



GRYNBERG PETROLEUM CO. v. BUREAU OF LAND MANAGEMENT

172 IBLA 167

Decided August 23, 2007

Editor's Note: appeal filed sub nom, Grynberg Petroleum Co. v. Dirk Kempthorne, Civ No. 07-CV-02330 (D. Colo. Nov. 21, 20078)



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

GRYNBERG PETROLEUM CO.
v.
BUREAU OF LAND MANAGEMENT

IBLA 2004-306

Decided August 23, 2007

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, affirming a decision of the Colorado State Office, Bureau of Land Management, which on State Director Review affirmed a civil penalty.

Affirmed as modified.

1. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

An appellant's argument that an administrative law judge improperly allocated the burden of proof in a hearing on the record of a proposed civil penalty under section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719 (2000), provides no basis for reversing the judge's decision where the evidence is not in equipoise and BLM preponderated on every material issue.

2. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

FOGRMA places the burden on the operator to justify a longer abatement period by informing BLM in a timely manner of circumstances that would prevent timely abatement of a violation identified in a Notice of Incidents

of Noncompliance. Where an operator did not request a longer abatement period, in a hearing on the record of a proposed civil penalty, he cannot carry his burden of showing, by a preponderance of the evidence, that the abatement period was inadequate.

APPEARANCES: Phillip D. Barber, Esq., Denver, Colorado, for appellant; Terri L. Debin, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Jack J. Grynberg, d/b/a Grynberg Petroleum Co., has appealed from the August 3, 2004, decision of Administrative Law Judge (ALJ) Harvey C. Sweitzer affirming a decision of the Colorado State Office, Bureau of Land Management (BLM), which on State Director Review (SDR) affirmed a civil penalty of \$30,000 proposed by BLM's San Juan Field Office. BLM proposed the penalty because Grynberg failed to plug and abandon the Wild Steer Federal Well No. 32-24 on oil and gas lease COC-017055 before the abatement periods established by BLM in two Notices of Incidents of Noncompliance (INCs) expired. The penalty was proposed pursuant to section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), *as amended*, 30 U.S.C. § 1719 (2000), and 43 C.F.R. § 3163.2. In his decision, Judge Sweitzer assumed without deciding that BLM bore the initial burden to prove that the violation occurred and that penalties were properly proposed because BLM was the proponent of the civil penalties. He found that BLM had met this initial burden and assigned Grynberg the burden to show, by a preponderance of the evidence, that the SDR decision was arbitrary or against the weight of evidence. Judge Sweitzer found that the evidence demonstrated that the SDR decision was neither arbitrary nor contrary to the weight of the evidence.

BACKGROUND

On November 1, 1972, BLM issued oil and gas lease COC-017055 for a term of 10 years and so long thereafter as oil and gas was produced in paying quantities. The Wild Steer Well was spudded on December 31, 1974, and drilled through the winter months until its total depth was reached on March 15, 1975. The well was completed by July 7 and shut-in while Grynberg sought a purchaser for the gas. Exs. R-10, R-11. Although BLM deemed the well capable of producing oil or gas in paying quantities at the end of the primary term of the lease, Ex. R-18, Grynberg never found a purchaser for the gas. Thus, no production from the well was ever reported.

The record shows that BLM has been concerned about the plugging and abandonment of this well since 1991. From 1991 until the beginning of 1996, BLM issued letters to Grynberg concerning the status of the well that referred to plugging and abandoning it.¹ On January 16, 1996, BLM approved Grynberg's request to place the well in temporary abandonment status until April 15. Ex. R-31. From April to July 1996, Grynberg filed notices to plug the well, which BLM approved, subject to conditions to protect certain water-bearing formations, but Grynberg objected to those conditions. Exs. R-34 through R-39. Grynberg sought SDR of a BLM decision dated July 12, 1996, Ex. R-40, which the State Office affirmed in part and rescinded in part by decision dated August 22, 1996. The State Office's decision was affirmed on appeal to this Board. *Grynberg Petroleum Co.*, 152 IBLA 300 (2000). Ex. R-45.

Upon receipt of the Board's decision affirming BLM's conditions for protecting water-bearing formations, Grynberg submitted notices of intent to plug and abandon the well in June and July 2000, but BLM did not approve Grynberg's plans. Exs. R-46, R-47. Grynberg submitted another notice that BLM approved on August 10, 2000. Ex. R-48. By that time, however, the well service company that Grynberg had contacted was busy with other work, as a Grynberg employee explained in a letter that BLM received on November 9. Ex. R-49. The well service company would not be able inspect the well location in order to submit a bid before winter arrived, but would do so in the spring. The letter referred to difficulty in finding available rigs to do the work. On February 12, 2001, BLM received a copy of a letter of commitment from the well service company to plug the well in the summer. Exs. R-50, R-51. On June 19, the drilling company confirmed that the well would be plugged between June 25 and 29.

