



FIDELITY EXPLORATION & PRODUCTION CO.

188 IBLA 302

Decided September 16, 2016



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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FIDELITY EXPLORATION & PRODUCTION CO.

IBLA 2014-229

Decided September 16, 2016

Appeal from a decision on State Director Review that affirmed findings of violation and affirmed as modified corrective actions concerning measuring, commingling, and using of gas produced from Federal oil and gas leases. SDR No. 922-13-01-A.

Affirmed.

1. Appeals: Burden of Proof;
Oil and Gas Leases: Burden of Proof;
Oil and Gas Leases: Production

A Federal lessee can commingle gas production from its leases if authorized by BLM, measure commingled gas production off-lease if authorized by BLM, or make beneficial use of its gas off-lease and exclude it from royalty calculations if permitted by BLM. Whether BLM authorized or permitted such actions is an issue of fact. Where BLM has determined it did not authorize or give its permission, the burden is on the appellant to show error in that determination by a preponderance of the evidence.

APPEARANCES: Jeffrey J. Oven, Esq., and Michael Tennant, Esq., Crowley Fleck PLPP, Billings, Montana, for Appellant; Lance C. Wenger, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Fidelity Exploration & Production Company (Fidelity) appeals from and petitions to stay the effect of a June 16, 2014, decision on State Director Review (SDR) by the State Director, Montana State Office, Bureau of Land Management (BLM), which affirmed as modified a decision by the Assistant Field Manager, Miles City (Montana) Field Office (MCFO), BLM. The State Director affirmed MCFO's

findings that Fidelity violated requirements for measuring, commingling, using, and reporting coal bed natural gas (CBNG) produced from Federal oil and gas leases in southeastern Montana but modified its corrective actions by replacing the requirement that Fidelity file amended Oil and Gas Operations Reports (OGORs) with the Office of Natural Resources Revenue (ONRR) with a requirement to submit corrected volumes to MCFO for verification, after which BLM would notify ONRR of the corrected volumes.¹

The operator of a Federal oil and gas lease may engage in off-lease commingling, measurement of commingled gas, and beneficial use of that gas if approved by BLM, but the record does not support Fidelity's claim that it had obtained the requisite approvals from BLM. Fidelity also claims the MCFO decision on SDR was vacated in its entirety when we set aside and remanded an earlier decision on SDR, but we disagree with its characterization of what the Board then did and, therefore, reject its claim that the decision on SDR here on appeal is a legal nullity (*e.g.*, the State Director could not affirm or modify a decision by this Board). We therefore affirm BLM's June 14, 2016, decision.

Background

Fidelity operates oil and gas leases in Big Horn County, Montana, which are part of the Tongue River Project (TRP) that produces CBNG from State and private leases communitized with Federal leases in the Powder River Basin. Fidelity submitted plans of development (PODs) for two components of the TRP, which were approved by BLM on February 9, 2004 (Badger Hills), and January 19, 2005 (Coal Creek).² As described by Fidelity:

Gas from federal, state and fee wells are delivered to a central battery.
 . . . Gas from each well is metered at the battery prior to commingling.
 Gas is then commingled where it is initially treated, separated and
 compressed. The gas is then metered at the master "sales meter[.]"
 Beneficial use gas is allocated to individual wells in proportion to the
 amount each initial individual well metering bears to the master "sales

¹ Based on our preliminary review of the pleadings and circumstances presented, we granted appellant's stay petition by Order dated Sept. 30, 2014. BLM submitted an administrative record (AR), which contains 22 tabbed documents that we cite as "AR Tab X."

² See AR Tab 20, Badger Hills Decision Record/Finding of No Significant Impact (DR/FONSI) at unpaginated (unp.) 2; AR Tab 22, Coal Creek DR/FONSI at unp. 2.

metering” for all wells flowing to the battery. The volumes are then reported by Fidelity to [ONRR].^[3]

MCFO conducted production accountability reviews of CBNG wells operated by Fidelity on Federal leases in the TRP, which identified compliance issues that were responded to by Fidelity.⁴

By Written Order dated October 25, 2012, MCFO found Fidelity in violation of applicable rules and ordered it take corrective actions:

- Fidelity was commingling production from Federal, State, and private leases and allocating their commingled production back to each Federal well without BLM approval, as required by 43 C.F.R. § 3162.7-3; BLM ordered Fidelity to measure and report production using individual well meters before any commingling occurred, which was its approved facility measurement point (FMP), and to submit amended OGORs to ONRR based on production data going back six years.⁵
- Fidelity was using its CBNG for beneficial use off-lease and reporting it as “used on lease,” which was not permitted under Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases (NTL-4A); BLM ordered Fidelity to stop reporting it as “used on lease” and to submit amended OGORs to ONRR that deleted its unauthorized deduction for gas “used on lease” on production going back six years.⁶
- Fidelity was reporting the Btu (British thermal unit) content of its CBNG after commingling and without BLM approval of commingling; BLM ordered Fidelity to report Btu content at its approved FMP, rather than at the sales meter after processing of commingled gas.⁷

³ AR Tab 5, Fidelity Request for SDR, dated Nov. 15, 2012 (SDR Request), at 5; *see id.* Ex. C, Master Surface Use Plan (MSUP) for the Badger Hills POD, at 15 (“Metering of natural gas flow from each well, treatment of the gas stream for additional water separation, and initial compression of the treated gas would occur at the battery, [after which it would enter a] high pressure compressor station and transportation pipeline for delivery to market.”); *id.* Ex. D, MSUP for the Coal Creek POD, at 6.

⁴ *See* AR Tab 1, BLM letter dated Feb. 25, 2011; AR Tab 2, BLM letter dated Apr. 11, 2012; AR Tab 3, Fidelity letter dated June 28, 2012 (claiming it was in full compliance with all applicable requirements because BLM approved its PODs).

⁵ *See* AR Tab 4, Written Order dated Oct. 25, 2012, at 1-2

⁶ *See id.* at 2 (citing NTL-4A, 44 Fed. Reg. 76,600 (Dec. 27, 1979)).

⁷ *See id.*

Fidelity was required to comply with applicable measurement and reporting requirements within 30 days and to file amended OGORs going back to November 2006. Fidelity timely requested SDR of MCFO's Written Order.

The State Director affirmed the Written Order by decision dated March 7, 2014, rejecting Fidelity's claim that BLM tacitly approved its commingling of CBNG and the beneficial use of that gas at a central facility when BLM approved the Badger Hills and Coal Creek PODs, and requiring it to submit amended OGORs.⁸ Fidelity timely appealed from that decision, which we docketed as IBLA 2014-156. BLM requested a remand, stating that "only ONRR has the authority to order Fidelity to amend its OGORs or make corrections on future OGORs."⁹ We granted its request by Order dated April 24, 2014.

On remand, the State Director again affirmed the MFCO findings of violation. As to unauthorized commingling of CBNG, he concluded: "The record does not demonstrate that Fidelity ever requested approval to commingle production. . . . [T]he PODs do not contain language expressly requesting commingling approval, or implying its approval as stated by Fidelity."¹⁰ The State Director stated that while NTL-4A permits beneficial use of gas off-lease if approved by BLM, no such approval had yet been granted by BLM.¹¹ However, the State Director modified the Written Order's corrective actions, replacing its requirement for Fidelity to file amended OGORs with ONRR with a requirement that it submit "corrected volumes to the MCFO for verification."¹²

Fidelity timely appealed from the Decision on SDR and filed a statement of reasons (SOR). BLM filed a response (Answer), to which Fidelity replied (Reply). This matter is now ripe for decision.

Discussion

Fidelity raises two principle issues on appeal. It first claims the "State Director was required to vacate completely the MCFO [Written Order]," contending that MCFO lacked "jurisdiction and authority" to issue that order and, in a related vein, asserts the

⁸ AR Tab 11, Decision on SDR dated Mar. 7, 2014, at 5-7.

⁹ AR Tab 13, Request to Remand Matter Back to the Bureau of Land Management, filed Apr. 21, 2014, at 2.

