



LKA INTERNATIONAL, INC.

175 IBLA 225

Decided July 23, 2008



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

LKA INTERNATIONAL, INC.

IBLA 2007-187

Decided July 23, 2008

Appeal from a decision of the Field Office Manager, Gunnison (Colorado) Field Office, Bureau of Land Management, declining to accept proposed notice-level mining operations on public lands and requiring submission of a plan of operations or plan amendment to conduct those operations. COC-70807.

Reversed and case remanded; petition for stay denied as moot.

1. Mining Claims: Plan of Operations

Departmental regulations governing the surface management of mining claims recognize three types of operations on mining claims: casual use, for which an operator need not notify BLM; notice-level operations, for which an operator must submit a notice; and plan-level operations, for which an operator must submit a plan of operations and obtain BLM's approval. 43 C.F.R. § 3809.10. Notice-level operations consist of exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed. 43 C.F.R. § 3809.21(a). Plan-level operations encompass operations that are greater than casual use, except for notice-level operations covered by 43 C.F.R. § 3809.21(a).

2. Mining Claims: Plan of Operations

Under 43 C.F.R. § 3809.313(e), a person cannot begin operations 15 calendar days after filing a complete notice, if BLM determines that the proposed activities do not qualify under 43 C.F.R. § 3809.11 as notice-level operations, because those activities necessitate the filing of a plan of operations.

3. Mining Claims: Generally

Under 43 C.F.R. § 3809.5, “[e]xploration,” for which a notice must be filed under 43 C.F.R. § 3809.21(a), means creating surface disturbance greater than casual use that includes sampling, drilling, or developing surface or underground workings to evaluate the type, extent, quantity, or quality of mineral values present.

Exploration does not include activities where material is extracted for commercial use or sale. Excavation of a tunnel may be considered “exploration,” when it constitutes developing underground workings to evaluate the type, extent, quantity, or quality of mineral present.

4. Mining Claims: Generally

BLM’s concern that a proposed exploration tunnel to be constructed pursuant to a mining notice may cause unnecessary or undue degradation of the public lands does not independently support BLM’s decision to require a plan of operations for the proposed activities. Such a concern must be addressed by BLM in accordance with 43 C.F.R. § 3809.311 or 43 C.F.R. § 3809.313.

APPEARANCES: George Tsiolis, Esq., Englewood, New Jersey, for appellant; Lance C. Wenger, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

LKA International, Inc. (LKA) has appealed from and petitioned for a stay of the effect of an April 24, 2007, decision of the Field Office Manager, Gunnison (Colorado) Field Office, Bureau of Land Management (BLM), declining to accept proposed notice-level mining operations on public lands and requiring submission of a plan of operations or plan amendment to conduct those operations.

For the reasons stated below, we conclude that BLM may not require the filing of a plan of operations or plan amendment for those activities. Accordingly, we reverse BLM’s decision and remand the matter to BLM for further consideration. We deny the petition for stay as moot.<sup>1</sup>

<sup>1</sup> We note that by order dated July 30, 2007, the Board suspended consideration of  
(continued...)

## *I. Background*

### *A. LKA's Notice of Intent*

LKA filed a “Notice of Intent to Conduct Exploration Activities for the LKA Exploration Adit Project” (NOI), COC-70807, with BLM on December 5, 2006.<sup>2</sup> It proposed to dig a 4,208-foot long, 8-foot high, and 6-foot wide tunnel on public lands, starting from an adit in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  sec. 10, T. 43 N., R. 4 W., New Mexico Principal Meridian, Hinsdale County, Colorado, within its overlapping LKA Nos. 1 and 2 lode mining claims, CMC-252483 and CMC-252484. Such activity, involving the use of machinery and explosives, is to be conducted over the course of an 18-month period of time and is intended to assess the quality and quantity of any gold and other valuable minerals present on the claims.

In a letter dated December 29, 2006, the Field Office deemed LKA's NOI to be incomplete and required, in accordance with 43 C.F.R. § 3809.301, the submission of additional information from LKA concerning the proposed activities. It stated: “Until a complete Notice is filed with this office, BLM is unable to determine that your proposed operations will not result in unnecessary or undue degradation . . . . In addition, we are unable to make a determination as to the amount of the required financial guarantee.” Letter to LKA, dated Dec. 29, 2006, at 2. The Field Office also stated that, until the information was provided, “your Notice cannot be processed and the proposed exploration activity is not to take place.” *Id.* LKA provided additional information on January 25, and April 9, 2007.

