

MINGO OIL PRODUCERS (ON RECONSIDERATION)

IBLA 85-646

Decided June 22, 1987

Reconsideration of Mingo Oil Producers, 94 IBLA 384 (1986), upon motion submitted by the Bureau of Land Management. W-155092.

Mingo Oil Producers, 94 IBLA 384 (1986), vacated, decision of the Wyoming State Office affirmed as modified in part, set aside in part, and remanded.

1. Bureau of Land Management--Oil and Gas Leases: Civil Assessments and Penalties

The BLM may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7(b)(1).

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

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board in view of the suspension of that regulation.

3. Oil and Gas Leases; Civil Assessments and Penalties--Regulations; Generally

The determination that an assessment for noncompliance with 43 CFR 3103.3(a) should be levied is discretionary, and the levy of an assessment is not automatic. The Board will set aside a BLM technical and procedural review decision that levy of an assessment is automatic and remand the case to allow BLM's exercise of discretion.

APPEARANCES: H. Byron Mock, Esq., Salt Lake City, Utah, for appellant; Lowell Madsen, Esq., U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE MULLEN

This is a reconsideration of this Board's opinion in Mingo Oil Producers, 94 IBLA 384 (1986). In that case, Mingo Oil Producers (Mingo) had appealed from a technical and procedural review decision of the Wyoming State Office, Bureau of Land Management (BLM), dated April 11, 1985, affirming the imposition of two notices of incidents of noncompliance (INC's) and concomitant assessments for noncompliance. In its opinion, this Board affirmed the BLM decision only with respect to the issuance of the first INC, and vacated the BLM decision as to the second INC and the two assessments for noncompliance.

BLM issued the first INC on February 19, 1985, which stated: "At the tank battery the Equilizer [sic] valve and the fill line valves are unable to be sealed. These valves must be able to be sealed when necessary. As assessment of \$500 is being levied. (Bill Attached). Authority 43 CFR 3163(j)."

The cited regulation, 43 CFR 3163.3(j), states: "For failure to maintain effective seals required by the regulations in this part and by applicable orders and notices, or for failure to maintain the integrity of any seal placed upon any property or equipment by the authorized officer, \$250." This regulation was subsequently suspended by notice printed in the Federal Register (50 FR 11517 (Mar. 22, 1985)). 1/

This first INC allowed 5 days from receipt of notice for corrective action. According to a subsequent handwritten notation on the INC, the violation was abated on February 21, 1985. Mingo did not request an extension of time to modify the valves to permit their being sealed. BLM reinspected the site on March 11, 1985, and issued the second INC, which stated: "Failure to comply with a written order of the Authorized Officer to correct incident of noncompliance within time specified INC Dated 2-19-85 (Equilizer [sic] Line unable to be sealed when necessary) 43 CFR 3163.3(j). This Violation Incurs An Automatic Assessment of \$250.00 Under 43 CFR 3163(A)." (Emphasis in original.) This second INC also threatened civil penalties under 43 CFR 3163.4.

Mingo paid the assessments under protest and BLM conducted a technical and procedural review. BLM then issued its decision on April 11, 1985, affirming the INC's and assessments. Mingo appealed to this Board, which then issued the decision on reconsideration here, Mingo Oil Producers, supra.

In the initial decision, the Board affirmed the issuance of the first INC, for failure to seal a valve effectively as required by 43 CFR 3162.7-4(b)(1). The assessment for this first INC was vacated due to the suspension of regulation 43 CFR 3163.3(j). In the mistaken belief that the second INC was also for violation of 43 CFR 3163.3(j), the second INC and its assessment were vacated.

BLM filed a petition for reconsideration of the decision as it affected the second INC and the assessments. Mingo petitioned for reconsideration of

---

1/ 43 CFR Part 3160 was amended effective April 21, 1987. See 52 FR 5384 (Feb. 20, 1987).

the affirmance of the first INC. By order dated March 17, 1987, the Board agreed to reconsider its prior decision and ordered briefing.

In its petition, BLM argues the second INC was issued pursuant to 43 CFR 3163.3(a) for noncompliance with the first INC. As a result, BLM argues, the second assessment must stand.

Mingo contends that the initial INC was unjustified because the well was in the production phase at the time the first INC issued. However, the undisputed fact that the cited fill-line and equalizer valves were incapable of being sealed gives rise to the rebuttable presumption that the valves were not sealed during the preceding sales phase. Appellant has now had several opportunities to augment the record with evidence that during the preceding sales phase the valve was, in fact, sealed or that there had been no prior sale from the well. However, the augmented record provides no basis for either of these conclusions. This Board must again uphold the first INC.

[1] In Mingo Oil Producers, *supra*, the Board erred when treating the two INC's as independently issued INC's for the same violation. The second INC issued because BLM found Mingo had not corrected the original violation within the time specified for abatement. Mingo attempted to comply within two days of the initial INC. However, Mingo now concedes the attempt was unsuccessful. Some of the cited equalizer valves were still not capable of being properly sealed. Mingo states: "The Wyoming state decision ignores the efforts of the Appellant to correct two days after the first INC, and that Sec. 3163.4 'Penalties' makes cancellation and fines contingent on lessee's failure 'to perform or commence the necessary remedial actions'" (Statement of Reasons at 6; emphasis in original). If, as Mingo alleges, it was making a good faith attempt to comply and it needed more time, Mingo had the opportunity to request an extension of the compliance period. Under such circumstances, BLM should grant such a request absent a showing that it is not in the best interest of the Department to do so. There being no extension of time for compliance, Mingo was required to comply within the stated period. <sup>2/</sup> Because Mingo did not comply with the first INC, we must find that the second INC, issued pursuant to 43 CFR 3163.3(a), for failure to comply with a written order or instruction, was correctly issued.

[2] BLM levied assessments for the two INCs pursuant to different paragraphs of regulation 43 CFR 3163.3. The initial assessment was levied pursuant to 43 CFR 3163.3(j). In Mingo Oil Producers, *supra*, the initial assessment was vacated by the Board. At the time of review, BLM had suspended regulations 43 CFR 3163.3(c) through (j), partly because of the lack of notice to operators that violations existed. When suspending the regulations, BLM recognized the need to clarify its operational and notification requirements. See 51 FR 3882 (Jan. 30, 1986); 50 FR 11517 (Mar. 22, 1985). We find no reason for reversing our prior decision vacating the assessment for violation of 43 CFR 3163.3(j).

---

<sup>2/</sup> If Mingo had filed a request for additional compliance time and if BLM had denied the request without cause, a different result might apply.

However, the second assessment was imposed pursuant to 43 CFR 3163.3(a), which had not been suspended. This regulation states: "For failure to comply with a written order or instructions of the authorized officer, \$250 if compliance is not obtained within the time specified." This assessment regulation requires, as a precondition, that there be notice to operators of the existence of a violation. Therefore, as the provisions of 43 CFR 3163.3(a) had not been suspended, it is not appropriate to vacate the second assessment.

[3] The second INC stated that the levy of an assessment for a violation of 43 CFR 3163.3(a) was automatic. The BLM technical and procedural review decision further states:

that for failure to comply with a written order of the authorized officer in the time frame specified, the assessment for noncompliance under 43 CFR 3163.3(a) must be levied. In addition, a civil penalty must be levied for failure to comply in the time frame but the District Office failed to do so. (Emphasis added).

The regulations do not mandate an assessment be levied. Lyco Oil Corp., 92 IBLA 81, 85 (1986). Regulation 43 CFR 3163.1 authorizes a BLM officer to perform various functions, but does not require the officer to do so. As we stated in Mingo Oil Producers, supra at 389:

This regulation is sufficiently broad to provide discretionary authority to not levy an assessment. BLM may properly invoke 43 CFR 3163.3 where it would not be arbitrary, capricious, or an abuse of discretion to do so. Benson-Montin-Greer Drilling Corp., 92 IBLA 92 (1986). At the time the disputed INC's were issued, it was BLM policy to apply the assessments listed in 43 CFR 3163.3 automatically. Lyco Energy Corp., supra at 85. See Instruction Memorandum (IM) No. 84-594 (July 12, 1984); IM No. 84-594 Change 3 (Jan. 4, 1985). (Footnote omitted).

We also noted that 43 CFR 3163.5(c) acknowledges the regulatory authority to waive assessments. The levy of an assessment is clearly a discretionary action.

Therefore, it is appropriate to remand this case to BLM to permit it to exercise its discretion and determine whether or not to issue an assessment for violation of 43 CFR 3163.3(a). 3/ BLM may still impose the assessment, if it finds that course of action appropriate.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision in Mingo Oil Producers, 94 IBLA 384 (1985), is vacated and the decision of the Wyoming

---

3/ For example, if BLM were to find that a good faith attempt to comply had been made but delayed for a short time by circumstances beyond an operator's control, such as a freak snow storm, BLM could choose to waive the assessment.

State Office, Bureau of Land Management, is affirmed as modified in part, set aside in part, and remanded for further consideration of the second assessment.

---

R. W. Mullen  
Administrative Judge

I concur:

---

John H. Kelly  
Administrative Judge

ADMINISTRATIVE JUDGE VOGT DISSENTING:

I dissent for the same reasons I dissented from the initial decision in this case. See 94 IBLA 384, 391 (1986).

---

Anita Vogt  
Administrative Judge  
Alternative Member