

DAVIS OIL CO.

IBLA 85-254

Decided November 24, 1986

Appeal from a decision of the Bureau of Land Management, Wyoming State Office, imposing noncompliance assessments for failure to report production on 20 wells located on oil and gas leases W-47681 et al.

Vacated.

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

Automatic assessments for failure to file timely production reports pursuant to 43 CFR 3163.3(h) are vacated in deference to a later issued BLM Instruction Memorandum suspending enforcement of 43 CFR 3163.3(h).

APPEARANCES: John F. Shepherd, Esq., Washington, D.C., for appellant; Lowell L. Madsen, Esq., Office of Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, Denver, Colorado, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Davis Oil Company appeals from a December 7, 1984, decision of the Wyoming State Office, Bureau of Land Management (BLM) sustaining the assessment of \$2,000 against Davis for its failure to timely notify BLM of initial production from 20 oil and gas wells located on Federal leases in Wyoming. 1/ Davis was originally assessed \$2,600, or \$100 apiece, for failure to report initial production on 26 wells, but review by BLM revealed that, as to six of those wells, there had either been timely notice of production or else production had not occurred.

On October 9, 1984, BLM's Casper District Manager had notified Davis that it would be assessed \$ 100 each for 26 wells on which it had produced hydrocarbons on Federal leases but had not reported the production within 5 days of production as required by a provision of the application for permit to drill. This provision states:

Should this well be successfully completed for production, this office must be notified when it is placed in a producing status.

1/ The leases are: W-47681, W-39980, W-36705, W-31336, W-32847, W-82738, W-82739, W-42101, W-40809, W-32847, W-36707, W-51882.

Such notification will be by telegram or other written communication and must be received in this office no later than the fifth business day following the date on which the well is placed on production.

Additionally, the Casper District Manager cited 43 CFR 3163.3(h) as authority for the proposed \$2,600 assessment. This regulation provides that failure to file required reports subjects the Federal oil and gas lessee to a \$100 assessment for every instance of noncompliance with regulations, orders, and notices. Davis then requested review of the Casper District Manager's assessment pursuant to 43 CFR 3165.3, which resulted in review by the Wyoming State Office, and, ultimately, in the decision of December 7, 1984, which reduced the assessment to \$2,000 and which is the subject of this appeal.

As the Casper District Manager found, 43 CFR 3163.3(h) provides for assessment of \$100 for every incident of noncompliance with regulation or order by a Federal oil and gas lessee. This includes the failure to make required reports, including the report of production from a well located on a Federal lease. Davis does not deny that it had an obligation, under applicable regulations, to file such reports for each of the 20 wells still at issue following the State office review and upon which it achieved production. Rather, Davis contends that, first, BLM has not correctly defined the term "production" which should be considered to occur at the time a first sale of hydrocarbons from a well takes place. So viewed, Davis argues, the reports which it submitted for the 20 wells remaining in issue on appeal to this Board would have been timely. Secondly, Davis contends that even if "production" may be found to occur prior to sale, it is nonetheless not properly assessed pursuant to BLM's regulation for these 20 instances of noncompliance, all of which occurred at roughly the same time and place, because the regulation is ambiguous concerning the reporting requirement and there was no prior notice of noncompliance to dispel that ambiguity. Finally, Davis argues that BLM lacks a statutory authority for the regulation codified at 43 CFR 3163.3.

Alternatively, Davis submits there should be a \$200 "cap" or limit placed upon the assessment, pursuant to provision of BLM Instruction Memorandum (IM) No. 84-594, change 3, which established limits upon noncompliance assessments.

Davis, therefore, does not challenge the right of BLM to require a production report. Rather, it defends the manner in which those reports were filed in the case of each of the 20 wells assessed in this case, and challenges the authority of BLM to make assessments against it, where it is argued Davis has substantially complied with the agency's reporting requirement. Further, this argument runs, none of the 20 cited instances has resulted in any damage to the Federal lessor, and no assessment can be justified under such circumstance, for the reasons stated as grounds for appeal. As explained below, the assessments against Davis must be vacated, although it is apparent BLM correctly found, in each case, that Davis' report was late, and therefore in violation of 43 CFR 3163.3(h).

[1] On March 22, 1985, except for cases where there was actual damage to the leasehold, BLM suspended assessments made under provision of 43 CFR 3163.3(h). See BLM Instruction Memorandum No. 85-834 (April 16, 1985). On January 30, 1986, BLM published proposed rules at 51 FR 3882, 3890, to revise 43 CFR 3163.3, and to require prior notice as a condition for assessments for failure to report. 51 FR 3890 (Jan. 30, 1986). As the preface to this rule explained, "Assessments under the various Acts authorizing the leasing of minerals would be modified by the proposed rulemaking to eliminate automatic assessments for noncompliance involving violations of §§ 3163.3(d), (e), (g), (h), and (j) of the existing regulations." Id. at 3887. The effect to be given to this agency rulemaking by this Board to pending appeals which arose from conduct occurring prior to 1985 was considered in Yates Petroleum Corp., 91 IBLA 252 (1985), where this Board gave retroactive effect to the BLM policy expressed in the proposed rulemaking. The Yates decision explains:

We recognize that 43 CFR 3163.3(e) and 43 CFR 3163.3(h) were in effect at the time BLM took its action, and neither the suspension nor the proposed regulations are clearly dispositive herein. They do, however, reflect the Department's present policy concerning the levy of an assessment for failure to comply with the identification and the reporting requirements. In the past this Board has applied the present BLM policy to a pending matter, if to do so would benefit the affected party, and if there were no countervailing laws, public policy reasons, or intervening rights.

Id. at 263. See also Burton/Hawks, Inc., 92 IBLA 180 (1986). The same considerations are clearly controlling here, and entitle appellant to relief from the assessments made against these 20 wells.

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 vacated.

Franklin D. Arness
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

