

INTERIOR BOARD OF LAND APPEALS

Emerald Gas Operating Co.

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EMERALD GAS OPERATING CO.

IBLA 96-287, 96-377

Decided November 4, 1996

Appeals from, and requests to stay decisions of the Colorado State Office, Bureau of Land Management, regulating methane gas production at the Valencia Canyon Pilot Project in the San Juan Resource Area. SDR-CO-96-2 and SDR-CO-96-3.

Stay denied, decision affirmed in IBLA 96-287; stay denied, briefing ordered in IBLA 96-377.

1. Oil and Gas Leases: Generally—Oil and Gas Leases: Drainage—Oil and Gas Leases: Production—Rules of Practice: Appeals: Stay

After BLM ordered a lessee to shut-in two of its wells to prevent drainage from adjacent leases, the lessee's petition for stay based upon an allegation that BLM had not complied with the Board's remand order in an earlier related appeal will be denied where the evidence shows that BLM in fact complied with the remand order.

2. Regulations: Generally—Regulations: Interpretation—Rules of Practice: Appeals: Stay

An offer to furnish a bond in support of a request, pursuant to 43 CFR 3165.4(d), to that stands as a decision for stay is not an appeal, established by 43 CFR 3165.4(c) have been met.

APPEARANCES: Marc D. Flink, Esq., Denver, Colorado, for Emerald Gas Operating Company; Marla J. Williams, Esq., Denver, Colorado, for Meridian Oil Inc.; Lyle K. Rising, Esq., Office of the Regional Solicitor, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Emerald Gas Operating Company (Emerald) has appealed from a March 4, 1996, decision of the Colorado State Office, Bureau of Land Management

(BLM), issued as SDR-CO-96-2, on March 4, 1996, and docketed as IBLA 96-287. The decision affirmed an order issued on January 23, 1996, by BLM's San Juan Resource Area Manager, that required Emerald to file an operating plan for the Valencia Canyon Pilot Project electing to either (1) shut-in or curtail methane gas production from Valencia Canyon infill wells, or (2) show how Emerald would protect correlative rights of adjacent mineral lessees, including Meridian Oil Inc. (Meridian), an intervenor herein, or (3) demonstrate that correlative rights in the resource of other lessees will not be affected by Emerald's production. After appealing the Area Manager's order, but while Emerald's appeal to the BLM State Office was still pending, Emerald produced a report that the State Office found to be a satisfactory response to the Area Manager's January order. Based upon this finding, BLM's Colorado State Office declared the appeal to be "moot" and remanded the matter back to the Area Manager with directions for further action based upon the report submitted by Emerald (SDR-CO-96-2 at 3). In remanding the question of continued production from the Valencia Canyon methane wells to the Area Manager, however, BLM provided instructions for evaluation of the Emerald report:

BLM would be remiss in its trust responsibility to the [mineral lessor Southern Ute Indian Tribe] and to the offset operators if it allowed the correlative rights of the adjacent mineral leases to be irreversibly impacted. Due to the fact that a 90-day extension proposed by Emerald, an additional estimated 1 BCFG [billion cubic feet of gas] will be produced from the 32-4 well, it is imperative that this situation be resolved in a timely manner. The potential for violation of correlative rights is only exacerbated the longer the well produces.

(SDR-CO-96-2 at 3). Emerald filed a timely appeal to this Board from SDR-CO-96-2, and petitioned to stay the effect of the decision pending appeal.

On March 6, 1996, the Area Manager issued an order requiring Emerald to shut-in two Valencia Canyon wells, 32-3 and 32-4. Emerald filed a timely appeal of the shut-in order to the Colorado State Office, but was informed on April 17, 1996, that BLM was unable to entertain this second appeal while the pending appeal of SDR-CO-96-2 remained undecided. Nonetheless, BLM prepared a draft decision affirming the shut-in order and approving the application made by the Area Manager of the information supplied by Emerald in response to his January 23, 1996, order; that draft was attached to BLM's Renewal of a motion to dismiss the appeal from SDR-CO-96-2. See SDR-CO-96-3, IBLA 96-377. Emerald reports that the wells have been shut-in in recognition of the rule that, under 43 CFR 3165.4, the shut-in order remains in effect unless otherwise ordered and might subject Emerald to penalties if not obeyed; Emerald contends nonetheless that such action does not amount to a waiver of any rights otherwise conferred by Emerald's lease (Statement of Reasons (SOR) at 13).

While the procedural history of these appeals is somewhat unusual, the dispute between Emerald and BLM's Area Manager in the first case involving SDR-CO-96-2 is straightforward. The issue presented arises from differing meanings assigned by BLM and Emerald to a statement appearing in a prior decision issued by this Board in San Juan Citizens Alliance, 129 IBLA 1 (1994); it is the contention of Emerald that BLM failed to properly implement remand instructions appearing in our 1994 decision.

Therein, after finding that BLM could properly allow an exception to an oil and gas well drilling program on an Indian reservation, we approved a decision that allowed Emerald to increase the number of methane gas wells on the reservation, finding that additional drilling could provide useful data about the resource and permit faster and greater recovery. Id. at 7. Two of those additional wells, 32-3 and 32-4, are the wells presently shut-in by the BLM Area Manager's decision issued on March 6, 1996. As part of our finding on this question, we also approved a condition, imposed by BLM upon the drilling exception, that production from the additional wells be limited to one-half their anticipated ultimate resource recovery. Id. at 8. Having approved this condition, we noticed what appeared to be an arithmetic error in BLM's estimate of half the recoverable gas, and observed that "[t]he four [added] wells would have reserves of 3.4 and 2.4 Bcf (sec. 29) and 3.9 and 3.4 Bcf. Half of these reserves is not 3 Bcf." After this statement, we concluded

we must set aside this finding of the October 21, 1992, decision and remand the case to BLM for reconsideration of an appropriate estimate of half the recovery expected from each infilled well in secs. 29 and 32. Any subsequent decision altering the estimate should show the basis for the determination and be supported by the record.

San Juan Citizens Alliance, 129 IBLA at 8.

Referring to this language, Emerald now argues that

IBLA remanded and ordered the BLM to determine one-half of the [methane] Wells' ultimate recoverable reserves supported by the record. Until such time as the BLM complied with this remand order, Emerald was permitted to operate the Wells without any special restrictions. Once one-half of the Wells' ultimate recoverable reserves was determined by the BLM on the record, and once such production was reached by Emerald, then Emerald would be obligated to show that the Wells were not impacting the correlative rights of the offsetting operators. Despite this remand order, the BLM never determined on the record one-half of the Wells ultimate recoverable reserves, and never held

any hearing whatsoever to determine the time when Emerald would be obligated to prove the Wells' non-impact on the correlative rights.

(Emerald SOR at 1-2).

Emerald argues that our 1994 decision held that "BLM was arbitrary in finding that 3 bcf equaled one-half of the Wells' ultimate recoverable reserves" (Emerald Petition For Stay at 5). Emerald asserts that, because of our prior holding, the BLM shut-in order was defective because BLM "never determined one-half of the Wells' ultimate recoverable reserves on the record and failed to give Emerald sufficient notice or time to demonstrate the Wells' non-impact" (Notice of Appeal at 2). Repeating this contention in arguing that BLM's shut-in order should be stayed pursuant to 43 CFR 3165.4 (the rule governing such relief in onshore oil and gas cases), Emerald asserts this appeal meets the standards for stay issuance set by 43 CFR 3165.4(c) (Petition For Stay at 2, 3). The question presented to us by this appeal, therefore, is simply whether BLM carried out the remand ordered by our 1994 decision. We find the remand order was properly handled by BLM.

BLM describes what happened following our 1994 decision of this case:

In March 1994, the BLM decision was upheld in part and remanded back in part for reconsideration of the appropriate estimate of half the recoverable reserves from the infilled sections 29 and 32. Shortly after the remand, the BLM reassessed the reserve estimates provided by Emerald from the expert testimony presented to the Colorado Oil and Gas Conservation Commission (COGCC) hearing on September 21, 1992. Based on this information, the BLM determined that half of the recoverable reserves was in fact \* \* \* 1.95 and 1.7 Bcf for the section 32 wells. These revised estimates were shared with [employees of Emerald]. Because well performance, in particular the Valencia Canyon 32-3 and the Valencia Canyon 32-4 wells[,] w[as] quickly approaching these revised estimates (1.4 and 1.5 Bcfg for the VC 32-3 and the VC 32-4 wells respectively as of 6/94), the San Juan Resource Area asked Emerald to provide a final assessment of the geology, reserve estimates and drainage determinations for the Valencia Canyon Pilot wells.

