

Appeal from a decision of the Deputy State Director, New Mexico State Office, Bureau of Land Management, affirming an assessment of liquidated damages for constructing a well pad without prior approval. SF-81160-F.

Affirmed.

1. Oil and Gas Leases: Civil Assessments and Penalties

Under 43 CFR 3163.1(b)(2) (1987), BLM shall impose an immediate assessment when an oil and gas lessee commences drilling or causes a surface disturbance preliminary thereto without obtaining prior BLM approval. The amount of the assessment, prescribed in the regulation, shall be \$500 for each day that the violation exists, including the days the violation existed prior to discovery, not to exceed \$5,000.

APPEARANCES: Noel Reynolds, Santa Fe, New Mexico, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Noel Reynolds has appealed from a decision of the Deputy State Director, New Mexico State Office, Bureau of Land Management (BLM), dated December 9, 1987, upholding an assessment of \$5,000 for commencing construction of a well pad without prior approval of the Farmington Resource Area Manager, BLM.

By letter dated November 16, 1987, the Farmington Resource Area Manager, BLM, informed Reynolds that he was being assessed \$5,000 for having built the location for Well No. 18 Torreon ^{1/} prior to obtaining BLM approval of his application for permit to drill (APD). The Area Manager stated that pursuant to 43 CFR 3163.1(b)(2), BLM was imposing an assessment of \$500 per day, not to exceed \$5,000, from October 26, 1987, the date on which the well pad was "reported," until November 6, 1987, the date on which BLM approved the APD. He explained that Reynolds would be billed for the amount of \$5,000.

^{1/} Well No. 18 Torreon is situated within the NW[^], SE[^], sec. 21, T. 18 N., R. 3 W., Sandoval County, New Mexico.

By letter dated November 20, 1987, Reynolds requested "administrative review" of BLM's assessment. He explained that on October 16, 1978, he "was granted an archaeological clearance on the entire 240 acre lease on which the subject well is a part," and that he had attached this October 16, 1978, archaeological clearance to his APD which was filed September 18, 1987. In this letter, Reynolds offered the following account of the facts relevant to the assessment:

On October 21, I met Mr. Jack Spears and Mr. Erroll Beecher, of the Farmington BLM office, who made an on-site inspection of the location. They said everything was in order and to proceed. I neither knew, nor was I told by anyone, that I would have to have another archaeological report, so I engaged a contractor to build a location for a well site. You will note on the application that the site is only 50' x 50' and that the well is to be only 600' deep, not requiring, of course, much disturbance of the terrain. Excavation work was done on October 23, 1987, by Mr. Philip Vigil.

Approximately November 1, I learned from Mr. Ned Dollar that an additional archaeological inspection was necessary. I secured an updated archaeological report and submitted it to the Farmington BLM office and got approval to drill on November 6, 1987. [Emphasis added.]

In his December 9, 1987, decision, the Deputy State Director, New Mexico State Office, BLM, provided the following explanation as to why the Farmington Resource Area Manager, BLM, had properly imposed the \$5,000 assessment:

At the meeting on October 21, 1987, the two individuals from the FRA [Farmington Resource Area Office] told the operator that "everything looked O.K." during the onsite inspection but they did not tell the operator to proceed with construction of the pad, as maintained by the operator. Approval was not granted until after receipt of the updated archaeological report.

The violation cited by the FRA was correct. The FRA also correctly calculated the amount of the assessment under 43 CFR 3163.1(b)(2) which is \$500 per day for each day the violation existed, not to exceed \$5000. The violation existed from October 23, 1987, to November 6, 1987, (15 days). Accordingly, the violation and assessment are upheld.

(Decision at 1, Dec. 9, 1987).