¹ On Sept. 21, 1991, BLM issued a letter to Grynberg requiring him to provide notice of his intent to condition the well to function, temporarily abandon it, or permanently plug and abandon it. Ex. R-20. By letter dated Feb. 17, 1993, BLM required Grynberg to test the well. Ex. R-23. On Apr. 3, 1993, BLM approved Grynberg's notice of intent to abandon the well, but in a letter to Grynberg dated Apr. 21, 1994, BLM allowed 60 days to commence reworking or drilling operations. Ex. R-25. That letter also provided 60 days in which Grynberg could submit justification for the belief that the well was capable of production in paying quantities. *Id.* The letter further advised Grynberg that the lease would terminate if he failed to submit a reworking or drilling proposal or justification that the well was capable of production. In a letter dated July 7, 1994, Grynberg stated that because of difficulty in obtaining necessary equipment, the well could not be plugged by July 21, and BLM approved his request for a 90-day extension. Exs. R-26, R-27. By letter dated Oct. 17, 1994, Grynberg advised BLM that he could locate only one operator to plug the well, and that operator would not be available until next spring. Ex. R-28. BLM approved an extension until June 1, 1995. Ex. R-29.

On June 25, 2001, however, the well service company informed BLM that Grynberg did not want the company to plug the well. Ex. R-54.² In a telephone conversation with BLM on June 26, Grynberg explained that the well is capable of producing 200 thousand cubic feet (mcf) per day and was 4 miles from a pipeline, but because the gas contained 40 percent nitrogen with a British Thermal Unit (BTU) content of 650 BTUs, the pipeline would not accept it. Ex. R-55. Grynberg believed that a new membrane technology could be used economically to screen out the nitrogen to make the gas acceptable. *Id.*; Ex. R-57. By letter dated July 11, 2001, Grynberg requested “an extension for plugging or connecting the subject well for one year from September 21, 2001.” Ex. R-57. Grynberg offered no reason for seeking an extension of BLM’s requirement to plug and abandon the well other than his continuing efforts to find a purchaser of gas from the well. At this point, however, Grynberg had no right to sell that gas because his lease had terminated.

By letter dated August 10, 2001, BLM denied the requested extension. Ex. R-59. BLM pointed out that Grynberg had been given a year after issuance of this Board’s decision, and that the well had to be plugged and abandoned by September 21, 2001. This letter was received by Grynberg on August 10. If Grynberg wished to challenge this denial of a request for an extension, he was obliged to file a request for SDR under 43 C.F.R. § 3165.3(b) within 20 business days of receiving the letter. Grynberg never appealed the denial of his request for an extension. As one Court long ago held, a party who fails to file an administrative appeal from an order requiring him to plug and abandon a well by a particular date “should not be heard to defend on the ground that . . . the order to plug was unreasonable.” *Forbes v. United States*, 125 F.2d 404, 411 (1942). Thus, Grynberg’s failure to plug and abandon the well by September 21 established a violation of a requirement of an order within the meaning of 43 C.F.R. §§ 3163.1(a) and 3163.2(a).³

² In his SOR, Grynberg refers to Ex. R-54 in disingenuously asserting that BLM knew that rigs were difficult to schedule in 2001 and that there were no more rigs available. SOR at 25. He states that BLM “was told by A-Plus [Drilling Company] that ‘it will not be able to plug this Well this year.’” *Id.* The exhibit cited by Grynberg refutes the argument he makes. It does not show that drilling rigs were difficult to schedule. On the contrary, it shows that Grynberg cancelled plugging service from an available rig because he simply did not want to plug the well. As set forth in a Conversation Record dated June 27, 2001, Grynberg explained the following day that he wanted to attempt to market gas from the well rather than plug and abandon it. Ex. R-55.

