, during BLM's technical and procedural review of an assessment order, 43 CFR 3163.3(c) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

APPEARANCES: R. Charles Gentry, Esq., Dallas, Texas, for appellant; Gayle E. Manges, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Benson-Montin-Greer Drilling Corporation has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated October 25, 1984, affirming an assessment of \$ 3,750 for an incident of noncompliance involving appellant's oil and gas lease NM-33013.

By letter dated October 2, 1984, the District Manager, Albuquerque District, New Mexico, BLM, informed appellant it was being assessed \$ 4,250 (\$ 250 per day) pursuant to 43 CFR 3163.3(c) for the failure to have an approved application for a permit to drill (APD) "well no. 25 (B-32) Canada unit" for the 17-day period between August 27 (the date the well was spudded) and September 13, 1984 (the date the APD was approved). The well is situated within sec. 32, T. 25 N., R. 1 W., New Mexico Principal Meridian, Rio Arriba County, New Mexico, in the Santa Fe National Forest.

The record indicates appellant had filed an APD for well No. 25 with BLM on July 18, 1984, and BLM had transmitted the APD to the Cuba Ranger District, Forest Service, U.S. Department of Agriculture, where it was received on July 25, 1984. By letter dated September 10, 1984, the Forest Service notified BLM it concurred in the approval of appellant's APD. BLM received the letter on September 11, 1984.

On October 9, 1984, BLM received appellant's response to its October 2, 1984, assessment letter, requesting a technical and procedural review pursuant to 43 CFR 3165.3. Appellant stated it had been informed by both BLM and Forest Service personnel "that these agencies were currently 'experimenting' with a new method of processing APD requirements such that the operator would deal directly with the BLM for subsurface matters and directly with the Forest Service for surface matters." Appellant reported the Forest Service had verbally approved the APD on August 23, 1984, and the Forest Service representative had also stated that "you will receive your written APD approval from the BLM." Appellant stated that on August 23, 1984, it had also "[c]ommenced dirtwork on location and made arrangements for contractor to move rig in as scheduled on Monday, August 27," because it could not afford a delay in its drilling program. Appellant noted it was informed by BLM in an August 31, 1984, telephone conversation that verbal approval by the Forest Service was not sufficient to entitle an operator to commence drilling. Appellant argued that in view of the transfer of authority it was initially justified in assuming verbal approval by the Forest Service was sufficient to commence drilling and, upon being informed that it was not sufficient, it was justified in assuming the approval date would nevertheless be August 23, 1984, in order to give effect to the transfer program.

In its October 1984 decision, BLM affirmed the assessment of \$ 250 per day for "failure to obtain BLM approval" of an APD prior to commencing operations, but reduced the total assessment to \$ 3,750 because the APD should have been approved on September 11, 1984, the date BLM received the Forest Service's written concurrence.

In its statement of reasons for appeal, appellant admits it started drilling the well prior to obtaining BLM written approval of the APD, but argues it was entitled, based on past experience and the experimental program, to commence drilling upon receiving verbal approval from the Forest Service, especially given its expectation that BLM approval would be effective as of that same date. Appellant also contends it should not be assessed pursuant to 43 CFR 3163.3(c) where that regulation does not provide for a mandatory assessment, especially where there has been no loss or damage to the United States and where verbal approval of drilling was sufficient under the regulation. In the alternative, appellant contends that even if 43 CFR 3163.3(c) is applicable, the assessment was improper because appellant did not expressly agree in the lease agreement to pay substantial liquidated damages for committing a technical violation of Departmental regulations. Appellant argues the assessment is so unreasonable that it is a penalty and therefore unenforceable on the grounds of public policy, and asserts that damages should be limited to actual damages which are zero or minimal. Finally, appellant argues that BLM violated the requirements of due process and the intent of Congress by trying to avoid the notice and opportunity for hearing provisions of 43 CFR 3163.4.

[1] Since June 1, 1942, the Department has provided for the assessment of liquidated damages in order to cover "[a]dministrative costs" arising from certain defaults and violations where the actual loss or damage to the United States is "difficult or impracticable of ascertainment," including the "failure * * * to obtain approval before starting to drill." 30 CFR 221.54 (7 FR 4138 (June 2, 1942)). The regulation in effect at the time BLM issued its assessment letter of October 2, 1984, continued this policy and provided in relevant part:

Certain instances of noncompliance result in loss or damage to the lessor, the amount of which is difficult or impracticable to ascertain. Except where actual losses or damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damage to the lessor from specific instances of noncompliance. Provided that as to paragraphs (a), (c), (g), and (j) of this section loss shall be applicable to each successive day of the noncompliance.

* * * * *

(c) For failure to obtain approval of an Application for Permit to Drill prior to commencing operations or causing surface disturbance preliminary thereto * * *, \$ 250.

43 CFR 3163.3 (47 FR 47772 (Oct. 27, 1982). Redesignated and amended at 48 FR 36583, 36586 (Aug. 12, 1983)).

Invocation of the liquidated damages provisions of 43 CFR 3163.3 is, as appellant maintains, not mandatory. Indeed, 43 CFR 3163.1 provides that, "[i]n the event of an act of noncompliance," the authorized officer is "authorized" in part to shut down operations, to recommend cancellation of the lease, and "to assess penalties and/or liquidated damages in specific instances of noncompliance." However, BLM may properly invoke 43 CFR 3163.3 where to do so is not arbitrary and capricious, or an abuse of discretion.

Appellant contends that 43 CFR 3163.3(c) cannot be invoked in any case where the Forest Service had given its verbal approval to the commencement of drilling operations. However, appellant is mistaken as to the nature of the purported experimental transfer program. The record contains a March 22, 1984, memorandum from the Deputy State Director, Mineral Resources, to the District Manager, Albuquerque District, concerning a "test," to run from April 1 to October 1, 1984, transferring surface management responsibilities with respect to oil and gas lease operations within the San Juan Basin of the Jicarilla and Cuba Ranger Districts from BLM to the Forest Service. The memorandum states that the Forest Service "will assume as much of the surface management responsibilities as possible, including the conduct of the predrill onsite inspections * * * and follow-up compliance," but that "BLM will continue to be responsible for the completeness and final approval of all APD's and plans submitted by the operator." It is well established that the authority to approve APD's is committed to the Secretary of the Interior. Udall v. Tallman, 380 U.S. 1, 4, rehearing denied, 380 U.S. 989 (1965); Copper Valley Machine Works, Inc. v. Andrus, 474 F. Supp. 189 (D.D.C. 1979), vacated on other grounds, 653 F.2d 595 (D.C. Cir. 1981); Beartooth Oil

and Gas Co., 85 IBLA 11, 92 I.D. 74 (1985). The Secretary has delegated this authority, pursuant to 43 CFR 3161.2, to the authorized BLM officer who is required by 43 CFR 3162.3-1(f) to consult with the appropriate Federal surface managing agency upon initiation of the APD process. 1/ Under 43 CFR 3162.3-1(c), the lessee is required to submit the APD to the authorized officer for approval and "[n]o drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized officer's approval of the permit." Appellant clearly violated this regulation. Appellant has presented no evidence that, either prior to, during, or subsequent to the experimental transfer program, BLM has permitted a lessee to commence drilling operations upon the purported approval by only the Forest Service. 2/ Moreover, there is no regulation or Departmental policy, of which we are aware, that permits BLM approval to operate retroactively to the date of purported approval by the Forest Service. There is no specific provision in the regulations that the approval of drilling operations be in writing; however, that generally would be the case given the need to specify the nature and scope of permitted operations. See 43 CFR 3162.3-1(f). Nevertheless, absent approval in some form by the authorized BLM officer of drilling operations by an oil and gas lessee, BLM clearly could invoke 43 CFR 3163.3(c). That is the situation herein. Appellant was not entitled to rely on the Forest Service's purported approval of drilling operations.

Appellant also argues BLM improperly invoked the liquidated damages provisions of 43 CFR 3163.3, rather than the civil penalty provisions of 43 CFR 3163.4, 3/ which provided in relevant part:

[T]he authorized officer shall give the lessee notice in writing to remedy any defaults or violations. Failure by the lessee to perform or commence the necessary remedial action * * * may subject * * * the lessee to a penalty of not more than \$ 1,000 per day * * *. Normally a penalty would only be assessed for violations involving serious threats to health, safety, property, or the environment, or for continuous disregard of orders. The lessee shall be entitled to notice of noncompliance and a hearing within 30 days after such notice, with respect to the terms of the lease, regulations, or orders violated. [Emphasis added.]

1/ We recognize the experimental program was undertaken as an effort to ascertain whether it would streamline the regulation of oil and gas lease operations where such operations are subject to the dual jurisdiction of BLM and the Forest Service. However, it is clear the program did not result in a delegation of BLM's APD approval authority, and appellant has presented no evidence that it did. Cf. Nance v. Environmental Protection Agency, 645 F.2d 701, 710 (9th Cir.), cert. denied, 454 U.S. 1081 (1981). 2/ In a Nov. 20, 1984, letter to BLM, submitted on appeal by appellant, the Forest Service essentially admitted it had in part been responsible for creating "wrong assumptions in what constituted authorization to proceed," due to "past precedent on allowing verbals to proceed." For a discussion of Departmental Policy concerning oral permission to drill, see William Perlman, 91 IBLA 208, 93 I.D. __ (1986).

3/ Section 3163.4 was removed and replaced by section 3163.4-1 effective October 22, 1984, at 49 FR 37365 (Sept. 21, 1984).

(47 FR 7772 (Oct. 27, 1982). Redesignated and amended at 48 FR 36583, 36586 (Aug. 12, 1983)). The clear intent of the above regulation is to provide the lessee written notice of a violation and opportunity for a hearing in those cases involving serious violations that may result in substantial loss or damage. There is no evidence the failure of appellant to obtain BLM approval of an APD before drilling resulted in a threat to health, safety, property, or the environment in this case so as to invoke the provisions of this regulation. The notice offered by 43 CFR 3163.3 that liquidated damages may be assessed if drilling operations commence prior to BLM approval of an APD constitutes sufficient notice to appellant of the probable consequence of its actions. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

Finally, appellant contends the assessment approved by BLM in its October 25, 1984, decision is in the nature of a penalty rather than liquidated damages and is unenforceable as a matter of public policy because it is significantly disproportionate to the minimal loss or damage suffered by the United States. We need not address the question of whether the \$ 3,750 assessed constitutes a penalty, because appellant is entitled to a significant reduction in the assessment under an amendment to 43 CFR 3163.3. During BLM's technical and procedural review of the assessment, that regulation was amended, effective October 22, 1984, deleting the provision for the continuing assessment of liquidated damages for each day of noncompliance. See 49 FR 37365 (Sept. 21, 1984). ^{4/} Thus, under the amended regulation, BLM was only entitled to assess one-time liquidated damages of \$ 250 for each instance of noncompliance for failure to obtain approval of an APD prior to commencing operations. ^{5/} In the absence of any intervening rights which would be adversely affected or countervailing public policy considerations, we will apply the amended regulation to the benefit of the affected party. James E. Strong, 45 IBLA 386 (1980). Accordingly, appellant's assessment is hereby reduced to \$ 250. ^{6/} We conclude this amount is commensurate with the

^{4/} In the preamble to the regulation, the Department explained this change as follows:

"Since the penalty provisions in both the proposed and final rulemakings are imposed for the continued disregard of orders to correct, there is no longer a need to continue assessments during such noncompliance and, therefore, the final rulemaking modifies § 3163.3 to indicate that any assessment for a violation will be a one-time charge."

49 FR 37361 (Sept. 21, 1984).

^{5/} On Mar. 22, 1985, BLM suspended the use of assessments for noncompliance pursuant to 43 CFR 3163.3(c), except where actual loss or damage could be ascertained. 50 FR 11517 (Mar. 22, 1985). BLM published proposed rules on Jan. 30, 1986, which would amend 43 CFR 3163.3 to provide drilling without approval "shall result in immediate assessments * * * [of] \$ 500 per day for each day that the violation existed, including days the violation existed prior to discovery, not to exceed \$ 5,000." 43 CFR 3163.3(a)(2) (51 FR 3890 (Jan. 30, 1986)).

^{6/} We note a reduction is also authorized under present BLM policy regarding assessments for violations of 43 CFR 3163.3(c) found prior to Oct. 22, 1984. This policy provides such assessments "should be considered discretionary actions" and with respect to presently unsettled cases, any assessment imposed prior to Oct. 22, 1984, may be reduced or waived. Instruction Memorandum No. 84-594, Change 4 (Apr. 16, 1985).

loss or damage suffered by the United States in a situation where actual loss or damage is difficult or impracticable to ascertain. We recognize there are instances where, other than administrative costs to BLM, there is no actual harm occasioned by a lessee going ahead with operations prior to approval thereof and that a lessee may, in such circumstances, be acting in good faith. See Wintershall Oil & Gas Corp., 85 IBLA 101 (1985). Indeed, that appears to be the situation herein. However, we conclude that administrative costs alone are sufficient to invoke the liquidated damages provisions of 43 CFR 3163.3 where a lessee, even in good faith, violates the clear dictates of the regulations. 7/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

John H. Kelly
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge.

7/ The preamble to the Oct. 22, 1984, amendment to 43 CFR 3163.3 states that an assessment under that regulatory provision is in part intended to compensate the United States for "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).

