

Appeal from three decisions of the Montana State Office, Bureau of Land Management, affirming the issuance of three Notices of Incidents of Noncompliance. TPR-M-920-6, TPR-M-920-7, and TPR-M-920-8.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982: Generally-- Words and Phrases

"Registered Mail." As used in sec. 109(h) of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. | 1719(h) (1982), the term "registered mail" embraces either "registered mail, return receipt requested" or "certified mail, return receipt requested."

APPEARANCES: Guy E. Maily, Esq., and Stephen N. Bretsen, Esq., Denver, Colorado, for appellant; Barry E. Crowell, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Texaco, Inc. (Texaco), has appealed from separate decisions of the Montana State Office, Bureau of Land Management (BLM), affirming issuance of three notices of Incidents of Noncompliance (INC) upon technical and procedural review (TPR) of these INC's. Because of a commonality of parties and issues, these three appeals have been consolidated for review by the Board.

On March 25, 1985, the Dickinson District Office, BLM, sent each of the INC notices to appellant, citing violations of the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. | 1701 (1982), and regulations adopted pursuant thereto. In all three cases, these notices were sent certified mail. The first notice, TPR-M-920-6, concerned three well signs which appellant was directed to make more legible. The second INC, TPR-M-920-7, was issued because legal descriptions were not included on facility signs at two different facilities. The third INC, TPR-M-920-8, involved violation of the minimum site security standards at one of the treating facilities.

Texaco duly sought technical and procedural review of all three of these INC's. In each case, Texaco argued that the INC was invalid because it had not been properly served upon Texaco. Texaco argued that the statute required that notice be either by personal service or by registered mail, citing 30 U.S.C. | 1719(h) (1982), and that service in each case had been by certified mail. This, Texaco contended, fatally compromised the INC's. Texaco made a number of additional challenges to the INC's based on what it concluded were other defects. It is important to note, however, that never once did Texaco contest the fact that violations of the regulations had existed.

By separate decisions dated April 5, 1985, the State Director affirmed issuance of the INC's. In each decision, the State Director noted that the term "registered mail" as used in 30 U.S.C. | 1719(h) (1982) had been interpreted to mean either registered mail, return receipt requested, or certified mail, return receipt requested. With reference to the other allegations pressed by Texaco, the State Director noted that none of the alleged deficiencies would justify reversal of the actions of the authorized officer in issuing the INC's. Accordingly, he rejected appellant's attack on the efficacy of the notices. Texaco duly pursued an appeal to this Board on all three INC's.

On April 20, 1987, while these matters were pending before the Board, Texaco filed notice with the Board that it had filed a petition for bankruptcy pursuant to Chapter 11 of the Bankruptcy Act, which would operate as a stay of all administrative proceedings which involved a "claim" against the corporation which arose prior to the filing of its bankruptcy petition on April 12, 1987.

On October 8, 1987, this Board issued an order, referencing the above filing, but noting that it was unclear whether the stay effectuated by the bankruptcy petition affected consideration of the instant appeals, since a review of the case files failed to indicate that any assessment against Texaco was ever made as a result of the INC's involved herein. The Board therefore requested that counsel for Texaco and BLM file briefs addressing the authority of the Board to adjudicate the issues presented in these appeals despite the bankruptcy proceedings.

Pursuant thereto, on December 22, 1987, counsel for Texaco filed its response to the Board's order. After first noting that the definition of the term "claim" as used in the Bankruptcy Act was intentionally broad to permit the broadest possible relief by the bankruptcy court, counsel noted that not all judicial or administrative proceedings to recover a claim against a debtor-in-possession were stayed by the Bankruptcy Code. Citing, inter alia, Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986), counsel agreed that "where an administrative agency is suing a debtor to prevent or stop violations of regulatory laws designed to protect the public health, safety and welfare, or is attempting to fix damages for violations of such laws, the action or proceeding does not fall within the automatic stay" (Brief of Appellant at 3-4). Therefore, counsel concluded that Texaco's bankruptcy filing did not affect the continued adjudication of the INC's due to 11 U.S.C. | 362(b)(4)

and (5) (1982), but that any attempt to collect fines imposed as a result would be stayed though such claims might be allowed in Texaco's Chapter 11 case in accordance with 11 U.S.C. | 502 (1982). On January 28, 1988, counsel for BLM filed a response to the Board's briefing request in which it concurred with Texaco's analysis. In view of the above filings, the Board finds it appropriate to adjudicate the cases presently before it.

