

NEVDAK OIL AND EXPLORATION, INC.

IBLA 86-325 Decided September 2, 1988

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, affirming denial of request for suspension of operations and production and notification of termination of oil and gas lease W-72441.

Affirmed.

1. Oil and Gas Leases: Suspensions

BLM properly denies a request for the suspension of operations and production under an oil and gas lease where an application for a permit to drill on the lease was filed less than 30 days prior to the lease expiration date, the application was processed expeditiously and approved by BLM prior to that date, and there is no basis to conclude that a suspension was necessary in the interest of conservation.

APPEARANCES: Dale W. Moench, Esq., Bismarck, North Dakota, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

NevDak Oil and Exploration, Inc. (NevDak), has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated December 26, 1985, affirming the denial of a request for the suspension of operations and production and notification of the termination of oil and gas lease W-72441.

Oil and gas lease W-72441 was issued on December 1, 1980, to the Western American Exploration Company (Western American) for 160.02 acres of land situated in lot 1 and the SE 1/4 NE 1/4, E 1/2 SE 1/4 sec. 1, T. 46 N., R. 64 W., sixth principal meridian, Weston County, Wyoming, pursuant to section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1982). The lease term was 5 years "and so long thereafter as oil or gas is produced in paying quantities." On November 18, 1985, BLM approved the assignment of the oil and gas lease from Western American to William Eberspecher, effective November 1, 1985. NevDak is Eberspecher's designated operator under the lease, by virtue of a November 5, 1985, designation.

On November 8, 1985, less than 30 days before the expiration of the oil and gas lease, NevDak filed with the Newcastle Resource Area Office, Wyoming, BLM, an application for a permit to drill (APD) a well (NevDak Federal No. 5) in lot 1, sec. 1. 1/ In its APD, NevDak proposed the drilling of a 6 1/2-inch hole to a depth of 710 feet, with an approximate starting date of November 30, 1985. By letter dated November 13, 1985, the Area Manager, Newcastle Resource Area, notified NevDak that the APD was "deficient" because of the absence of a Class III cultural resources survey, which BLM required to be submitted within 45 days of the date of the notice. The record indicates that the site of proposed drilling operations was inspected by BLM on November 14, 1985, and that the APD continued to be subject to BLM review throughout that month. On November 29, 1985, BLM received a Class I cultural resources survey prepared by a private archaeological consulting firm. In a May 7, 1986, affidavit submitted by BLM on appeal, John Hanson, a BLM petroleum engineer, states that the survey report was filed by a representative of NevDak. The survey report states that the area of proposed drilling operations had been inspected on November 22, 1985, but that a Class III survey was precluded by snow cover. 2/ Nevertheless, the report concludes, based on the field inspection and a records search, that there is a very low probability that the area contains any cultural resources and recommends that a cultural clearance be issued, "with a special stipulation that the area be reevaluated in the spring, following natural snow melt" (Survey Report at 1).

In a "Categorical Exclusion/Land Report/Decision Record," dated November 29, 1985, BLM concluded that the proposed well would have a negligible effect with respect to various environmental factors, including cultural resources. Further, the record indicates that BLM accepted the Class I cultural resources survey in lieu of a Class III survey on November 29, 1985. In his May 7, 1986, affidavit, Hanson explains that the survey was accepted "due to minimal surface disturbance, shallow well and truck mounted portable drilling rig." Also, on November 29, 1985, the Acting Area Manager approved NevDak's APD, subject to certain conditions, including completion and submission of a Class III cultural resources survey "immediately after normal snowmelt occurs." In addition, the conditions attached to the approved APD, at page 3, state:

If this well intends to earn drilling extension, active drilling must be in progress on November 30, 1985, advance lease rentals must have been paid, and two copies of a notarized affidavit of actual well operations performed on November 30, 1985 and December 1, 1985 received by this office.

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1/ In a letter received by the Wyoming State Office on Nov. 8, 1985, Eberspecher stated that an APD was being filed "so we can start drilling operations before the Lease expires December 1, 1985."

2/ According to the survey report, at page 2, the Nov. 22 field inspection detected recent activity in the area of proposed drilling operations: "Part of the well pad has been recently bladed, and an area of about 350 square feet of the natural ground surface is clear of snow. A backhoe trench adjacent to the well centerstake is about 40' long, 2-4' wide, and 6-8' deep, with backdirt piled alongside."

The record contains the handwritten notes of Margaret Ferguson, a BLM petroleum engineer technician, which indicate she inspected the site of NevDak's proposed drilling operations at various times on November 30, 1985. These notes state that the road to the site had been plowed and that there was a rig on the site at midnight of that date, but the hole had not been spudded. In a May 7, 1986, affidavit submitted by BLM on appeal, Ferguson explains that she had found no rig on the site when she inspected the site at 12:30 p.m. and 5 p.m., but that she returned to the site shortly before midnight in the company of Hanson:

We arrived on location at approximately 11:30 p.m. to find that the truck mounted rig had been moved onto the location but no drilling was taking place. There were no personnel on location at that time, either. There was a 5 gallon bucket over where the hole was to have been drilled but it had not been spud. We took numerous pictures at that time and remained on location until 12:20 of 12-1-85.

The record contains various photographs taken during the several visits to the well site on November 30, 1985.

By letter dated December 4, 1985, the Area Manager notified NevDak that oil and gas lease W-72441 had terminated at the end of its primary term on November 30, 1985, in the absence of production or diligent drilling operations, and required NevDak to cease any further oil and gas exploration activity and reclaim the well site. The Area Manager also stated that the APD was cancelled effective December 1, 1985 "as a result of the lease terminating at 12:00 midnight, November 30, 1985."

The record indicates that, prior to the end of the primary term of oil and gas lease W-72441, Eberspecher had filed a letter with the Casper District Office, Wyoming, BLM, on November 26, 1985, stating in full:

Due to the fact that I have not been able to get a class 3 geological survey [3/] on said lease, because of the heavy amount of snow on the lease, I have applied for a drilling permit and Jack Hanson in the Newcastle office has informed me that everything has been approved with the exception of the geological survey. In reference to form #43CFR3103.4-2, I wish to request an extension on said lease.

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3/ While Eberspecher refers to a Class III "geological survey," it is clear that he meant a Class III cultural resources survey which had been precluded by the snow cover on the site of the proposed drilling operations. Indeed, there is nothing in the record to indicate that BLM had required a geological survey and the record contains a Nov. 19, 1985, "Geologic Report," prepared by BLM. BLM, likewise, interpreted Eberspecher's letter to refer to a Class III cultural resources survey.

BLM responded to Eberspecher's "request" by letter dated December 6, 1985. In that letter, the Acting District Manager stated that BLM had construed the letter as a request for the suspension of operations and production filed pursuant to 43 CFR 3103.4-2. Noting that the requirement to submit a Class III cultural resources survey prior to approval of the APD had been waived and the APD had been approved, the Acting District Manager concluded that approval of the APD had "rendered your request for a suspension \* \* \* invalid" and stated that the request was "returned herewith." In effect, the Acting District Manager denied Eberspecher's suspension request.

On December 13, 1985, NevDak filed a request for a technical and procedural review (TPR). NevDak contended that it was entitled to a "favorable review" because of "short notice" and "adverse weather conditions." NevDak explained:

We were under the impression that the lease was going to be extended for the lack of a Class 3 Geological Survey 4/ because of snow cover. Therefore, we had made no attempt to dig the pit and move the rig to the location or plow out roads 3 feet deep with snow.

\* \* \* The APD was approved at 4:00 p.m. on Friday, November 29, 1985 which left us only 32 hours to move the rig 20 miles, dig the pit, plow out 2 miles of road and start drilling.

\* \* \* We plowed out the road, dug the pit, moved the rig to location in 14 degrees below weather with 10 mile per hour wind. While raising the derrick at 7:00 p.m. on Saturday, November 30, 1985 we broke a hydraulic line because of the cold hydraulic oil and had to suspend operations for the night.

In its December 26, 1985, decision, the Wyoming State Office conducted its TPR. 5/ BLM concluded that the Acting District Manager had properly returned Eberspecher's request for a suspension of operations and production "since the APD was approved" and that the Area Manager had properly notified NevDak of the termination of oil and gas lease W-72441 "because actual drilling activity had not commenced before midnight on November 30, 1985." Referring to NevDak's "impression" that the request for a suspension of operations and production would be granted, BLM stated that "there is no reason to believe, nor any assurance, that such a request will be granted." Finally, BLM recognized that "weather conditions over the lease expiration date were less than conducive to drilling operations," but stated that the APD had not

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4/ NevDak clearly meant a Class III cultural resources survey.

5/ The State Office's December 1985 decision purports to be only a review of the Area Manager's December 1985 letter notifying NevDak of the termination of oil and gas lease W-72441. However, the State Office reviews both the Area Manager's December 1985 letter and the Acting District Manager's December 1985 letter, thus effectively affirming the denial of Eberspecher's request for a suspension of operations and production under the lease.

been filed "at least 30 days before commencement of operations is anticipated," as required by 43 CFR 3162.3-1(d). NevDak has appealed from that decision.

