



GAS DEVELOPMENT CORPORATION

177 IBLA 201

Decided May 12, 2009



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

GAS DEVELOPMENT CORPORATION

IBLA 2008-250

Decided May 12, 2009

Appeal from a decision of the Deputy State Director, Colorado State Office, Bureau of Land Management, affirming on State Director Review the Branch of Fluid Minerals' denial of a request to terminate the Mary Akin Unit (Unit Agreement COC474648X). SDR CO-08-03.

Affirmed.

1. Courts--Res Judicata--State Courts--Oil and Gas Leases:
Unit and Cooperative Agreements

The United States is not bound by state court rulings made in proceedings to which it is not a party. Nor is BLM or this Board required to follow state court rulings affecting Federal interests under a Federally-approved unit agreement within the jurisdiction of BLM under Federal law.

2. Oil and Gas Leases: Unit and Cooperative Agreements--
Oil and Gas Leases: Termination

A unit agreement approved by BLM under the Mineral Leasing Act, 43 U.S.C. § 226(m) (2006), is a contract between the United States and participating parties for joint development and operation of a targeted oil and gas field. While implementing rules contain a model unit agreement, that agreement does not represent a regulatory mandate but a "model" for use by the parties. BLM must therefore refer to the provisions of the approved unit agreement when interpreting and applying its terms to a unit, including a request to terminate the unit or unit agreement.

APPEARANCES: Phillip D. Barber, Esq., Denver, Colorado, for Gas Development Corp.; Kristen C. Guerriero, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Gas Development Corporation (GDC) appeals from the August 1, 2008, decision by the Deputy State Director, Colorado State Office, Bureau of Land Management (BLM), upholding the denial of GDC's request to terminate the Mary Akin Unit (MAU or Unit), Unit Agreement COC474648X (Unit Agreement). GDC contends the Unit terminated (or should be terminated) because the only well sustaining that unit is situated on a private oil and gas lease that is not committed to the Unit Agreement. For the reasons discussed below, we affirm the decision on appeal.

BACKGROUND

The Unit Agreement was entered into by Atlantic Richfield Company (ARCO) and others on December 14, 1982. Shortly thereafter, John E. Akin agreed to commit certain of his fee lands (Akin land) to that agreement by executing a Ratification and Joinder of Unit Agreement and by leasing these same lands to ARCO under an oil and gas lease (ARCO lease), both of which he executed on December 18, 1982. BLM approved the Unit Agreement on February 28, 1983,¹ thereby establishing an exploratory oil and gas unit of more than 35,000 acres, the MAU, and obligating the Unit Operator (ARCO) to drill two test wells. Both of these obligation wells were drilled on private lands and mineral estates, with the first completed as plugged and the second, the Mary Akin Unit No. 2 (MAU2), completed as capable of production on July 12, 1983, on Akin land in SE $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 27, T. 38 N., R. 14 W., New Mexico Principal Meridian, Montezuma County, Colorado.

Based on the second obligation well being capable of production, BLM approved a participating area of approximately 410 acres effective July 12, 1983 (*i.e.*, Initial Desert Creek Formation Participating Area "A").² After additional wells

¹ By memorandum of even date, the Deputy Minerals Manager informed the State Director that "[a]ll lands and interests are fully committed" to the MAU (excepting only parcels not here relevant) and, therefore, that "effective control of operations within the unit area is assured."

² Participating Area "A" embraces 10 "quarter-quarter sections" within secs. 27 and 34, T. 38 N., R. 14 W., NMPM (eight full quarter-quarter sections and two irregular lots approximating quarter-quarter sections). Five are Federal lands (encompassed
(continued...))

were drilled but completed as plugged, BLM concurred in the Unit Operator's determination that the MAU be contracted and limited to the previously approved 410-acre participation area pursuant to the Unit Agreement. BLM's concurrence was issued on February 6, 1989, with an effective date of July 12, 1988.

ARCO sold, transferred, and assigned all of its right, title, and interest under its lease with Akin to Black Resources, Inc. (Black), in May 1992. ARCO later transferred its rights and responsibilities under the Unit Agreement to Black. BLM accepted ARCO's resignation and approved Black's designation as Unit Operator on April 7, 1995.

Akin entered into an Oil and Gas Top Lease with GDC in January 1998 (GDC lease), which would become effective only upon the invalidation, release, or termination of the ARCO lease assigned to Black. Jack Grynberg (apparently for GDC) thereafter applied for a right-of-way (ROW) to construct a pipeline connecting the MAU2 well with the TransColorado Pipeline, but it was not accepted because "according to paragraph 19 of the Unit Agreement, covenants regarding unit operator of record run with the land unless the Agreement terminates [and] any actions involving the unit must come from the unit operator of record." Protest by counsel for Grynberg, Phillip D. Barber, dated Feb. 25, 1999 (purportedly quoting from rejection of ROW application). Barber adverted to litigation canceling the ARCO lease "on the grounds that there had been a failure to produce and market production from [MAU2]," claiming that since a State of Colorado State court judgment cancelled that lease, neither MAU2 nor Akin land are subject to the Unit Agreement. *Id.* at 2, quoting Unit Agreement ¶ 27 (Loss of Title). He also suggested that the MAU be contracted further to include only Akin land under lease to GDC because MAU2 "will drain, at most, only the area included within the [GDC lease]." *Id.*, quoting Unit Agreement ¶ 11 (Participation After Discovery). BLM responded on March 30, 1999, by stating that "the Mary Akin Unit agreement is still a valid unit" and that MAU2 "is a unit well within the unit boundary and is the responsibility of Black Resources, the unit operator." As to State court litigation referred to by Barber, BLM advised that "[i]t is the responsibility of the litigants . . . to coordinate with BLM when [court] provisions involve federal leases and agreements."³ *Id.*

Barber, then representing GDC, thereafter updated BLM on State court litigation involving Akin land and requested termination of the MAU, claiming "[i]t is

² (...continued)

by Federal oil and gas leases COC-27165 and COC-33653); the remainder are private lands and include Akin land (*i.e.*, three quarter-quarter sections, 120 acres).

³ BLM later issued a "status" notice to Black on October 1, 2003, stating that the MAU "remains a producing unit."

time to terminate the Mary Akin Unit” because Black has “obviously used the Mary Akin Unit for speculative purposes for many years,” “never drilled a well during the 23 years the Unit has purportedly been in existence,” and “never produced a single MCF of gas or a single barrel of Oil” from the Unit. Termination Request dated June 1, 2006, at 2, 3. BLM informed the Unit Operator of GDC’s request; Black stated in response that the Colorado Oil and Gas Conservation Commission has recognized it as the operator of MAU2 and ordered a mechanical integrity test, which apparently led to claims that Black had trespassed on Akin land. Black Response dated June 14, 2006, at 2. The Unit Operator argued that state courts lack jurisdiction to terminate the ARCO lease because it had been committed to and modified by the Unit Agreement, which are matters within the exclusive jurisdiction of BLM and preempted by Federal law.⁴ *Id.*

Richard J. Ryan, Branch of Fluid Minerals, Colorado State Office, denied GDC’s request to terminate the MAU on October 30, 2007. He found that termination under Unit Agreement ¶ 20(c) had not been demonstrated because GDC “failed to establish that the Mary Akin No. 2 Well is not capable of production in paying quantities” and GDC’s claims that Black failed to market production from MAU2 are “irrelevant,” noting that BLM is not bound by “State court rulings contrary to federal law.” *Id.* at 2, citing *Merrion Oil & Gas Corp.*, 169 IBLA 47, 53-54 (2006) (*Merrion Oil*). GDC then pursued State Director Review.

The Deputy State Director issued the decision on appeal on August 1, 2008 (Decision). He held that rulings in state court litigation involving Akin, Black, and GDC that the ARCO lease had terminated for failure to market production from MAU2 “are preempted by federal law to the extent that the Court’s rulings adversely impact federal interests in the MAU or otherwise conflict with achievement of congressionally approved uses of federal lands.” *Id.* at 4. Because there had been no showing that Akin lacked good title when he entered into the ARCO lease, the Deputy State Director rejected GDC’s claim that Akin land was not committed to the Unit on the theory that there was a “loss of title” to the ARCO lease under ¶ 27 of the Unit Agreement (and ¶ 18.9 of the MAU Operating Agreement), as determined by state court rulings that there was a failure of title when the ARCO lease terminated for failing to market production from MAU2. He found that Akin, himself, had

⁴ The Unit Operator (Black) argued that even if the ARCO lease had terminated under State law, Grynberg should not be allowed to “steal” MAU2 or “deprive the federal government of its entitlement to revenues” therefrom. *Id.* at 3. Black claimed that Grynberg is not entitled to the Unit Operator’s “physical equipment, casing, and tubing free of charge” and that BLM should apply the Unit Agreement, require him to contribute his “proportionate share of the costs of previous unit operations,” and not “permit him to drain the federal acreage without payment of any compensation to the federal government.” *Id.*

separately committed his fee lands to the Unit by his December 1982 Ratification and Joinder of Unit Agreement and that Unit Agreement terms are covenants running with the land, *quoting* Unit Agreement ¶ 19 (Covenants Run With Land). Decision at 5. He then ruled:

Any rights in the unitized lands or unitized substances acquired by GDC pursuant to its lease with Mr. Akin were taken subject to the MAU Unit Agreement. For whatever rights and interest GDC may have acquired by means of its top lease are derivative of and subordinate to Mr. Akin's title.

Id. He observed that the State court rulings relied on by GDC to claim that its lease was not part of the Unit absent its express agreement failed to recognize the difference between a unit agreement and an operating agreement⁵ and melded a December 1982 Operating Agreement⁶ with the Unit Agreement to reach “erroneous conclusions.” *Id.* at 6. The Deputy State Director upheld denial of GDC’s request because it “has not presented any facts that would require termination of the MAU,” concluding that the MAU “remains a valid unit with a single participating area based on [MAU2].” *Id.* at 7.⁷ This appeal followed.

⁵ As explained by the Deputy State Director:

A unit agreement specifies the method for allocation of production for purposes of determining royalties, overriding royalties, and other non-cost bearing burdens . . . [and] is not effective until approved by BLM upon a determination by BLM that the agreement is “necessary or advisable in the public interest and is for the purpose of more properly conserving natural resources.” 43 C.F.R. § 3183.4(a).

By contrast, a unit operating agreement is a private agreement entered into by the working interest owners for the purposes of agreement on the details of actual operations, including such things as allocation of costs, expenses, benefits, and other rights and obligations between the Unit Operator and other working interest owners . . . [but] there is no requirement that BLM approve unit operating agreements before they are effective.

Decision at 6.

⁶ The Unit Operator (Black) responded to GDC’s request to terminate by expressing unfamiliarity with that operating agreement. Black Correspondence dated June 14, 2006, at 2. There is no showing in this record that Black is a party to the operating agreement referred to by GDC.

⁷ In light of apparent rancor between Black and GDC/Grynberg/Akin and the Unit Operator’s inability to access MAU2, the Deputy State Director added, “[a]ll working
(continued...)”

DISCUSSION

GDC maintains the Unit terminated under the Unit Agreement because the only well capable of production on unitized lands is MAU2 which is on the GDC lease and its lease has not been committed to the Unit. GDC claims state court rulings terminating the ARCO lease and recognizing that GDC has exclusive rights under its lease with Akin are dispositive and should be given effect to demonstrate a “loss of title” under the Unit Agreement. BLM disagrees and, like GDC, expends considerable effort in analyzing the several state court actions arising out of extensive and extended litigation between the parties. *See Answer at 3-6, 8, 10-13; Statement of Reasons (SOR) at 2-10, 11.*

[1] Because state court rulings are at the heart of GDC’s appeal, we first review them *seriatim* and their relevance to this case before addressing the merits of this appeal:

- *Akin v. Black Resources, Inc.*, No. 1998CV000023 (Colo. Dt. Ct., County of Montezuma, 1998), *aff’d in part, vacated and remanded in part*, No. 98CA2600 (Colo. Ct. App. 2000)

Akin sought a declaration that the ARCO lease had terminated for breach of an implied covenant to market production. The court confirmed a jury verdict terminating that lease and awarding damages of \$24,810; the appellate court affirmed on damages but remanded to determine whether conditional cancellation with time to achieve production should be applied in that case. *See SOR Ex. 2.* The district court afforded Black until May 31, 2002, to commence marketing production from MAU2; by order dated May 23, 2002, the district court ordered the case closed and that a notice of lease termination be issued, which was filed by GDC on May 31, 2002. *See SOR Ex. 6.*

- *Akin v. Black Resources, Inc.*, No. 2000CV000232 (Colo. Dt. Ct., County of Montezuma, 2003)

Action for trespass on Akin land dismissed on stipulation that Black not enter upon the GDC lease (except by agreement with counsel for GDC). *See SOR Ex. 7.*

⁷ (...continued)

interest owners within the MAU, with the assistance of [BLM], will need to determine whether there is a need for a successor unit operator under Sections 5 and 6 of the [Unit] Agreement.” Decision at 7.

- *Gas Development Corporation v. Black Resources, Inc.*, No. 05-CV-5729 (Colo. Dt. Ct., County of Denver), *removed but remanded*, No. 05-CV-01810-MSK-BNB (D. Colo. Sept. 13, 2006) (*Slip opinion*)

Action asserting causes of action under state law for trespass, breach of contract, tortious interference with a contract, conversion, and slander of title and requesting, *inter alia*, a declaration that GDC is the exclusive operator of MAU2. *See* SOR Ex. 8. Black removed the action to Federal court on claim of federal question jurisdiction under the Mineral Leasing Act and moved to dismiss for failure to exhaust administrative remedies; GDC moved to remand. The U.S. District Judge remanded, ruling that GDC's complaint raised state law issues only and that Black failed to show that the Mineral Leasing Act completely preempts all state law relating to private land within an exploratory unit. *Slip opinion* at 5-6, *citing Chuska Energy Co. v. Mobil Exploration & Producing North America, Inc.*, 854 F.2d 727, 731-32 (5th Cir. 1988).

- *Gas Development Corporation v. Black Resources, Inc.*, No. 05-CV-5729 (Colo. Dt. Ct., County of Denver, Dec. 18, 2007), *aff'd in part and remanded in part*, No. 08CA0202 (Colo. Ct. App. 2009)

On remand from Federal court, the Denver County District Court ruled against GDC on all issues except breach of contract, for which it awarded nominal damages. It dismissed GDC's request for a declaration regarding operator recognition for failure to exhaust administrative remedies. *See* SOR Ex. 12. The appeals court affirmed on all issues (except for tortious interference with contract), ruled that state courts have subject matter jurisdiction over contract matters where non-federal lands are involved, and recognized that terminating the Unit Agreement was an issue separate from GDC's tort and contract claims under state law. *See* Supp. SOR (attached exhibit).

As the United States was not a party to any of the above-proceedings, it is not bound by any of their rulings. *See Aberdeen Idaho Mining Co.*, 155 IBLA 350, 359 (2001); *State of California*, 121 IBLA 73, 110-11, 98 I.D. 321, 341 (1991); *Estate of Arthur C. W. Bowen, Deceased*, 14 IBLA 201, 209-10, 81 I.D. 30, 33-34 (1974). Nor is BLM or this Board required to follow state court rulings (or observations) affecting Federal interests under a Federally-approved unit agreement. Federally-approved agreements that include Federal land are within the jurisdiction of BLM under Federal law, and parties challenging BLM decisions under such agreements must exhaust their available administrative remedies. *See Froholm v. Cox*, 934 F.2d 959, 965 (8th Cir.