³ In his SOR, Grynberg asserts “[i]t was not until [he] received BLM’s notice on November 19, 2001, that he was advised that there had been a ‘violation’ of his duty (continued...) ”

In a letter dated October 19, 2001, more than 2 months after the unappealed denial of his extension request and almost 1 month after the day the plugging of the well was to be completed, Grynberg informed BLM that he was still trying to connect the well to the pipeline. Ex. R-60. On November 13, BLM issued a Notice of Incidents of Noncompliance (INC) requiring Grynberg to plug and abandon the well by December 5.⁴ Ex. R-61. Grynberg received the INC on November 19 (Ex. R-61), and because it was not received until that date, BLM deemed December 10 to be the last day of the abatement period. Ex. R-62; *see* R-90. As provided by 43 C.F.R. § 3163.1(d), continued noncompliance after December 10 affirmatively “subject[ed] the operating rights owner or operator, as appropriate, to penalties described in § 3163.2 of this title.” If Grynberg wished to challenge the facts of the violation on which the INC was predicated or the reasonableness of the abatement period, he was obliged to do so by seeking SDR within 20 business days of receiving the INC on November 19. 43 C.F.R. § 3165.3(b).

On December 13, BLM issued a second INC with a \$250 assessment, as provided in 43 C.F.R. § 3163.1(a)(2) for minor violations. Ex. R-62.⁵ The second INC, received by Grynberg on December 17, required him to plug and abandon the well by January 8, 2002, and stated that failure to comply would render him liable for civil penalties in accordance with 43 C.F.R. § 3163.2. Again, Grynberg did not seek SDR to challenge the facts of the violation on which the INCs were based or the reasonableness of the abatement period by seeking SDR within 20 business days. 43 C.F.R. § 3165.3(b).

GRYNBERG FAILS OR REFUSES TO COMPLY WITH THE INCs

By letter dated January 22, 2002, which Grynberg received on January 24, BLM proposed a civil penalty of \$50 per day beginning December 19, 2001, until the violation was corrected or until January 28, 2002. If the violation remained uncorrected on January 29, the \$50 proposed penalty would be replaced by a proposed civil penalty of \$500 per day beginning December 19, 2001, until the violation was corrected or until February 17. Ex. R-69. If the violation remained

³ (...continued)

to P&A.” SOR at 18. This assertion is simply false; once Grynberg had received the denial of his extension request, he knew that he would be in violation of his duty if the well were not plugged by Sept. 21.

⁴ The INC classified the violation as minor, but made no assessment under 43 C.F.R. § 3163.1(a)(2).

⁵ The \$250 assessment was not paid until Mar. 14, 2002, 3 months later. At that point, additional charges of \$12.70 for interest and handling had accrued. Ex. R-73.

uncorrected at that date, BLM would notify Grynberg of the full civil penalty amount. *Id.*

A memorandum of a January 25, 2002, telephone conversation between Grynberg and a BLM employee indicates that Grynberg even then was still trying to get the well connected to a pipeline. Ex. R-70. When Grynberg was reminded that the lease had terminated, he responded that he was “going to get the lease back” and offered to escrow \$40,000 for the costs of plugging the well in early summer. *Id.* The BLM employee advised Grynberg to seek SDR. *Id.*

BLM inspectors visited the site on January 31, having no difficulty getting there even with 4 to 6 inches of snow. Ex. R-71. They reported that there had been no activity in years and no change in the condition of the well. On February 5, BLM issued a letter that referred to its January 22 notice and advised Grynberg that the civil penalty would be imposed at a rate of \$500 per day from December 19 through February 17. Ex. R-72. As of February 14, Grynberg had not paid the initial \$250 assessment, and BLM notified him that the amount due had increased because of interest and handling charges. Ex. R-73. As noted, Grynberg paid the assessment on March 14. Ex. R-79.

The essential facts are not disputed, and they show a remarkable degree of forbearance by BLM. Although Grynberg’s failure to plug and abandon the well by September 21 established a violation of an order on September 22, BLM did not issue an INC until November 13. FOGRMA made Grynberg potentially liable for civil penalties of up to \$500 per day beginning on November 13, and for up to \$5,000 per day if corrective action was not taken within 40 days. Under BLM’s regulations, however, for a minor violation Grynberg would be liable for civil penalties only after issuance of the second notice, and then only for \$50 per day initially, and only for \$500 per day if the violation continued uncorrected after 40 days. Furthermore, while FOGRMA places no limit on the number of days for which an operator would be liable for up to \$5,000 per day, BLM regulations provide for a 60-day maximum for Grynberg at \$500 per day, or \$30,000. This limit was reached when Grynberg’s violation remained uncorrected on February 17.

SDR

In a letter dated February 5, 2002, which was received by the BLM State Office on February 25, Grynberg requested SDR of the January 22 notice of proposed civil penalties, although he had not sought SDR to challenge the facts leading to issuance of the INCs that provided the basis of the January 22 notice. Ex. R-74. He referred to his lawsuits against various pipelines and his unsuccessful efforts to sell gas to

Northwest Pipeline (Northwest).⁶ Grynberg acknowledged that the lease had “expired,” but asserted that the lease could be reinstated. He denied that he had ignored previous orders, instead stating that he had hoped to connect the well to Northwest’s pipeline. He offered to escrow \$40,000 to cover the expense of plugging the well and requested that the civil penalties be withdrawn.⁷ *Id.* He filed a supplemental SDR request on February 25. Ex. 78a.

In a decision dated February 28, 2002, the State Office determined that the INCs were properly issued and affirmed the proposed civil penalties inasmuch as “[t]he well has yet to be plugged.” Ex. R-78, SDR Decision at 4. In a letter dated March 11, BLM declined to reopen SDR in response to Grynberg’s supplemental request. Ex. R-78. Grynberg filed a notice of appeal with this Board in which he requested a hearing on the record. By order dated August 15, 2002, the Board referred the case and the request for a stay to the Hearings Division. Ex. R-85.

JUDGE SWEITZER’S DECISION

After 3 days of hearings, Judge Sweitzer issued the decision from which this appeal is taken. He rejected Grynberg’s arguments that the abatement periods were unreasonable because of weather or the unavailability of rigs. He noted that Grynberg never requested an extension of the abatement period and that there was no evidence that Grynberg or anyone affiliated with him had ever attempted to visit the well during the relevant period. Decision at 8. Although BLM may have granted Grynberg extensions during other winters, and one of Grynberg’s employees testified about his difficulty at the site on another occasion, the well was drilled during the winter months in 1974 and 1975. Judge Sweitzer properly found that “the only

⁶ Grynberg made his real purpose in failing to plug and abandon the well evident in his request for SDR. He had filed numerous complaints against numerous pipeline companies under the False Claims Act, 31 U.S.C. §§ 3729-3730(b) (2000), alleging underpayment of royalties as a result of mismeasurement of the volume and BTU content of natural gas produced from Federal oil and gas leases. *See* Feb. 5, 2002, Request for SDR at 2 and Attachments 3 and 4. He stated that he had tried to convince Northwest to allow him to connect the well to its pipeline and construed Northwest’s refusal to do so as an effort “to harass a whistle blower” in violation of the False Claims Act that rendered Northwest liable to him for triple damages. Feb. 2, 2002, request for SDR at 2. Thus, the reason why Grynberg did not comply with the INC was his desire to connect the well to Northwest pipeline or join Northwest in an action for triple damages for not doing so.

⁷ Judge Sweitzer correctly characterized the bond offer as an “empty gesture” because Grynberg’s existing bond would have provided adequate coverage. Decision at 11.

evidence concerning the Well's accessibility at the relevant time is the documented inspections by BLM personnel," who "had no difficulty getting there." Decision at 8; Ex. R-71. Judge Sweitzer cited evidence that it was reasonable to believe that the site could be accessed by larger rigs. Decision at 8; Tr. 179-81. Grynberg offered no evidence pertinent to the relevant time period.

In rejecting Grynberg's arguments as to the reasonableness of the abatement periods, Judge Sweitzer stated that Grynberg should have notified BLM and asked for an extension, citing our decision in *Fancher Oil Co.*, 121 IBLA 397, 402 (1991), where we stated: "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." Decision at 9. Finding that BLM had no duty to determine the availability of rigs, Judge Sweitzer stated: "The regulatory scheme presumes that a 20-day abatement period is reasonable and places the burden on the operator to seek an extension if he believes it is unreasonable." *Id.* Judge Sweitzer noted that Grynberg had asked for and received extensions to abate violations on numerous other occasions, and "clearly understood that he could ask for more time if it was needed." Decision at 11. He concluded that BLM had acted properly and had followed its regulations in establishing the abatement periods and in proposing civil penalties.

ARGUMENTS ON APPEAL

Grynberg contends that Judge Sweitzer incorrectly assigned the burden of proof to him, asserting that BLM is the proponent of the civil penalty and therefore must carry the burden of proof to not only establish that the violation occurred and was not abated, but also to establish that the site was accessible, that drilling equipment was available, and that the abatement period in the INC was reasonable. Grynberg relies on the Supreme Court's decision in *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994), in which the Court held, under a provision of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d) (2000), that the proponent of an order must lose "when the evidence is evenly balanced." *Id.* at 281.⁸

⁸ In *Greenwich Collieries*, the Court considered whether a Department of Labor rule that shifted the burden of persuasion to the party opposing the claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (2000), and the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950 (2000), was consistent with the APA, 5 U.S.C. § 556(d) (2000). Under the Department's rule, where the evidence was evenly balanced, the claimant prevailed. The Court determined that the APA was applicable to adjudications under both Acts, and rejected the Department's contention that "burden of proof" under the APA imposed

(continued...)

Specifically, Grynberg argues that there was no evidence that rigs were available to plug the well or that the well location was accessible during the abatement period. *Id.* at 16. He further argues that BLM has the responsibility to establish a reasonable abatement period and that it is a misallocation of the burden of proof to require the operator to seek an extension if he believes the abatement period in the INC is unreasonable. *Id.* at 19. He faults BLM for not having taken into consideration the location of the well, the condition of the access roads, the uncertainty of the weather, and the availability of drilling equipment in determining the reasonableness of the abatement periods in the two INCs, asserting that BLM acted arbitrarily in establishing 20-day abatement periods. *Id.* at 18-24. Grynberg further asserts that the SDR review was cursory and upheld a penalty that was “mechanically applied in violation of BLM regulations,” which constitutes an abuse of discretion. *Id.* at 24-29. Finally, Grynberg asserts that BLM and Judge Sweitzer should have reduced the penalty under 43 C.F.R. § 3163.2(h) because the well posed no risk and caused no harm, because the well was inaccessible, because no plugging rig was available, and because Grynberg offered to escrow money to plug the well.

Deeming Grynberg’s arguments to be much the same as those considered and rejected in Judge Sweitzer’s opinion, BLM has filed an Answer accompanied by its briefs to Judge Sweitzer.

ANALYSIS

INCs, Assessments, and Civil Penalties

We begin with the statutory and regulatory framework through which BLM secures compliance by oil and gas operators with the requirements of statutes, regulations, lease terms, and orders. Under 43 C.F.R. Subpart 3163, the failure of an operating rights owner or operator (hereafter operator) to comply with applicable regulations, the terms of any lease or permit, or the requirements of any notice or order may result in the issuance of an INC leading to an assessment under 43 C.F.R. § 3163.1 and a civil penalty under 43 C.F.R. § 3163.2. The provisions of § 3163.1 and § 3163.2 resemble each other, but are distinguishable.

Assessments under 43 C.F.R. § 3163.1 are in the nature of liquidated damages that are levied when an operator fails to comply with a written order of the authorized officer within the time period specified in that order. *Grynberg Petroleum Co.*,

⁸ (...continued)

only the burden of production. 512 U.S. at 270-71, 276. The Court held that, according to its ordinary meaning, “burden of proof” under the APA means “burden of persuasion,” and invalidated the Department’s rule that when the evidence is evenly balanced, the benefits claimant wins. *Id.* at 280-81.

137 IBLA 76, 79 (1996). BLM levies assessments under authorities that include provisions of the Mineral Leasing Act, 30 U.S.C. §§ 188(a) and 189 (2000), and other laws. See 52 Fed. Reg. 5286-87 (Feb. 20, 1987); *United States v. Forbes*, 125 F.2d at 408-410.

Assessments and liquidated damages alone were not considered adequate to ensure compliance by operators. Their inadequacy prompted Congress to enact section 109 of FOGRMA, 30 U.S.C. § 1719 (2000), to provide for imposition of civil penalties. See H.R. Rep. No. 97-895 at 18, *reprinted in* 1982 U.S.C.C.A.N. 4268, 4272. When an operator fails to comply with an INC within 20 days or such longer time as the Secretary may agree to,⁹ § 1719(a) provides for a penalty of up to \$500 per day for each day the violation continues from the date of the notice. See also 43 C.F.R. § 3163.2. If corrective action is not taken within 40 days or such longer period as the Secretary may agree to, the violator becomes liable for a civil penalty of up to \$5,000 per violation for each day the violation continues, dating from the date of the first INC. 30 U.S.C. § 1719(b) (2000); 43 C.F.R. § 3163.2. In providing that the increased penalty would be computed from the date of the original notice, Congress intended “[t]o further encourage a violator to quickly come into compliance.” H.R. Rep. No. 97-895 at 35, *reprinted in* 1982 U.S.C.C.A.N. 4268, 4289. Congress provided that no penalty shall be assessed “until the person charged with a violation has been given an opportunity for a hearing on the record” and also granted the Secretary authority to compromise or reduce penalties “on a case-by-case basis.” 43 U.S.C. § 1719(e), (g) (2000).

The implementing regulation, 43 C.F.R. § 3163.2(a), requires BLM to “notify the operator . . . of a violation, unless . . . the notice was previously issued under § 3163.1 of this title.” Because the notice had been previously issued on November 13, Grynberg became liable for “a civil penalty of up to \$500 per violation for each day of such violation, dating from the date of such notice” 43 C.F.R. § 3163.2(a). If the violation was not corrected within 40 days of the notice (or a longer period if authorized in writing), he became “liable for a civil penalty of up to \$5,000 per violation for each day the violation continue[d], not to exceed a maximum of 60 days, dating from the date of such notice. . . .” 43 C.F.R. § 3163.2(b).

⁹ Congress intended that “the Secretary may agree to a longer period if he believes that is warranted based on the good faith effort of the violator to comply with the Act in a timely manner.” H.R. Rep. No. 97-895 at 35, *reprinted in* 1982 U.S.C.C.A.N. 4268, 4289.

The INC that triggered the periods in subsections (a) and (b) of the statute and regulations is the INC Grynberg received on November 19.¹⁰ Subsection (a) establishes a liability of up to \$500 per day from that date. If the violation was not corrected within 40 days from that date, the liability escalated up to a maximum of \$5,000 per day, not to exceed a maximum of 60 days, dating from November 19.

Notwithstanding the provisions of 43 C.F.R. § 3163.2(a) and (b) and the general civil penalty structure, and the maximum penalty amounts and abatement time periods established thereunder, § 3163.2(g)(2) of that regulation separately provides for minor violations and states that no penalty shall be “assessed” unless three conditions are satisfied.

First, it must be shown that BLM notified the operator of the violation in writing, and that the operator did not correct the violation within the time allowed. 43 C.F.R. § 3163.2(g)(2)(i). This condition was satisfied by the first INC that Grynberg received on November 19 and Grynberg’s failure to comply by December 10.

Second, it must appear that the operating rights owner or operator was initially subjected to an assessment of \$250 under 43 C.F.R. § 3163.1(a)(2) and that a second notice giving an abatement period of not less than 20 days was issued. 43 C.F.R. § 3163.2(g)(2)(ii). On December 17, 2001, Grynberg received the second INC dated December 13, with a \$250 assessment, as provided in 43 C.F.R. § 3163.1(a)(2) for a minor violation. Ex. R-62. The second INC required him to plug and abandon the well by January 8, 2002, and stated that failure to comply would render him liable for civil penalties in accordance with 43 C.F.R. § 3163.2.

The third prerequisite to liability for a civil penalty is that “[t]he noncompliance was not abated within the time allowed by the *second* notice.” 43 C.F.R. § 3163.2(g)(2)(iii) (emphasis added).¹¹ In this case, that date was January 8. BLM inspected the site on January 31, 2002, and found that the well was not plugged. Ex. R-71.

The regulation at 43 C.F.R. § 3163.2(g)(2)(iii) provides that the initial proposed penalty for a minor violation under 43 C.F.R. § 3163.2(a) shall be at the rate of \$50 per day beginning with the second notice which Grynberg received on

¹⁰ Although the regulations refer to the date of the INC rather than the date the INC was received, BLM in this case calculated the abatement periods on the basis of the date of receipt, as will we.

¹¹ Compare with 43 U.S.C. § 1719(a) (2000) and 43 C.F.R. § 3163.2(a), which provide for a penalty of up to \$500 per day for failure to comply after issuance of the *first* INC.

December 13. If the violation is not corrected within 40 days, 43 C.F.R. § 3163.2(g)(2)(iii) further provides: “Under paragraph (b) of this section, the penalty shall be at a daily rate of \$500.” *Id.* Subsection (g)(2) does not specify whether the higher penalty rate kicks in after 40 days of nonabatement following the *first* notice (as provided in subsection (b)) or following the *second* notice. However, because subsection (g)(2) varies from subsection (a) in providing that the initial civil penalty period begins with the *second* notice,¹² we find no fault in BLM’s conclusion that, under subsection (g)(2), the higher daily penalty rate is not triggered until 40 days after the *second* notice, and that it relates back to the date of the *second* notice, up to a 60-day maximum. *See* Ex. R-90.¹³

The second INC was received on December 17, 2001, and required Grynberg to plug the well by January 8, 2002. Under 43 C.F.R. § 3163.2(g)(2)(iii), if he failed to comply by January 8, Grynberg would become liable for civil penalties of \$50 per day, beginning with the date of the second notice, or December 13, 2001. However, by letter dated January 22, 2001, BLM proposed a civil penalty of \$50 per calendar day beginning December 19, 2001 (2 days after the notice was actually received), and continuing until the violation was corrected, or until January 28. Ex. R-69; *see also* Ex. R-90. If the violation remained uncorrected on January 29, the proposed penalty would be \$500 per day beginning December 19, 2001, and it would continue until it was corrected, or until February 17. *Id.* Thus, the 60-day maximum was to end on February 17.

BURDEN OF PROOF

Grynberg contends that, based on *Greenwich Collieries*, BLM was the proponent of the civil penalty and therefore had the burden of proving that the violation occurred and that penalties were properly imposed.¹⁴ In response, BLM argued that the burden

¹² *See* n.5.

¹³ Ex. R-90 is a case chronology that in graphic form depicts the relevant events in this case, including the abatement periods and the periods in which the civil penalties accrued.

¹⁴ Grynberg also cites the decision in *Houghland Farms, Inc., v. BLM*, 77 IBLA 245, 260 (1983), where we held that penalties in civil actions should not be imposed except in cases that are clear and free from doubt, and that in application of penalties, all questions in doubt must be resolved in favor of the party from whom the penalty is sought, *citing Acker v. Commissioner of Internal Revenue*, 258 F.2d 568 (6th Cir. 1958), *cert. denied*, 358 U.S. 940 (1959). In a case involving the imposition of civil penalties on the operator of an offshore oil and gas lease under 43 U.S.C. § 1350(b) (2000), we concluded that the agency assessing the penalty is the

(continued...)

is on the party challenging the State Director's decision to show that it was arbitrary or against the weight of the evidence, citing our decisions in *Conley P. Smith Oil Producers*, 131 IBLA 313, 322 (1994); *Northland Royalty Operating Co.*, 129 IBLA 164, 166 (1994), and *Northland Royalty Operating Co.*, 123 IBLA 104, 107 (1992).

[1] Grynberg's argument is unavailing. First, as the foregoing recitation of the facts shows, this is not a case in which the evidence is evenly balanced on any material issue, so that *Greenwich Collieries* is not germane. To the contrary, Grynberg's testimony establishes that the *only* reason Grynberg did not plug and abandon the well was because he was engaged in efforts to sell gas from that well to Northwest. In attempting to market the gas, Grynberg ignored the fact that the lease had terminated, so that he no longer even had the right to sell the gas.¹⁵ Although Grynberg testified that he believed the lease could be reinstated, he never sought reinstatement and therefore could not in good faith engage in negotiations with Northwest. Even had he requested reinstatement, as BLM has pointed out, it had no authority to reinstate the lease in these circumstances.¹⁶

Second, whether it was assigned the initial burden or not, it is clear that BLM discharged its burden by presenting the testimony of three witnesses and introducing numerous documents in evidence to establish the history and facts relevant to the well, the direction to plug and abandon it, and Grynberg's prolonged failure to respond to that directive. Grynberg's argument that Judge Sweitzer improperly

¹⁴ (...continued)

"proponent of a rule or order" and has the burden of proving its allegations with "reliable, probative, and substantial evidence." *W&T Offshore, Inc.*, 148 IBLA 323, 360 (1999). In *W&T*, we also quoted the "free from doubt" language from *Houghland*, which is more properly considered as articulating a *standard* of proof rather than an allocation of the *burden*. Notwithstanding *W&T's* and *Houghland's* language to the contrary, the Supreme Court has held that the standard of proof for imposing a sanction in a proceeding governed by the APA is the "traditional preponderance-of-the-evidence standard." *Steadman v. Securities & Exchange Commission*, 450 U.S. 91, 102 (1981).

¹⁵ On Apr. 12, 1999, BLM issued a decision declaring Grynberg's lease terminated for cessation of production, effective Apr. 18, 1996, the date that BLM received Grynberg's first notice and plan to plug the well. Exs. R-34, R-44. Grynberg filed no appeal from the decision that declared his lease terminated and it was final for the Department. As a result, Grynberg had no right to market gas produced from the well.

¹⁶ *Cf.* 30 U.S.C. § 188(c), (d), and (e) (2000) (which provide for reinstatement of leases terminated for failure to pay rental timely). No provision exists for reinstating a lease that terminates by reason of cessation of production.

allocated the burden of proof provides no basis for reversing his decision where the evidence is not in equipoise and BLM preponderated on every material issue.

[2] To the extent that he contends BLM was required to introduce evidence concerning weather conditions and whether the unavailability of drilling equipment made the abatement period unrealistic, Grynberg's arguments are directed at the burden of production. We will address these arguments, even though Grynberg's testimony establishes that site conditions and equipment availability were not the proximate cause or even the remote cause of his failure to abate the INC. In essence, Grynberg argues that before BLM can propose a civil penalty for failure to plug a well, it must first look for a drilling rig for the operator and prove that the well site was accessible. SOR at 2. However, it is the operator's responsibility to find the equipment it needs to fulfill the requirements of a lease or BLM order. In providing that the Secretary may agree to an abatement period longer than the statutory minimum, 30 U.S.C. § 1719(a)(2)(A) (2000), FOGRMA places the burden on the operator to justify a longer abatement period by informing BLM in a timely manner of circumstances that would prevent timely abatement, such as conditions at the site or lack of equipment. Congress explained:

If the corrective action requires obtaining a new part or equipment that cannot be accomplished within the . . . grace period allowed, the Secretary may agree to a longer period if he believes that is warranted *based on the good faith effort of the violator to comply with the Act in a timely manner.*

H.R. Rep. No. 97-589 at 35, *reprinted in* 1982 U.S.C.C.A.N. 4268, 4289 (emphasis added).¹⁷ The operator who believes a longer period is needed accordingly must seek the Secretary's agreement. Where no such request was made, in a hearing on the

¹⁷ Reference to FOGRMA is appropriate because the APA, 5 U.S.C. § 556(d) (2000), provides that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” (Emphasis added.) Even though we hold that FOGRMA assigns the operator the burden of justifying a longer abatement period, we do not consider such an allocation inconsistent with the APA. In explaining the provision of § 556(d) that the proponent of a rule or order has the burden of proof,” Congress stated: “That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that the *other parties, who are proponents of some different result, also for that purpose have a burden to maintain.*” Sen. Rep. No. 752, 79th Congress, 1st sess., at 22 (Sen. Doc. p. 208) (emphasis added), *quoted in* Attorney General's Manual on the Administrative Procedure Act at 75 n.3 (1947), also citing H.R. Rep. No. 1980, 79th Congress, 1st sess., at 36 (Sen. Doc. p. 270.).

record of a proposed civil penalty, the operator cannot carry his burden of showing, by a preponderance of the evidence, that the abatement period was inadequate. See *Fancher Oil Co.*, 121 IBLA at 402. We cannot find that BLM erred in failing to give Grynberg an extension he did not request.

Grynberg's final assertion is that BLM and Judge Sweitzer should have reduced the penalty under 43 C.F.R. § 3163.2(h) because the well posed no risk, caused no harm, and the violation is minor. SOR at 26-30. This argument ignores the fact that BLM's regulations provide differing penalties for major and minor violations and BLM has already taken the minor nature of appellant's violation into account by applying the penalties set forth in 43 C.F.R. § 3163.2(g)(2), rather than those set forth in subsection (g)(1). Grynberg refers to cases holding that assessments for minor violations under 43 C.F.R. § 3163.1 are in the nature of liquidated damages that should bear some relationship to the harm caused to BLM. However, this is not a case involving an assessment under § 3163.1 where an operator may have failed to correct a violation within the time provided in the first INC but abated the violation soon thereafter. This case involves a civil penalty imposed under § 3163.2 because Grynberg failed to abate the violation before the expiration of the period in a *second* INC.

As noted above, Congress provided for civil penalties in FOGRMA out of concern that assessments alone provided inadequate incentive for operators to comply timely with applicable requirements and orders. Congress also provided for an increased penalty after 40 days of nonabatement that would be computed from the date of the original INC "[t]o further encourage a violator to quickly come into compliance." H.R. Rep. No. 97-895 at 35, *reprinted in* 1982 U.S.C.C.A.N. 4268, 4289. Inasmuch as Grynberg made no effort whatsoever at timely compliance, we find no basis for reducing a penalty in a case such as this, where even the maximum penalty proved insufficient to achieve the result that Congress intended. To reduce the penalty in this case below that already provided in the applicable regulations would undermine Congress's primary purpose in providing for civil penalties in FOGRMA.

We modify the decisions of Judge Sweitzer and BLM in one respect. Under 43 C.F.R. § 3163.2(b), the \$250 that Grynberg paid as an assessment under § 3163.1(a)(1) must be deducted from the \$30,000 civil penalty.¹⁸

¹⁸ We do not deduct the additional money Grynberg paid for interest and handling charges.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed as modified.

_____/s/_____
T. Britt Price
Administrative Judge

I concur:

_____/s/_____
R. Bryan McDaniel
Administrative Judge