In August 1994, Emerald proposed the Pilot Project Reservoir Evaluation Program (PREP). The objective of the PREP was to take the gathered geologic and engineering data and accurately determine the reserves and to perform a reservoir simulation study to determine the drainage areas for 22 wells in the pilot area. The simulation work was projected to take approximately 8 weeks to finish with a final report and conclusions to follow shortly thereafter. The BLM accepted this proposal as Emerald's

fulfillment of the original conditions of the pilot. Various efforts were made by both private consultants and academia in an attempt to quantify reservoir conditions in the PREP; all of it taking a significant amount of time. [Emerald] provided periodic updates on simulation progress, however, the final report was not received until September 29, 1995, when Emerald presented its report entitled "Evaluation of the Geologic Character and Gas Content of the Fruitland Coals in the Valencia Canyon Project Area." The report included detailed geologic descriptions, reserve and production figures and a single well simulation report for the Valencia Canyon 32-1 well. However, no drainage results were presented for the other wells in the pilot. \* \* \* [Emerald's] response to our demand for the protection of offsetting correlative rights requests additional time to perform further reservoir stimulation work to assess producing characteristics of the reservoir. \* \* \* As of January 1, 1996, the Valencia Canyon 32-3 and the 32-4 wells have produced 4.98 and 6.68 Bcfg respectively; well over 50 percent of the recoverable reserves presented in the September 29, 1995 report (3.8 and 5.6 Bcf for the VC 32-3 and 32-4 wells respectively). Furthermore, in the time that Emerald is proposing to conduct this computer simulation, an additional 1 Bcfg would likely be produced from the Valencia Canyon 32-4 well, potentially violating further the correlative rights of the offsetting mineral interests.

(Resource Area Shut-In Order dated Mar. 6, 1996, at 2, 3).

The chronology of these events, or that they occurred substantially as stated in the BLM order, is not disputed; what is questioned is whether the events described by BLM satisfy the remand order in our 1994 decision. We find that they do.

[1] We find that BLM fully complied with the 1994 decision on remand when, in 1994, Emerald was notified that the estimation that two wells producing 3.9 and 3.4 Bcf of methane gas averaged 3 Bcf was corrected, based upon data then available, to show the current estimated reserves. Our reference to "the record" (San Juan Citizens Alliance, 129 IBLA at 8) was made to the administrative record compiled by BLM, and did not require a formal evidentiary hearing. The 1994 decision did not attempt to forecast how any of the wells would develop, nor did we require any action by BLM beyond that taken when the Emerald employees were notified of the corrected reserve estimate to be used for the wells. We therefore conclude that BLM acted properly in response to the remand instruction in our 1994 decision. The complaint made by Emerald, to the extent it relies upon this allegation of error, is therefore without foundation and must be rejected.

Consequently, it is apparent that Emerald cannot prevail on the merits of the appeal taken from SDR-CO-96-2, the first of the decisions issued

by the Colorado State Office; this being the case, the request for stay of this decision must be denied, since it fails to meet the standard for stay issuance set by 43 CFR 3165.4(c)(2). Further, since our review of the stay request addressed to SDR-CO-96-2 has effectively decided this appeal on the merits, the decision is properly affirmed, there being no point in delaying final disposition of the matter. See, e.g., Albert Eugene Rumpfelt, 134 IBLA 19, 23 (1995). The decision herein affirmed, SDR-CO-96-2, is IBLA Docket No. 96-287.

Although Emerald seems to suggest otherwise, our 1994 decision also established that it would be proper for BLM to limit production at any of the named wells in secs. 29 and 32 when each of them should have produced half the anticipated ultimate recovery. See San Juan Citizens Alliance, 129 IBLA at 8. No appeal was taken from this ruling; it has become a final Departmental ruling on this issue upon which rests the second Colorado State Office (draft) decision proposed to be issued in this case, SDR-CO-96-3, IBLA 96-377. The draft decision affirms the March 6, 1996, shut-in order issued by the Area Manager, finding that Emerald had, based upon production data provided by Emerald in February, June, and September 1995, reached the critical point in production, and that the wells were therefore required to be shut-in to avoid drainage of adjoining leases (SDR-CO-96-3 at 9). The draft decision also rejects Emerald's offer to post bond and refuses to stay the decision. Id. at 10.

BLM has moved to dismiss the appeal filed by Emerald. Because of the way in which the intermediate appeals to the Colorado State Office from the Resource Area were handled in this case, BLM argues that a jurisdictional defect exists which prevents further action by the Colorado State Office on the shut-in order until the appeal docketed as IBLA 96-287 is disposed of. That matter has now, however, been decided, and there is no reason not to proceed with our consideration of the second decision. Somewhat similar to the procedural situation present in the appeal leading to our 1994 decision (see San Juan Citizens Alliance, 129 IBLA at 5), it is clear that when the State Office returned the case file to the Resource Area Manager in March 1996 with instructions to protect correlative rights of other operators, the only action remaining to be accomplished was computation of the anticipated ultimate recovery of the wells, pursuant to the plan of operations for the wells approved by BLM and this Board's decision. See San Juan Citizens Alliance, 129 IBLA at 5, 8. The data and analysis used by BLM in making the resource computation itself has, however, not been examined by this Board.

Under the circumstances, we will retain jurisdiction of this case, and accept for filing the draft decision offered by BLM as the decision of BLM serially numbered SDR-CO-96-3. The document filed by Emerald on July 23, 1996, in opposition to BLM's motion to dismiss for lack of jurisdiction, and which declares an intention to appeal from the draft decision,

is accepted as a timely notice of appeal from SDR-CO-96-3, which is considered to have been issued when it was filed on June 17, 1996. The record indicates that all appearing parties have been mailed a copy of the draft decision.

Nonetheless, the appeal from SDR-CO-96-3 is not yet ripe for adjudication. Because BLM delayed issuance of the draft decision, Emerald must be allowed time to file an SOR; an SOR should be filed by Emerald not later than 45 days from receipt of this decision. Copies of the Emerald SOR should be sent to both BLM and Meridian, who is recognized to be a party to this proceeding as a potentially affected adjoining leaseholder whose lands may be affected by drainage caused by the Emerald operations, and who might be adversely affected by our decision in this pending appeal. Answers to the Emerald SOR shall be filed by BLM and Meridian not later than 45 days following their receipt of the Emerald SOR. Once the answers are filed, or when the time for such filing has passed without comment, no additional pleading shall be filed by any party without permission from this Board.

[2] This leaves the question of the effect upon this proceeding of the bond offered by Emerald to indemnify correlative rights, which was rejected by the decision in SDR-CO-96-3 at 10. While denying that the two wells are draining Meridian's adjacent operations, Emerald has offered to post a bond indemnifying Meridian in the amount of \$825,000 (and another neighboring operator in the amount of \$430,000) for 6 months, an amount said to equal production for a 6-month period from the two wells (Petition For Stay at 9). Citing 43 CFR 3165.4(d), Emerald suggests that the offered bond will suffice, alone, to support a requested stay, since it affords "adequate protection" from any harms that might arise from drainage while the merits of this appeal are considered (Petition For Stay at 10). Meridian, however, objects that the offered bond is too small and is based upon assumptions that do not follow BLM practice in calculating compensatory royalty in drainage cases.

Whatever the correct bond amount might be in this case, an offer to post bond is not alone sufficient to satisfy Departmental standards governing stay issuance. Emerald has offered no data to show that the offered bond is adequate to cover any damage that might arise from continued operations at the two shut-in wells. While a bond might suffice, if it offered complete indemnity to affected parties, to prevent irreparable harm from occurring (see 43 CFR 3165.4(c)(3)), or minimize or equalize relative harms to the parties from an action (43 CFR 3165.4(c)(1)), posting a bond cannot substitute for a showing, pursuant to 43 CFR 3165.4(c)(3) of a likelihood of success on the merits. Nor can an offer of indemnity support stay issuance if it appears that to do so would be contrary to the public interest. See 43 CFR 3165.4(c)(4). The rule established by 43 CFR 3165.4 would be undermined if, as suggested, we were to read subsection (d) of the regulation as a substitute for subsection (c). To give the rule complete effect, as we must do if we are to enforce it properly, both

subsections (c) and (d) must be construed as part of an integrated plan for stay issuance provided by 43 CFR 3165.4. Posting a bond does not obviate the need to show that a party seeking a stay has a likelihood of success on the merits or that the public interest favors a stay. Emerald has yet to do so in this case.

To summarize our holding in this decision: We conclude that BLM complied with this Board's instructions on remand in San Juan Citizens Alliance, supra, by conforming a current estimate of the ultimate amount of resource recovery for the wells at issue to the data available in 1994, as directed by our decision. Further, we deny a stay of BLM's decision SDR-CO-96-2, finding that Emerald has shown no likelihood of success in that appeal because the record shows BLM complied with our order of remand in San Juan Citizens Alliance, supra. Concerning the BLM decision serialized as SDR-CO-96-3, we have allowed a draft decision proposed by BLM to be docketed as IBLA 96-377, and have established a briefing schedule for that case, which concerns the shut-in of Valencia Canyon wells 32-3 and 32-4. We have also determined that furnishing a bond, pursuant to 43 CFR 3165.4(d) is not a substitute for compliance with standards set for stay issuance by 43 CFR 3165.4(c). A request for stay that was supported only by a bond offer was therefore properly denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the request to stay BLM decision SDR-CO-96-2 is denied and the decision is affirmed. We will continue, however, to review BLM decision SDR-CO-96-3. The parties will proceed with briefing of that appeal as scheduled above in this decision. A request by Emerald for oral argument is taken under advisement pending completion of briefing as ordered herein.

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Franklin D. Amess  
Administrative Judge

I concur.

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Gail M. Frazier  
Administrative Judge