



FERRELL ANDERSON

171 IBLA 289

Decided May 25, 2007

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IBLA 2006-96, 2006-97

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Appeal from two decisions issued by the Baker Field Office, Oregon, Bureau of Land Management, determining the amount of a reclamation bond and attaching certain conditions to the extension of a mining notice. OR47527.

Affirmed.

1. Administrative Review: State Director Review--Appeals:
Generally--Appeals: Jurisdiction

Under 43 C.F.R. § 3809.806(a), if the BLM State Director does not make a decision within 21 days of receipt of a request for State Director review, the applicant is to consider the request denied and may appeal the original BLM decision to the Board of Land Appeals. However, neither that regulation nor any other regulation in 43 C.F.R. Subpart 3809 imposes any specific deadline for filing such an appeal.

2. Mining Claims: Generally--Mining Claims: Operations
Conducted Under Notices--Mining Claims: Lode Sites

A BLM decision establishing the amount of the financial guarantee (reclamation bond) required to extend the mining notice for operations on certain lode mining claims will be affirmed where the operator fails to demonstrate error in BLM's reclamation cost estimate, including the type of equipment to be used for reclamation.

3. Mining Claims: Generally--Mining Claims: Operations Conducted
Under Notices--Mining Claims: Lode Sites

The regulations at 43 C.F.R. Subpart 3809, which require BLM to prevent unnecessary or undue degradation to the public lands and allow BLM to enter into agreements with the states to regulate mining activity, authorize BLM to require operators

seeking an extension of a mining notice to provide BLM with copies of any required state permits as a condition of the extension of the notice.

APPEARANCES: Ferrell Anderson, Unity, Oregon, *pro se*; Ted Davis, Acting Field Manager, Baker Resource Area, Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Ferrell Anderson appeals from two decisions issued by the Baker Field Office, Oregon, Bureau of Land Management (BLM), which estimated the cost of reclamation, set the amount of the reclamation bond for Anderson's notice-level mining operations, and attached certain conditions to the extension of Anderson's notice. The appeals, docketed separately by the Board, arise out of the same facts and issues. Therefore, we have consolidated them *sua sponte*. Because Anderson fails to show error in BLM's reclamation cost estimate, and because BLM is authorized to require Anderson to submit copies of relevant state permits as a condition to extending her notice, we affirm.

However, before we reach the merits of this case, we must address its procedural posture. BLM issued a decision on December 27, 2004, rejecting Anderson's reclamation cost estimate for her extension of notice OR 47527 and establishing an acceptable cost estimate for her required financial guarantee. Anderson responded to the December 27 decision by letter dated January 11, 2005, providing additional information and a revised cost estimate for reclamation. On January 18, 2005, BLM sent Anderson another letter, rejecting the revised cost estimate and stating that the December 27 decision remained in effect. On January 24, 2005, Anderson petitioned for State Director Review (SDR) of both the December 27 decision and the January 18 letter. Anderson received no response to her requests for SDR. On December 13, 2005, Anderson filed notices of appeal for both BLM decisions.

Anderson's pending appeals are governed by 43 C.F.R. §§ 3808.800-809. These regulations explain the process by which an SDR applicant may obtain administrative review. Section 3809.801 is titled: "When may I file an appeal of the BLM decision with OHA [the Office of Hearings and Appeals]?" The regulation explains that an SDR applicant has three options for further administrative review.

1. Under 43 C.F.R. § 3809.801(a)(2), if the State Director does not accept the request for SDR, the SDR applicant may appeal the original BLM decision to the

Board¹ “within 30 calendar days of the date you receive the State Director’s decision not to review.”

2. Under 43 C.F.R. § 3809.801(a)(3), if the State Director accepts a request for SDR, “but has not made a decision on the merits of the appeal,” the SDR applicant may appeal the original BLM decision to the Board “before the State Director issues a decision.”

3. Under 43 C.F.R. § 3809.801(a)(4), if the State Director makes a decision on the merits of the appeal, the SDR applicant may appeal the SDR decision “within 30 calendar days of the date you receive, or are notified of, the State Director’s decision.”

None of these scenarios directly addresses the situation at hand, in which Anderson filed her petition for SDR but was not notified of whether or not her petition would be accepted for review. However, 43 C.F.R. § 3809.806(a) states that “[i]f the State Director does not make a decision within 21 days [of receipt of an SDR request] on whether to accept your request for review, you should consider your request for State Director review declined, and you may appeal the original BLM decision to OHA.”

This provision creates a method for the State Director to issue a de facto rejection of a request for SDR by not taking any action on the request within 21 days of its receipt. In this case, the State Director took no action during that time period or thereafter. Anderson’s petition for review was thereby rejected, and she consequently has the right to appeal to this Board. What the regulation does not state is whether there was a deadline for Anderson to submit a timely Notice of Appeal.

[1] BLM argues that 43 C.F.R. § 3809.801(a)(2) imposes a deadline of 30 days after the 21-day review period in which to timely appeal a State Director’s de facto rejection of an SDR request. We are not persuaded by this argument. The 30-day period for filing a timely appeal under 43 C.F.R. § 3809.801(a)(2) begins *only* after the applicant receives notice of the State Director’s rejection of the request for SDR. It is undisputed that Anderson never received such notice.

The regulations do, however, provide guidance regarding how a deadline for a timely appeal to this Board under the surface management regulations is triggered. The triggering event is a communication from the State Director, either declining to

¹ While references in the appeal regulations at 43 C.F.R. §§ 3809.800-809 are to “OHA,” appeals of BLM decisions under 43 C.F.R. Subpart 3809 to OHA are directed to the Board of Land Appeals pursuant to 43 C.F.R. Part 4. Further regulatory references to OHA will be construed as meaning the Board of Land Appeals, and OHA will be referenced only if the regulations are quoted.

accept a petition for SDR or issuing a decision in a case that had been accepted for SDR. *See* 43 C.F.R. § 3809.801(a)(2) and (4).² These regulations assume that the State Director will notify an SDR applicant, and only after that notice is received must the applicant appeal to this Board by a specified deadline. In the instant case, where there has been no notice from the State Director of any kind, the regulations impose no such deadline. Accordingly, we find that Anderson's appeals are timely, and we proceed to examine their merits.

Anderson is owner of the Mule Shoe #5, #6, and #16 lode claims in Malheur County, Oregon, and is the operator of a notice-level mining operation on the claims. She filed her original Notice of Operation (Notice) on November 11, 1984. On November 21, 2000, BLM reorganized and revised its regulations governing the surface management of mining claims. The revisions included a grace period of 2 years for existing notice-level operations. A notice-level operator identified on file with BLM on January 20, 2001, who wished to continue operations at the end of the grace period, was required to submit an application for extension of the notice by January 20, 2003. 43 C.F.R. § 3809.300. Anderson's appeals arise out of her application for an extension.

On April 27, 2004, BLM issued a decision stating that Anderson's Notice had not been extended and had therefore expired. Upon reconsideration, BLM issued a decision on May 11, 2004, that vacated the April 27, 2004, decision and stated that BLM "anticipated processing [Anderson's] notice extension this summer."³ After correspondence throughout the summer and fall of 2004, BLM issued a decision on December 27, 2004, that rejected Anderson's estimate of the cost of reclamation and extended Anderson's Notice subject to certain conditions, including posting a financial guarantee in the amount of BLM's estimate of the cost of reclamation. Anderson submitted a revised plan for reclamation by letter dated January 11, 2005. BLM then sent Anderson its January 18, 2005, letter, which rejected Anderson's

² Even section 3809.801(a)(3), which allows an SDR applicant to appeal to the Board during the pendency of SDR but before a decision is made and thus does not have a specific deadline, is only applicable after the applicant has received notice from the State Director that the request for SDR has been accepted.

³ Anderson cites to the May 11, 2004, decision in her appeal docketed as IBLA 2006-96, arguing that this decision granted her an extension for 2 years and that therefore BLM's subsequent decision on Dec. 27, 2004, issuing an extension with certain requirements, was an unauthorized attempt to amend the extension. We reject that argument because the May 11, 2004, decision did not grant an extension of her Notice; it states only that BLM intended to process the application for an extension of her Notice during the summer of 2004.

revised plan and cost estimate and stated that the December 27, 2004, decision was still in effect.

Anderson makes several arguments in her appeals, which we group into two general arguments. First, Anderson challenges the basis of BLM's estimate of the cost of reclamation. Second, Anderson argues that BLM is not authorized to condition the issuance of an extension of her Notice on Anderson's providing copies of state water permits or documentation that water permits are not required.

RECLAMATION COST ESTIMATE

[2] Before BLM revised its regulations in 2000, a notice-level operator was not required to provide a financial guarantee for reclamation. *Pilot Plant, Inc.*, 168 IBLA 193, 198 (2006). Under the revised regulations, as part of her application for an extension, Anderson was required to provide a financial guarantee in the amount necessary to reclaim her operations. *Id.*; 43 C.F.R. § 3809.300(a); 43 C.F.R. § 3809.503. Anderson's original reclamation cost estimate of \$717 was based on the use of one back-hoe to reshape and a hand-seeder to revegetate the land. BLM rejected this cost estimate and generated its own cost estimate of \$1,042 based on the use of a back-hoe and a D-6 CAT to reshape the land and an All Terrain Vehicle (ATV) to reseed. Anderson's revised cost estimate of \$694 was based on the use of one D-7 CAT and a hand-seeder.

Anderson argues that BLM unreasonably insisted on an equipment-intensive strategy for reclamation that inflated the cost estimate for reclamation. "An individual challenging the amount of a reclamation bond or financial guarantee required by BLM must show error in BLM's decision." *Pilot Plant*, 168 IBLA at 199. The appellant has the burden of showing with objective evidence that BLM erred in calculating its estimate.