In its statement of reasons for appeal, appellant recognizes that the APD was not filed timely, but argues that BLM effectively waived the failure to file timely. Further, appellant contends that BLM failed to properly consider the request for a suspension of operations and production and that BLM should have approved the request where heavy snow cover precluded a Class III cultural resources survey and then extended the lease for a reasonable period of time "to allow for \* \* \* obtaining" a suitable report.

This case raises the principal question whether BLM properly denied the request for a suspension of operations and production under oil and gas lease W-72441, filed prior to the expiration date of that lease, where a suspension would have extended the term of the lease and thereby prevented the lease's termination.

[1] The Secretary or his delegated representative is empowered by section 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1982), to suspend operations and production under an oil and gas lease "in the interest of conservation," and thereby extend the term of the lease for the suspension period. We have construed section 39 of the Mineral Leasing Act to provide for suspension either as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded, or as a matter of discretion, in the interest of conservation. Sierra Club (On Judicial Remand), 80 IBLA 251 (1984), aff'd, Getty Oil Co. v. Clark, 614 F. Supp. 904 (D. Wyo. 1985), aff'd sub nom., Texaco Producing, Inc. v. Hodel, 840 F.2d 776 (10th Cir. 1988).

In the present case, it is clear that beneficial enjoyment of lease W-72441 was not precluded by any act, omission, or delay by a Federal agency. An APD could have been filed at any time during the 5-year primary term of the lease. However, an APD was not filed until November 8, 1985, 22 days before the lease expiration date. BLM is not to blame for the late filing. Moreover, upon receipt of the APD, BLM acted with considerable dispatch, approving the APD in 21 days. <sup>6/</sup> In these circumstances, the processing of the APD cannot be characterized by any delay on the part of BLM. Thus, the fact that the APD was not approved until November 29, 1985, one day before the lease expiration date, is not attributable to any act, omission, or delay by BLM, but rather simply the fact that the process was "begun too late." Sierra Club (On Judicial Remand), supra at 263; see also Lario Oil & Gas Co., 92 IBLA 46, 51 (1986); William C. Kirkwood, 81 IBLA 204, 207-08 (1984); Jones-O'Brien, Inc., 85 I.D. 89, 96-97 (1978). Accordingly, neither Eberspecher nor appellant was entitled to suspension of operations and production under lease W-72441 as a matter of right. See Sierra Club (On Judicial Remand), supra at 264.

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<sup>6/</sup> In addition to requiring that an APD be filed at least 30 days prior to the commencement of operations, 43 CFR 3162.3-1(d) states that, where the APD process is initiated less than 30 days prior to that date, "the process may not be completed by the desired date."

We, therefore, turn to the question of whether BLM should have granted a suspension of operations and production in the interest of conservation as an exercise of its discretionary authority under section 39 of the Mineral Leasing Act. See John March, 98 IBLA 143, 147 (1987). We conclude that BLM properly denied the request for a suspension where there was no demonstration that a suspension would be "in the interest of conservation." 30 U.S.C. § 209 (1982).

In accordance with the court's opinion in Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595, 600 (D.C. Cir. 1981), the term "conservation" in section 39 of the Mineral Leasing Act is to be given its "ordinary meaning" and includes "prevention of environmental damage." Thus, operations and production may be suspended not only where to do so conserves the mineral resource, but also where suspension affords the Department sufficient time to decide whether and/or under what circumstances to permit exploration and development of the mineral resource so as to best protect other resources. See Solicitor's Opinion, 78 I.D. 256, 258-61 (1971); see also Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973); Sierra Club (On Judicial Remand), supra at 253; Texaco, Inc., 68 I.D. 194 (1961); J. B. Mulcock, 61 I.D. 126 (1953); Robert D. Snyder, A-25941 (Dec. 7, 1950). In the present case, Eberspecher's suspension request contained no cogent assertion and no reasons in support of any assertion that suspension of operations and production under lease W-72441 was necessary to conserve the mineral resource, or to permit BLM to determine how to best protect other resources, or in any other way in the interest of conservation. <sup>7/</sup> Nor can we discern any basis for concluding that suspension was justified in the interest of conservation.

On appeal, appellant contends that suspension should have been granted in order to permit a proper survey of the cultural resources at the well site. However, in processing appellant's APD, BLM concluded that a Class III cultural resources survey need not be prepared prior to approval of the APD because of the negligible anticipated effect on cultural resources of drilling at the site and, accordingly, approved the APD, subject to a survey at a later point in time. Appellant has offered no basis to dispute that conclusion. <sup>8/</sup> Thus, we cannot conclude that suspension of operations and

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<sup>7/</sup> Eberspecher's suspension request was clearly deficient under 43 CFR 3103.4-2(a), which requires that, in the case of such requests, "[c]omplete information shall be furnished showing the necessity of such relief." The request was, therefore, subject to rejection for this reason alone. Prima Exploration, Inc., 102 IBLA 352, 354-55 (1988); Duncan Miller, 21 IBLA 361 (1975).

<sup>8/</sup> It is clear from the record that appellant's real concern is not with the effect of drilling operations on cultural resources but, rather, the fact that it was under the "impression" that BLM, in absence of a Class III cultural resources survey, would not approve the APD and, accordingly, would suspend operations and production and extend the lease term (Request for TPR, dated Dec. 11, 1985, at 1). There is nothing in the record to indicate that BLM had acted in any way so as to create such an "impression." Also, if appellant was, in fact, under that "impression," its action in moving the portable drilling rig onto the site on Nov. 30, 1985, was inconsistent with

production was necessary to conserve cultural resources, or even to permit further study to determine the presence of, or anticipated effect of, drilling on such resources. Rather, it is apparent that the only interest that would have been served by a suspension was appellant's and the lessee's in extending the term of the lease and thereby permitting further exploration and development. In these circumstances, we must conclude that BLM properly denied the request for a suspension of operations and production under oil and gas lease W-72441 pursuant to BLM's discretionary authority under section 39 of the Mineral Leasing Act. See Jack J. Grynberg, 88 IBLA 330, 334 (1985); Ben F. Swisher, A-27201 (Nov. 21, 1955); Continental Oil Company, A-26537 (Nov. 6, 1953).

While a suspension of operations and production pursuant to section 39 of the Mineral Leasing Act is not justified in the present case, we recognize that BLM also has authority under section 17(i) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(i) (1982), to suspend operations or production, thereby also extending the lease term. See Solicitor's Opinion, 92 I.D. 293, 299-301 (1985). The Department recently amended 43 CFR 3103.4-2 to set forth a standard for granting a section 17(i) suspension. Such a suspension may be granted where the lessee is prevented from operating on the lease or producing from the lease, despite the exercise of due care and diligence, by reason of force majeure, that is, by matters beyond the reasonable control of the lessee. 43 CFR 3103.4-2(a) (53 FR 17354 (May 16, 1988)). We cannot conclude that appellant was prevented from operating on the lease "despite the exercise of due care and diligence" where the APD was filed less than 30 days prior to the lease expiration date at which time it was reasonably foreseeable that appellant would have little, if any, time to initiate drilling operations, let alone to deal with any mishaps, prior to the expiration date. The inability to conduct drilling operations on November 30, 1985, was clearly linked to the lack of diligence in submitting the APD. This lack of diligence precludes the granting of a suspension of operations pursuant to section 17(i) of the Mineral Leasing Act.

In the absence of a suspension of operations and/or production and the concomitant extension of the lease term, we must conclude that lease W-72441 expired at the end of its primary term on November 30, 1985, where there was no other basis for extension of the lease term. We can find no such basis. There was no production of oil or gas in paying quantities and no well capable of such production with respect to the lease. In such circumstances,

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fn. 8 (continued)

that "impression." Moreover, we are aware of no regulation or statute which precluded the approval of an APD in the absence of a Class III cultural resources survey. Rather, the record contains a page from Part 8143 of the BLM Manual (Release 8-3, Appendix 3, Page 1), which states that certain actions, including drilling from truck-mounted rigs, will generally be "excluded from the Class III inventory requirement unless the Class I inventory indicates the project will impact an area which contains or shows potential for significant cultural resources." The record indicates that an exclusion was appropriate herein.

the lease could only be extended for 2 years pursuant to 30 U.S.C. § 226(e) (1982), where diligent drilling operations were conducted over the lease expiration date. Mobil Producing Texas & New Mexico, Inc., 99 IBLA 5, 7 (1987); American Resource Management Corp. (On Judicial Remand), 88 IBLA 172, 175 (1985). The record establishes that appellant was not engaged in actual drilling operations at the approved well site prior to or immediately after midnight November 30, 1985. Appellant's mere preparatory work to actual drilling operations will not suffice. Estelle Wolf, 37 IBLA 195, 197 (1978); Inexco Oil Co., 20 IBLA 134, 139 (1975). Indeed, appellant makes no assertion that it was engaged in actual drilling operations or that the lease was otherwise entitled to an extension. Accordingly, we conclude that lease W-72441 expired on November 30, 1985.

Based on the foregoing analysis, we conclude that the Wyoming State Office properly affirmed the December 4, 1985, letter from the Area Manager notifying appellant that lease W-72441 had terminated on November 30, 1985, and the December 6, 1985, letter from the Acting District Manager effectively denying Eberspecher's request for a suspension of operations and production under that lease.

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.

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John H. Kelly  
Administrative Judge

I concur:

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Bruce R. Harris  
Administrative Judge