¹⁰ AR Tab 15, Decision on SDR dated Jun. 16, 2014, at 6 (citing *Devon Energy Production Company (Devon Energy)*, 176 IBLA 396, 407 (2009)).

¹¹ *See id.* at 6-7 (citing *Plains Exploration & Production Company*, 178 IBLA 327, 343 (2010)).

¹² *Id.* at 8; *see id.* ("Once the corrected volumes and the updated reporting procedures are verified by the MCFO, we will also notify ONRR of the corrected volumes.").

Decision on SDR cannot relate back to when the Written Order was issued and require Fidelity to submit corrected volumes going back to November 2006, because to do so might violate the statutory limitation for making a demand under 30 U.S.C. § 1724 (2012).¹³ Fidelity's second major claim is that BLM authorized commingling, off-lease measurement of commingled gas, and beneficial use of that gas off-lease, as permitted by 43 C.F.R. § 3162.7-3 and 30 C.F.R. § 1202.150(b), when it approved the Bridger Hills and Coal Creek PODs.¹⁴ We address each claim separately below.

I. BLM has jurisdiction and authority to find violations of applicable requirements and require that corrective action be taken to address them.

The authority of BLM to perform inspections and investigations, identify violations of applicable requirements, and require violators to take corrective action to address such violations is well-established.¹⁵ Fidelity claims MCFO lacked jurisdiction and authority to issue the Written Order, but nowhere does it question MCFO's authority to perform production accountability inspections, find Fidelity in violation of applicable requirements, or order it to comply with those requirements. Rather, its claim focuses exclusively on the reporting components of the corrective actions in the Written Order, as modified by the Decision on SDR after remand from this Board.

Fidelity originally appealed from the March 2014 decision on SDR that affirmed the Written Order. All that was before us in IBLA 2014-156 was the propriety and legality of the State Director's affirmance of the Written Decision.¹⁶ Rather than reach the merits of that appeal and decide whether the State Director properly affirmed the MCFO Written Order, we granted BLM's request to remand that matter back to it. In doing so, we simply set aside the March 2014 decision on SDR, which restored BLM's authority to adjudicate Fidelity's request for SDR, and left it up to the State Director to decide whether to affirm, affirm as modified, or reverse (in whole or in part) the Written Order.¹⁷

The State Director affirmed the MCFO findings of violation and affirmed as modified its corrective action requirements by deleting the requirement that Fidelity file amended OGORs with ONRR and replacing it with a similar requirement that it submit corrected volumes to MCFO for verification. We find nothing in the

¹³ SOR at 5; *see id.* at 4-6 ("Every substantive part of the MCFO [Written Order] is invalid because it was issued without jurisdiction or authority.").

¹⁴ *See* SOR at 6-13.

¹⁵ *See, e.g., Devon Energy*, 176 IBLA at 408-09, and cases cited.

¹⁶ *See* 43 C.F.R. § 3165.4(a) ("Any party adversely affected by the decision of the State Director after State Director review, . . . of an instruction, order, or decision may appeal that decision to the Interior Board of Land Appeals").

¹⁷ *See* Order dated April 24, 2012; BLM Request for Remand.

regulations governing the SDR process that precludes a State Director from modifying a written order in this way, particularly since a State Director's decision constitutes the "final Bureau decision from which further review may be obtained" ¹⁸ Thus, the State Director is free to affirm, modify, or reverse the underlying BLM field office decision, and there is no need for a new field office decision.

We also agree with BLM that it did not request the Board to vacate its decision on SDR, only that we set it aside and remand to the State Director so he could regain jurisdiction and correct a perceived error in the Written Order's corrective action provisions. ¹⁹ Nor do we find any basis in law or logic for requiring the State Director to vacate the Written Order on remand, rather than affirm that order as modified. ²⁰ Stated more simply, where BLM issues a decision that it believes is partly beyond its authority, only the unauthorized part need be set aside, vacated, or reversed; the authorized parts of the decision may stand and be affirmed.

Fidelity questions BLM's authority to require a modified form of corrective action that relates back to when the Written Order issued on October 25, 2012, claiming it might have the effect of illegally extending/tolling the applicable statute of limitations period. ²¹ Fidelity appears to base its argument on the possibility that a future demand for payment of royalties by ONRR, stemming from the modified MCFO Written Order, would be barred by the seven-year statute of limitations in 30 U.S.C. § 1724(b) (2012). What is before us is the State Director's decision; what is not before this Board is any demand issued by ONRR to which the statute of limitations applies. Because Fidelity's argument concerning the statute of limitations can be made only if and when ONRR makes a demand for payment under the statute, we do not address this argument here.

We therefore affirm the State Director's decision affirming as modified the corrective action provisions of the MCFO Written Order.

- II. The record does not support Fidelity's claim that BLM had authorized its commingling of CBNG, off-lease measurement of commingled gas, and/or beneficial use of commingled gas off-lease.*

Fidelity has long claimed its commingling of gas, off-lease measurement of commingled gas, and beneficial use of commingled gas off-lease were authorized when BLM approved its PODs. These same claims were made in its June 2012 response to MCFO compliance concerns and November 2012 request for SDR of the Written Order.

¹⁸ 43 C.F.R. § 3154.3(d).

¹⁹ See BLM Answer at 14-15.

²⁰ But see SOR at 5.

²¹ See *id.* at 5-6 (citing 30 U.S.C. § 1724 (2012)).

Both decisions on SDR considered and expressly rejected its claims. They are again raised in this appeal.

[1] The law is clear: Fidelity can commingle its CBNG if authorized by BLM under 43 C.F.R. § 3162.7-3; Fidelity can measure commingled gas off-lease if authorized by BLM under 43 C.F.R. § 3162.7-3; and Fidelity can make beneficial use of its gas off-lease and exclude it from royalty if such use is permitted by BLM under NTL-4A and 30 C.F.R. § 1202.150(b). What is controverted is whether BLM authorized or permitted these actions when it approved the Badger Hills and Coal Creek PODs. The burden is on the appellant to show error in the decision on appeal by a preponderance of the evidence.²² Fidelity has not met its burden in this case.

Both MCFO and the State Director found BLM had approved the off-lease measurement of CBNG from each Federal lease when it approved the POD but that it had not approved commingling or the measurement of commingled production.²³ Their reliance on *Devon Energy* is particularly instructive as we there held:

[O]ff-lease gas measurement and production commingling before measurement are two separate operations, each of which required BLM approval. Approval of one operation does not automatically authorize the other. Consequently an operator must obtain BLM's prior approval both to measure production off-lease and to commingle production. If BLM does not approve an application to commingle production before measurement, it follows that an operator cannot properly commingle production and use a measurement method that allocates the commingled sales volume back to individual wells.^[24]

The PODs in this case clearly state that Fidelity's Federal wells "will be managed and operated in conjunction with adjacent/nearby fee lease wells" and that they would share facilities, including centralized processing facilities (where each well's gas flow would be metered).²⁵ However, nowhere in the POD documents do we find a request for BLM authorization or permission, a representation that BLM authorized or would authorize commingling of CBNG from Federal wells with state and fee wells and/or measuring that commingled production off-lease, or a representation that BLM permitted or would permit the beneficial use of CBNG off-lease (e.g., at a centralized facility). Each POD was prepared by Fidelity and is several hundred pages long.

²² See *Devon Energy*, 176 IBLA at 407; *Universal Resources Corp.*, 141 IBLA 244, 248 (1997).

²³ See Decision on SDR at 5-6 (quoting *Devon Energy*, 176 IBLA at 407).

²⁴ *Devon Energy*, 176 IBLA at 407 (citations omitted).

²⁵ AR Tab 19, Badger Hills Project Description at 4; see *id.*, Badger Hills MSUP at 15; AR Tab 21, Coal Creek Project Description at 4; Coal Creek MSUP at 6.

Fidelity may well have thought it could implement the TRP as it intended, but to realize that intent, Fidelity needed certain BLM authorizations and permission. Fidelity simply has not carried its burden to show it requested or obtained any such authorizations and permission from BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,²⁶ we affirm the June 14, 2014, State Director review decision.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
Amy B. Sosin
Administrative Judge

²⁶ 43 C.F.R. § 4.1.