In his statement of reasons (SOR), Reynolds asks for "leniency" concerning the assessment, stating that "it has always been [his] intent to follow the regulations of the BLM," and that he is in the "bankruptcy

process (Chapter 13)." He reiterates that "[n]o work was undertaken until October 21, 1987, when the site was inspected by BLM officials from the Farmington office and cleared by them to go ahead." He states:

I was not told by them then, nor at any other time, that a new archaeological inspection had to be conducted. Seeing that I had had an archaeological clearance on the whole Torreon lease (which included the subject lease) cleared and approved on October 18, 1978, I engaged a contractor to build a location of 50'x50'. I expected written approval in the mail within a day or two of my application to drill; approval came on November 6, 1987. [Emphasis added.]

[1] For the reasons set forth below, we affirm BLM's assessment of \$5,000 under 43 CFR 3163.1(b)(2), which provides as follows:

(b) Certain instances of noncompliance are violations of such a serious nature as to warrant the imposition of immediate assessments upon discovery. Upon discovery the following violations shall result in immediate assessments, which may be retroactive, in the following specified amounts per violation:

* * * * *

(2) For drilling without approval or for causing surface disturbance on Federal or Indian surface preliminary to drilling without approval, \$500 per day for each day that the violation existed, including days the violation existed prior to discovery, not to exceed \$5,000 * * *.

This regulation, adopted on February 20, 1987 (52 FR 5393), reflects BLM policy that drilling without approval, or causing surface disturbance preliminary to drilling without approval, constitutes an instance of noncompliance "of such a serious nature as to warrant the imposition of immediate assessments upon discovery."

Since June 1, 1942, the Department has provided for the assessment of liquidated damages in order to cover "[a]dministrative costs" arising from certain defaults and violations where the actual loss or damage to the United States is "difficult or impracticable of ascertainment," including the "failure * * * to obtain approval before starting to drill." 30 CFR 221.54 (7 FR 4138 (June 2, 1942)); see M. John Kennedy, 102 IBLA 396, 399 (1988); Benson-Montin-Greer Drilling Corp., 92 IBLA 92, 94-95 (1986). On March 22, 1985, BLM suspended 43 CFR 3163.3(c), the previous version of the regulation providing for the assessment of liquidated damages for failure

to obtain approval before starting to drill, 2/ except where actual loss or damage could be ascertained. 50 FR 11517.

On January 30, 1986, BLM proposed the current version of the regulation, which provides that drilling without approval "shall result in immediate assessments * * * [of] \$500 per day for each day that the violation existed, including days the violation existed prior to discovery, not to exceed \$5,000." 43 CFR 3163.3(a)(2) (51 FR 3890 (Jan. 30, 1986)). In this proposed rulemaking, BLM explained that "[w]hile comments expressed almost unanimous objection to the imposition of automatic assessments for minor violations, many saw the continuing need for immediate assessments as an effective regulatory tool for the more serious major violations," and that "[t]he comments of the joint industry workgroup suggested significantly increased amounts for certain major violations." 51 FR 3882, 3885 (Jan. 30, 1986). BLM stated that "[i]n response to these comments, the proposed rulemaking would retain automatic assessments on a daily basis for certain specific major violations and would cap them at specified amounts." *Id.* With regard to the specific violation of drilling without approval, BLM stated:

[T]he suggestion to distinguish between automatic assessment amounts for unauthorized drilling based on whether or not a plan has been filed has not been adopted in the proposed rulemaking. The controlling issue is drilling without approval and no distinction should be made based on whether or not a plan has been filed.

In the final rulemaking published at 52 FR 5384 (Feb. 20, 1987), BLM renumbered the provision concerning assessments for drilling without approval, or causing surface disturbance preliminary thereto, from 43 CFR 3163.3(a)(2) to the current 43 CFR 3163.1(b)(2). BLM noted that "[t]he

2/ 43 CFR 3163.3(c) provided in relevant part:

"Certain instances of noncompliance result in loss or damage to the lessor, the amount of which is difficult or impracticable to ascertain. Except where actual losses or damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damage to the lessor from specific instances of noncompliance. Provided that as to paragraphs (a), (c), (f), (g), and (j) of this section the specified loss or damage shall be applicable to each successive day of the noncompliance.

* * * * *

"(c) For failure to obtain approval of an Application for Permit to Drill prior to commencing operations or causing surface disturbance preliminary thereto * * *, \$250." 43 CFR 3163.3 (47 FR 47772 (Oct. 27, 1982)).

This regulation was amended, effective Oct. 22, 1984, deleting the provision for the continuing assessment of liquidated damages for each day of noncompliance. *See* 49 FR 37361 (Sept. 21, 1984). Thus, under the amended regulation, BLM was entitled to assess one-time liquidated damages of \$250 for each instance of noncompliance for failure to obtain approval of an APD prior to commencing operations. *See, e.g., Benson-Montin-Greer Drilling Corp.*, 92 IBLA at 96.

comments raised serious concerns about the automatic nature of some of the assessments, arguing that notice and an opportunity to correct the noncompliance must be provided before an assessment can be made." 52 FR at 5386-87. In responding to these comments, BLM explained that the final rules provide for the assessment of liquidated damages without notice and an opportunity to abate in only three instances, those being (1) the failure to install blowout preventers, (2) the failure to obtain approval prior to drilling or causing surface disturbance, and (3) the failure to obtain approval of a plan for well abandonment. BLM's rationale for structuring 43 CFR 3163.1(b)(2) so as to require BLM to impose an "immediate assessment" for these three violations disposes of Reynolds' "appeal for leniency" and his concern that the assessment amounts to more than the cost of drilling the well:

The comments specifically criticized the provision of the proposed rulemaking that would permit the assessment of damages without notice. Lessees and operators, of course, are expected to know the obligations and requirements of a Federal or Indian oil and gas lease. In essence, the comments complain that the proposed rulemaking fails to provide provisions for notifying them that they are failing to comply with requirements which are contained in their lease or the regulations that control their operations. The inconsistency of this argument is clear because the only violations assessed without notice and an opportunity to abate are set out in paragraph (b) of this section and cover only a failure to install blowout preventers, a failure to obtain approval prior to drilling, and a failure to obtain approval for well abandonment. These three enumerated requirements for Federal and Indian lease operations could not be clearer or more widely known. The Bureau finds that additional notice prior to the assessment is not warranted due to the serious nature and poten-tial consequences of a breach of these requirements. [Emphasis added].

52 FR at 5387.

Our purpose in discussing the history of 43 CFR 3163.1(b)(2) is to emphasize the seriousness of the violation cited by BLM in this appeal. 3/

3/ Causing surface disturbance without approval is regarded as serious as drilling without approval:

"Several of the comments suggested that the final rulemaking should modify § 3163.3(a)(2) of the proposed rulemaking, drilling without approval, to make it apply only to actual drilling operations, not to preliminary actions. The suggested change has not been adopted by the final rulemaking because the Bureau of Land Management considers the prior approval requirements for both the actual drilling and associated surface disturbance as being very clear and the prior approval of these operations is critical to proper multiple use management of the public lands.

52 FR 5388 (Feb. 20, 1987).

In his November 20, 1987, letter to BLM, and again in his SOR, Reynolds concedes that BLM did not approve his APD until November 6, 1987. A memorandum dated December 4-5, 1987, from Jack Spears, Farmington Resource Area, to Ray Thompson, New Mexico State Office, indicates that Reynolds was aware as early as October 20, 1987, that a second archaeological report was necessary. In a letter dated November 3, 1987, Zofia Sliwinski, Archaeological Resource Service, whom Reynolds retained to prepare the second archaeological report, explained to the Farmington Resource Area archaeologist that "[t]he well pad was already cleared prior to [the] inspection" which she conducted on October 29, 1987. In her report, Sliwinski states that "Mr. Reynolds contracted a small dozer to clear the well location and access road. In addition, a small pit, 20'x8'x4', was dug north of the drill stake. Therefore, the area was disturbed prior to [my] inspection."

We conclude that BLM was correct in its application of 43 CFR 3163.1(b)(2) in this case. Reynolds caused surface disturbance at the Well No. 18 Torreon site as early as October 23, 1987, but BLM did not approve Reynolds' APD until November 6, 1987.

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 affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge