



BLACK RESOURCES, INC.

180 IBLA 259

Decided December 16, 2010



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

BLACK RESOURCES, INC.

IBLA 2010-96

Decided December 16, 2010

Appeal from a decision of the State Director, Colorado State Office, Bureau of Land Management, affirming, on State Director Review, a decision of the Deputy State Director, denying requests for an extension of time to drill the initial obligation well for the Northeast Cortez Unit and declaring prior approval of the Unit Agreement invalid *ab initio*. SDR CO-10-01 (COC-071913X).

Vacated and remanded.

1. Oil and Gas Leases: Diligence--Oil and Gas Leases: Unit and Cooperative Agreements

A BLM State Director Review decision affirming a BLM decision denying requests for an extension of time to drill the initial obligation well and declaring prior approval of the unit agreement invalid *ab initio* will be vacated and the case remanded where the unit operator has exercised due care and diligence, as required by the unit agreement, in timely commencing drilling operations on the initial obligation well and seeking timely extensions, upon encountering mechanical problems, for commencing operations on another unit well. When the unit operator has taken the steps necessary to commence operations on an initial obligation well, as approved by BLM, by posting the required bond, obtaining an application for permit to drill, making arrangements for a contractor to begin drilling by the extended deadline, and submitting to the U.S. Forest Service an application for approval of a Surface Use Plan, and requested revisions thereto, the unit operator will be deemed to have exercised due care and diligence. The unit operator will not be deemed to have failed to exercise due care and diligence when the U.S. Forest Service has not approved a Surface Use Plan before the extended deadline for commencing operations,

when the record demonstrates that the unit operator sought to comply with a series of requests for additional information and revisions to the plan.

APPEARANCES: Thomas J. Kimmell, Esq., Denver, Colorado, for Black Resources, Inc.; Arthur R. Kleven, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Black Resources, Inc. (Black Resources), has appealed from a January 19, 2010, decision of the Colorado State Office (CSO), Bureau of Land Management (BLM), affirming, on State Director Review (SDR), an October 7, 2009, decision of the Deputy State Director (DSD), Energy, Lands and Minerals, BLM. In his decision, the DSD denied requests by Black Resources for an extension of time to drill the initial obligation well (Black-State 7H-03-37-14) for the Northeast Cortez Unit (NE Cortez Unit), of which Black Resources was and is the Unit Operator. The DSD also declared the prior approval of the NE Cortez Unit Agreement (Unit Agreement) invalid *ab initio*.<sup>1</sup> In affirming the DSD decision, the CSO held specifically that Black Resources had failed to exercise “due care and diligence” in meeting its obligations under Section 25<sup>2</sup> of the Unit Agreement.

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<sup>1</sup> Although the Jan. 19, 2010, decision purports to be the response to a request for SDR pursuant to 43 C.F.R. § 3165.3(c), it was signed on behalf of Gregory P. Shoop, the DSD, Energy, Lands and Minerals. The Oct. 7, 2009, decision being reviewed was also issued by the DSD, Energy, Lands and Minerals, who at that time was Lynn E. Rust. Despite the difference in personnel, the State Director appears to have delegated his review authority to the same official whose decision was being reviewed.

<sup>2</sup> Section 25 of the Unit Agreement provides:

25. UNAVOIDABLE DELAY. All obligations under this agreement requiring the Unit Operator to commence or continue drilling, or to operate on, or produce unitized substances from any of the lands covered by this agreement, shall be suspended while the Unit Operator, despite the exercise of due care and diligence, is prevented from complying with such obligations, in whole or in part, by strikes, acts of God, Federal, State, or municipal law or agencies, unavoidable accidents, uncontrollable delays in transportation, inability to obtain necessary materials or equipment in the open market, or other matters beyond the reasonable control of the Unit Operator whether similar to matters herein enumerated or not.

As explained below, we conclude that the record does not support the finding in the DSD and CSO decisions that Black Resources failed to exercise due care and diligence in meeting its obligations under the Unit Agreement. Based upon the facts, as best we can understand them, given the record submitted by BLM, we vacate the CSO's decision affirming the DSD's denial of Black Resources' request for an extension of time to drill the initial obligation well and declaring the prior approval of the Unit Agreement invalid *ab initio*, and remand the matter to BLM for further action.

### I. BACKGROUND

BLM approved the Unit Agreement for the NE Cortez Unit on September 27, 2007. The Unit consists of 34,023.30 acres in Montezuma County, Colorado, and includes 12,578.23 acres of Federal land (36.97%), 18,518.31 acres of state land (54.43%), and 2,926.76 acres of private land (8.60%). In accordance with Section 9 of the Unit Agreement, Black Resources proposed, on September 30, 2007, to reenter three existing wells: (1) the Black-State #1-9 well, in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of sec. 9, T. 38 N., R. 14 W., New Mexico Principal Meridian (NMPM), Montezuma County, Colorado; (2) the Federal #1-26 well in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of sec. 26, T. 38 N., R. 15 W., NMPM; and (3) the Mary Akin #3 well (later redesignated as the 7H-03-37-14 well) in the SW $\frac{1}{4}$ NE $\frac{1}{4}$  of sec. 3, T. 37 N., R. 14 W., NMPM. Documents in the record indicate that all three drill sites are on land managed by the Forest Service, U.S. Department of Agriculture (USFS), from which Black Resources must have an approved Surface Use Plan (SUP) for road use and wellsite development, and that the mineral rights are owned by the State of Colorado and subject to permitting by the Colorado Oil and Gas Conservation Commission (COGCC).