1991).⁸ While the ARCO lease may have terminated for purposes of state law-based claims between Black, GDC and Akin, it does not follow that the Federally-approved MAU terminates under the Unit Agreement or as a matter of Federal law. It is to GDC's request to terminate the Unit Agreement under Federal law that we now turn.

[2] In broad conceptual terms, unitization is the joint, coordinated operation of a petroleum reservoir by all the owners of rights in the separate tracts overlying the reservoir. *See 6 Williams and Meyers Oil & Gas Law*, § 901 (2008). Unitization results from an agreement

to jointly operate an entire producing reservoir or a prospectively productive area of oil and/or gas. The entire unit area is operated as a single entity, without regard to lease boundaries, and allows for the maximum recovery of production from the reservoir. . . . The objective of unitization is to provide for the unified development and operation of an entire geologic prospect or producing reservoir so that exploration, drilling and production can proceed in the most efficient and economical manner by one operator.

Cox, "Unitization and Communitization," § 18.01[2], in *Law of Federal Oil and Gas Leases* (Rocky Mountain Mineral Law Foundation 2008). Where substantial amounts of public lands are involved, a unit may be established where the Secretary determines it necessary or advisable in consideration of the public interest. *See* 30 U.S.C. § 226(m) (2006); *Celsius Energy Co.*, 136 IBLA 293, 294 (1996). A resulting unit agreement after such a determination is a contract between the United States and participating parties for joint development and operation of a targeted oil and gas field. *Id.*; *see also Merrion Oil*, 169 IBLA at 52; *Jack J. Grynberg*, 88 IBLA 330, 333 n.4 (1985).

Congress invested the Secretary with broad authority to approve any unit plan deemed necessary or proper to secure the protection of the public interest, to mandate unitization, and to prescribe a plan that protects the rights of all parties in interest, including the United States. 30 U.S.C. § 226(m) (2006). Pursuant to this statute, the Department promulgated regulations directing how BLM is to exercise its delegated authority in managing the varied aspects of Federal units. *See* 43 C.F.R.

⁸ Contrary to GDC's suggestion, SOR at 4-6, the U.S. District Court did not rule that state courts have jurisdiction to interpret and apply the terms of a Federally-approved unit agreement. Nor did the state court interpret or apply those terms to require that GDC be recognized as the exclusive operator of MAU2. To the contrary, it dismissed that claim for GDC's failure to exhaust administrative remedies. Whatever views that court may have held regarding the relationship between MAU2, the Unit, and the Unit Agreement are dicta and of limited value to our consideration of this appeal.

Part 3180. While these rules contain a model unit agreement, 43 C.F.R. § 3186.1, neither it nor its provisions represent a regulatory mandate but a “model” the parties may use or adopt as they wish. *Colorado Open Space Council*, 109 IBLA 274, 287 n.10 (1989). BLM must therefore refer to the provisions of the approved unit agreement when interpreting and applying its terms to a unit. *See Merrion Oil*, 169 IBLA at 52 (“the individual [unit] agreement must always be consulted”).⁹ Thus, BLM was directed to look to the language of the Unit Agreement in determining whether to terminate the MAU, as had been requested by GDC.

GDC contends the MAU terminated (or should be terminated) due to a “loss of title” following the state court’s cancellation of the ARCO lease. SOR at 11. The Unit Agreement, however, specifies that:

In the event title to any tract of unitized land shall fail and the true owner cannot be induced to join in this unit agreement, such tract shall be automatically regarded as not committed hereto and there shall be such readjustment of future costs and benefits as may be required on account of the loss of such title. In the event of a dispute as to title as to any royalty, working interest, or other interests subject thereto, payment on account thereof may be withheld without liability for interest until the dispute is finally settled; provided, that, as to Federal land or leases, no payments of funds due the United States should be withheld, but such funds shall be deposited as directed by [BLM], to be held as unearned money pending final settlement of the title dispute, and then applied as earned or returned in accordance with such final settlement. Unit Operator as such is relieved from any responsibility for any defect or failure of any title hereunder.

Unit Agreement ¶ 27 (Loss of Title) (emphasis added). When the Unit was contracted to the participating area in 1988, there can be no question but that Akin land under lease to ARCO was then “unitized land” or that Akin held and continues to hold title to that land. *See* Unit Agreement ¶ 3 (“All land committed to this agreement shall constitute land referred to herein as ‘unitized land’ or ‘land subject to this agreement’”). GDC equates Black’s working interest (on Akin land under the ARCO lease) with title to unitized land, but we find the above-quoted provisions speak clearly of effects on working interests when title to the land is in dispute and, as such, recognize a fundamental difference between working interests and title to unitized lands. Only if title to unitized land fails and the true titleholder refuses to

⁹ BLM guidance is to the same effect: “[I]t is necessary to review the provisions of each agreement to determine the circumstances under which [automatic or voluntary] terminations may occur.” *BLM Handbook H-3180-1, Unitization (Exploratory)*, at sec. II.K.

join in the Unit Agreement will such land cease to be committed to the Unit, withholdings released to working interest holders, and a readjustment of future costs and benefits made as between and among working interests. Since there has been no failure of Akin's title to unitized land, we agree with BLM that there has been no loss of title under the Unit Agreement under the circumstances of this case. See Decision at 5.

But even if we could equate a working interest with title to unitized land, we nonetheless would find that Akin committed his land to the Unit when he executed the Ratification and Joinder of the Unit Agreement on December 18, 1982, and that his commitment of Akin land to the Unit was a covenant running with the land and a condition GDC assumed when entering into the GDC lease in 1998. The Unit Agreement also speaks to this issue:

The covenants herein shall be construed to be covenants running with the land with respect to the interests of the parties hereto and their successors in interest until this agreement terminates, and *any grant, transfer, or conveyance of interest in land or leases subject hereto shall be and hereby is conditioned upon the assumption of all privileges and obligations hereunder by the grantee, transferee, or other successor in interest.* No assignment or transfer of any working interest, royalty, or other interest subject hereto shall be binding upon Unit Operator until the first day of the calendar month after Unit Operator is furnished with the original, photostatic, or certified copy of the instrument of transfer.

Unit Agreement ¶ 19 (Covenants Run with Land) (emphasis added). If Akin's title to unitized land failed, neither he nor his successors in interest would be bound by the Unit Agreement due to loss of title. But since such is not this case and GDC's claimed working interest under the GDC lease springs from Akin's title to unitized land, Akin's granting of that lease to GDC was conditioned upon its assuming all rights, privileges, and obligations under the Unit Agreement. We therefore agree with the Deputy State Director's ruling the "[a]ny rights in the unitized lands or unitized substances acquired by GDC pursuant to its lease with Mr. Akin were taken subject to the MAU Unit Agreement" and are "derivative of and subordinate to Mr. Akin's title." Decision at 5.¹⁰ As such, one of the privileges GDC may be heir to under the Unit Agreement

¹⁰ As discussed, the state court ruled that GDC, not Black, is the owner of a working interest on Akin land due to a cancellation of the ARCO lease under state law based on Black's unwillingness or inability to market gas from MAU2. Whatever may be said of the correctness of that ruling under state law, it is neither controlling nor instructive for interpreting and applying the Unit Agreement under Federal law, particularly where a failure to market gas would not be grounds to divest a lessee of

(continued...)

is the opportunity to request termination. It is GDC's burden on appeal to show error in BLM's denial of its request to terminate the Unit, either as a matter of law or by a preponderance of the evidence. See *Meritage Energy Partners*, 165 IBLA 204, 214 (2005).

The Unit Agreement provides that it "shall terminate" after a 5-year initial term unless certain conditions are met.¹¹ The only condition potentially applicable to this case is:

a valuable discovery of unitized substances has been made or accepted on unitized land during said initial term or any extension thereof, in

¹⁰ (...continued)

its working interest under the Unit Agreement and could adversely affect the Federal interest in production from that unit.

¹¹ Unit Agreement ¶ 20 (Effective Date and Term), states in full:

This agreement shall become effective upon approval by the Secretary or his duly authorized representative and shall terminate five (5) years from said effective date unless:

- (a) such date of expiration is extended by the Director, or
- (b) it is reasonably determined prior to the expiration of the fixed term or any extension thereof that the unitized land is incapable of production of unitized substances in paying quantities in the formations tested hereunder and after notice of intention to terminate this agreement on such ground is given by the Unit Operator to all parties in interest at their last known addresses, this agreement is terminated with the approval of the Manager, or
- (c) a valuable discovery of unitized substances has been made or accepted on unitized land during said initial term or any extension thereof, in which event this agreement shall remain in effect for such term and so long thereafter as unitized substances can be produced in quantities sufficient to pay for the cost of producing same from wells on unitized land within any participating area established hereunder, and should production cease, so long thereafter as diligent operations are in progress for the restoration of production or discovery of new production and so long thereafter as unitized substances so discovered can be produced as aforesaid, or
- (d) it is terminated as heretofore provided in this agreement. This agreement may be terminated at any time by not less than 75 per centum, on an acreage basis, of the working interest owners signatory hereto, with the approval of the Manager; notice of any such approval to be given by the Unit Operator to all parties hereto.

which event this agreement shall remain in effect for such term and so long thereafter as unitized substances can be produced in quantities sufficient to pay for the cost of producing same from wells on unitized land within any participating area established hereunder, and should production cease, so long thereafter as diligent operations are in progress for the restoration of production or discovery of new production and so long thereafter as unitized substances so discovered can be produced as aforesaid.

Unit Agreement ¶ 20(c). The Deputy State Director upheld the denial of GDC's request to terminate because it "failed to present any evidence that [MAU2] is not capable of production in paying quantities." Decision at 3.¹²

We have rejected the claim that the term "can be produced" means and requires actual production under a unit agreement and recognized that whether unitized substances can be produced (or diligent actions are being taken to restore production from a unit) are factual determinations which must be made before a unit will terminate. *See Merrion Oil*, 169 IBLA at 53-57. Since such facts were not proven in *Merrion Oil*, we affirmed BLM's denial of unit termination. *Id.* at 54.

The record shows that MAU2 was capable of production when a participating unit was established in 1983, the Unit contracted to that area in 1988, and BLM determined the status of the Unit in 2003. *See* n.3; *Merrion Oil*, 169 IBLA at 56, 57. Once a unit well is capable of production, the unit will continue "so long thereafter as unitized substances can be produced," thereby permitting the logical inference that such well continues to be capable of production until the contrary is shown or determined by BLM. Unit Agreement ¶ 20(c); *Merrion Oil*, 169 IBLA at 55. We find the record supports BLM's decision not to terminate the Unit, and while GDC may view the circumstances differently or have a different opinion as to what they show, such is not sufficient to demonstrate error in the decision on appeal. *See Benson-Montin-Greer Drilling Corp.*, 118 IBLA 8, 12 (1991).

¹² He earlier noted that the "productive capability of [MAU2], as stated on a Colorado Oil and Gas Conservation Commission completion report dated July 20, 1983, is 25 barrels of oil and 2.436 million cubic feet of methane gas per day." Decision at 1 n.2.

Therefore, 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.

_____/s/_____
James K. Jackson
Administrative Judge

I concur:

_____/s/_____
Geoffrey Heath
Administrative Judge