

FANCHER OIL CO.

IBLA 89-399

Decided December 26, 1991

Appeal from a decision of the Deputy State Director, Wyoming State Office, Bureau of Land Management, upholding assessments for incidents of noncompliance on oil and gas lease WYW 74190. SDR No. WY-89-12.

Affirmed.

1. Oil and Gas Leases: Incidents of Noncompliance

An oil and gas operator that challenges a determination that it did not timely abate an incident of noncompliance with applicable regulations, lease terms, or written order bears the burden of establishing by a preponderance of the evidence that the determination was in error.

2. Oil and Gas Leases: Civil Assessments and Penalties

An assessment levied pursuant to 43 CFR 3163.1(a)(2) is for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. Such an assessment is not a penalty or fine, but is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. Assessments under 43 CFR 3162.1(a)(2) are only applicable to those violations deemed "minor" by the authorized officer and the amount of damages is discretionary, limited to a maximum amount of \$250. As the Board normally accords considerable deference to such judgmental decisions when they are supported by substantial evidence, a decision to assess \$250 for each minor violation will be affirmed where the appellant has not presented sufficient evidence to establish by a preponderance that the decision is in error.

APPEARANCES: Stephen W. Barnes, Petroleum Engineer, Fancher Oil Company, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Fancher Oil Company (Fancher) has appealed from an April 10, 1989, decision of the Deputy State Director, Wyoming State Office, Bureau of Land Management (BLM), upholding assessments for two incidents of noncompliance on oil and gas lease WYW 74190.

An application to drill an oil well on the lease was filed by Fancher as operator on June 24, 1988, and approved by the Buffalo, Wyoming, Resource Area Manager, BLM, on August 19, 1988. The resulting well, Hauber Federal 32-1, situated in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, sec. 32, T. 54 N., R. 70 W., sixth principal meridian, Campbell County, Wyoming, was inspected by BLM on November 15, 1988. A record of the inspection and notice of violations was mailed to Fancher on November 17, 1988, reporting:

Failure to exercise due care and diligence to protect surface resources (43 CFR 3162.5-1(a)). Specifically: Dumping trash in the reserve pit.

Corrective action required: Remove the trash from the reserve pit and dispose of it in an approved site for disposal.

Failure to properly identify an abandoned location (43 CFR 3162.6(b)).
Corrective action required: Install a well location sign with the complete and correct information in a prominent location at the well site by December 9, 1988.

The notice stipulated that corrective actions should be completed no later than December 12, 1988, and reported to BLM, for which the failure to do so would result in \$250 assessments under 43 CFR 3163.1(a)(2). The notice also stated that an informal review of the technical or procedural aspects of the notice could be requested.

On December 5, 1988, Fancher reported to BLM that the violations had been corrected as follows: "The trash was cleaned up to the best of our ability considering the reserve pit was full of water. The well signs will be installed prior to January 10, 1989, as per verbal approval for a one month extension given by Mr. Glenn Bessinger."

BLM reinspected the well location on March 6, 1989, and reported "[s]till no well sign!" and "[p]hotos show a lot of trash in the reserve pit, it has not been cleaned out at all."

An assessment of \$250 for each violation was sent to Fancher on March 10, 1989, by the Buffalo Resource Area Manager. Fancher requested State Director Review (SDR) in accordance with 43 CFR 3165.3(b).

In its statement to the Director, Fancher related that the well identification signs were ordered on November 22, 1988, the same day that Fancher was notified of the missing signs, and the completed signs were hand carried to Gillette, Wyoming, on November 25. However, due to

a misunderstanding, they were not picked up by or delivered to Fancher's pumper. Fancher noted that the signs were installed on March 11, 1989, after it learned of the misunderstanding. With respect to the trash, Fancher argued that, due to unexpected high water levels in the reserve pit after the November inspection, it was impossible to safely remove the trash until the water evaporated. "Fancher's contention here is that the pit level at the time of each inspection was low enough that some of the trash could be safely removed, but at the time of the notice of noncompliance, it was too high" (Mar. 24, 1989, Letter at 2). Fancher stated it cleaned out as much trash as possible on March 16.

In his April 10, 1989, decision the Deputy State Director, Wyoming State Office, BLM, noted:

At the reinspection on March 6, 1989, the well signs were still not in place. * * * The company did not request an extension of the allowed timeframe to complete the trash removal. When the pit was reinspected on March 6, 1989, the water level was not such that the thread protectors could not be removed as provided in the original administrative letter.

He concluded that Fancher "had ample opportunity to comply with the orders of the authorized officer of the Buffalo Resource Area or request additional time to properly complete the work," and upheld the assessments of \$250 each for violations of 43 CFR 3162.5-1(b) and 3162.6.

In its statement of reasons for appeal (SOR), Fancher states that its explanation that "extenuating circumstances and not willful negligence were the reason for the problems" was not addressed by the Deputy State Director (SOR at 1). Fancher argues that both of these violations were "trivial at best" and states:

As I mentioned in the original appeal, Fancher Oil made a prudent effort to see that these problems were corrected, but in the case of the well sign, a breakdown in communications between our field people resulted in the well sign not being installed. As far as the trash in the reserve pit is concerned, it was just not reasonable to get it cleaned out until the pit level had receded to a point where it could all be removed. * * * I don't believe we should be required to clean it in stages as the pit level recedes.

(SOR at 2). Fancher notes both violations have been corrected and argues that "these regulations, as carefully as they might have been conceived and written, should not be applied in all instances. * * * [S]ome degree of judgment must be used in regards to the strict enforcement of these regulations" (SOR at 3).

The Office of the Regional Solicitor filed an answer on behalf of BLM. It notes that a showing of negligence is not necessary for the imposition of an assessment, which is "levied to recover to the Federal Government the loss caused by the failure to correct each violation within the abatement time frame allowed. In this case, the direct loss to the Government included the costs of the followup inspection work and

the administrative costs relating to the processing of followup notices and other office work" (Answer at 2). BLM considered the violations minor and imposed a commensurate assessment, it points out, and observes that a May 22, 1989, inspection revealed that trash remained in the reserve pit.

[1] Departmental regulations applicable to the management of onshore oil and gas operations require that operators "conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality" and "comply with the pertinent orders of the authorized officer and other standards * * * as set forth in the * * * approved drilling plan or subsequent operations plan." 43 CFR 3162.5-1(a). Further, 43 CFR 3162.5-1(b) provides that "[a]ll produced water must be disposed of by * * * approved pits, or by other methods which have been approved by the authorized officer." In this case the water-filled pit containing trash is the reserve pit. The application for permit to drill (APD) distinguished between the reserve pit and the trash pit: "2) Drilling fluids will be handled in the reserve pit. * * * 5) Garbage and non-flammable waste produced during drilling or testing will be handled in the trash pit. * * * Drill fluids, drilling water, mud and cuttings will be kept in the reserve pit, as shown on EXHIBIT 'H'" (APD, Exhibit D, Multipoint Requirements To Accompany APD, G. "Handling of Water, Materials, and Disposal"). Thus, the trash in the reserve pit is a violation of both the APD and 43 CFR 3162.5-1(b). Although Fancher acknowledges the trash, it contends that it could not safely remove it earlier than it did.

The application regulation, 43 CFR 3162.6(b), provides that "[f]or wells located on Federal and Indian lands, the operator shall properly identify, by a sign in a conspicuous place, each well, other than those permanently abandoned." Fancher acknowledges that such a sign was not placed on the well site until March 11, 1989. BLM may assess an operator \$250 for failure to install a sign within the time specified. Diversified Operating Corp., 119 IBLA 107 (1991).

A party challenging BLM's determination that violations were not abated within the allotted period has the burden to prove by a preponderance of the evidence that BLM's determination is wrong. Chase Energy, Inc., 115 IBLA 76, 80 (1990). In this case the fact, that the violations went unabated during the stipulated compliance period is not denied and photographs in the case file confirm the inspector's report that the violations still existed in March 1989 (Inspector's Reports dated Mar. 6, 1989).