On March 6, 2008, Black Resources requested a 6-month extension of time to commence operations on the initial obligation well, due to severe winter conditions and anticipated extended road closures within the San Juan National Forest where the NE Cortez Unit is situated. By letter dated March 18, 2008, the CSO granted Black Resources' request, effective to September 27, 2008.

Black Resources requested a further 1-year extension by letter dated August 12, 2008, stating, *inter alia*, it was awaiting site and road use permits from the USFS; the Black-State 9-11-38-14 was being permitted by the COGCC "as a new drill"; an extension was needed "to allow sufficient lead time to contract for a drilling rig after the issu[ance] of the necessary U.S. Forest Service permits"; and the area was "subject to road closures from November until May." Aug. 12, 2008, Letter from Black Resources to CSO. Black Resources asserted that there was unavoidable delay under Section 25 of the Unit Agreement due to "unknown timing of the pending authorization approvals and the unavailability of drilling

rigs.” *Id.* The CSO denied the extension in an August 27, 2008, letter. *See* SDR Decision at 3. By letter dated September 5, 2008, Black Resources informed the CSO that the Black-State 9-11-38-14 had been permitted by the COGCC. In a September 8, 2008, letter, Black Resources renewed its request for an extension of time to drill the unit obligation well. As stated in the SDR Decision: “There is no documentation in the CSO NE Cortez unit file of a response from the CSO to this extension request or proposed change in unit obligation well.” *Id.* at 3.

The record includes a September 24, 2008, letter from Black Resources addressed to Jamie Sellar-Baker in the Dolores Public Lands Office (DPLO) as the “Associate District Ranger.”<sup>3</sup> It mentions an environmental assessment (EA) that had

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<sup>3</sup> The CSO refers to DPLO as a “Service First organization in Dolores, Colorado.” SDR Decision at 8. The letterhead for DPLO includes the address of the San Juan National Forest, Dolores Ranger District, USFS, *and* the San Juan Center, Dolores Field Office, BLM. According to BLM, “the Service First initiative encourages the co-location of BLM and FS field offices to improve public service by streamlining administrative costs and developing common business practices.” BLM Answer at 3-4.

We note that the Federal Onshore Oil and Gas Leasing Reform Act of 1987 provides for the complementary regulatory authority by the Secretary of Agriculture, acting through USFS, and the Secretary of the Interior, acting through BLM, over oil and gas exploration and development on National Forest lands. *See* 30 U.S.C. § 226(g)(1) (2006). On National Forest lands, the USFS has ultimate authority to regulate all surface-disturbing activities. *See* 30 U.S.C. § 226 (g); 43 C.F.R. § 3162.3-1; 36 C.F.R. §§ 228.107(b)(2) and 228.108(a) and (f). In a series of enactments, Congress has authorized the Secretaries to conduct a pilot test of joint permitting and leasing programs. Pub. L. 106-291, § 330, 114 Stat. 996 (2000); *as amended*, Pub. L. 109-54, § 428, 119 Stat. 555 (2005); *as amended*, Pub. L. 118-8, § 418, 123 Stat. 747 (2009). The “Service First” program in the San Juan Basin implements this authority.

Conditions for approval of oil and gas operations are set forth in Onshore Oil and Gas Order No. 1, 72 Fed. Reg. 10328 (Mar. 7, 2007). Part XIII of that Order provides that the USFS’ regulations at 36 C.F.R. Part 251 govern appeals by an operator of written USFS decisions related to use authorizations on National Forest lands. The Order states that “[i]ncorporation of a [US]FS approved Surface Use Plan of Operations into the approval of an APD or Master Development Plan is not subject to protest to the BLM or appeal to the Interior Board of Land Appeals.” 72 Fed. Reg. at 10338; *see also San Juan Citizens Alliance v. Stiles*, 2010 WL 1780816 (D. Colo.) (Mark Stiles sued in his official capacity as San Juan National Forest Supervisor and BLM Center Manager of the San Juan Public Lands Center). Clearly, the appeal

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been submitted to the USFS in 1999 and the issuance of a finding of no significant impact (FONSI), presumably prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006). Those documents are not part of the record. Black Resources stated, based upon the documentation, that it intended “to access and commence activity upon the existing well sites this autumn,” and asked to be advised “if there are any further requirements or alterations needed to this document or other requirements such as the anticipated Special Use Road permit and the thirteen point Surface Use Plan as now envisioned by you or your staff.” Sept. 24, 2008, Letter from Black Resources to Sellar-Baker.

In a letter dated October 31, 2008, Black Resources informed the CSO that, although the Mary Akin #3 well had been “rigged up” on September 24, 2008, it had been plugged on October 26, 2008, after loss of well bore integrity. The CSO did not consider the Mary Akin #3 to have qualified as a unit obligation well, but deemed the operations at the Mary Akin #3 well to have met the September 27, 2008, drilling deadline. BLM advised Black Resources to commence drilling the next unit obligation well by April 26, 2009. Oct. 7, 2008, Letter from CSO to Black Resources at 2.

Black Resources requested an extension of time to July 1, 2009, stating that the drill sites for the Black-State 9-11-38-14 and a new well, to be permitted “away from the plugged well bore at the Mary Akin #3 well site,” are “within the San Juan National Forest at about 8,000' elevation and are subject to winter road closures until May-June.” Oct. 31, 2008, Letter from Black Resources to CSO. The SDR Decision reports that the CSO file for the NE Cortez Unit does not include a response to that request. SDR Decision at 4.

Sellar-Baker sent Black Resources a December 17, 2008, letter, signed as Associate Field Manager of the DPLO, discussing the spill of drilling fluids and hydrocarbons at the Mary Akin #3 wellsite and the need to provide soil samples as had been agreed to by Black Resources. The letter states in part:

Section III–Responsibilities of the Holder, parts D, I, J and M of your Special Use Permit (#DOL 426002) as well as CFR 3162.5-1 (b and c) require you to prevent any degradation to the well site and control any pollutants and/or hazards. This responsibility has not been met. Therefore, in order to ensure that Black Resources fulfills their agreement with the US Forest Service we require that the soil sampling

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<sup>3</sup> (...continued)

procedures can be exercised effectively only if the official identifies the agency for which their actions are taken.

results are submitted to Tom Rice, Natural Resource Specialist,[Oil and Gas Program, DPLO,] at the address above within 10 days of receipt of this letter.

Dec. 17, 2008, Letter from Sellar-Baker to Black Resources at 1. There is no “Special Use Permit” in the record and it is unclear whether Sellar-Baker was referring to an approved SUP held by Black Resources for the Mary Akin #3 well or some other type of authorization. The third sentence indicates that she represented the USFS, but the regulation she referred to was promulgated by BLM. Moreover, she went on to threaten not only the “forfeiture of [Black Resources’] Special Use Permits for this project and subsequent projects on National Forest System lands,” actions which could be taken only by the Forest Service, but stated that Black Resources “may also be subject to an Incident of Non-Compliance punishable by an initial fine of \$250 and an additional civil penalty of up to \$500 per day (CFR 3163.1(a)(2) and 3163.2(a)).” *Id.*

By letter dated February 16, 2009, Black Resources requested an extension “until summer 2009.” The Chief, Branch of Fluid Minerals, BLM, responded in a letter dated February 25, 2009, reminding Black Resources that its previous request for a 1-year extension had been denied and that it was “obligated to commence the unit obligation well by September 27, 2008.” Feb. 25, 2009, Letter from Chief, Branch of Fluid Minerals, to Black Resources at 1. He acknowledged that Black Resources had informed BLM that drilling operations had commenced on the Mary Akin #3 well prior to that date and that the well had been plugged on October 26, 2008. He required Black Resources to “furnish . . . the complete drilling record for the well, including a copy of the completion report and all tests and downhole surveys and logs that were run.” *Id.*

By letter to BLM dated March 23, 2009, Black Resources requested an extension of time and explained, in response to BLM’s February 25, 2009, request for information, that “operations to re-enter the Mary Akin #3 well were commenced timely on September 24, 2008, and continued diligently until October 21, 2008, when the sidetrack that was drilled to 3,906’ collapsed during drilling operations.” Mar. 23, 2009, Letter from Black Resources to BLM at 1. Black Resources asserted that the collapse made further drilling operations impracticable under Section 9 of the Unit Agreement and that Section 25 applied, “with the onset of inclement weather and road closures.” *Id.* Black Resources stated that a new well, the Black-State 7H-03-37-14, was to be drilled 56 feet from the plugged well, and that an application for a permit to drill (APD) had been submitted to the COGCC. Black Resources further explained that Tracker Resources Development, LLC, had been appointed its agent with respect to the Mary Akin #3 well, but would “not be involved in subsequent operations.” *Id.* Black Resources requested an extension of

time until at least the third quarter of 2009 to obtain road use and well site permits from COGCC and the USFS. In addition, Black Resources informed BLM that the COGCC had approved a permit for a new well to be drilled 117 feet from the plugged Black-State 9-11-38-14 well, and that “[a]nother obligation re-entry well” was being “renamed from the plugged 1-9 State-Tully well.” *Id.* at 2.

In a letter dated March 18, 2009, Sellar-Baker, again signing as the Associate Field Manager, DPLO, acknowledged that Black Resources had contacted Tom Rice, Natural Resource Specialist, DPLO, BLM, to discuss soil sampling, and that sampling had not been completed by Black Resources’ contractor due to scheduling problems and “winter weather barring access to the well site.” Mar. 18, 2009, Letter from Sellar-Baker to Black Resources at 1. She repeated the requirement to provide soil samples to Rice, but modified the date to be “within 10 days of accessing the Mary Aiken [sic] site.” *Id.* She also required Black Resources to submit to the DPLO both a “revised 13 point [SUP] for any new proposed drilling activity at the Mary Akin #3 site” and one for the Black State 9-11-38-14 wellsite, both of which were to be “approved by this office.” *Id.* at 2. In addition, Sellar-Baker stated:

Because the NEPA documentation for the pipeline and well pad is outdated, this office must review the document and any inadequacies must be addressed. The original decision document (*Decision Notice/Finding of No Significant Impact, Northeast Cortez Pipeline Project*; 2001) approves only the construction of a compressor station and 7.5 miles of high pressure line, as well as the construction of a gas gathering pipeline. Because it does not address the well pad[,] additional analysis may be required. This office agrees to review the existing NEPA document and provide feedback to you by within 30 days of your written request. It will be Black Resources['] responsibility to address the comments. We recommend that you enlist the help of a third party NEPA contractor during your review of our comments.

*Id.* Sellar-Baker’s statement about adequacy and her promise to review “the existing NEPA document and provide feedback” appears to have been made on behalf of the USFS. However, she next stated: “The Bureau of Land Management recognizes the existing lease rights and responsibilities you already have. However, the BLM requires that all operators follow prudent operating procedures when exercising those rights, including those outlined in this letter.” *Id.*

By letter dated April 2, 2009, the CSO granted an extension to July 31, 2009, to commence drilling the Black-State 7H-03-37-14 well. The CSO stated that, although the Mary Akin #3 well had met the deadline for drilling, “it did not reach the required depth necessary to qualify as a unit obligation well.” Apr. 2, 2009,

Letter from CSO to Black Resources at 1. The CSO stated further that the Black-State 7H-03-37-14 well “will qualify as the initial obligation well if it reaches the required depth of 5,700 feet or 200 feet below the top of the Gothic Shale, whichever is the lesser depth,” and would replace the initial obligation well. *Id.* The July 31, 2009, deadline for drilling the initial obligation well for the unit was later extended to September 26, 2009.

In a letter dated May 22, 2009, Sellar-Baker, signing as the Associate Field Manager, DPLO, acknowledged that hydrocarbon spills had been removed “shortly after demobilization of the drilling rig,” as confirmed by a field inspection, but “we are not in the receipt of the results of the soil analysis.” May 22, 2009, Letter from Sellar-Baker to Black Resources at 1. Again citing “Section III–Responsibilities of the Holder, parts D, I, J and M of your Special Use Permit (#DOL 426002) as well as CFR 3162.5-1 (b and c),” she stated that “to ensure that Black Resources fulfills their agreement with the US Forest Service we require that the soil sampling results are submitted to Tom Rice, Natural Resource Specialist, at the address above within 10 days of receipt of this letter.” *Id.* She again threatened “forfeiture of your Special Use Permits for this project and subsequent projects on National Forest System lands,” a possible “Incident of Non-Compliance punishable by an initial fine of \$250,” as well as “an additional civil penalty of up to \$500 per day (CFR 3163.1(a)(2) and 3163.2(a)).” *Id.* at 1-2.

By letter dated May 27, 2009, Steven K. Beverlin, Field Manager of the DPLO, acknowledged receiving SUPs for the Black-State 7H-03-37-14 well, but noted that two different plans had been provided and described a number of changes that needed to be made. *See* Black Resources’ Brief on Appeal (Brief), Ex. 1.<sup>4</sup> He informed Black Resources that “the NEPA analysis is outdated and incomplete,” and that it was the company’s “responsibility to have a third party contractor complete the required NEPA [analysis] in coordination with this office.” May 27, 2009, Letter from Beverlin to Black Resources at 2. He also proposed that the parties meet.

On June 15, 2009, Black Resources submitted a revised SUP for the Black-State 7H-03-37-14 well and met with BLM and COGCC personnel on June 23, 2009. *See* Brief, Ex. 2.

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<sup>4</sup> The record includes SUPs for the Black-State 7H-03-37-14 and 4H-9-3-14 wells and notices of staking for the Black-State 14H-18-38-14, the Black-State 1H-20-38-14, and the Black-State 4H-32-38-14. All are date-stamped as received by BLM in Durango on Apr. 7, 2009. There is no cover letter or other document showing how they were transmitted.

In a July 14, 2009, e-mail, Black Resources referred to a meeting of the various parties on June 23, 2009, stating that it was unclear “when the permits will be approved,” and that there was “insufficient lead time to properly coordinate drilling activities before the previously required obligation date of July 31, 2009.” July 14, 2009, e-mail from Black Resources. Black Resources claimed that there was unavoidable delay “as defined in paragraph 25 of the Unit Agreement” and stated that it would be submitting a formal request for an extension of time. That request was made by letter to the CSO dated July 23, 2009. Black Resources added that an APD for the Black-State 9-11-38-14 had been issued “with road use bond in place,” but that a road use and surface use permit “has not been issued from the US Forest Service.” July 23, 2009, Letter from Black Resources to CSO at 1. Black Resources stated that an “update” of the EA was “in process[,] as required by the US Forest Service.” *Id.* Black Resources requested an extension until the second quarter of 2010 “to allow for passing of forthcoming winter weather and road closures, compliance with additional bonding requirements, NEPA updates, and APD approvals.” *Id.*

By letter dated July 31, 2009, Sellar-Baker (now as Acting Chief, Branch of Fluid Minerals, CSO) acknowledged Black Resources’ request for an extension. She noted that a telephone conference call had occurred on July 28, 2009, and provided a lengthy description of the history of the NE Cortez Unit and the extensions which had been granted. After listing the reasons provided in Black Resources’ request, she stated that the CSO,

in consultation with the DPLO and the SJPLO [San Juan Public Lands Office] staff, believe[s] that Black Resources has been given sufficient time to address all these issues in the 22 months since the Unit Agreement was approved on September 27, 2007, and that the listed and discussed deficiencies are in reasonable control of Black Resources and can be taken care of in the allotted time frame if diligently addressed by Black Resources.

July 31, 2009, Letter from Sellar-Baker to Black Resources at 2-3. She allowed 30 days from receipt of the July 31 letter to commence drilling obligations for the initial obligation well, *i.e.*, the Black-State 7H-03-37-14. She also required Black Resources to provide to the DPLO four items regarding deficiencies in the SUP for the Black State 7H-03-37-14 well that had been identified in her May 22, 2009, letter and were deemed “necessary to satisfactorily complete” the SUP. *Id.* at 3. In addition, she stated that the DPLO would “be providing Black Resources with further guidance in the near future regarding the remaining BLM and USFS requirements that need to be completed for surface and other approvals for the other two obligation wells.” *Id.* The letter was reissued on August 20, 2009, by

Ken McMurrough, signing as Acting Chief, Branch of Fluid Minerals, CSO, and received by Black Resources August 26, 2009, thereby making the deadline September 26, 2009.

Black Resources submitted another SUP dated August 26, 2009, which was reviewed by Rice and responded to in a September 8, 2009, letter by Sellar-Baker as Associate Field Manager of the DPLO. *See* Brief, Exs. 3, 4. She acknowledged receipt of the SUP and listed 3 general points and 10 specific items as “issues that must be resolved . . . prior to the commencement of drilling of the 7H-03-37-14” well by the September 26, 2009, deadline.<sup>5</sup> Sept. 8, 2009, Letter from Sellar-Baker to Black Resources at 1. Black Resources submitted another SUP dated September 17, 2009, which it claims “fully satisfied and complied with the revisions to the SUP previously identified by the BLM.” Brief at 3, *see* Ex. 5. Apparently receiving no response, Black Resources sent a letter dated September 22, 2009, to the CSO, explaining that it had met the COGCC’s requirement to obtain a \$60,000.00 blanket bond to replace the individual bonds for each proposed well, and that it had submitted a revised SUP to the DPLO and the COGCC. Black Resources also stated that, due to the uncertainty of timing for APD approval, no drilling contract could be secured, and that the drilling rig which had been available had been committed to other projects and deployed to Utah. It asked for “a reasonable extension of time . . . to commence a unit obligation well.” Sept. 22, 2009, Letter from Black Resources to CSO.

After receiving the September 22, 2009, letter from Sellar-Baker, Black Resources submitted another revised SUP, which it contends “satisfies all the previous suggestions made by the BLM.” Brief at 3, *see* Ex. 8. Black Resources also sent its September 26, 2009, request for an extension of time, addressing it to both the CSO and the San Juan National Forest at the address for the DPLO. *See* Brief, Ex. 9. Black Resources asserted, *inter alia*, that the situation constituted unavoidable delay under Section 25 of the Unit Agreement. Black Resources stated that it had received the

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<sup>5</sup> Of particular note, she stated that Black Resources was “limited to utilizing no more than **two acres** on the existing National Forest footprint,” but had sent a “Typical Rig Layout” measuring 2.74 acres, which was “beyond the scope of the Forest Service’s Special Use Authorization (12/31/2012 expiration date), as well as, our earlier NEPA decision.” Sept. 8, 2009, Letter from Sellar-Baker to Black Resources at 1. Sellar-Baker’s discussion shows not only that she was acting on behalf of the USFS, but also that Black Resources already had some form of authorization that is not in the record. The statements were repeated in a Sept. 22, 2009, letter Sellar-Baker sent to Black Resources acknowledging receipt of a revised SUP that “clarified and corrected some issues brought to your attention in a letter sent to you on 9/8/09.” Sept. 22, 2009, Letter from Sellar-Baker to Black Resources at 1.

September 22, 2009, letter from Sellar-Baker, as Associate Field Manager, and Tom Rice, identified as the Natural Resource Specialist–Oil and Gas Program, DPLO, that itemized several concerns with the SUP, and further that a revised SUP had been “emailed and faxed back on September 24 [that] thoroughly addressed and should have eliminated the issues.” Sept. 26, 2009, Letter from Black Resources to Sellar-Baker and Rice at 1. Black Resources stated that it believed “[a]n approved SUP from the DPLO” was “a prerequisite for approval of the pending APD at the COGCC,” but that it had “not received written or verbal approval from the DPLO.” *Id.* at 1-2. The letter describes a further attempt to contact Sellar-Baker, who was out of the office until October 1, and a conversation with Rice. Black Resources explained that “Colorado law requires a minimum 48 hours prior notice for ‘1 call’ to set anchors and the APD conditions of approval require a 48 hour notice of spud to the COGCC field inspector.” *Id.* at 2. Black Resources asserted that there was continued unavoidable delay because of the various legal requirements, and because it had not received SUP approval from the DPLO in time to give the required notices. In addition, Black Resources noted that it had obtained a drilling contractor who had notified Rice that it was on “standby for preparation of the existing well site for the rig set up.” *Id.*

In its October 7, 2009, decision, the DSD denied Black Resources’ September 22 and 26, 2009, requests for an extension of time to commence drilling the initial unit obligation well. The DSD held that Black Resources had “failed to drill any of the three unit obligation wells on time and diligently, and as a result, the unit agreement approval is declared invalid *ab initio*.” DSD Decision at 3. The DSD stated that such failure on Black Resources’ part was contrary to the public interest requirement of 43 C.F.R. § 3183.4(b), which requires a unit operator to commence “actual drilling operations and thereafter diligently prosecute[] such operations in accordance with the terms of said agreement.” DSD Decision at 1, 3.

As noted, in its January 19, 2010, decision on SDR, the CSO affirmed the DSD’s decision. The CSO stated that Black Resources had not been diligent in its efforts to secure an SUP from the USFS, and had not “focused on meeting the obligations of the NE Cortez unit.” SDR Decision at 9.<sup>6</sup> The CSO stated that changes

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<sup>6</sup> The SDR decision is 11 pages, 6 of which comprise a section entitled “Background.” Upon review of the record, it is clear that much, if not most, of the history described is not supported by the documents submitted by the CSO. BLM’s “Answer to Black Resource’s Statement of Reasons” (BLM Answer) received on Mar. 25, 2010, provides a “Background” section which “incorporates by reference the background discussion contained in BLM’s SDR Decision” and cites that Decision. Because documents referred to in the SDR Decision were not in the record sent to the Board, it is unclear  
(continued...)

to the designated obligation wells “without corresponding BLM approval . . . only served to confuse all involved parties, including Black Resources.” *Id.* The CSO explained: “Sufficient extensions of time addition were granted by the CSO . . . to allow Black Resources the opportunity to focus, define, and meet the NE Cortez unit obligations,” but “no dependable and timely action was evident from Black Resources.” *Id.* The CSO concluded that Black Resources failed to meet its obligations under the Unit Agreement “in the requisite time.” *Id.*

## II. THE MATTER ON APPEAL

In its Notice of Appeal/Statement of Reasons for Appeal (NOA/SOR), Black Resources argues that BLM’s decision is arbitrary and capricious and contrary to applicable law. Black Resources states that it was prevented from drilling the initial unit well by September 26, 2009, because of the “unreasonable failure” of the USFS, “acting in conjunction with [BLM] to timely issue a surface use permit and because of events outside of the reasonable control of Black Resources.” NOA/SOR at 1. According to Black Resources, BLM “acted erroneously, arbitrarily, and capriciously by denying the request of Black Resources for an additional extension of the drilling deadline to allow Black Resources to obtain the required surface use permit.” *Id.*

In its subsequently filed Brief, Black Resources repeats the claims made in its NOA/SOR, but also details its attempts to obtain an approved SUP, as documented by attached exhibits. It asserts that it has made a “substantial investment in the leases and unit,” and has “prepar[ed] and submitt[ed] no less than six (6) Surface Use Plans.” Brief at 3. It argues that the “changing requirements” for the SUP, as imposed by BLM, violated its rights under the due process clause and applicable statutes and regulations. *Id.* It requests that the Board reverse the SDR Decision;

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<sup>6</sup> (...continued)

what documents were reviewed when preparing the Answer. The Board has frequently discussed BLM’s responsibility to provide the complete record upon which it made its decision. *See Silverado Nevada, Inc.*, 152 IBLA 313, 322-23 (2000), and cases cited; *Mobil Oil Exploration and Producing Southeast, Inc.*, 90 IBLA 173, 177 (1986), *appeal dismissed*, Civ. No. 38587-L (Cl. Ct. Nov. 5, 1991). As a general rule, the Board will set aside and remand or vacate and remand a BLM decision if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for the decision. *Great Western Onshore, Inc.*, 133 IBLA 386, 396-97 (1995); *Shell Offshore, Inc.*, 113 IBLA 226, 232-33, 97 I.D. 74, 77-78 (1990). Although it is unlikely that the documents submitted by the CSO represent the complete dealings between Black Resources and various components of BLM, including by telephone and e-mail, we have determined that the record is sufficient to review and address the DSD and CSO decisions.

rule that the NE Cortez Unit and underlying leases be deemed still in effect; and grant it a “mutually agreeable extension” to obtain an approved SUP and commence drilling. *Id.* Black Resources also requests a hearing. *See* 43 C.F.R. § 4.415.

In its Answer to Black Resources’ Brief, BLM claims that Black Resources is

mistaken as to the respective roles of BLM and the United States Forest Service (FS) in approving the surface use of lands within the National Forest System for oil and gas development, and as to the Board’s jurisdiction to consider appeals of decisions of the FS. To be clear, BLM *does not* authorize use of National Forest lands for oil and gas development. Throughout its Brief, Appellant continually ascribes to BLM the authority to set forth the requirements for and to approve the Surface Use Plan (SUP) required before Appellant could commence surface disturbing operations on National Forest surface.

Answer to Brief at 3.

BLM then states that Black Resources’ “confusion may have stemmed from the need to obtain surface use authorization from the FS through a BLM/FS combined ‘Service First’ office,” *i.e.*, the DPLO in Dolores, Colorado. *Id.*; *see* DSR Decision at 8. Involvement of the DPLO does not, BLM asserts, “imbue BLM with the authority to prescribe requirements for an SUP or to otherwise approve uses of lands within a National Forest.” *Id.* at 4. In fact, BLM states that the SDR Decision made clear that “[s]ince all wells that were considered as NE Cortez unit obligation wells are on FS surface and state minerals, the BLM plays no role in the permitting process”; that “[t]he operating regulations at 43 CFR 3160, as they pertain to lease operations, are under the responsibility of the BLM and are not applicable in this case”; and that “[t]he requirements for a SUP and road use permit are found under the regulations at 36 CFR Chapter II, which are administered by the FS.” Answer to Brief at 4 (quoting SDR Decision at 8). BLM claims that Black Resources “misunderstands the respective roles of the agencies” and improperly “seeks the Board to review the FS’s actions relating to the requirements for approval of the necessary SUP.” *Id.* at 5-6.

### III. ANALYSIS

The Department has long recognized that a unit agreement is a contract between private parties, who are the lessees holding oil and gas operating rights and other owners of interests in the oil and gas under the tracts committed to the unit agreement. *Shannon Oil Co.*, 62 I.D. 252, 255 (1955). When Federal land is included, the Secretary has authority to certify that unitization is “necessary or advisable in the public interest” and the Department has adopted a model form for a

unit agreement. 30 U.S.C. § 226(m) (2006); *see* 43 C.F.R. §§ 3183.4(a), 3186.1. Although an approved unit agreement has been described as a contract between the United States and the participating parties for joint development and operation of a targeted oil and gas field, BLM has broad authority under statutes and regulations to assure that a plan protects the rights of all parties in interest, including the United States. *See Gas Development Corp.*, 177 IBLA 201, 208 (2009); *Merrion Oil & Gas Corp.*, 169 IBLA 47, 52 (2006); *Celsius Energy Co.*, 136 IBLA 293, 294 (1996). Once adopted, however, the provisions of the approved unit agreement control rather than the model agreement. *Gas Development Corp.*, 177 IBLA at 209.

The requirement that Black Resources, the unit operator, diligently drill to discovery pursuant to Section 9 of the approved unit agreement is based upon the terms of 43 C.F.R. § 3183.4(b), which provides:

*The public interest requirement of an approved unit agreement for unproven areas shall be satisfied only if the unit operator commences actual drilling operations and thereafter diligently prosecutes such operations in accordance with the terms of said agreement.*<sup>7</sup> If an application is received for voluntary termination of a unit agreement for an unproven area during its fixed term or such an agreement automatically expires at the end of its fixed term without the public interest requirement having been satisfied, the approval of that agreement by the authorized officer and lease segregations and extensions under § 3107.3-2 of this title shall be invalid, and no Federal lease shall be eligible for extensions under § 3107.4 of this title. [Emphasis added.]

The CSO's conclusions regarding Black Resources' diligence obligations under Section 9 of the Unit Agreement and 43 C.F.R. § 3183.4(b) are as follows:

Sufficient extensions of time were granted by the CSO in an attempt to allow Black Resources the opportunity to focus, define, and meet the NE Cortez unit obligations. However, no dependable and timely action was evident from Black Resources. The obligations

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<sup>7</sup> Under 43 C.F.R. § 3193.4(a), the BLM authorized officer is required to determine that unitization is "necessary or advisable in the public interest and is for the purpose of more properly conserving natural resources." Similarly, an application to designate the unit area requires geologic and other information "showing that unitization is necessary and advisable in the public interest." 43 C.F.R. § 3183.2. *See also Chesapeake Operating, Inc.*, 149 IBLA 188, 202 (1999); *Orvin Froholm*, 132 IBLA 301, 305 (1995).

required from Black Resources in accordance with the NE Cortez [sic] unit agreement were simply not met in the requisite time.

SDR Decision at 10. As discussed below, we conclude that the record demonstrates otherwise.

We begin with BLM's observation that there are differences between the surface management responsibilities of BLM and the USFS, and the applicable regulations. There is no question that confusion is manifested in the record as to how those responsibilities were apparently carried out in this case. The letterhead for the DPLO shows the presence of both the Dolores Ranger District of the San Juan National Forest and the Dolores Field Office of BLM's San Juan Center. Black Resources received letters about its SUP and other matters from Sellar-Baker using DPLO letterhead. Although BLM responsibilities may have been delegated to her within the "Service First" Office, the record provides no documentation of the fact. Sellar-Baker's letters do not clearly identify her role but, instead, provide conflicting indications as to whether she was acting on behalf of the USFS or BLM. To the extent Black Resources may have been confused as to the respective responsibilities of BLM and the USFS, we find that confusion justified. We, too, find ourselves unable to discern whether Sellar-Baker was acting on behalf of BLM or USFS in her communications with Black Resources concerning the SUP and Black Resources' obligations under the NE Cortez Unit Agreement. Some documents show her appearing to discharge responsibilities of both agencies at the same time.<sup>8</sup> Nonetheless, our review of the record has not revealed a clear instance in which BLM or Black Resources was confused about which well was under discussion. The finding of "confusion" appears to have been BLM's means of avoiding a direct response to Black Resources' claims that delays in approval of necessary permits constituted unavoidable delay under Section 25 of the Unit Agreement.

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<sup>8</sup> The Board can give little credence to the finding in the SDR Decision that Black Resources' changes in obligation wells "without corresponding BLM approval" served to confuse "all involved parties." SDR Decision at 9. The correspondence between Black Resources and BLM shows that the company assumed that, because the mineral rights for the proposed wells were held by the State of Colorado, and it was required to obtain drilling permits from the COGCC, it needed only to inform the CSO about changes to designated wells and pending permits and request from BLM extensions of time to commence drilling. It appears that BLM not only failed to respond to some of Black Resources' letters, but, when it did, it provided only a minimal response without addressing the status of the Unit Agreement or the need to seek and obtain approval of obligation wells.

Black Resources identified three obligation wells under the Unit Agreement, timely commenced drilling operations at Mary Akin #3 on September 24, 2008, but was unable to reach the required depth for an obligation well. Although Black Resources wavered between drilling the Black-State 9-11-38-14 and the Black-State 7H-03-37-14 wells (located on the same well pad as the collapsed and plugged Mary Akin #3) as its next obligation well, all parties clearly understood by the end of March 2009 that it would be the Black State 7H-03-37-14 well. On April 2, 2008, the CSO granted an extension for Black Resources to commence drilling that well; a deadline that was later extended until September 26, 2009. Black Resources received COGCC approval for that well on September 24 but was unable to commence drilling because it had yet to receive an approved SUP from USFS, a process that Black Resources had begun nearly 6 months earlier.

Black Resources applied for an SUP to drill the Black-State 7H-03-37-14 well in mid April 2009. USPS responded on May 22 by identifying 10 deficiencies. Black Resources addressed those deficiencies by submitting a revised SUP on June 15 and meeting with USFS and COGCC personnel on June 23 to discuss its revision. It thereafter received CSO correspondence from Sellar-Baker identifying four deficiencies in the SUP and submitted a second revised SUP on August 26, 2009. Sellar-Baker responded by letter dated September 8, 2009, which identified 12 deficiencies, the most significant of which was that the well pad would be 2.74 acres, in excess of the acreage allowed by USFS. *See note 5 supra.* Black Resources submitted a third revised SUP on September 22 to address those deficiencies, deleting the proposed reserve pit so that the footprint of its operations would be less than two acres. Sellar-Baker responded on October 22, 2009, by stating that the proposed pad was 2.74 acres and “utilizes too large of an area.” Black Resources submitted a fourth revised SUP by facsimile and e-mail on September 24, and received notice of COGCC approval of an APD that evening. Black Resources requested from BLM an extension of the deadline for it to commence drilling. The DSD denied that request on October 7, 2009.

In regard to Black Resources’ attempts to obtain an approved SUP, the October 7, 2009, DSD Decision states only that, according to the DPLO, “as of September 25, 2009, there still were a number of issues that had yet to be resolved with the Black Resources SUP for the [Black State] 7H-03-37-14 well,” and as of September 28, 2009, “the well site still had not been properly staked and drilling operations for the 7H-03-37-14 well had not commenced.” DSD Decision at 2. The DSD Decision acknowledges that Black Resources asserted in its September 22, 2009, letter that the situation constituted unavoidable delay under Section 25 of the Unit Agreement because an APD had not yet been received from the COGCC and “for inclement weather conditions.” *Id.* The Decision then states that BLM had accepted

the Black State 7H-03-37-14 well as the initial obligation well in its April 2, 2009, letter and that, although the COGCC had approved an APD on September 23, 2009,

this issue is mute [sic] to the BLM since the required SUP was not complete as of the drilling deadline of September 26, 2009. The unresolved SUP issues for the 7H-03-37-14 [well] . . . could have been addressed at any time since April 2, 2009, through timely and diligent effort by Black Resources, but was not. Therefore, the September 22, 2009 extension request is denied.

*Id.* at 3. The DSD Decision did not discuss Black Resources' September 26, 2009, letter, which asserted that the failure to receive an approved SUP constituted unavoidable delay under Section 25, except to say that the letter "referenced the September 22, 2009, letter and requested a brief extension of time," to October 17, 2009, to drill the well. The DSD denied an extension "for the same reasons as discussed in the preceding paragraph above in the denial of the September 22, 2009, request." *Id.*

Our discussion makes clear that the primary reason provided in the SDR Decision for affirming the DSD Decision is that Black Resources did not exercise due care and diligence in its efforts to secure an SUP from the USFS, and had not been "focused on meeting the obligations of the NE Cortez unit." SDR Decision at 9; see BLM Answer to SOR at 4 ("In short, BLM concluded in its SDR that Appellant was not diligent and focused on meeting its obligations under the unit agreement."). The SDR Decision states only that, "[a]ccording to the Dolores RD [Ranger District] as of September 25, 2009, there still were a number of issues that had yet to be resolved with the Black Resources SUP for well 7H-03-37-14," and "[a]s of September 26, 2009, the well site still had not been properly staked and drilling operations on well 7H-03-37-14 had not commenced." SDR Decision at 9. No basis is offered by either decision to support the conclusion that Black Resources was not "diligent" in its attempts. Black Resources' efforts at meeting its obligations under the Unit Agreement are not similar to those in *Premco Western, Inc.*, 165 IBLA 328, 340 (2005), as argued by BLM. In *Premco*, there were long periods of non-operation and other indicia of a lack of diligence, including the failure to submit required data and reports. We conclude that BLM's statement that "no dependable and timely action was evident from Black Resources" has no support in the record. Because the decision does not provide a rational basis for its conclusions, it is hereby vacated. See BLM Answer to Brief at 5-6 (citing *Biodiversity Conservation Alliance*, 174 IBLA 1, 6 n.2 (2008)).

BLM also relies upon the fact that because the wellsites are on land managed by the USFS, that agency and not BLM is responsible for reviewing and approving the

necessary SUP. BLM also argues that the record “illustrates Appellant’s inability to meet consistent informational requirements,” and that “[t]he necessity for revisions to the SUP was due to Appellant’s own changes to its SUP and its failure to follow consistent direction.” Answer to Brief at 3-4, 8, 9. BLM goes on to assert, “[b]y way of example,” that “Appellant never provided the FS consistent information regarding the proposed rig layout and whether it intended to utilize open reserve pits or [a] closed loop system for handling drilling fluids.” *Id.* at 9. It discusses the point for several pages, before concluding that the USFS “had well-founded reason” for wanting to be sure that the SUP for the Black-State 7H-03-37-14 well “contained complete and accurate information on Appellant’s plans for drilling and operation of the well.” *Id.* at 12. The Board’s evaluation of the argument, and more generally the determination that Black Resources did not exercise due care and diligence, would entail reviewing USFS regulations, other administrative documents applicable to SUPs, the contents of the SUPs submitted by Black Resources, and the reasonableness of the responses Sellar-Baker and others provided. Such an evaluation is beyond the Board’s review authority, even if adequate documentation for such review were included in the record. We cannot endorse BLM’s conclusion that the USFS acted properly in the manner in which it adjudicated Black Resources’ various requests for an SUP, when the reason given by BLM for denying Black Resources’ request for an extension of time to obtain the SUP is that USFS, not BLM, is responsible for such action.

BLM asserts that it is not responsible for reviewing the substance of Black Resources’ SUP submissions. BLM further declares that those submissions establish as a matter of record that “Black Resources was not diligent in their efforts to secure a SUP from the FS,” and that Black Resources “was not prevented, beyond its reasonable control[,] from complying with its obligations under the unit agreement.” SDR Decision at 9-10. If the USFS did not believe that Black Resources had provided, or could provide, a satisfactory SUP, it would have been appropriate for that agency to issue a decision based upon the statutes and regulations it administers. Black Resources could have challenged the ruling through the USFS appeals process. Alternatively, BLM could base a decision on a record of its own actions. *See Premco Western Inc.*, 165 IBLA at 333-36, 338. It is not legally sustainable for BLM to claim that Black Resources’ attempts to obtain an approved SUP establish that the company was not diligent as required by the Unit Agreement when the applicable requirements and the adequacy of the SUPs it submitted cannot be reviewed. BLM asserts that it has no control over USFS review of Black Resources’ SUP submissions, but uses that very process as a basis for denying Black Resources’ request for extensions and declaring the Unit Agreement void *ab initio*. Because we conclude that BLM’s

decision lacks a rational basis, we set it aside and remand the matter to BLM for further review.<sup>9</sup>

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 January 19, 2010, SDR Decision is vacated and this matter is remanded for further action.

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
James K. Jackson  
Administrative Judge

<sup>9</sup> Black Resources also requested a hearing. In light of our disposition of Black Resources' appeal, we deny the request for a hearing. See 43 C.F.R. § 4.414.