

Appeal from a decision of the Montana State Office, Bureau of Land Management, affirming the issuance of a notice of incidents of noncompliance and assessment for failure to comply with a written order. (TRP-M-922-31).

Affirmed.

1. Notice: Generally -- Oil and Gas Leases: Generally -- Oil and Gas Leases: Civil Assessments and Penalties -- Oil and Gas Leases: Incidents of Noncompliance

Where BLM served notice of noncompliance and assessment on an individual other than the lessee's designated representative for service yet the lessee gained knowledge of the notice and timely sought review, the lessee was not prejudiced by BLM's failure to serve a designated representative.

2. 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."

3. Oil and Gas Leases: Generally -- Oil and Gas Leases: Civil Assessments and Penalties -- Oil and Gas Leases: Incidents of Noncompliance -- Regulations: Generally

BLM may properly issue a notice of incidents of noncompliance requiring a unit operator to file a form designating a successor operator and assess liquidated damages under 43 CFR 3163.3(a) (1984) for failure to comply with that notice.

APPEARANCES: Guy E. Mailly, Esq., and Stephen N. Bretsen, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Texaco, Inc. (Texaco), appeals from a technical and procedural review (TPR) decision of the Montana State Office, Bureau of Land Management (BLM), dated October 24, 1985. The TPR decision affirmed a notice of incident of noncompliance (INC) for failure to comply with a written order issued by BLM and a related assessment of \$ 250 under 43 CFR 3163.3(a) (1984). ^{1/}

By letter dated July 29, 1985, BLM required that appellant file forms relating to a change of unit operator. This letter reads as follows:

Federal unit agreements provide for the change of the designated operator. When a change is desirable or required, a Designation of Successor Unit Operator by Working Interest Owners, or a Change in Unit Operator by Assignment, must be accepted by the Bureau of Land Management authorized officer before the change is official.

Your letter dated July 3, 1985, stated that Texaco is no longer the operator for the Northeast Cut Bank Sand or the Southeast Cut Bank Sand Units. You also stated that Texaco has sold its interest in these units. It is, therefore, your responsibility as unit operator of record for these units to make the formal arrangements necessary to accomplish the official change of unit operator. This may be accomplished by the use of a Designation of Successor [Unit] Operator or a Change in Unit Operator by Assignment as arranged for in the "Successor Unit Operator" section of the unit agreement and as specified in the unit operating agreement. The two enclosed forms are provided for your convenience.

You must file, or cause to be filed, within 30 days of your receipt of this letter, the appropriate changes necessary to accomplish the official change of unit operator, or explain why this is not necessary at this time. Failure to do so will result in the assessment of penalties pursuant to 43 CFR 3163.3(a).

This letter was sent by certified mail to A. J. Sanford, Texaco U.S.A. The return receipt card shows a receptor's signature and August 2, 1985, as the date of delivery.

Subsequently, by letter dated September 25, 1985, BLM stated that appellant had failed to comply with BLM's order of July 29, 1985, to file a change of designated operator within 30 days from receipt of the letter or explain why a change was not necessary. BLM assessed appellant \$ 250 under 43 CFR 3163.3(a) (1984) for failure to comply with the order.

^{1/} The current regulation dealing with noncompliance and assessment is codified at 43 CFR 3163.1(a). For a discussion of previous changes in this regulation, see William Perlman, 96 IBLA 181, 186 n.4 (1987).

Appellant filed a request for TPR with the Montana State Office, BLM. Appellant asserted that it was improper for BLM to send its assessment letter of September 25, 1985, to Sanford because he was neither a lessee in the unit nor designated operator of the unit.

Appellant explained that it had attempted to comply in good faith with the BLM request that it file a designation of successor unit operator; that it received BLM's letter requesting the Designation of Successor Unit Operator on August 12, 1985; that on August 12, 1985, it executed a Designation of Successor Unit Operator by Working Interest Owners form and mailed it to Ron Lambrecht at Western Reserves, Inc.; that it inquired at BLM as to whether Western Reserves, Inc., had filed the documents and was told it had not; that it attempted to contact Lambrecht numerous times but without success; that it was finally told by Western Reserves that it (Western Reserves) was involved in a dispute with its co-owners and therefore would not sign and file the document until the dispute was resolved; and that on October 9, 1985, Western Reserves indicated that it would be executing the form and filing it with BLM immediately.

Appellant asserted that it is improper to assess a penalty for violation of 43 CFR 3163.3(a) (1984) because that section is merely a section which allows for the assessment of penalties for violation of another section of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. §§ 1701-1757 (1982), and is not an otherwise enforceable regulation.

Finally, appellant asserted that BLM has not complied with 30 U.S.C. § 1719(h) (1982) which requires that notice be given by personal service or registered mail. BLM sent the letter to Sanford at Texaco U.S.A. by certified mail. Moreover, appellant stated that by letter of April 1, 1985, it designated J. N. Hurlbut as its sole representative to receive on its behalf notices of violation in the State of Montana. Therefore, Texaco claimed it had not received any such notice.

The Montana State Office of BLM affirmed the INC and the related assessment for noncompliance. In its decision, BLM stated that Sanford, to whom BLM addressed its assessment letter of September 25, 1985, was meant to be the addressee or individual in Texaco with whom BLM should make contact, and was not intended to be held individually responsible for the penalty. BLM stated that if Western Reserves had not executed the Designation of Successor Unit Operator forms, it could not assume operation duties and Texaco remained the operator. BLM stated that section 5 of the unit agreement required the operator to formally designate a new unit operator and relieve the previous operator of unit duties. BLM pointed out that it was Texaco's responsibility to file the Designation of Successor Unit Operator forms. Finally, BLM stated that use of certified mail to give notice has been interpreted to be proper under FOGRMA.

In its statement of reasons, appellant reiterates its arguments presented to BLM. Appellant asserts that because BLM failed to provide notice to Texaco, Inc., by service upon its designated representative J. N. Hurlbut, the service of the notice of INC is improper and void.

Appellant asserts that the assessment of penalty against Texaco U.S.A. is improper because Texaco, Inc., not Texaco U.S.A., was the lessee and operator of the Southeast Cut Bank Sand Unit. Appellant claims that there has never been a valid assessment against it (Texaco, Inc.), because BLM's assessment letter of September 25, 1985, was addressed to Texaco U.S.A. rather than to Texaco, Inc.

Appellant asserts it was not served by registered mail or personal service as required by 30 U.S.C. § 1719(h) (1982). According to appellant, service by certified mail violates principles of administrative law. Appellant contends that an administrative agency is constrained by the statute under which it is operating and that its actions inconsistent with its enabling laws are void. It states that an agency may not adopt rules without explanation of the reason therefor.

Appellant contends that the assessment letter of September 25, 1985, does not specify a violation of a statute or regulation. Appellant states it has not been found to be in violation of any section of 43 CFR Part 3160 and, therefore, no penalty under those regulations may be assessed.

[1] We first consider the issue relating to notice and service. While BLM should have served appellant's designated representative, we do not find that service is void because it was made upon A. J. Sanford. Nor do we find that BLM never imposed an assessment on Texaco, Inc., because its assessment letter was addressed to Sanford of Texaco U.S.A. A. J. Sanford was the party who informed BLM by letter dated July 2, 1985, that "Texaco has sold its interest and is no longer operator of NECBSU and SECBSU." Having received this notice, BLM in response then sent its letter of July 29, 1985, to Sanford requesting that a change of operator form be filed. The return receipt card shows that this letter was received at Sanford's address on August 2, 1985.

In its request for TPR, appellant admits that on August 12, 1985, it received in its Land Department BLM's letter 2/ requesting that a Designation of Successor Unit Operator form be filed. Therefore, appellant had notice of BLM's request that the form be filed and that a penalty would be assessed for failure to comply with its order. It appears that Texaco U.S.A. is affiliated with Texaco, Inc., because Sanford of Texaco U.S.A. contacted BLM regarding the fact that "Texaco" was no longer unit operator. It was not unreasonable, given this circumstance, that BLM should assume that if Sanford were responsible for notifying BLM that "Texaco" was no longer the unit operator, he would also be responsible for notifying Texaco, Inc., of BLM's request to file the required form. Similarly, when Sanford volunteered to act on behalf of Texaco, Inc., to notify BLM of the change of unit operator, BLM apparently considered that he volunteered to receive the

2/ Appellant refers to BLM's letter of Aug. 5, 1985, requesting that it file a Designation of Successor Unit Operator form. We note that the file does not contain a letter dated Aug. 5, 1985. We assume that appellant was referring to BLM's letter dated July 29, 1985, requesting that the form in question be filed.

subsequent assessment for failure to comply with the unit operating order. It appears that Texaco, Inc., was informed of the notice; it does not deny that it was. There is no doubt that Texaco, Inc., was the unit operator and that the INC and related assessments were directed toward it. Appellant has not shown that it was prejudiced by BLM's failure to serve J. N. Hurlbut.

[2] Appellant contends that service by certified mail is inadequate because the statute mandates "[n]otice under this subsection (a) of this section shall be by personal service by an authorized representative of the Secretary or by registered mail." 30 U.S.C. § 1719(h) (1982). Departmental regulations 43 CFR 3163.4-1(b)(1) (1984) and 43 CFR 3163.4-1(b)(7)(i) (1984) both provide that notice shall be served by personal service "or by certified mail." In promulgating these regulations, the Department took notice of the fact that a number of comments suggested that this provision required 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 contends that this interpretation is contrary to the plain meaning of the statute and that the Department has not provided a reasonable explanation for this interpretation.

Whether service by certified mail is proper under 30 U.S.C. § 1719(h) (1982) was discussed at length in Texaco, Inc., 102 IBLA 86 (1988). The Board explained that the primary distinction between certified mail 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. Thus, the Board stated, the ability to track a document, which greatly enhances the ability to recover mail that may have been lost, is not of utility for the purposes of FOGRMA since an INC is not intrinsically valuable.

The Board explained in Texaco, Inc., supra, that under FOGRMA it is important to utilize a system which keeps the Department informed of date of delivery, because liability for violations is dependent on the date on which the operator obtains notice of the violations. The date on which a person receives notification is relevant to both the question of whether damages may be assessed, as well as to the amount of the daily damages for which an individual may be liable. Id. The Board concluded that use of certified mail comports with the regulatory scheme because a record is provided which can establish when notification occurred. We follow Texaco, Inc., and reject the argument that the INC should have been sent by registered rather than by certified mail. See Texaco, Inc., supra at 89-90.

[3] Appellant's argument that BLM may not assess a penalty against Texaco, Inc., because BLM made no mention in the assessment letter of any statute or regulation that had been violated is without merit. BLM's notice states that Federal unit agreements provide for the change of designated

operator. ^{3/} BLM's order to Texaco, Inc., to submit the necessary change-of-operator documentation is proper in light of the requirement that a change of designated operator must be provided. Regulation 43 CFR 3162.1(a) (1984) confers broad authority upon BLM's authorized officer to issue "orders and instructions" of the kind challenged herein. 43 CFR 3162.1(a) (1984) provides that "[t]he lessee shall comply with applicable laws and regulations; with the lease terms, Onshore Oil and Gas Orders, NTL's; and with other orders and instructions of the authorized officer." See William Perlman, supra at 184. Therefore, it is clear that BLM had regulatory authority to issue the INC.

43 CFR 3163.3(a) (1984) authorizes BLM to impose against a lessee a liquidated damages assessment for "failure to comply with a written order or instructions of the authorized officer, \$ 250.00 if compliance is not obtained within the time specified." See William Perlman, supra at 186; Mont Rouge, Inc., 90 IBLA 3 (1985); Willard Pease Oil & Gas Co., 89 IBLA 236 (1985). The written order or instruction constitutes the notice to the operator. Appellant received an order which included a time to meet BLM's requirement. Thus, appellant had both notice and opportunity to cure prior to issuance of the INC. See William Perlman, supra. Therefore, BLM properly imposed an assessment under 43 CFR 3163.3(a) (1984) for appellant's failure to comply with its order.

Therefore, 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.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

^{3/} In the TPR decision BLM referred to section 5 of the Southeast Cut Bank Sand Unit Agreement which requires formal designation of a new unit operator when the previous operator is relieved of unit duties.

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

This Board is consistent in holding that an oil and gas lessee stands to lose the lease if the rental payment is not mailed to the proper state office of the Bureau of Land Management (BLM). See Jerry W. Wolf, 70 IBLA 131 (1983). The same is true if a notice of intent to hold a mining claim is sent to an area office of BLM rather than the state office. See John Lovelady, 66 IBLA 245 (1982). The regulations designate the proper office for delivery of these documents, and lessees and mining claimants are charged with knowledge of the proper mailing address. See generally Ward Petroleum Corp., 93 IBLA 267 (1986).

Unsuccessful appellants have argued that when a notice is sent to the Minerals Management Service (MMS) in Denver, rather than BLM's Wyoming State Office, or to BLM's Casper District Office, rather than the State Office in Cheyenne, the notice has been given to the Department of the Interior and should be considered to have been received. The argument usually advanced is that the various offices can forward the notice to the correct office and the appellant should not be penalized for having mailed the notice to the wrong office. We do not accept this argument. It is not enough that the document will eventually sift through the Department's bureaucracy and reach the proper office. It must be addressed to the proper BLM office.

Departmental regulations also provide that a notice is properly served if mailed to the last address of record. 43 CFR 1810.2. In this case, Texaco filed a notice with BLM that its sole representative for receipt of notices of violations for the States of North Dakota, South Dakota, and Montana was J. N. Hurlbut, Drilling and Production Manager, Denver Operations Division, 4601 DTC Boulevard, Denver, Colorado 80237. The notice of violation was sent to A. J. Sanford at Texaco's Casper, Wyoming Office.

The notice sent to the Casper, Wyoming Office of Texaco, Inc., apparently filtered through Texaco's corporate bureaucracy to reach the proper Texaco official. The majority finds that what is sauce for the goose is not sauce for the gander. I find the notice was not properly served, and, as with a document sent by a lessee or mining claimant, improper service should have the same effect as no service. What purpose is there for giving BLM notice of the proper corporate office for service, if the service of a notice on any employee of a lessee will be deemed to be service on the lessee?

We say that when a document is sent to the last address of record it is properly served. Richard L. Knowles, 88 IBLA 120 (1985). On the other hand, this Board has properly stated that "when BLM mails a decision to a lessee at an address other than the applicant's address of record, BLM cannot attribute constructive notice of the decision to the applicant under the provisions of 43 CFR 1810.2(b)." Victor M. Onet, Jr., 81 IBLA 144 (1984).

The majority holds that Texaco, Inc., had actual notice. The danger of this approach is also found in our prior decisions.

If someone other than the named agent responds to an improperly addressed notice, can it be assumed that he has authority to bind the principal, or do we take the same approach as when an employee of BLM replies to an inquiry from the public? Reliance on information or advice provided by Federal employees cannot create a right not authorized by law. David D. Beal, 90 IBLA 91 (1985). Can BLM rely on statements by an employee of Texaco, Inc., who was not the party to whom the notice was to be addressed, without first determining if that employee is authorized to make such statements? If he is not, is his "appearance" binding on Texaco, Inc., merely because he is an employee?

BLM had clear notice of the delegation of authority within Texaco, Inc. Having been put on notice, they were obliged to either deliver the notice to the proper party or ascertain if the responding party had authority to bind Texaco, Inc. Under the circumstances, authority cannot be implied. Texaco had given notice of the proper procedure to be used to bind it to the conditions stated in the notice. It was to be delivered to the address of the sole agent for service of such notices.

R. W. Mullen
Administrative Judge