

INTERIOR BOARD OF LAND APPEALS

Meridian Oil, Inc.

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MERIDIAN OIL, INC.

IBLA 94! 346

Decided February 4, 1997

Appeal from a decision of the Deputy State Director, Lands and Minerals, New Mexico, Bureau of Land Management, upholding an order of the Farmington District Office, New Mexico, Bureau of Land Management, returning, as unapproved, applications for the downhole commingling of oil and gas production from wells on Federal lands on the basis that the applications were unsupported by the necessary technical data. SDR 94! 006.

Affirmed.

1. Oil and Gas Leases: Production

Approval by BLM of applications for permit to drill, which included drilling plans containing the statement that two formations would be completed and commingled pursuant to a state regulatory authority order, did not constitute approval of the commingling of production from two formations. Under 43 CFR 3162.3! 2(a) a proposal for further well operations must be submitted by the operator on Form 3160! 5 for approval by the authorized officer prior to commencing operations to commingle production between intervals, and the authorized officer may require the submission of technical data in support of the proposal.

2. Estoppel! ! Oil and Gas Leases: Production

BLM may properly decline to approve a request by an oil and gas lease operator to engage in the downhole commingling of production from a well on Federal land pending submission of technical supporting data and independent review by BLM, even though the operator has previously obtained State approval for such activity. BLM is not estopped from declining to approve any longstanding practice of adopting State decisions approving downhole commingling.

APPEARANCES: W. Thomas Kellahin, Esq., Santa Fe, New Mexico, for appellant; Arthur Arguedas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

## OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Meridian Oil, Inc. (Meridian) has appealed from a January 24, 1994, decision of the Deputy State Director, Lands and Minerals, New Mexico, Bureau of Land Management (BLM), affirming, on State Director Review (SDR) under 43 CFR 3165.3, an order of the Farmington District Office, New Mexico, BLM, dated October 8, 1993, returning, as unapproved, applications for the downhole commingling of oil and gas production from the Basin Fruitland Coal and Pictured Cliffs formations for seven wells on Federal lands on the basis that they were unsupported by the necessary technical data. <sup>1/</sup> The seven wells at issue are one unit well in the San Juan 28-4 Unit (No. 226), five wells in the San Juan 28-5 Unit (Nos. 200, 227, 228, 229, and 232), and one well in the San Juan 29-4 Unit (No. 200), all situated on Federal lands in Ts. 28 and 29 N., R. 4 W., and T. 28 N., R. 5 W., New Mexico Principal Meridian, Rio Arriba County, New Mexico.

Between April 21, and June 10, 1993, Meridian filed with BLM applications for permit to drill (APD's) for the wells in question. Meridian attached to each of its APD's an "Operations Plan," which specified, under the heading "Additional information," that "[t]he Fruitland Coal and Pictured Cliffs formations will be completed and commingled per New Mexico Oil Conservation Division [NMOCD] order." BLM approved the APD's between June 4, and July 22, 1993. Thereafter, by six letters dated August 31, 1993, and one letter dated September 21, 1993, Meridian applied to NMOCD for approval of downhole commingling in the case of the subject wells, submitting all of the data BLM indicated was necessary for its review.

At the same time as it sought State approval, Meridian notified BLM in separate letters of the filing of each of its applications with NMOCD, in accordance with that agency's rules and regulations. Meridian also asked BLM to sign each of these letters if it did not object to the proposed commingling. At the bottom of each letter, there were the words "[t]he above downhole commingling request is hereby approved," followed by a colon, beneath which was a signature line. <sup>2/</sup>

Thereafter, on September 28, and October 1, 6, and 25, 1993, NMOCD issued various administrative orders approving downhole commingling for

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<sup>1/</sup> In its October 1993 order the District Office stated: "In order for a downhole commingling application to be approved, technical data including a wellbore diagram, production tests, gas analysis, pressure data corrected to a common datum, and proposed allocation factors must be submitted with the application."

<sup>2/</sup> BLM construed Meridian's letters as applications for its approval of downhole commingling. It did not sign them, as requested by Meridian. Instead, it issued its Oct. 8, 1993, order.

all seven wells. Meridian notified BLM, by letter dated September 28, 1993, that NMOCD had or would approve its applications. <sup>3/</sup> See Request for SDR at 2; Decision at 2. On December 22, 1993, following BLM's refusal to approve its commingling requests and final action by NMOCD, Meridian submitted to the State Director, in support of its SDR request, copies of its applications to NMOCD, including its supporting economic analysis, and the resulting final State administrative orders approving downhole commingling. The Deputy State Director then issued his January 1994 decision.

[1] Meridian first contends that BLM improperly declined to approve downhole commingling where, pursuant to 43 CFR 3162.3-1, it had already given approval for commingling in conjunction with its approval of the various APD's for the subject wells. It states that BLM incorrectly relied on 43 CFR 3162.3-2, an operational regulation, and incorrectly interpreted that regulation. It asserts that regulation does "not require an independent review of the same data by the BLM" (Statement of Reasons (SOR) at 13).

First, Meridian's argument is inconsistent with the documents in the record. Although operations plans filed with the APD's did contain the statement that the formations would "be completed and commingled per New Mexico Oil Conservation Division order," Meridian apparently did not consider approval of the APD's to constitute BLM's approval of commingling. If it did, there would have been no reason for it subsequently to seek BLM's approval, which it did by its letters of August 31, 1993, and September 21, 1993, each of which stated that it was a "downhole commingling request."

Second, despite Meridian's arguments to the contrary, the applicable regulation in this case is 43 CFR 3162.3-2, entitled "[s]ubsequent well operations." The regulations at 43 CFR 3162.3-1 govern the filing of APD's, drilling plans, and surface use plans of operations. They do not provide for the approval of the commingling of production. Thus, approval of Meridian's APD's did not constitute BLM's approval to commingle. Under 43 CFR 3162.3-2(a):

A proposal for further well operations shall be submitted by the operator on Form 3160-5 for approval by the authorized officer prior to commencing operations to redrill, deepen, perform casing repairs, plug back, alter casing, perform nonroutine fracturing jobs, recomplete in a different interval, perform water shut off, commingling production between intervals and/or conversion to injection. [Emphasis added.]

See Bolack Minerals Co., 93 IBLA 159, 161-63 (1986) (water shut off); Energy Reserves Group, Inc., 92 IBLA 219, 221 (1986) (recompletion).

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<sup>3/</sup> On appeal, Meridian contradicts the Sept. 28, 1993, date set forth in its SDR request on page 2. It now asserts that it notified BLM that NMOCD had or would approve commingling "[o]n August 31, 1993" (SOR at 5). Given the timing of NMOCD's orders, Sept. 28 seems the more likely date.

In this case, Meridian was required to file Form 3160-5 for approval prior to "commingling production between intervals." The operations plans filed with its APD's, which contained the statement that the two formations would be completed and commingled per NMOCD order, were, in fact, the drilling plans required by 43 CFR 3162.3-1. Each plan filed by Meridian specified such things as the mud program, the casing program, the tubing program, the float equipment, the wellhead equipment, and cementing information.

Accordingly, we must reject Meridian's contention that, in approving the APD's, BLM authorized downhole commingling.

Meridian also contends that, in originally approving the three relevant unit agreements in 1953, the Secretary of the Interior, acting through the U.S. Geological Survey, consented to the exclusive exercise by NMOCD of the Department's authority over downhole commingling:

The BLM! State Director's decision is an attempt to assert jurisdiction over the subject downhole commingling operation thereby creating a conflict in supervision to which the Secretary of Interior has contractually agreed to defer to the NMOCD.

Having already consented to NMOCD jurisdiction the BLM is obligated to rely upon the NMOCD downhole commingling orders and is estopped from now requiring a separate and independent review of that process.

(SOR at 9).

We find no language in the unit agreements obligating BLM to defer to NMOCD on downhole commingling matters. Meridian points to language in section 23 of each of the agreements, entitled "Conflict of supervision," which states as follows: "The parties hereto, including the [NMOCD], agree that all powers and authority vested in the [NMOCD] in and by any provisions of this contract are vested in the [NMOCD] and shall be exercised by it pursuant to the provisions of the laws of the State of New Mexico" (SOR at 3, Exh. 8). While this language refers to authority vested in NMOCD by the unit agreements, Meridian points to nothing in the agreements that vests ultimate authority in NMOCD for approval of downhole commingling requests. There is no divestiture of Federal authority. As BLM properly states:

This section essentially states that the Unit Operator and working interest owners will not be subject to any penalty, liability, forfeiture, etc., if they are prevented from complying with the terms of the unit agreements because they hadn't received the necessary BLM or NMOCD approvals. It does not delegate BLM authority to NMOCD.

(Answer at 1).

Approval of the unit agreements did not amount to a delegation of authority from the Secretary to NMOCD to approve downhole commingling. As BLM notes, section 1 of the unit agreements incorporates Federal regulations in the case of Federal lands, and State regulations in the case of non-Federal lands.<sup>4/</sup> Thus, decisions regarding the production of unitized substances from Federal lands, including whether to permit downhole commingling, are ultimately governed by Federal, not State, regulations. BLM is responsible for implementing those regulations.

[2] Meridian also contends that BLM's decision to exercise its authority to approve or disapprove downhole commingling, rather than simply accede to State decisionmaking, is an impermissible "[F]ederal preemption" of State regulation of Federal oil and gas lease operations, which is not supported by any Federal statute or regulation (SOR at 12).

It is well established that a state's exercise of its police powers for oil and gas conservation and other purposes will be deemed to have been preempted when Congress, in the exercise of its paramount authority over Federal lands, including underlying oil and gas deposits, has determined to deal exclusively with the subject. Kirkpatrick Oil & Gas Co., 15 IBLA 216, 221! 22, 81 I.D. 162, 165 (1974), and cases cited therein. Preemption may also occur with the promulgation of Federal regulations. Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985).

We find no provision in the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181! 287 (1994), that authorizes the Secretary to decide whether to approve downhole commingling in the case of production from Federal lands, or otherwise provides direction to him in the case of such matters, thus preempting State regulation. However, the Act does authorize the Secretary to "dispos[e]" of oil and gas deposits on Federal lands through the issuance of leases and to "prescribe necessary and proper rules and regulations" to that end. 30 U.S.C. §§ 181, 189, 226(a) (1994). In 43 CFR 3161.1(a), the Department provides that "[a]ll operations conducted on a Federal \* \* \* oil and gas lease by the operator are subject to the regulations in this part," i.e., 43 CFR Part 3160. Further, these regulations are under the general administrative jurisdiction of BLM. See 43 CFR 3160.0! 2. Finally, as the Deputy State Director properly noted, the authority to permit downhole commingling is specifically accorded to BLM by 43 CFR 3162.3! 2(a). See Decision at 2! 3; Answer at 2.

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<sup>4/</sup> The unit agreements state in section 1 that "all valid pertinent regulations, including operating and unit plan regulations, heretofore issued [under the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181! 287 (1994)] or valid pertinent and reasonable regulations hereafter issued thereunder are accepted and made a part of this agreement as to Federal lands" (E.g. SOR, Exh. 8).

Clearly, in the area of downhole commingling there has not been a blanket preemption of state regulation. The State of New Mexico still has a valid role in regulating oil and gas lease operations within its borders for the purpose of conserving oil and gas, including deciding whether to approve downhole commingling. However, the Federal Government, by regulation, has provided, as well, that such commingling may not take place without its permission. Meridian has presented no evidence, or any persuasive legal argument and citation to authority, that supports a conclusion that the State has preempted the Federal role in this area. As BLM states:

BLM is required to insure that production accountability is assured on \* \* \* Federal \* \* \* lands. A number of downhole commingling facets are a production accountability issue. The BLM must review and approve these aspects to insure that the action will result in maximum economic recovery, minimum waste, and that the Federal Government, Indian Tribe, or Allottee receive their fair share of royalties. Reviews and approvals strictly by NMOCD do not ensure production accountability. To perform its mandated duties, the BLM must perform an independent review and approval process.

(Answer at 2). Meridian has offered nothing in rebuttal.

Meridian argues that BLM is estopped from refusing to approve its downhole commingling requests with respect to production from Federal lands pending submission of technical supporting data, by virtue of its longstanding acquiescence in, which has amounted to "consent" to, State regulation of this aspect of oil and gas lease operations (SOR at 10).

BLM denies that it has acquiesced in decisions by NMOCD regarding downhole commingling:

Meridian appears to have misinterpreted BLM's adoption of numerous state regulatory decisions as an indication of these bodies having authority over operational actions on Federal Lands. BLM's adoption of these decisions is in fact a BLM approval of the decision. Without the BLM approval of these actions, the State regulatory decision does not go into effect for Federal lands.

(Memorandum to Deputy State Director from District Manager, Farmington District, New Mexico, BLM, dated Nov. 10, 1993).

The fact that in the past BLM may have adopted State decisions regarding downhole commingling does not bind it to do so in the future. As BLM notes, its adoption of a state ruling, in fact, constitutes a BLM ruling on the matter.

There is no basis for estopping BLM from declining to approve Meridian's downhole commingling requests pending submission of technical supporting data since, regardless of any detrimental reliance by Meridian. Any longstanding practice by BLM does not amount to affirmative misconduct, in the form of a misrepresentation or concealment of material fact, on which to base estoppel. See, e.g., Schweiker v. Hansen, 450 U.S. 785, 788-89 (1981); United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); James W. Bowling, 129 IBLA 52, 55 (1994).

While we find nothing in the present case that would require BLM to defer to a NMOCD ruling, deferral is not precluded and nothing in 43 CFR 3162.3-2(a) would require that BLM undertake its own independent review. Nevertheless, BLM may do so and it may require Meridian to present the requested data to determine whether to permit downhole commingling.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur.

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R.W. Mullen  
Administrative Judge