

HOLCOMB OIL AND GAS, INC.  
MARALEX RESOURCES, INC.

IBLA 98-397, 98-402

Decided June 21, 1999

Appeal from a decision of the Colorado State Office, Bureau of Land Management, denying a protest of the designation of a successor Unit Operator for the Ragged Mountain Unit (14-080001-19467) (SDR CO 98-1, SDR CO 98-2).

Affirmed.

1. Oil and Gas Leases: Unit and Cooperative Agreements

When, under the terms of a unit agreement establishing the succession of the unit operator, a replacement operator must be selected by a majority of the working interests by acreage, a challenge to BLM's approval of a document designating a new operator which was executed by working interest holders who collectively hold more than 50 percent of the working interest acreage is properly denied. It is also proper for BLM to deny approval of documents attempting to effect a change in the designation of a unit operator which do not comport with unit agreement provisions providing for unit operator succession.

APPEARANCES: William J. Holcomb, President, Holcomb Oil and Gas, Inc., Farmington, New Mexico, and Robert Cardin, Esq., Farmington, New Mexico, for Holcomb Oil & Gas, Inc.; Patrick M. Keller, Land Manager, Maralex Resources, Inc., Denver, Colorado, for Maralex Resources, Inc.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Holcomb Oil and Gas, Inc. (Holcomb), and Maralex Resources, Inc. (Maralex), have each appealed from that portion of separate, but nearly identical, June 5, 1998, decisions issued by the Colorado State Office, Bureau of Land Management (BLM), on State Director Review (hereinafter SDR) (SDR CO 98-1 and SDR CO 98-2) affirming an April 24, 1998, decision by the Reservoir Management Team, Colorado State Office, BLM, approving the removal of Maralex and designating Riviera Drilling & Exploration Company (Riviera) as successor Unit Operator for the Ragged Mountain Unit

(14-080001-19467) (COC47672X), and affirming a May 11, 1998, determination by the same Reservoir Management Team to return unapproved documents naming Holcomb as successor Unit Operator for that Unit.

Teton Energy Company, Inc., was named as the Unit Operator when the Ragged Mountain Unit was created by a Unit Agreement executed May 22, 1980, and approved by BLM on September 24, 1980. When formed, the Unit embraced 40,720.83 acres (of which 39,457.90 were Federally owned) in Gunnison, Pitkin, Delta, and Mesa Counties, Colorado. Effective December 10, 1991, the Unit was contracted to 3,284.99 acres. <sup>1/</sup> Maralex was appointed successor Unit Operator on August 1, 1996, and the assignment of Marlex as the successor Unit Operator was accepted by BLM on October 22, 1996.

On November 17, 1997, Riviera submitted a copy of a Resignation of Unit Operator document indicating the resignation of Maralex as Unit Operator and a Designation of Successor Operator, dated November 14, 1997, naming Riviera as successor Unit Operator for the Ragged Mountain Unit. The document designating Riviera as successor Unit Operator had been executed by interest holders claiming to have combined holdings exceeding 50 percent of the Unit acreage. On November 28, 1997, Riviera submitted a document entitled Removal of Successor Unit Operator, dated November 22, 1997, and executed by the same group of interest holders. This document effected removal of Maralex as the Unit Operator for the Ragged Mountain Unit. By letter dated December 4, 1997, BLM returned the documents unapproved asking for additional information verifying the working interest percentages, further evidence documenting the cause for Maralex's removal, and submission of adequate bond coverage for Riviera.

On December 15, 1997, Holcomb submitted a Resignation of Unit Operator executed by Maralex and a Designation of Successor Unit Operator naming Holcomb as the Unit Operator. Both documents were dated November 14, 1997. By letter dated February 6, 1998, BLM informed Maralex, Riviera, and Holcomb that it would neither approve Maralex's resignation nor approve the designation of a successor Unit Operator until an acceptable successor Unit Operator was chosen by the working interest owners pursuant to the Ragged Mountain Unit Agreement. This letter also stated that neither document purporting to designate a successor Unit Operator that it had received would be reviewed until the working interest percentages within the Unit were verified.

On April 24, 1998, BLM accepted Riviera as the new Unit Operator by approving the Designation of Successor Unit Operator received on November 22, 1997. On May 11, 1998, BLM returned unapproved the documents designating Holcomb successor Unit Operator, stating that Holcomb's designation was not executed by a sufficient percentage (by acreage) of

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<sup>1/</sup> The Federal land remaining in the contracted Ragged Mountain Unit is in leases COC16187, COC13600 through COC13602, and COC13935. All of the land in these leases is in Gunnison County, Colorado.

the working interest holders. Holcomb and Maralex both requested SDR of these determinations in accordance with 43 C.F.R. §§ 3165.3(b), 3185.1.

Two separate, but nearly identical decisions were issued by the Colorado State Office, BLM, on June 5, 1998 (SDR Decision). The SDR Decision affirmed the decisions on appeal in part, vacated those decisions in part, and remanded the case file to BLM. In pertinent part, the SDR Decision stated that "[e]ssentially, the outcome of the decisions of the Colorado State Office, Reservoir Management Team made on April 24, 1998, and May 11, 1998, remain unchanged. Only the method and procedure implementing the decision has been revised by this SDR [Decision]." (SDR Decision at 3.) Of importance to our review is the basic fact that the SDR Decision affirmed the April 24, 1998, acceptance of Riviera as successor Unit Operator and the May 11, 1998, rejection of Holcomb as successor Unit Operator. <sup>2/</sup> The SDR Decision acknowledged that "[i]n]umerous reasons are provided by Holcomb [and Maralex] in support of this request [to not designate Riviera as Successor Unit Operator for the Ragged Mountain Unit]." (SDR Decision at 2.) Addressing the question of what documentation is needed for appointment of a successor Unit Operator, the SDR Decision held that a duly executed Designation of Successor Unit Operator can serve to effect a change in the Unit Operator, and that a corresponding document showing resignation or removal of the previous Unit Operator is unnecessary. The SDR Decision further held that Riviera was properly designated as the successor Unit Operator by a sufficient percentage (by acreage) of the working interest holders. The SDR Decision declined to address allegations of fraud and other offenses voiced by Holcomb and Maralex, noting that while further investigation may be warranted, those allegations would be considered in a different setting.

In its Statement of Reasons (SOR) for appeal to this Board, Holcomb argues that BLM did not properly construe the relevant provision of the Unit Agreement controlling Unit Operator succession. Holcomb asserts that under the Unit Agreement, Riviera was required to vote its own interest and secure the affirmative vote of another working interest owner to be successfully appointed as a new Unit Operator. Holcomb also argues that the SDR Decision did not adequately review the November 22, 1997,

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<sup>2/</sup> The remainder of the SDR Decision remedied simple mistakes. First, the decision vacated BLM's determination to accept a Removal of Successor Unit Operator document dated Nov. 22, 1997 (deeming it unnecessary), and BLM's reference to a Nov. 22, 1997, Designation of Successor Unit Operator to Riviera for the Ragged Mountain Unit (as no such document was received by BLM on Nov. 28, 1997). Next, it remanded the Designation of Successor Unit Operator to Riviera dated Nov. 14, 1997, for approval as it was the only such document received and the record did not indicate that this document constituted the proper basis for BLM's actions. As noted in the SDR Decision, none of those actions adversely affected the outcome of the actions affirmed.

documents naming Riviera as Unit Operator, and that if it had, it would recognize that a fraud may exist regarding filing of those documents with BLM. Holcomb contends that the majority of the working interest owners do not want Riviera as the Unit Operator.

In its SOR, Maralex asserts that Riviera is unacceptable as the Unit Operator, alleging that Riviera has often violated the terms and conditions of the Unit Operating Agreement, such as improperly working a well without approval or failing to properly credit the joint interest billing account. Maralex particularly focuses on the document Riviera submitted indicating Maralex's resignation as Unit Operator, contending that Riviera fraudulently altered that document and then submitted it to BLM, arguing that such behavior should bar Riviera from becoming the Unit Operator.

Holcomb has asked for expedited consideration. We find that the matter at issue, who should be recognized as the Unit Operator of the Ragged Mountain, governs the very operation of the Unit. Until that issue is resolved, the efficient day-to-day operations may be jeopardized. We note that BLM has warned the Unit participants that continued failure to cooperate may constitute sufficient reason to dissolve the Unit. We find sufficient grounds to grant the request.

[1] An appellant carries the burden of proof to show error in the decision being appealed, and, in the absence of such a showing, the decision will be affirmed. Dale Daugherty, 139 IBLA 56, 65 (1997); Charles S. Stoll, 137 IBLA 116, 126 (1996); Fred Wilkinson, 135 IBLA 24, 25 (1996); B.K. Lowndes, 113 IBLA 321, 325 (1990). When a party appeals a BLM approval of the designation of a successor unit operator or refusal to approve the designation of a successor unit operator, the appellant must show that BLM's determination is incorrect.

Parties leasing Federal lands for oil and gas "may unite with each other, or jointly or separately with others, in collectively adopting and operating under a cooperative or unit plan of development or operation \* \* \* whenever determined and certified by the Secretary." 30 U.S.C. § 226(m) (1994). The Department has the discretion to establish regulations to "secure the proper protection of the public interest." Id. Of concern in this appeal is the proper replacement of a unit operator, and the pertinent regulation, entitled "Qualifications of Unit Operator," is found at 43 C.F.R. § 3182.1:

A unit operator must qualify \* \* \*. The unit operator may be an owner of a working interest in the unit area or such other party as may be selected by the owners of working interests. The unit operator shall execute an acceptance of the duties and obligations imposed by the agreement. No designation of or change in a unit operator will become effective until approved by the authorized officer [of the Department], and no

such approval will be granted unless the successor unit operator is deemed qualified to fulfill the duties and obligations prescribed in the agreement.

This is the only regulation stating BLM's responsibilities when considering whether a proposed successor unit operator is qualified for that position. However, it is also appropriate for BLM to look to the Unit Agreement the parties have entered into to ascertain whether the candidate successor unit operator is "qualified to fulfill the duties and obligations."

The process for removing the Unit Operator and appointing a successor Unit Operator is set forth in sections 5 and 6 of the Ragged Mountain Unit Agreement. The Unit Operator "shall have the right to resign \* \* \* at any time a participating area established hereunder is in existence." Unit Agreement at 3, § 5. The Unit Operator may "be subject to removal by the same percentage vote of the owners of working interests as \* \* \* provided for the selection of a new Unit Operator." Id. The following language governing selection and appointment of a new Unit Operator is found in the Unit Agreement:

Whenever the Unit Operator shall tender his or its resignation as Unit Operator or shall be removed as hereinabove provided, or a change of Unit Operator is negotiated by working interest owners, the owners of the working interests in the participating area or areas according to their respective acreage interest in such participating area or areas, or, until a participating area shall have been established, the owners of the working interests according to their respective acreage interests in all unitized land, shall by majority vote select a successor Unit Operator. Provided, that, if a majority but less than 75 percent of the working interests qualified to vote are owned by one party to this agreement, a concurring vote of one or more additional working interest owners shall be required to select a new operator. Such selection shall not become effective until:

(a) a Unit Operator so selected shall accept in writing the duties and responsibilities of Unit Operator, and

(b) the selection shall have been approved by the Supervisor.

If no successor Unit Operator is selected and qualified as herein provided, the Director at his election may declare this unit agreement terminated.

Id. at 3-4, § 6.

As noted above, two proposals for a successor to replace Maralex as the Unit Operator were presented to BLM. The first was submitted by

Riviera. This package included Maralex's resignation (the authenticity of which has been challenged) and a statement of Riviera's election to and acceptance of the responsibilities as Unit Operator. The second proposal included a new statement of Maralex's resignation and a statement of Holcomb's acceptance as successor. As noted, neither of these proposals was immediately recognized by BLM as a completed request for BLM approval, due to identified errors and omissions, and a lack of supporting data.

BLM delayed reviewing the requests until the working interest acreage was verified. In its subsequent determination to accept Riviera as successor Unit Operator, BLM concluded that Riviera and the other signators to the Riviera appointment document maintain "a sufficient percentage of the working interest (by acreage) to preclude removal of a unit operator." (SDR Decision at 2.) The record includes an inventory apparently prepared by BLM entitled, "Ragged Mountain Unit Working Interest Acreage, May, 1998." The working interests of the unit were outlined by BLM as follows:

	<u>Acres [3/]</u>	<u>Percent of Unit</u>
Holcomb Oil and Gas, Inc.	1205.4	36.3
Harry Demick	154.3 4.6	
Thumer Heat Treating, Corp.	768.8 23.1	
Riviera Drig. & Expl. Co.	1052.8 31.7	
Scott Thumer	50.0 1.5	
Doris Thumer	50.0 1.5	
Albin & Jean Rominiecki	<u>43.0 1.3</u>	
Total	3324.3	100.0

Riviera also submitted an inventory dated December 5, 1997, giving the breakdown by ownership percentages, but not giving the breakdown of ownership by acreage owned in the various tracts. Riviera places the parties in two groups, dependant on whether they had signed the November 14, 1997, Designation of Successor Unit Operator. The signatory parties, Riviera, Scott P. Thumer, Doris P. Thumer, and Scott Thumer, Trustee for Thumer Heating Corporation Employees Profit Sharing Plan, were deemed by Riviera to hold 2,020 of the 3,284.99 acres in the unit, or 61.5 percent of the total acreage in the unit. Using the BLM calculations, the same parties held 1,921.6 of 3,324.3 acres or 57.8 percent of the acreage.

<sup>3/</sup> There is a 39.3 acre discrepancy between the total acreage used in the BLM calculations and the acreage set out in the Unit Agreement, but the end result is unchanged. The BLM calculations give the acreage in Tracts 8, 9, 10, and 19 as 360.7 acres, 900.2 acres, 957 acres, and 159.5 acres, respectively. On the document showing a total of 3,284.99 acres in the Unit area, the acreage of the tracts is as follows: Tract 8 — 360.0 acres (0.7 acres less); Tract 9 — 896.0 acres (4.2 acres less); Tract 10 — 922.1 acres (34.9 acres less); and Tract 19 — 159.5 acres (0.5 acres more).

Although we are concerned by the discrepancy in the BLM acreage calculation, we have no problem with the end result of its analysis. No single entity named as a working interest holder owns more than 50 percent of the working interest acreage. When Riviera submitted its Designation of Successor Unit Operator, the document was executed by four working interest holders whose combined acreage exceeded 50 percent of the unit acreage, and the appellants have submitted nothing that would lead us to believe that, together, these four parties hold less than 50 percent of the acreage subject to the Unit Agreement. Thus, the document effecting the change in Unit Operator is not contrary to sections 5 and 6 of the Unit Agreement. On the other hand, the combined holdings of those expressing an interest in having Holcomb as the Unit Operator clearly represent less than one-half of the acreage in the Unit Area.

Holcomb argues that the majority of the owners do not endorse Riviera and desire Holcomb become the successor Unit Operator. It cites a 1981 letter describing the previous designation of a successor Unit Operator, stating that the documents were "executed by more than the required 75% of the committed working interest owners," and suggests that a change is effected by the number of interest owners voting.<sup>4/</sup> We find this argument to be without merit. The key to the selection process is not the number of working interest owners but the acreage within the unit held by each of those interest holders. This requirement is specifically detailed in the Unit Agreement: "[T]he owners of the working interests in the participating area or areas according to their respective acreage interest in such participating area or areas, or, until a participating area shall have been established, the owners of the working interests according to their respective acreage interests in all unitized land." (Unit Agreement at 4, § 6.) BLM properly looked to the ownership acreage to determine that Riviera had been named to succeed Maralex as the Unit Operator by those interest holders holding a majority of the acreage in the Unit.

Holcomb also contends that for Riviera to assume the duties of the Unit Operator it must obtain the consent of another party, citing the Unit Agreement language in section 6 providing that "if a majority but less than 75 percent of the working interests qualified to vote are owned by one party to this agreement, a concurring vote of one or more additional working interest owners shall be required to select a new operator." As noted above, BLM's inventory shows that seven parties held working interests in the Unit in May 1998. The Designation of Successor Unit Operator naming Riviera as Maralex's replacement was executed by four of the working interest holders who collectively hold 57.8 percent of the working interest acreage (BLM calculation). These working interest holders are Thumer Heat Treating, Corporation – 23.1 percent; Riviera – 31.7 percent; Scott Thumer – 1.5 percent; and Doris Thumer – 1.5 percent of the Unit acreage. No single owner held more than 50 percent of the total

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<sup>4/</sup> That letter was a terse cover letter conveying documents to the U.S. Geological Survey and there is no indication that it was intended to address a change in the requirements for succession.

acreage. When Riviera submitted its inventory report it did not detail the acreage held by each interest holder signing the successor designation document, showing only that the combined acreage exceeded 50 percent of the Unit. On its face, the provision that if more than 50 percent but less than 75 percent of the working interest acreage is owned by one party, a concurring vote of at least one additional working interest owner is required to select a new operator, is not applicable. None of the individual interest owners holds in excess of 50 percent. However, the interpretation of this article is complicated by the fact that one party executed the Designation of Successor Unit Operator on behalf of all four of the above listed interest holders. Holcomb asserts that because all four entities are controlled by the same individual, they should be considered as one entity holding more than 50 percent, but less than 75 percent.

No matter how unpleasant it may be to the other working interest owners, there is nothing in the record that would allow us to conclude that any of the unit interest owners owns more than 50 percent of the acreage in the Unit. In the absence of a provision in the Unit Agreement instructing on how to determine "working interest owners" other than by looking at "the respective acreage interests," or language equating control to ownership, we must look to the obvious — in whose name is the working interest lodged. The fact that Scott Thurner executed the Designation of Successor Unit Operator in various capacities for the various interest owners does not, in and of itself, demonstrate that he owns those entities (other than the 1.5 percent of the acreage in his name). Holcomb has not shown that BLM's determination is incorrect.

Both Holcomb and Maralex assert that Riviera has acted in a manner which makes it unfit to be the Unit Operator. That issue was not directly addressed in the SDR Decision, which states:

Riviera maintains a sufficient percentage of the working interest (by acreage) to preclude removal \* \* \*. However, the reasons stated in your SDR [Decision] for BLM denial of Riviera as a unit operator are serious assertions and a critical concern. The Colorado State Office would be happy to set up and moderate a meeting with all unit interest holders to not only discuss the situation, but seek resolutions beneficial to all involved.

The allegations made in your SDR request concerning a fraudulent Resignation of Unit Operator filing submitted by Riviera (letter dated November 14, 1997, are not addressed in this SDR [Decision]. The referenced document has no bearing on this SDR [Decision]. However, the nature of this allegation may warrant further investigation. Information contained in your requests for SDR and a Petition for Stay will be forwarded to our Solicitors and Law Enforcement offices for further consideration.

(SDR Decision at 3.) We agree with that conclusion. 5/ There is no allegation that the document designating the new Unit Operator is fraudulent, and there is no evidence that BLM has failed to render a proper determination concerning the qualifications of a Unit Operator or shown a disregard for its duties. The SDR Decision stated: "[A] duly executed Designation of Successor Unit Operator can serve as the only document necessary to change a unit operator. There is no need to secure a corresponding resignation or removal of a unit operator." (SDR Decision at 2.) 6/

We find the SDR Decision well-reasoned, and commend the decision-maker for setting out the method and procedure implementing the decision in a manner that logically ties the action taken to applicable Unit Agreement provisions, governing rules, and regulations. See SDR Decision at 3.

Accordingly, 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.

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R.W. Mullen  
Administrative Judge

I concur.

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Bruce R. Harris  
Deputy Chief Administrative Judge

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5/ We need not consider what might be proper sanctions for a fraudulently altered document submitted to BLM. The sanctions could well be much more severe than the one being proposed by Holcomb and Maralex. The issue is not before us. The State Director concluded that the authenticity of the "Resignation of Unit Operator" document did not affect Unit Operator succession.

6/ BLM noted that it prefers to know the departing Unit Operator's position on the change of unit operator. In this regard, BLM also considered a document reflecting Maralex's resignation submitted by Holcomb as evidence that Maralex did not desire to continue as Unit Operator.

