ZAVANNA, LLC

194 IBLA 206          Decided March 29, 2019
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IBLA 2015-109

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Appeal from a decision issued by the State Director, Montana State Office, Bureau of Land Management, affirming a Notice of Incidents of Noncompliance issued by the Field Manager, North Dakota Field Office, Bureau of Land Management. SDR No. 922-14-03.

Reversed.

1. Oil and Gas Leases: Incidents of Noncompliance; Administrative Procedure: Administrative Review

The Board reviews questions of law de novo and does not defer to BLM's legal conclusions on such questions.

2. Oil and Gas Leases: Incidents of Noncompliance

Where BLM issues a notice of incident of noncompliance for violation of a regulation that does not apply to the recipient, the Board will find the incident of noncompliance invalid and reverse BLM's decision.


OPINION BY ADMINISTRATIVE JUDGE JACKSON

Zavanna, LLC (Zavanna) appealed and petitioned to stay the effects of a January 23, 2015, decision of the Director of the Montana State Office, Bureau of Land Management (BLM), upholding a Notice of Incidents of Noncompliance (INC) from the
Field Manager, BLM North Dakota Field Office. In the INC, BLM cited Zavanna for drilling through Federal oil and gas in McKenzie County, North Dakota, without authorization. The Board granted Zavanna's stay petition by Order dated April 7, 2015, and a motion to intervene by Statoil Oil & Gas LP (Statoil), which, like Zavanna, received a similar INC for drilling in the same section of McKenzie County.¹

SUMMARY

BLM may issue INCs for violations of its rules. BLM issued an INC to Zavanna, a company that was not a Federal lessee or operator on the Federal lease at issue, for violating a BLM rule governing oil and gas operations on a Federal lease. Because that regulation did not apply to Zavanna, BLM did not have authority to issue the INC. Accordingly, we reverse BLM's decision.

BACKGROUND

The activities giving rise to this dispute occurred on land riparian to the Yellowstone River near its confluence with the Missouri River in McKenzie County, North Dakota.² This area was officially surveyed in 1901, and the Surveyor General approved a plat conforming to the survey in 1902.³ The lots at issue in this appeal are Lots 3, 4, and 5 in sec. 22, T. 152 N., R. 104 W., 5th Principal Meridian. According to the survey, Lots 3 and 4 encompassed 16.6 acres of public land along the right (or east) bank of the Yellowstone River in Section 22, whereas Lot 5 encompassed 27.9 acres of public land on the opposite (or left) bank of the Yellowstone River.⁴ The United States later granted a patent to Lot 5.⁵

¹ Order: Motion to Intervene Granted (Apr. 9, 2015); Statoil Oil & Gas LP’s Motion to Intervene at 1.
² Statement of Reasons (SOR) at 2.
³ SOR Exhibit (Ex.) 1 (1902 Plat of Survey).
⁴ See 1902 Plat of Survey; SOR Ex. 11 at 1.
⁵ See Master Title Plat and Historical Index for T. 152 N., R. 104 W., 5th Principal Meridian; SOR Ex. 11.

194 IBLA 207
The Goodrich Well

Zavanna’s predecessor-in-interest, Zenergy, Inc. (Zenergy), obtained the right to drill the Goodrich Well from private land in Lot 5. Zenergy directionally drilled the Goodrich Well from Lot 5, penetrating minerals under Lot 3, to a target roughly 300 feet beyond Lot 3’s northwest corner. Zenergy completed the Goodrich Well and began producing oil on March 12, 2007. Zenergy continued to produce oil from the Goodrich Well and paid royalties to the State of North Dakota and private landowners until it transferred its well, operating rights, and lease interests to Zavanna in August of 2010, which has continued to produce oil and pay those royalties.

Ownership of Lots 3 and 4

In reliance on the 1901 Survey that identified Lots 3 and 4 as Federal land, BLM issued an oil and gas lease for Lots 3 and 4 on August 7, 2013, to Agri Properties LLP and Bakken Production Inc. As depicted on documents supporting the Federal lease, Lots 3 and 4 were no longer on the right bank of the Yellowstone River, as shown in the 1902 Plat of Survey, but under and partially on its left bank. The Federal lease encompasses the area through which the Goodrich Well was drilled over 6 years earlier.

INC and State Director Review

On August 26, 2014, BLM’s North Dakota Field Office sent an INC to Zavanna for drilling a well “through leased federal minerals without the authorization of the BLM via an approved Application for Permit to Drill (APD).” BLM identified the regulation Zavanna violated as 43 C.F.R. § 3163.1(b)(2), which authorizes BLM to impose a monetary assessment for drilling without approval. BLM ordered Zavanna to pay an

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6 SOR at 3.
7 Administrative Record (AR), Well Location Plat, Kadrmas Lee & Jackson, dated Aug. 9, 2006, and Plan View Surface to Bottom Hole Location, Sunburst Consulting, filed with North Dakota Oil and Gas Division, Feb. 12, 2007.
9 SOR at 3-4, 17-18.
10 Id. Ex. 6 (Serial Register Page for Lease NDM 105582); SDR Decision at 2.
11 SOR Ex. 8 at 115 (Environmental Assessment supporting Federal lease).
13 See 43 C.F.R. § 3163.1 (2015). In this decision, we cite the BLM regulations that were in effect when BLM issued the August 2014 INC.
immediate assessment of $5,000 and to abate the violation by submitting an APD and a
communitization agreement (CA) “within 30 days.”14 Zavanna responded by requesting
State Director Review (SDR) of the INC on September 16, 2014.15

Zavanna claimed on SDR that public lands in Lots 3 and 4 were eroded away by
the Yellowstone River, and so the “United States lost title to the minerals and owns no
interest in these lands.”16 According to Zavanna, because the lands were no longer
Federal, Zavanna should not be subject to an INC for unauthorized drilling into Federal
lands.17 Zavanna therefore requested that the State Director suspend the requirement
for it to submit an APD and CA until “the claim of the United States to ownership of 16.6
acres in Section 22” is resolved.18

The State Director upheld the INC, determined that Zavanna must share its
production from the Goodrich Well with the Federal lessees, but “waived” the $5,000
assessment due to “extenuating circumstances.”19 Zavanna timely appealed the State
Director’s decision to the Board.

Arguments on Appeal

On appeal, the parties focus on ownership of Lots 3 and 4 and the continuing
validity of the 1901 Survey that governs BLM but no longer reflects the current location
of the river. Zavanna argues that “BLM’s decision should be set aside and remanded
with instructions to resurvey the affected lands in Section 22.”20 BLM responds by
characterizing Zavanna’s challenge to the INC as a “misplaced” challenge to BLM’s
decision to lease Lots 3 and 4, which properly “relied on the official 1901 survey to reach
its decision to lease the Federal minerals [under Lots 3 and 4].”21 BLM concludes by
asserting that “the Board lacks jurisdiction to adjudicate Appellant’s claim that the
United States lacks title to the federal mineral interests underlying Lots 3 and 4

14 Id. at 2.
15 SDR Decision Enclosure (Encl.) 1 (SDR Request).
16 SDR Request at 4.
17 Id. at 5.
18 Id. at 6-7.
19 SDR Decision at 4; see id. (“[Zavanna] will be responsible for sharing its partnership
and production allocation of the [Goodrich Well] with the Lessee of record for Lots 3 and
4.”).
20 SOR at 19.
21 Answer at 5-6.
[because] federal districts courts have exclusive original jurisdiction of civil actions under [the Quiet Title Act].  

To adjudicate this appeal, it is not necessary for the Board to resolve the parties' dispute about land ownership and the effect of the 1901 Survey. As we will explain, BLM does not have the authority over Zavanna that it asserts in its INC.

**Standard of Review**

[1] BLM issues INCs to onshore Federal oil and gas lessees and operators under the authority of the Mineral Leasing Act and Federal Oil and Gas Royalty Management Act, among other laws, and regulations BLM developed to implement those statutes.  
The Board reviews a BLM decision to issue an INC to determine whether BLM had a rational basis that is stated in the decision and supported by facts of record demonstrating that the decision is not arbitrary, capricious, or an abuse of discretion.  
The Board reviews questions of law *de novo* and does not defer to BLM's legal conclusions on such questions.

**DISCUSSION**

This appeal raises a question about BLM's authority to apply its regulations governing oil and gas operations to Zavanna. We review this legal question *de novo*.

In the INC and the letter accompanying the INC, BLM cited Zavanna for a violation of 43 C.F.R. § 3163.1.  
At the time BLM issued the INC, this regulation provided that “[w]henever an operating rights owner or operator fails or refuses to comply with the regulations in this part, the terms of any lease or permit, or the requirements of any notice or order, [BLM] shall notify the operating rights owner or

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22 Id. at 8 (citing 28 U.S.C. §§ 1346(f), 2409a (2012)).  
25 *See Statoil Gulf of Mexico LLC*, 42 OHA 261, 289 (2011) (IBLA is not obliged to defer to a bureau’s legal interpretations); *U.S. v. Michael D. Scavarda*, 189 IBLA 9, 13 (2016) (“[W]hen we have before us – as we do here – solely a question of law, we review that issue *de novo*.”).  
26 BLM letter accompanying INC and INC Form.
operator . . . in writing of the violation." This section also set forth assessments for certain violations and explained when BLM may shut down operations. BLM cited Zavanna for violating subsection 3163.1(b)(2), which specifies that "drilling without approval" warrants "imposition of immediate assessments upon discovery."

We first observe that the rule at 43 C.F.R. § 3163.1 (Remedies for acts of non-compliance), in place at the time of BLM's decision, expressly applied only to "an operating rights owner or operator" on a Federal lease and that Zavanna was neither. BLM defines operator as "any person or entity . . . who has stated in writing to the [BLM] authorized officer that it is responsible under the terms and conditions of the lease for the operations conducted on the leased lands or a portion thereof," an operating rights owner as "a person who owns operating rights in a lease," and such leases as "any agreement issued or approved by the United States under a mineral leasing law that authorizes exploration for, extraction of or removal of oil or gas." Because Zavanna was neither an operator nor operating rights owner on the Federal lease covering Lots 3 and 4, the regulation at 43 C.F.R. § 3163.1 did not support BLM's issuance of this INC to Zavanna. Although that rule was revised in 2016 and now applies to "any person," BLM explained this change was to make clear that those performing work for operating rights owners and operators are also subject to assessments for their noncompliance with applicable requirements.

We glean from the language BLM used in the INC and the letter accompanying the INC that BLM faults Zavanna for drilling without an approved APD in violation of 43 C.F.R. § 3162.3-1(c), which continues to state: "The operator shall submit to the authorized officer for approval an Application for Permit to Drill for each well. No drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized officer's approval of the permit." But as we explained above, since BLM defines operator as someone designated to operate on a Federal lease, this

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27 43 C.F.R. § 3163.1(a).
28 Id. § 3160.0-5 (Definitions).
29 Id. § 3163.1(a) (2018); see Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Measurement of Gas, 81 Fed. Reg. 81,516, 81,599 (Nov. 17, 2016) (final rule) (revising § 3163.1(a) to apply to "any person" instead of only operating rights owners and operators to "enable[] the BLM to impose assessments directly on parties who contract with operating rights owners or operators to perform activities on Federal or Indian leases that violate applicable regulations").
30 See letter accompanying INC (referencing "a well that was drilled through leased federal minerals without the authorization of the BLM via an approved [APD]").
rule applies only to lessees and operators on Federal leases and does not include Zavanna.\footnote{See 43 C.F.R. § 3160.0-1(a) ("The regulations in this part govern operations associated with the exploration, development and production of oil and gas deposits from . . . [l]eases issued or approved by the United States.").}

Here, Zavanna does not have a Federal lease that authorizes it to extract oil and gas from Lots 3 and 4, nor is it a person identified as an operator of such a Federal lease. Consequently, the regulation BLM relies upon does not apply to Zavanna under the circumstances of this case.

Furthermore, BLM identified the required abatement action for the violation as not only submission of an APD, but also submission of a communitization agreement (CA). Under BLM’s regulations, a CA enables the development and operation of leased lands with other lands to conform to a well-spacing program.\footnote{See 43 C.F.R. § 3105.2-2 (purpose of CAs).} A CA must ensure apportionment of production or royalties to the parties and protect the interests of the United States.\footnote{Id. § 3105.2-3(a).} BLM may approve a CA when it determines that it is in the public interest to do so.\footnote{Id. § 3105.2-2.} BLM may also require a lessee of a Federal lease to enter into a CA to protect the lease from drainage.\footnote{Id. § 3162.2-4(b).} Like the APD requirement, the requirement to enter into a CA assumes a connection to a Federal lease, and this requirement applies only to Federal lessees.\footnote{See Statoil Oil & Gas, LP, 192 IBLA 32, 40 (2017) (drainage regulations in 43 C.F.R. subpart 3162 apply only to Federal lessees and operating rights owners).}

With respect to the lands BLM is trying to protect in Lots 3 and 4, Zavanna is not a lessee or an operator under BLM’s regulations governing oil and gas operations. Zavanna is therefore not subject to those regulations, and BLM cannot require Zavanna to comply with them by, for example, filing an APD or CA. If Lots 3 and 4 are Federal lands, the only authority that BLM would have over Zavanna to protect those lands is the authority BLM would have over a trespasser. Specifically, under BLM’s regulations, where a non-Federal lessee or operator has drilled into Federal minerals, BLM’s recourse is under 43 C.F.R. Part 9230 - TRESPASS.\footnote{See, e.g., 43 C.F.R. §§ 9239.0-7 ("Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts."), 9239.5-2 (oil trespass).}
CONCLUSION

Because the INC on appeal is an effort by BLM to assert authority over Zavanna as if it were a Federal lessee, operating rights owner, or operator of Lots 3 and 4—which Zavanna is not—the INC is invalid. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, we reverse BLM's decision.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
Silvia Riechel Idziorek
Acting Deputy Chief Administrative Judge

38 See 43 C.F.R. § 4.1.