To prepare its estimate, BLM used the Caterpillar Performance Handbook (2001, 32nd. ed.) to calculate the amount of time it would take the various equipment combinations proposed to reshape the land disturbed by Anderson's operations. Anderson challenges BLM's estimate with her own calculations, which rely on the Handbook of Heavy Construction (1971, 2nd ed.). The Caterpillar Performance Handbook is more current than the Handbook of Heavy Construction, and Anderson has not provided evidence refuting BLM's claim that the Caterpillar Performance Handbook represents the industry standard. Memorandum of Telephone Conversation between Richard Chaney, Baker Field Office, BLM, and Jan Alexander, Anderson's representative, dated Jan. 13, 2005. Therefore, we find that Anderson has not shown error in BLM's reclamation cost estimate calculation utilizing information in the Caterpillar Performance Handbook.

Anderson also fails to show error in BLM's determination that Anderson's reclamation estimate should not include the use of a D-7 CAT. Anderson argues that a D-7 CAT could perform reshaping more quickly and therefore more economically than could a less powerful and smaller D-6 CAT. But BLM points out that the D-7 CAT is 10,000 pounds heavier and has a longer tread base. BLM reasonably concluded that the transport of the larger equipment over existing access roads on BLM lands would cause unnecessary and undue degradation of public lands. Although Anderson references an unverified conversation with a Forest Service engineer, who she alleges told her that a D-7 CAT would not cause significantly different damage than a D-6 CAT, this is insufficient to show error in BLM's decision.

BLM is charged with ensuring that mining operations on public lands do not cause undue or unnecessary degradation to the public lands. 43 U.S.C. § 1732(b) (2000); 43 C.F.R. § 3809.1. "Unnecessary or undue degradation" is defined in the regulations to include "conditions, activities, or practices" that, *inter alia*, fail to comply with "the performance standards in § 3809.420." 43 C.F.R. § 3809.5. Section 43 C.F.R. § 3809.420(a) requires miners to "use equipment, devices, and practices that will meet the performance standards of this subpart." Those standards include specifying access route locations and other conditions to prevent unnecessary or undue degradation, 43 C.F.R. § 3809.420(b)(1), and reclaiming disturbed areas at the earliest feasible opportunity by taking reasonable measures to prevent or control on-site and off-site damage of the Federal lands, 43 C.F.R. § 3809.420(b)(3).

BLM is authorized to prevent unnecessary or undue degradation by limiting the size of heavy equipment that will be used on the public lands. Anderson has not demonstrated that BLM erred when it determined that the D-7 CAT's greater size and weight would cause unnecessary or undue degradation to the public lands, making it an inappropriate choice for the reclamation of Anderson's operations.

Anderson also disputes BLM's decision to include in its reclamation cost estimate the use of an ATV to revegetate the disturbed land. Although Anderson argues that the disturbed area is too small and too steep for cost-effective revegetation by ATV, she presents no evidence to support her assertions. Mere disagreement with BLM's approach to reclamation is not sufficient to demonstrate error.

STATE PERMIT

Anderson's second general argument on appeal is that BLM is not authorized to make the extension of her Notice contingent on her providing to BLM either a copy of her Water Pollution Control Facility General Permit 600 (WPCF) for water discharge from the Oregon Department of Environmental Quality or documentation from the state that a water permit is not necessary. In its decision, BLM referenced

43 C.F.R. §§ 3809.202⁴ and 3809.333 for its authority to impose these requirements. Anderson argues that these regulations do not specifically require notice-level operators to provide copies of state permits to BLM.

The regulations at 43 C.F.R. §§ 3809.200-203 establish how BLM and a state can coordinate to regulate mining. Under these regulations, BLM may enter into an agreement with a state, under which that state will have primary authority to regulate any or all parts of Subpart 3809. 43 C.F.R. § 3809.201(a). Subpart 3809 regulates surface management, with the ultimate goal of preventing unnecessary or undue degradation of the public lands. 43 C.F.R. § 3809.1(a). This includes protecting water quality, an area in which the states have traditionally taken an active role. *See* 43 C.F.R. § 3809.420(b)(5) (“All operators shall comply with applicable Federal and state water quality standards”). A notice under the new regulations must describe “[t]he measures that you will take to prevent unnecessary or undue degradation during operations.” 43 C.F.R. § 3809.301(b)(2)(i). “Unnecessary or undue degradation” includes the failure to comply with state water quality standards. *See* 43 C.F.R. §§ 3809.5, 3809.420(b)(5).

[3] Anderson concedes that BLM is entitled to be informed whether she has the appropriate permits and even to see her permit. IBLA 2006-96, SOR at unpaginated 4. Her argument focuses on the requirement that she provide BLM with a copy of the permit or proof that it is not required, which she maintains is not authorized in the regulations. We are not persuaded by Anderson’s interpretation of the regulations. We hold that the regulations at 43 C.F.R. Subpart 3809 discussed in the previous paragraph, which require BLM to prevent unnecessary or undue degradation to the public lands, also empower BLM to require miners, before notices are issued or extended, to provide BLM with evidence that unnecessary or undue degradation will be avoided. We find that BLM did not err by requiring Anderson to provide a copy of her WPCF permit or related documentation.

To the extent Anderson raises arguments not addressed in this decision they have been considered and rejected.

⁴ The decision cited “§ 3809.202(2)” which does not exist. We assume that this was a typographical error.

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 decisions appealed from are affirmed.

H. Barry Holt
Chief Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge