PILOT PLANT, INC.

IBLA 2004-136 Decided March 16, 2006

Appeal from a decision of the Las Vegas Field Office, Bureau of Land Management, requiring a financial guarantee to extend mining notice N-71982.

Affirmed.

1. Mining Claims: Generally--Mining Claims: Mill Sites

A BLM decision establishing the amount of the financial guarantee (reclamation bond) required to extend a mining notice for a mill site will be affirmed where the operator fails to establish error in BLM's determination of the bond amount or to show that his bond estimate more accurately reflects the costs of reclaiming the site.

APPEARANCES: K. Ian Matheson, President, Pass Minerals, Inc., Henderson, Nevada, for appellant; Mark R. Chatterton, Assistant Field Manager, Nonrenewable Resources, Las Vegas Field Office, Bureau of Land Management, Las Vegas, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Pilot Plant, Inc. (Pilot), through K. Ian Matheson, has appealed the January 14, 2004, decision of the Las Vegas (Nevada) Field Office (LVFO), Bureau of Land Management (BLM), issued to him and Pass Minerals, Inc. (PMI), as operator, requiring a financial guarantee in the amount of $106,500 to extend mining Notice N-71982 for the Becki M mill site (NMC 293456) located in sec. 14, T. 23 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada. The mill site is currently owned by Pilot Plant, Inc. [1/] Pilot also petitioned for a stay of the decision.

[1/] In a communication dated July 17, 1997, Matheson notified BLM that the "Becky M" mill site, among other transfers, had been conveyed to Pilot by Arby J. Vincent, one of appellant's predecessors, and from Pilot to PMI by quitclaim deeds.

(continued...)

The Becki M mill site was located on December 14, 1983, by Vincent. [2/] PMI is conducting operations pursuant to Notice N-71982, which was filed on September 30, 1992, and acknowledged by BLM on October 27, 1992. See BLM January 2004 Reclamation Cost Estimate N-71982 Becki M Mill Site (Cost Estimate) at 2. [3/] The site is approximately two acres in size and photographs in the record confirm that the site contains a mill building, a lab, a double-wide house trailer, several storage trailers, concrete pads, a well, a septic system, equipment, scrap, and trash. Id.; see also Oct. 23, 2003, Nevada 3809 Compliance Inspection Report, reviewed on Oct. 30, 2003, at 2 (site inventory).

By letter dated September 12, 2002, BLM informed PMI that the surface management regulations at 43 CFR 3809 had been revised effective January 20, 2001, and that action was necessary to comply with the new regulations. BLM highlighted the new requirement that reclamation bonds be submitted by January 20, 2003, for all notice level operations on file with BLM and explained that any notices not bonded by that date would expire, and that authorization of all activities other than reclamation under those notices would terminate. BLM advised PMI that before January 20, 2003, it would have to either submit a reclamation cost estimate

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[1/] (...continued)
The record also contains a letter from Matheson to Mark Chatterton, BLM, dated Feb. 13, 2003, informing BLM that the "new owner" of the mill site is Pilot, while confirming that Pilot was also the "previous owner." In the Feb. 13 letter, Matheson avers that PMI is the operator, and that he is "no longer an officer, director or signing officer of this company," and that he has "never been a shareholder of Pilot Plant Inc." (Letter at 1.) He further avers that "[n]one of the corporations I am affiliated with have an ownership position in the Becky M mill site." (Letter at 2.)

The record contains nothing that clearly demonstrates that Matheson or PMI can practice before the Department or represent Pilot. See 43 CFR 1.3. Nonetheless, we note that the shareholders of PMI are Pilot, Kiminco, Inc., and a defunct company called Pure Air. The shareholders of Kiminco are Matheson, his wife, Debra Matheson, and Pilot. The shareholders of Pilot are Debra Matheson's three children. See United States v. Pass Minerals, Inc., 168 IBLA 115, 118 n.1 (2006). Matheson in fact actively directs, and likely controls, the activities of Pilot, PMI, and Kiminco, and has done so for some years.

[2/] Although the parties sometimes refer to it as the "Becky M," the location notice states that the name of the mill site is the Becki M.

[3/] Vincent's Notice originally was serialized as N54-93-001N. Most of the documentation in the record before the Board bears this serial number. In 2002, the Notice was assigned serial number N–71982 as a result of the upgrade of BLM's records system.

covering all costs associated with the reclamation of its disturbance by a third party contractor, including administrative costs, to the LVFO for review and approval, after which it would be required to submit an appropriate financial instrument to the Nevada State Office; or it would have to reclaim the disturbance to the standards listed in 43 CFR 3809.1-3(d) (2000).

PMI submitted a reclamation bond cost estimate of $31,000 and a bond in that amount to the Nevada State Office on December 17, 2002. [4/] By decision dated January 16, 2003, the LVFO notified PMI and Matheson that the estimate was unacceptable because it lacked the calculations and rationale used to determine the bond amount and needed supplementation. BLM noted that, before a bond properly could be sent the Nevada State Office, the LVFO had to determine that the estimate was acceptable and issue a decision accepting the bond. According to BLM, not only did the cost estimate lack the calculations and rationale used to determine the bond amount, but it also omitted costs for removing everything currently on the site, including all the scrap metal and equipment and the septic system, and for plugging the well. BLM advised PMI and Matheson that indirect costs had to be included in the cost estimate [5/] and enclosed a Reclamation Cost Summary Sheet and Reclamation Bond Checklist to help them provide the requisite information. See Jan. 16, 2003, Notification Timely Received Requiring Additional Information, Notice Held for Closure, at 1.

Matheson responded on January 22, 2003, with a revised bond estimate dated January 21, 2003. Although the revised estimate did not break down the original $31,000 estimate, it did provide costs for plugging the well ($9,600), removal of the septic system ($750), removal of equipment and scrap ($5,000), and administrative costs other than contractor bonds and profits that he asserted that been included in the direct cost figures ($8,343 for BLM administrative costs and $4,635 for contingency costs), for a total estimate of $59,328. Matheson explained the genesis of his original estimate, stating that, because he lacked the technical expertise to calculate the cost of removing a building, electrical equipment, and concrete slabs, he had obtained third party costs for removing the buildings, trailers, and other structures and equipment from C & W Enterprises (C & W), a demolition contractor,

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[4/] The case file does not contain copies of the December 2002 cost estimate and bond, but the parties do not dispute either the submission of those documents or their content.

[5/] The required indirect costs included: 1. a BLM administrative cost of 18% of the total direct costs; 2. a contractor's bond of 3% of the total direct costs; 3. a contractor's profit of 10% of the total direct costs; and 4. a contingency cost of 10% of the total direct costs. (Jan. 16, 2003, Notification Timely Received Requiring Additional Information, Notice Held for Closure, at 1.)

and had used C & W's cost figures as the basis for his original reclamation bond cost estimate. He also stated that he had relied on an estimate from a Dave Simpson to calculate the well plugging costs and on quotes from Martinie Septic Tanks to arrive at the cost to remove the septic system, the equipment, and the scrap.

BLM was unable to review Matheson's estimate until the latter part of 2003. BLM inspected the Becki M mill site on October 23, 2003, and completed an inventory of the site. BLM also asked Matheson for a list of the chemicals on the site, which he provided by letter dated November 20, 2003. In the November 20, 2003, letter, Matheson also stated that C & W's October 30, 2002, quoted price included demolishing and removing the building and slab, the security trailer, the fence, and the power poles, as well as rough grading the property and replanting cactus and seed, and that Martinie's quote for removal of the septic tank assumed that the buried tank held 400 gallons.

BLM prepared its Cost Estimate for the Becki M mill site on January 12, 2004, and the Assistant Field Manager, Nonrenewable Resources, concurred in the estimate on January 13, 2004. The estimate calculated the required bond amount as $106,500. On January 14, 2004, BLM issued its decision directing PMI to post a reclamation bond in that amount within 60 days of receipt of the decision. The decision did not refer to or include a copy of the Cost Estimate, nor did it offer any rationale for the calculated bond amount. [6/]

Matheson complained that, not only did he receive the decision almost one year after he had submitted his revised reclamation cost estimate, but the decision contained no explanation of how BLM determined that $106,500 was the proper bond amount. He asserted that he had been involved in approximately $100 million worth of construction and development and that his calculations were not grossly inaccurate.