[2] There remains the question whether the assessment of \$250 per violation is properly sustained. An assessment under 43 CFR 3163.1 is not considered to be either a fine or a penalty. Rather, it is in the nature of "liquidated damages" to cover loss damage to the lessor from specific instances of noncompliance. See 52 FR 5384, 5387 (Feb. 20, 1987). 1/ Under 43 CFR 3163.1(a)(2), the \$250 in liquidated damages may

1/ The preamble for this regulation states:

"The provisions of the regulations providing assessments have been promulgated under the Secretary of the Interior's general authority set out in section 32 of the Mineral Leasing Act of 1920, as amended and

be assessed "for failure to abate the violation or correct the default within the time allowed." Because Fancher failed to comply within the abatement period prescribed in the November 1988 notice, as extended, BLM is entitled to assess \$250 for each of the instances to cover administrative and other costs to the United State caused by the failure to abate.

Appellant has asserted that since the violations were neither life-threatening nor a safety hazard, they should be construed as unimportant and without basis for an assessment. This concern was reflected in the regulations applied to the subject violations. Under 43 CFR 3163.1(a)(2), if the violation is "minor" BLM may levy an assessment of \$250 for failure to comply with an order of the authorized officer within the time allowed, as it did in this case. See Chase Energy, Inc., supra at 79, and cases cited.

Fancher further argues that the assessment should have been waived because of its good faith effort to comply. We note that the current regulations at 43 CFR 3163.1(e) provide authority to the State Director to compromise or reduce the amount of an assessment. 2/ Moreover, an assessment for a minor violation under 43 CFR 3162.1(a)(2) itself is

fn. 1 (continued)

supplemented (30 U.S.C. 189), and under the various other mineral leasing laws. Specific authority for the assessments is found in section 31(a) of the Mineral Leasing Act (30 U.S.C. 188(a)), which states in part ' . . . the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.' All Federal onshore and Indian oil and gas lessees must, by the specific terms of their leases, which incorporate the regulations by reference, comply with all applicable laws and regulations.

"Failure of the lessee to comply with the law and applicable regulations is a breach of the lease, and such failure may also be a breach of other specific lease terms and conditions. Under section 31(a) of the Act and the terms of the leases, the Bureau may seek cancellation of the lease in these circumstances. However, since at least 1942, the Bureau (and formerly the Conservation Division, U.S. Geological Survey), has recognized that lease cancellation is too drastic a remedy except in extreme cases. Therefore, a system of liquidated damages was established to set lesser remedies in lieu of lease cancellation * * *.

"The Bureau of Land Management recognizes that liquidated damages cannot be punitive, but are a reasonable effort to compensate as fully as possible the offended party, in this case the lessor, for the damage resulting from a breach where a precise financial loss would be difficult to establish. This situation occurs when a lessee fails to comply with the operating and reporting requirements. The rules therefore establish uniform estimates for the damages sustained, depending on the nature of the breach." 52 FR at 5387.

2/ Prior to 1987, the regulations mandated an assessment of not less than \$250 for failure to comply with a written order or instructions of the authorized officer. 43 CFR 3163.3; see, e.g., Yates Energy Corp., 89 IBLA 150 (1985).

discretionary. However, the circumstances were reviewed by both the Area Manager and the Deputy State Director and neither considered Fancher's efforts sufficient for waiver or reduction of the assessments. In a case such as this involving a judgmental decision by agency personnel who have special authority or qualifications to make such decisions, the Board normally accords considerable deference to the decision if it is supported by substantial evidence. An appellant may overcome such a decision by a preponderance of the evidence. Mapco Oil & Gas Co., 94 IBLA 158, 161 (1986). In this case, the record supports the Deputy State Director's decision and we see no basis for finding he abused his discretion. As the Deputy State Director noted, Fancher did not request an extension of time to remove the trash from the reserve pit. It is incumbent on the operator to seek such an extension when it cannot complete the corrective action within the time specified in the incident of noncompliance. Dalport Oil Corp., 104 IBLA 327, 330 (1988).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

James L. Burski
Administrative Judge