### *B. Field Office's April 2007 Decision*

In its decision, the Field Office stated that, based on its review of the submitted materials, it would “not accept the proposed Notice level operations,” noting instead that “[t]he proposed operations could be re-submitted to this office as a Plan of Operations or as a Plan amendment.” Decision at 1, 2.

BLM set forth, in some detail, three basic reasons for not accepting the proposed notice-level operations. First, BLM stated that the proposed operations

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<sup>1</sup> (...continued)

the appeal at the request of the parties in order to allow them to explore settlement of this appeal. On May 20, 2008, counsel for LKA reported that those negotiations had been unsuccessful.

<sup>2</sup> Gault Group Inc. (Gault) prepared, filed, and pursued LKA's NOI with BLM, on behalf of LKA. Gault also filed a copy of the NOI with the Division of Reclamation, Mining and Safety (DRMS), Department of Natural Resources, State of Colorado.

would not constitute “exploration,” and, therefore, would not qualify as a notice-level operation under 43 C.F.R. § 3809.21:

The proposed operations exceed industry standards for exploration. Standard industry exploration is drilling to investigate metal values, and to collect underground mining conditions in advance of determining the costs and impacts of a 4,208 (+/-) foot long adit through unknown conditions to potential mineralization.<sup>[3]</sup> . . . We see this 6 [foot] wide x 8 [foot] high “exploration adit” as a production sized working, per Mr. Lance Barker’s testimony (US v. Miller, IBLA 2003-342) that the Golden Wonder Mine “main level drift is 8 by 8 feet” for the production adit.<sup>[4]</sup> As such, BLM is not prepared to permit a 4,208 (+/-) foot long production facility with a sizable surface dump including an unknown quantity of acid generating material and unknown water conditions as exploration under a Notice.

Decision at 1.

Second, BLM stated that the proposed operations were actually part of a nearby mining operation, which was already subject to a plan of operations:

The proposed operation is designed to intersect with an existing mining operation [the Golden Wonder Mine]. The proposed activities have been determined to be an expansion of the existing operation to reach the known ore body from a lower level. As such, segmenting the operation to avoid filing a Plan of Operations or a Plan Amendment to keep total surface disturbance under 5 acres is not permitted (43 CFR 3809.21(b)).

Decision at 1-2.

<sup>3</sup> BLM also referred to the fact that LKA was required, by 43 C.F.R. § 3809.420(a)(2), to “follow[] a reasonable and customary mineral exploration, development, mining and reclamation sequence,” in order to prevent unnecessary or undue degradation, under 43 C.F.R. § 3809.415. Decision at 1.

<sup>4</sup> BLM refers to testimony by Barker, described as “a geologist, who operates the Golden Wonder Mine, a gold mine near Lake City, Colorado, with a partner and one other person,” at the 2002 hearing in the Government contest that resulted in the Board’s May 9, 2005, decision in *United States v. Miller*, 165 IBLA 342. *Id.* at 371. Barker testified that underground mining operations at the Golden Wonder Mine used a series of drifts to access the narrow veins of ore and associated material: “He stated that their ‘main level’ drift is 8 by 8 feet, but other drifts are 6 by 4 feet, with some as small as ‘3 to 4 feet wide’.” *Id.*

Third, BLM stated that the proposed operations would cause unnecessary or undue degradation of public lands “by generating a large quantity of waste and acid generating rock from an adit as compared to the smaller quantity that standard drill holes used for exploration would generate.” Decision at 1. BLM added that

underground conditions may be speculative without sufficient data to support the water and rock to be encountered at the level and length of the proposed LKA adit, without exploration drilling in advance of driving the adit. The proximity of the adit to drinking water supplies at the Lake Fork of the Gunnison River and the issue of siting and need for potential water treatment facilities (based on underground water conditions at the nearby Golden Wonder Mine above this area) adds to this concern.

Decision at 2.

LKA initially sought State Director Review (SDR) of the decision, but the Deputy State Director, Energy, Lands, and Minerals, Colorado, BLM, issued a May 15, 2007, letter, declining to review the decision. Thereafter, pursuant to 43 C.F.R. § 3809.801, LKA filed a timely appeal of the Field Office decision.<sup>5</sup>

## II. *LKA's Arguments on Appeal*

On appeal, LKA challenges what it asserts is BLM's determination “that LKA's exploration tunnel, which would be dug on BLM land to explore for locatable minerals and cause less than five acres of surface disturbance, does not qualify as a notice-level operation under 43 C.F.R. § 3809.21.”<sup>6</sup> Petition at 1. LKA asks the Board to reverse the decision, and allow it to proceed with its proposed exploration in accordance with the terms of its notice.

