

CRAIG MCGRIFF EXPLORATION, INC.

IBLA 92-420

Decided May 17, 1995

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, upholding assessment of liquidated damages for two incidents of noncompliance. SDR 92-11.

Affirmed.

1. Oil and Gas Leases: Civil Assessments and Penalties—Oil and Gas Leases: Incidents of Noncompliance

An assessment of liquidated damages in the amount of \$250 for failure to abate a minor violation within the time allowed in an incident of noncompliance or any extension thereof under 43 CFR 3163.1(a)(2) is properly affirmed when it appears from the record that the violation was not timely abated.

APPEARANCES: Craig McGriff, President, Craig McGriff Exploration, Inc., Oklahoma City, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Craig McGriff Exploration, Inc. (McGriff), has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated February 21, 1992, upholding the December 18, 1991, assessment by the Tulsa District Office, Oklahoma, BLM, in the amount of \$500. The assessment was issued because of appellant's failure to timely abate two incidents of noncompliance (INC's). The INC's were issued with respect to the CORA 1-17 well situated on Indian oil and gas lease 14-20-0208-4004. The INC's involved the failure to file a request for approval for the disposal of produced water and the failure to submit a site security plan and facility diagram.

McGriff is the lessee under the subject lease, which encompasses 160 acres of land situated in the NW $\frac{1}{4}$ sec. 17, T. 16 N., R. 6 E., Indian

Meridian, Lincoln County, Oklahoma. The record indicates that production was initiated from the CORA 1-17 well on March 13, 1986. It is evident that BLM attempted through telephone communications to obtain a request for approval for the disposal of produced water and a site security plan and facility diagram with respect to that well before issuing the INC's involved here. The record contains two handwritten notes, dated June 9 and July 1, 1986. In the first, a BLM employee refers to a June 9, 1986, conversation in which Craig McGriff, president of appellant firm, said he had previously sent NTL-2B ^{1/} and the site security plan, but would make a copy and send it "today." In the second, the same employee refers to a July 1, 1986, conversation in which McGriff indicated that the site security and NTL-2B information had been "mailed."

There is no evidence in the BLM case files forwarded to the Board that BLM received a request for approval and a site security plan and facility diagram prior to December 18, 1990. On that date, the District Office issued INC No. NM-040-91-RAM-042 for failure to submit a request for approval for the disposal of water produced from the CORA 1-17 well, either by injection into the subsurface, by placement in approved pits, or by another approved method. 43 CFR 3162.5-1(b). On the same date, the District Office issued INC No. NM-040-91-RAM-043 for failure to submit a site security plan and facility diagram as required by regulation. 43 CFR 3162.7-5. Each INC required that corrective action, in the form of submission of the required request and plan and facility diagram, be taken within 30 days of receipt of the INC. While no assessment was made in the INC's, they each warned that "you may incur an * * * assessment under * * * 43 CFR 3163.1" in the absence of timely compliance. The record indicates that McGriff received the INC's on December 19, 1990.

The INC's were reissued on October 29, 1991, along with a short letter. Therein, the District Office stated that BLM "ha[d] not received any information back concerning [the two December 1990 INC's]." The letter afforded McGriff an additional 30 days to comply. Enclosed were copies of NTL-2B (40 FR 57814 (Dec. 12, 1975)) and Onshore Oil and Gas Order No. 3 (54 FR 8056 (Feb. 24, 1989)), which governed the submission of site security plans and facility diagrams. The record indicates that McGriff received the reissued INC's on October 30, 1991.

^{1/} The reference to NTL-2B is to Notice to Lessees and Operators (NTL)-2B, issued effective Jan. 1, 1976, which required Indian oil and gas lessees to request approval for the disposal of produced water. See 40 FR 57814 (Dec. 12, 1975) ("All * * * disposal method[s] must be approved in writing by [BLM] regardless of the physical location of the disposal facility"). As of December 1990, approval was to be sought by submission of a "Sundry Notices and Reports on Wells" (Sundry Notice, Form 3160-5).

Again, there is no evidence in the BLM case files forwarded to the Board that a request for approval for the disposal of produced water or a site security plan and facility diagram were filed with BLM after reissuance of the INC's on October 29, 1991. On December 18, 1991, the District Office directed an assessment in the amount of \$250 with respect to each of the two INC's, for a total of \$500.

According to a December 23, 1991, note in the file by a BLM employee, Craig McGriff called BLM on that date and said that he had sent in the documents "2 weeks ago." He attributed their absence from the record to BLM: "He * * * stated that he was having constant problems with * * * the BLM office, concerning his files on his leases." McGriff was informed that BLM "had not received his paper work as of 12-23-91." McGriff again called on January 2, 1992, according to another note by the same employee:

Mr. McGriff * * * wanted to know what we wanted him to send in again on lease 14[-]20[-]0208[-]4004. * * * I mailed him a[n] NTL-2B [a]nd a copy of onshore order [No.] 3 and 3 copies of sundry notices. He said he got rid of his secretary and he did not have the files.

Finally, by letter dated January 15, 1992, McGriff objected to the assessment of \$500, contending that he had supplied the required documents on several prior occasions, both before and after issuance of the INC's:

The BLM received a copy of the site security [and] a copy of the NTL-2B * * * soon after the well was put in production. Furthermore, two years ago or so, the BLM said they needed * * * an NTL-2B. I met Mr. Henson of the BLM at the well and hand carried * * * another NTL-2B to him. And just lately your office again needed the site security and NTL-2B; so, I mailed you that information you needed approximately two weeks before Christmas.

McGriff requested the State Director to review the District Office's December 1990 INC's and December 1991 assessment of \$500. See 43 CFR 3165.3(b).

On State Director Review (SDR), BLM upheld the District Office's December 1991 assessment of \$500 for failure to supply the documents as required by the INC's. The decision noted that the record "does not support McGriff's contention that the information was previously given to, or sent to, BLM" (Decision at 1). BLM noted that, despite McGriff's assertions, the "requested items are not in the Tulsa District files." Id. McGriff appealed from the February 1992 BLM decision.

In the statement of reasons for appeal, appellant does not take exception to the fact that it was properly required by BLM, under Departmental regulations, to submit both a request for approval for the disposal of

produced water and a site security plan and facility diagram. ^{2/} Rather, appellant contends that it had complied with BLM's directives by submitting the required documents long before issuance and reissuance of the December 1990 INC's and again before the December 1991 assessment. BLM has indicated, however, there is no evidence that the documents were ever filed with it observing that they are not found in the records of the District Office. See Decision at 1. Review of the BLM records tendered on appeal does not disclose any such documents filed prior to the decision under appeal.

The fact that a document is not found in BLM's files raises the inference that it was not filed with BLM since there is a presumption that BLM employees have properly discharged their official duties and thus have not lost or misplaced legally significant documents. See Wilson v. Hodel, 758 F.2d 1369, 1372 (10th Cir. 1985); H. S. Rademacher, 58 IBLA 152, 155, 88 I.D. 873, 875 (1981). That presumption may be rebutted by substantial countervailing evidence. See Wolfgang v. Burrows, 181 F.2d 630, 631 (D.C. Cir. 1950), cert. denied, 340 U.S. 826 (1950). Upon the submission of evidence tending to refute the presumption, there remains only the inference that the document was not filed arising from the absence of the document from BLM's files and BLM's practice of properly handling legally significant documents. See H. S. Rademacher, supra at 155-56, 88 I.D. at 875-76. At that point, the party seeking to establish that a filing occurred must demonstrate by a preponderance of the evidence that the document was actually filed with BLM. See H. S. Rademacher, supra at 155-56, 88 I.D. at 875-76.

Appellant provided no evidence, with its SDR request in January 1992, that the request for approval for the disposal of produced water and the site security plan and facility diagram were actually filed with BLM,

^{2/} The relevant regulation provides that "[a]ll produced water must be disposed of by injection into the subsurface, by approved pits, or by other methods which have been approved by the authorized officer." 43 CFR 3162.5-1(b) (emphasis added). The record indicates that production from the CORA 1-17 well began in March 1986. Although the record does not disclose the volume of water produced by the well, it appears from the record that appellant desired to dispose of produced water. On appeal, McGriff indicates that it disposed of such water by trucking it to a private well (Terry No. 1) situated in the SE¹/₄ SE¹/₄ SE¹/₄ sec. 9, T. 14 N., R. 6 E., Indian Meridian, Lincoln County, Oklahoma. See Sundry Notice, dated Apr. 18, 1988 (filed with BLM on May 8, 1992). Accordingly, appellant was required to obtain BLM's approval for such disposal. Further, the regulations require facility diagrams for producing leases on Indian lands. See 43 CFR 3162.7-5(d).

either prior to issuance of the December 1990 INC's or the December 1991 assessment. However, on appeal to the Board, appellant provided copies of the reports that were allegedly lost by BLM. Appellant provided a copy of a Sundry Notice (Form 3160-5 (June 1990)), signed by Craig McGriff with a date of April 18, 1988. This document, however, does not support a finding that the requested documentation was filed either in 1986 as indicated in appellant's previous verbal communications or in 1988 when the signature is dated. The Sundry Notice could not have been signed on April 18, 1988, as indicated by the date beside the signature as it is clear that the form on which the Sundry Notice was submitted was not printed before June 1990. Further, the document contains no evidence that it was filed with BLM prior to the assessment under appeal. ^{3/}

Appellant also submits a copy of a May 2, 1992, letter to BLM from the BLM petroleum engineering technician assertedly responsible for the subject lease until his retirement in 1988. The letter states:

On or about April 18th, 1986[,] I met Craig McGriff in Stroud, Okla[homa] and rec[e]ived from him the site security diagram and produced water disposal application [with respect to the CORA 1-17 well.] * * * I took those [documents] and on the same day went to th[e] * * * lease[] and confirmed their accuracy. I turned them in with an inspection of th[e] lease[]. [Emphasis added.]

(Letter, dated May 2, 1992, at 1). This constitutes some evidence that the documents requested in the INC were tendered to a BLM employee in 1986, ^{4/} although they apparently were not placed in the BLM case file. McGriff's evidence is subject to two critical shortcomings. First, in view of the handwritten notes in the case file subsequent to the date the documentation was purportedly provided to BLM, we are unable to conclude that appellant has shown by a preponderance of the evidence that the documentation identified in the INC's was filed with BLM. Second, and more crucial, the evidence provided with the appeal does not support a finding that the missing documentation was filed with BLM after issuance of the INC's mandating this abatement. It is this absence of the required documentation from the BLM case file which was addressed by the INC's issued to appellant. The issue raised by this appeal of the assessment is whether appellant abated the INC's by providing copies of the required documentation for the BLM records

^{3/} The copy of the "Sight [sic] Security Diagram" filed with the notice of appeal, although dated Apr. 18, 1988, also bears no evidence that it was previously filed with BLM.

^{4/} This evidence is rebutted by the handwritten notes in the case file dated June and July 1986 which were apparently prepared by the same employee writing the letter on behalf of appellant. These notes indicated that the documentation had not been filed with BLM.

as directed by the terms of the INC's. Despite the repeated efforts of BLM to obtain this documentation, the preponderance of the evidence supports a finding that the documentation requested by BLM in the INC's was not filed by appellant until the appeal to this Board was filed.

[1] This Board has upheld a BLM assessment of an operator for failure to abate a minor violation within the time allowed under 43 CFR 3163.1(a)(2). See, e.g., Diversified Operating Corp., 119 IBLA 107, 108 (1991). When, as in this case, the INC's describe a minor violation, an assessment of \$250 is properly made for failure to abate the INC within the time allowed. 43 CFR 3163.1(a)(2); Diversified Operating Corp., *supra* at 109. Such an assessment is not considered a fine or penalty; rather, it is in the nature of "liquidated damages" to cover loss or damage to the lessor from specific instances of noncompliance. Fancher Oil Co., 121 IBLA 397, 400 (1991). It is well established that BLM is entitled to assess liquidated damages when an operator fails to comply with a written order within the time specified in that order. Ominex Petroleum, Inc., 123 IBLA 1, 4 (1992).

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.

C. Randall Grant, Jr.
Administrative Judge

I concur.

Will A. Irwin
Administrative Judge

5/ Civil penalties may be imposed under 43 CFR 3163.2 where the violation remains uncorrected.