In all three cases, Texaco reiterates its contention that service of the INC's was fatally defective because it was accomplished by certified mail rather than registered mail as expressly provided by the applicable statute. The statute in question, 30 U.S.C. | 1719(h) (1982), provides:

Notice under this subsection (a) of this section shall be by personal service by an authorized representative of the Secretary or by registered mail. Any person may, in the manner prescribed by the Secretary, designate a representative to receive any notice under this subsection.

Pointing out that the statute expressly mandates either personal service or service by registered mail, appellant argues that service by certified mail is simply inadequate. To the extent that the regulation attempts to substitute certified mail for registered mail, Texaco suggests that the regulation must be deemed void as contrary to the statute. We do not agree.

[1] As appellant recognizes, 43 CFR 3163.4-1(b)(1) and 43 CFR 3163.4-1(b)(7)(i) both provide that notice shall be served by personal service "or by certified mail." In promulgating these regulations, the Department took note of the fact that a number of comments suggested that the Department require the use of registered rather than certified mail. The Department rejected this suggestion, noting that "[t]he term 'certified mail' remains in the final rulemaking because the term 'registered mail' as used in the Act has been interpreted to mean U.S. Postal Service mail service 'Registered Mail, Return Receipt Requested' or 'Certified Mail, Return Receipt Requested.'" 49 FR 37362 (Sept. 21, 1984). Appellant suggests that this interpretation is simply contrary to the plain meaning of the statute and must be rejected. Before analyzing this question, we think it is useful to set forth the similarities and differences between registered and certified mail.

As the United States Postal Service's Domestic Mail Manual (DMM) notes, when mail is delivered via ordinary first class service there is no record of delivery at the delivering post office, nor can a return receipt be requested. See DMM | 932.1. There is, however, a record of the date of delivery at the delivering post office for mail sent either registered or certified. Additionally, for either registered or certified mail the sender can request a return receipt as evidence of the date of delivery. The DMM describes the difference between the two services as follows:

The registered mail system is designed to provide added protection for valuable and important mail. Postal insurance coverage may be purchased for mail that is registered in case of loss or damage. Registered mail is the most secure service the Postal

Service offers. It incorporates a system of receipts to monitor the mail's movement from the point of acceptance to delivery.

DMM | 911.11.

Certified mail service provides the sender with a mailing receipt and a record of delivery at the office of address. No record is kept at the office at which certified mail is mailed. It will be dispatched and handled in transit as ordinary mail. No insurance coverage is provided.

DMM | 912.1.

The primary distinction between certified and registered mail is that the latter service encompasses a system of receipts for tracking mail from the point of mailing to the point of delivery and permits the insuring of the object mailed to protect against damage or loss. As the DMM notes, use of registered mail is normally necessary only for mail that is "valuable or important." While a notice of an INC is important, it is not intrinsically valuable because a duplicate notice can be issued at minimal expense. Thus, the ability to track a document, which greatly enhances the ability to recover mail that may have been lost, is not of particular utility for the purposes of FOGRMA. What is important, however, is that the system utilized must be one in which the Department is informed of the date of delivery. The reason for this is very simple: under the structure of the Act, liability for violations is dependent on the date on which the operator obtains notice of the violations.

Civil penalties for INC's accrue at a daily rate up to \$500 per violation for each day, commencing with the "date of such notice or report," unless the operator has corrected the violation within 20 days of "notification." See 30 U.S.C. | 1719(a)(2)(B) (1982). These penalties may be increased to \$5,000 per violation for each day if no corrective action is taken within forty days "after due notice." See 30 U.S.C. | 1719(b) (1982). Thus, the date that a person receives notification is relevant to both the question whether any damages may be assessed as well as to the amount of the daily damages for which an individual may be liable. It can therefore be seen that, within the statutory framework, the date on which an individual obtains notice is of critical import.

Use of certified mail comports with the regulatory scheme. Thus, a record is provided which can establish when notification occurred. In a similar context, the Massachusetts Court of Appeals held that where a party receives actual notice, that party will not be heard later to object to the fact that the notice was provided by certified rather than registered mail, since certified mail advances the purposes implicit in the rationale for requiring notice by registered mail, viz., it provides a method for resolving disputes as to the fact of delivery. See Gerson Realty Inc. v. Casaly, 316 N.E.2d 767 (1974), and cases cited. So, too, in the instant case, we find the where an individual has received actual notice of an INC,

an argument that the INC should have been sent by registered rather than certified mail will be rejected. ^{1/}

Appellant makes two additional arguments with reference to the individual INC's. With reference to TPR-M-920-7, Texaco argues that the INC erroneously cited 43 CFR 3162.7-4(6) as the regulation being violated. In point of fact, the proper citation was 43 CFR 3162.7-4(b)(6). A similar challenge is levied against TPR-M-920-8, where BLM cited 43 CFR 3162.7-4 rather than 43 CFR 3162.7-4(b)(1). Noting that 43 CFR 3163.4-1(b)(1) requires the Secretary to notify a lessee in writing of any failure to comply with the applicable laws or regulations, Texaco argues that the two INC's referenced above provided inadequate notification as to the nature of the alleged deficiencies. A review of the facts involved in these two INC's clearly establishes that this argument borders on the specious.

Thus, the INC involved in TPR-M-920-7 noted that "Legals are not displayed on Facility Signs at Sec. 32 treating facility and Sec. 16 treating facility. (Ref. 43 CFR 3162.7-4(6) Site Security)." BLM's citation, which failed to reference subsection (b) was incorrect. However, it is clear from the citation and the description of the violation set out in the INC that BLM was citing Texaco for violating 43 CFR 3162.7-4(b)(6), which provides, in part:

All facilities at which oil is stored shall be clearly identified with a sign that contains the name of the operator, the lease serial number (or communitization or unit agreement identification), and, in public land States, the quarter-quarter, section, township, and range.

Notwithstanding the omission of the subsection, BLM gave appellant more than sufficient notice of the violation as required by 43 CFR 3163.4-1(b)(1).

A similar result obtains with reference to TPR-M-920-8. In that case, the BLM inspector noted that "[a] 2" x 1/2" bushing on discharge side of recycle pump must be sealed at sec. 32 treating facility. (Ref. 43 CFR 3162.7-4 Site Security)." The applicable regulation, 43 CFR 3162.7-4(b)(1), requires lessees to seal appropriate valves on lines entering or leaving oil storage tanks during the production and sales phases of operations. We find that the description of the violation together with the citation as set out in the INC provided Texaco with adequate notice of the violation. In light

^{1/} We recognize that 43 CFR 1821.2-4 provides that: "Certified mail as outlined in 39 CFR Part 58, may be used in lieu of registered mail in public land matters within the jurisdiction of the Department of the Interior except where use of registered mail is specifically required by statute." As we understand the import of this regulation, where Congress expressly mandates that only registered mail be used, certified mail may not be substituted therefor. From our review of the statute, we can perceive no Congressional intent, to say nothing of a justifying rationale, to preclude use of certified mail in providing notice under section 109(h) of FOGRMA.

of our analysis set forth above, we conclude that BLM properly issued the three INC's which were the subject of these appeals.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

James L. Burski
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

102 IBLA 91

SPECIAL CONCURRENCE BY AJ IRWIN (102 IBLA 92) IS MISSING