LKA argues that BLM's conclusion that the tunnel will cause unnecessary or undue degradation is unsubstantiated by the record, specifically arguing that BLM does not address or find fault with the comprehensive measures LKA described that it

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<sup>5</sup> LKA's Notice of Appeal and Petition for Stay (Petition) contains its statement of reasons for appealing the April 2007 decision. Following the failure of settlement negotiations, BLM sought and was granted time to file an answer. BLM has filed its answer and LKA has replied.

<sup>6</sup> LKA states that the NOI demonstrated, in accordance with 43 C.F.R. § 3809.301(b), “that all surface disturbance resulting from digging the tunnel, including road construction necessary to access the tunnel site, and the staging of excavated material and equipment, diesel fuel, lubricants and explosives nearby the tunnel entrance, would not exceed 1.22 acres.” Petition at 2.

would take to avoid unnecessary or undue degradation as a result of the tunnel project. Reply at 2. LKA asserts that BLM has not demonstrated that, despite such measures, unnecessary or undue degradation would still occur.<sup>7</sup> *Id.*

LKA recognizes that BLM can, under 43 C.F.R. §§ 3809.312(a) and 3809.313, lawfully prohibit LKA from proceeding with the tunnel project under the NOI, if it properly determines, as a matter of law, that the proposed operation does not qualify as a notice-level operation under 43 C.F.R. § 3809.11 or § 3809.21. It argues, however, that its proposed exploration, in fact, qualifies as a notice-level operation, since it is not disqualified under any of the provisions of 43 C.F.R. §§ 3809.11 and 3809.21: “[BLM’s] Decision fails to put forth a lawful reason for denying LKA the right to proceed with the exploration tunnel as a notice[-]level operation,” adding that “[BLM] does not establish that any of the conditions that trigger the requirement of a plan of operations exists in this case.” Petition at 13-14.

### *III. Discussion*

[1] Departmental regulations governing the surface management of mining claims recognize three types of operations on mining claims: “[c]usual use, for which an operator need not notify BLM”; “[n]otice-level operations, for which an operator must submit a notice”; and “[p]lan-level operations, for which an operator must submit a plan of operations and obtain BLM’s approval.” 43 C.F.R. § 3809.10. What is at issue here is the distinction between notice-level operations, which are defined by 43 C.F.R. § 3809.21(a), and plan-level operations, which are defined by 43 C.F.R. § 3809.11(a).

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<sup>7</sup> LKA anticipated the excavation and removal of a total of 7,467 cubic yards of “andesite [and] argillic alteration rock.” NOI at 3. LKA broke the total down into 5,689 cubic yards of andesite and 1,777 cubic yards of argillic alteration rock. Notice of Intent, Attachment G (*Volume Estimates*). The andesite is described as “a crystalline volcanic rock that contains stable minerals, which are inert to metals leaching.” Notice of Intent, Attachment E (*Water Management Plan for the LKA Exploration Adit*), at unpaginated 2. The argillic alteration rock is represented as the only “waste rock,” or rock with acid-bearing characteristics, which might be encountered in the tunnel. Notice of Intent, Attachment H (*Waste Rock Management Plan*), at unpaginated 1. Following extraction and removal from the tunnel, both the andesite and argillic alteration rock would be segregated on the surface, using the andesite to encapsulate the argillic alteration rock. All of the material would eventually be covered with topsoil and reclaimed. In general, the argillic alteration rock would have little to no exposure to the air and water: “In the absence of atmospheric oxygen and water, the encapsulated acid-bearing materials will not yield any acids of significance or concern.” *Id.* at unpaginated 3.

Notice-level operations consist of “exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed.” 43 C.F.R. § 3809.21(a). Plan-level operations are those operations which are “greater than casual use,” and yet are not notice-level operations described in 43 C.F.R. § 3809.21. 43 C.F.R. § 3809.11(a). Thus, plan-level operations encompass operations that are greater than casual use, except for notice-level operations covered by 43 C.F.R. § 3809.21(a).<sup>8</sup>

[2] BLM does not issue a decision approving notice-level mining operations. Instead, upon receipt of a notice, BLM must review it within 15 calendar days to determine if, in accordance with 43 C.F.R. § 3809.301, it is complete. If it is complete, operations may begin under the notice, no sooner than 15 calendar days after receipt of that complete notice, if BLM does not take any of the actions described in 43 C.F.R. § 3809.313. 43 C.F.R. § 3809.312(a). If BLM determines that a notice is not complete, it will either inform the person filing the notice of the additional information that must be filed or it may take the actions described in 43 C.F.R. § 3809.313. Under 43 C.F.R. § 3809.313(e), a person cannot begin operations 15 calendar days after filing a complete notice, if BLM determines that the operations do not qualify as a notice-level operation. In such a situation, BLM requires the filing of a plan of operations before commencement of operations.<sup>9</sup> *Id.*

In its April 2007 decision, BLM did not determine the notice to be incomplete. Instead, it took the action described above. We now address the reasons provided by BLM for taking that action by posing them as questions.

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<sup>8</sup> Plan-level operations also encompass “any bulk sampling in which you will remove 1,000 tons or more of presumed ore for testing,” and “any operations causing surface disturbance greater than casual use” in certain “special status areas where § 3809.21 does not apply.” 43 C.F.R. § 3809.11(b) and (c). There is no evidence that any of these criteria are applicable in this case. *See* Petition at 10.

<sup>9</sup> LKA notes that a proposed operation may also be barred from proceeding, under 43 C.F.R. §§ 3809.312(a) and 3809.313, in circumstances other than where it does not qualify as a notice-level operation, but that BLM did not find any of them applicable:

“[T]he Field Office has not informed LKA that the Field Office needs additional time to complete its review of the Notice; has not informed LKA that it must modify the Notice to include additional measures necessary to prevent unnecessary or undue degradation; never informed LKA that the Field Office would like to consult about the location of roads that might be constructed or modified for access to the project area; and never informed LKA that the Field Office needs to perform an on-site visit to assist in the evaluation of the Notice.”

Petition at 13.

A. *Do LKA's Proposed Operations Constitute Exploration?*

[3] BLM's April 2007 decision holding that LKA's proposed operations do not qualify as notice-level operations rested, in part, on its conclusion that the operations do not constitute "exploration" under 43 C.F.R. § 3809.21(a).<sup>10</sup> LKA, however, argues that its proposed operations constitute "exploration." It challenges BLM's conclusion that exploration consists of drilling, but not sinking a tunnel, such as that described in the NOI, and BLM's claim that such tunneling exceeds industry standards and can only be described as production. *See* Decision at 1. LKA states that such tunneling fits within the regulatory definition of "exploration," which provides at 43 C.F.R. § 3809.5 that that term "means creating surface disturbance greater than casual use that includes sampling, drilling, or developing surface or underground workings to evaluate the type, extent, quantity, or quality of mineral values present," but "does not include activities where material is extracted for commercial use or sale." LKA argues that "[c]learly, a tunnel is a type of underground working and, under the rule, a valid method of conducting exploration that is co-equal and alternative to drilling; whereas the tunnel's dimensions are irrelevant to a determination of whether the tunnel is exploratory in nature."<sup>11</sup> Petition at 10.

The record supports LKA's contention that its proposed operations fall within the regulatory definition of exploration. The tunneling that LKA proposes to undertake constitutes "developing . . . underground workings" that are intended "to evaluate the type, extent, quantity, or quality of mineral values present." Since the regulation does not specify the size of such "workings," we cannot find that the proposed tunnel must be considered production, rather than exploration, activity. While it is true, as evidenced by the testimony in *Miller*, that such a tunnel may be used for the production of mineral ore, there is no evidence here that LKA's present intention is to extract material for commercial use or sale, rather than to evaluate the

<sup>10</sup> BLM does not dispute LKA's contention that there would not be a violation of the acreage limitation on notice-level operations, regardless of the extent of underground disturbance, because the total surface disturbance associated with its proposed operations will be only 1.22 acres. *See* 43 C.F.R. § 3809.21(a).

<sup>11</sup> With its Reply, LKA offers the declarations of Delmer L. Brown and Stephen E. Glass. Reply, Ex. 1. Brown, a geological engineer with 42 years experience in mineral exploration and development, and Glass, an environmental scientist with 17 years experience in the mining industry and Chief Executive Officer of Bluerock Energy Corporation, an underground mining company with mining claims, properties and related interests in Colorado and Utah, both state that "the sinking of a adit, shaft or tunnel to explore for the presence, quantity and quality of subsurface minerals is considered a standard form of exploration within the mining industry." Brown Declaration at ¶5; Glass Declaration at ¶5. Such activity, they both state, "is standard and accepted even if it is not preceded by a drilling program." *Id.* at ¶ 6.



type, extent, quantity, or quality of mineral values present. If at any time during tunnel construction, LKA desires to commence production, it will need to file a plan of operations. LKA acknowledges such a requirement. Petition at 12.

BLM also argues that tunneling does not properly constitute “exploration,” as that term is defined by 43 C.F.R. § 3809.5, because tunneling is properly preceded by drilling. Such an argument derives from the language of 43 C.F.R. § 3809.420, which sets out the general and specific “performance standards” applicable “to your notice or plan of operations,” specifying, in subsection (a)(2), the proper “*Sequence of operations*,” as follows: “You must avoid unnecessary impacts and facilitate reclamation by following a reasonable and customary mineral exploration, development, mining and reclamation sequence.” We find no support therein for a ruling that the phrase “reasonable and customary . . . sequence” dictates that drilling *must* precede tunneling, where both are aimed at disclosing underground mineral values, or that it has any bearing on whether LKA’s proposed tunneling constitutes exploration. In addition, LKA offers evidence to the contrary. *See* n.11, *supra*.

We conclude that LKA’s proposed operations constitute “exploration” within the meaning of the regulations in 43 C.F.R. Subpart 3809.

*B. Does LKA’s NOI Constitute an Improper Segmentation of a Plan of Operations?*

LKA asserts that its NOI does not constitute an attempt to engage in improper segmentation as described in 43 C.F.R. § 3809.21(b). LKA asserts that there will not be any segmentation, arguing as follows:

43 C.F.R. § 3809.21(b) provides “[y]ou must not segment a project area by filing a series of notices for the purpose of avoiding filing a plan of operations.” In this case, LKA has not filed a series of notices and is not proposing any other exploration. The Notice for the exploration project at issue is the only notice LKA has filed.

Petition at 11. LKA also asserts that it is not segmenting operations within a project area, since its proposed exploration is “wholly independent” of the Golden Wonder Mine mining operations. *Id.* at 12. It explains that, while the Golden Wonder Mine is being operated on a mining claim owned by LKA, under a lease that grants LKA a percentage of the net smelter return in compensation for the lease, neither LKA nor its owners have an ownership interest in AU Mining, the company that operates the Golden Wonder Mine or operational control over the Golden Wonder Mine. It states: “LKA’s exploration tunnel is a separate LKA prospecting endeavor, wholly independent of the Golden Wonder Mine and AU Mining’s interests, and would be dug on a separate claim at a separate location.” *Id.* It also states that the proposed exploration tunnel would not intersect the Golden Wonder mining operations since

the tunnel “would be at a vertical elevation over 950 feet below the lowest elevation of the Golden Wonder Mine.”<sup>12</sup> *Id.*

Although BLM provides copies of several pages of information from LKA’s website, as well as a copy of an LKA Press Release dated May 4, 2006, Answer, Ex. C, which BLM characterizes as “indicat[ing] that the adit proposed by the Notice was intended as an expansion of the existing Golden Wonder Mine owned by Appellant,” Answer at 8, the record does not support BLM’s conclusion that LKA’s NOI constitutes an improper segmentation of a plan of operations in violation of 43 C.F.R. § 3809.21(b). BLM has failed to rebut LKA’s assertion that the proposed tunnel would not intersect the Golden Wonder Mine workings, and that the two projects would not be worked together, since operational control over the two projects is vested in two distinct parties.<sup>13</sup> Nor do we find “a series of notices” intended to evade the requirement to file a plan of operations; the Golden Wonder Mine workings are already covered by a plan of operations.

We conclude that LKA’s NOI does not constitute an improper segmentation of a plan of operations.

*C. Do BLM’s Concerns About Unnecessary or Undue Degradation Support the Necessity for a Plan of Operations or a Plan Amendment?*

[4] BLM is required by section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (2000), and 43 C.F.R. Subpart 3809 to ensure that no proposed activity under the mining laws results in unnecessary or undue degradation of the public lands. *Mineral Policy Center v. Norton*, 292 F. Supp.2d 30, 33, 41-46 (D.D.C. 2003); *Cat Mountain Corp.*, 148 IBLA 249, 252 (1999); 66 Fed. Reg. 54834, 54841 (Oct. 30, 2001) (“For the past 20 years, BLM’s 3809 regulations have been in place to protect the public lands against unnecessary or undue degradation”).

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<sup>12</sup> LKA notes that the claims encompassing the proposed adit and the Golden Wonder Mine are situated “about half a mile” apart, which is confirmed by Figure 1 of LKA’s NOI. Petition at 12.

<sup>13</sup> In its Reply at page 7-8, LKA states that the information relied on by BLM in Ex. C represents a disclosure and qualification to potential LKA investors “that any future linkage with the Golden Wonder Mine would be materially conditional on the exploration tunnel actually hitting a vein.” It states that if the tunnel were to intersect a vein, whether an extension of the Golden Wonder Mine vein or a vein unrelated to the Golden Wonder Mine vein, and LKA made a business decision to mine that vein, “LKA will of course submit a mine plan of operation for the production.” *Id.* at 8.

When unnecessary or undue degradation is likely to occur, BLM is required to take appropriate steps to preclude such degradation, including requiring an operator, pursuant to 43 C.F.R. §§ 3809.312(a) and 3809.313, to modify its proposed operations in such a manner as “to prevent unnecessary or undue degradation,” or barring an operator, pursuant to 43 C.F.R. § 3809.311(c), from conducting operations where it is unable “to prevent unnecessary or undue degradation.”

LKA states that, while BLM may require an operator to modify a proposed notice-level operation in order to ensure that it does not unnecessarily or unduly degrade the public lands, the regulation does not allow BLM to totally disqualify an operation from proceeding as a notice-level operation and force the operation to proceed as a plan-level operation based on concerns about unnecessary or undue degradation.

We agree with LKA that the regulations in 43 C.F.R. Subpart 3809 do not state that BLM may require one proposing to conduct notice-level operations to file a plan of operations merely because BLM has concerns that those operations might cause unnecessary or undue degradation of the public lands. BLM may properly seek to prevent notice-level operations from proceeding until it is reasonably assured that they are unlikely to cause any unnecessary or undue degradation of the public lands.<sup>14</sup> Thus, BLM could have required LKA to provide, as part of the process of reviewing LKA’s NOI, additional information designed to address the uncertainties regarding the quality and quantity of the underlying rock and water which was likely to be intersected by its proposed tunnel. While BLM did require additional information regarding those matters, it did not request any further information or require LKA to modify its NOI to prevent unnecessary or undue degradation.<sup>15</sup> Instead, BLM refused to allow the proposed operations to proceed under a notice and required the filing of a plan of operations or a plan amendment. The record does not support such action.

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<sup>14</sup> LKA properly notes: “If the BLM intends to prevent notice-level operations from occurring based on concerns about unnecessary or undue degradation, then 43 C.F.R. § 3809.313(b) specifically allows the BLM to remand the notice to the project proponent with a request that it be modified further to resolve the BLM’s concerns.” Petition at 8; *see also id.* at 9 (“If there are lingering, valid concerns about unnecessary or undue degradation resulting from the tunnel project, then the BLM may ask LKA to address those concerns by further modifying the Notice”).

<sup>15</sup> The regulations expressly state at 43 C.F.R. § 3809.311(c) that BLM will review required additional information from the person filing a mining notice to ensure the notice is complete, and that BLM will repeat the process until the notice is complete or until it determines that operations may not proceed “because of your inability to prevent unnecessary and undue degradation.”

We conclude that BLM's concerns about unnecessary or undue degradation do not support the necessity for a plan of operations or a plan amendment. However, if, on remand, BLM continues to have concerns about unnecessary or undue degradation, it may, in accordance with 43 C.F.R. § 3809.313(b), require LKA to modify the NOI.<sup>16</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, BLM's decision is reversed and the case is remanded for action consistent with this opinion. The petition for stay is denied as moot.

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/s/  
Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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/s/  
H. Barry Holt  
Chief Administrative Judge

<sup>16</sup> It is evident from LKA's May 20, 2008, report that the parties have had significant discussions regarding BLM's concerns regarding unnecessary and undue degradation. On remand, BLM should articulate any lingering concerns in order to allow LKA to address them.