In its response, BLM stated that it had prepared a detailed reclamation estimate based on its site inventory, Matheson's list of chemicals and volumes, H2O Environmental's chemical removal cost quote, the CAT Handbook's equipment specifications, and heavy construction cost data published by R.S. Means. BLM pointed out that the cost estimate was in the Notice file, which is available for public review, and that Matheson could have obtained a copy of the estimate upon request or reviewed the estimate in the file at the LVFO. BLM questioned Matheson's expertise in evaluating the reasonableness of the bond estimate, noting that

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[6/] The decision also stated that Matheson's Dec. 19, 2002, notification of his intent to extend Notice N-71982 covering activities on the Becki M mill site was complete, and that a financial guarantee was required in accordance with 43 CFR 3809.503.

Matheson had admitted in his January 22, 2003, letter that he lacked the technical expertise to compute necessary costs.

By order dated March 17, 2004, the Board took Matheson's petition for stay under advisement and directed BLM to serve a copy of the January 2004 Cost Estimate on Matheson. [7/] The Board also granted Matheson until March 29, 2004, to respond to the estimate, adding that, if he intended to challenge the estimate, his response should include a detailed cost estimate following the format of the BLM estimate.

In his response, Matheson maintained that BLM had received a lump sum estimate for the cost of chemical removal just as he had received a lump sum price for the demolition work and that, if BLM could use such estimates, he reasonably assumed that he could also do so. He argued that BLM should have obtained two additional bids for chemical removal and used the lowest bid for the cost estimate. [8/] He further asserted that BLM had counted the contingency, profit, and contract administration costs twice by adding them to the lump sum chemical removal cost, which had already accounted for those costs. Matheson objected to BLM's requiring him to expend considerable time and effort to establish a reasonable reclamation figure when BLM was simply going to arbitrarily set the bond amount. Matheson concluded that BLM's estimate was excessive by at least $30,000. [9/] Matheson also

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[7/] By order dated May 6, 2004, the Board denied Matheson's petition for a stay of BLM's decision pending appeal.

[8/] This argument is rejected. No such obligation appears in the regulations. To the extent appellant believes additional bids would result in different or lower costs, it behooved Pilot to obtain bids and submit the information to BLM when the details of Pilot's cost estimate were requested, or to this Board to buttress Pilot's reasons for appealing BLM's decision.

[9/] Matheson's response contained the following calculations:

"BLM CALCULATIONS:

"Demolition Building	14,250
"Lab	470
"Concrete demolition	19,038
"Fence removal	2,058
"Removal waste	9,047
"Earth work	1,031
"Mobilization	431
"Total	46,325
"10% profit	4,632
"Total of above including profit	50,957

(continued...)

provided a copy of C & W's proposal to demolish and remove a "60' X 40' building with slab, security trailer, fence, power poles, rough grade on property, replant cactus and seed property" for the sum of $31,000.

[1] Prior to the revision of the surface management regulations at 43 CFR Subpart 3809, effective January 20, 2001, no bond was required for mining operations conducted under a mining notice. 43 CFR 3809.1-9(a) (2000). The revised regulations addressing mining notices allowed an operator identified on a notice filed with BLM before January 20, 2001, to continue conducting operations under the terms of the existing notice and prior regulations for 2 years after that date. 43 CFR 3809.300(a). Upon expiration of the 2-year period, an operator seeking to continue operations was required to extend the notice under 43 CFR 3809.333 or, if necessary, modify the notice in accordance with 43 CFR 3809.331, either of which triggered the requirement that the operator provide a financial guarantee. 43 CFR 3809.300(a); 43 CFR 3809.503.

Under the regulations, an individual financial guarantee "must cover the estimated cost as if BLM were to contract with a third party to reclaim your operations according to the reclamation plan." [10/] 43 CR 3809.552. Reclamation cost estimates "must estimate the cost to reclaim operations as if BLM were hiring a third-party contractor to perform the reclamation of operations after [the operator has] vacated the project area," the estimate "must include BLM's cost to administer the reclamation contract," and it "must be acceptable to BLM." 43 CFR 3809.554(a), (b).

In this case, BLM found both Matheson's initial reclamation cost estimate of $31,000 and his expanderevised cost estimate of $59,328 to be unacceptable because

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[9/] (...continued)

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"Contract price		31,000
"Difference	say	20,000
"Contingency 10%		2,000
"Contract Administration 18%		3,600
"Excess of bond amount		$25,600"

(Mar. 26, 2004, response to BLM Cost Estimate at 1-2.) It is unclear exactly how Matheson arrived at the $30,000 figure, given that his computations total only $25,600. In any event, we note that Matheson's list of BLM's estimated costs omitted the costs for chemical and septic tank removal, well plugging, and demobilization.

[10/] The revised regulations did not alter the existing substantive performance standards for reclamation activities. Compare 43 CFR 3809.420(b)(3) with 43 CFR 3809.1-3(d)(4) (2000).

neither estimate was sufficiently detailed. BLM therefore prepared its own reclamation cost estimate for the Becki M mill site. Matheson does not deny that he is required to file a reclamation bond; he objects to the amount of the bond. An individual challenging the amount of a reclamation bond or financial guarantee required by BLM must show error in BLM's decision. See Dale Burgett, 136 IBLA 115, 120 (1996) (geothermal lease); P & K Co., 135 IBLA 166, 168 (1996) (coal lease); United States Fuel Co., 109 IBLA 398, 402 (1989) (coal lease); Dallas Oil Co., 93 IBLA 218, 220 (1986) (oil and gas lease); see also Norman Reid, 163 IBLA 324, 329 (2004) (trespass); Daryl Richardson, 125 IBLA 132, 136 (1993) (right-of-way). More than a conviction that BLM's estimate is excessive is necessary to prevail.

BLM's 16-page Cost Estimate reflected the effective reclamation standards established in 43 CFR 3809.1-3(d)(4) (2000) and utilized industry standard cost estimating guides and reference material. The Cost Estimate included the costs for removing all the structures, the equipment, the scrap and trash, the chemicals, and the septic tank, as well as plugging the well, ripping, scarifying, and seeding the entire disturbance. It contained detailed information about the structures, materials, and conditions currently existing on the mill site and the activities needed for structure and concrete demolition, waste removal and disposal, chemical and septic tank removal, well plugging, earthwork and reseeding, and mobilization and demobilization. The Cost Estimate set forth the specific costs associated with each aspect of the work needed, including equipment, materials, and labor; projected the number of hours involved; and explained assumptions underlying the estimate. BLM's Cost Estimate also provided six appended attachments further amplifying the bases for its reclamation cost assessments.

In contrast, Matheson's bond estimate, as supplemented by his January 2003 revision and appeal submission, not only does not specifically identify and quantify the components of the original $31,000 estimate, [11/] but also fails to describe the work, materials and equipment, and/or labor supporting the additional estimates for the costs of plugging the well, removing the septic system, and removing the equipment and scrap. Nor has Matheson presented any objective evidence that would undermine the reasonableness of BLM's Cost Estimate or the manner in which it was calculated. The complaint that BLM used a lump sum price for chemical removal is belied by Attachment 5 to BLM's Cost Estimate, which enumerates packaging costs, including labor and equipment, and transportation and disposal costs, that depend on the type of disposal and the number and size of the needed drums. In short, neither the general cost information Pilot submitted nor unsupported allegations of error provides a basis for challenging the reasonableness

[11/] The copy of C & W's proposal submitted on appeal also does not itemize the materials, equipment, labor, and unit costs underpinning the proposal.

of BLM's Cost Estimate or for finding it to be excessive. Consequently, we find no reason to accept Pilot's bond estimate rather than BLM's.

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

T. Britt Price
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge