



COTTONWOOD GOLD COMPANY

178 IBLA 386

Decided February 25, 2010



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

COTTONWOOD GOLD COMPANY

IBLA 2009-151 & IBLA 2009-152

Decided February 25, 2010

Appeals from a decision of the Kingman (Arizona) Field Office, Bureau of Land Management, issuing a cessation order under 43 C.F.R. subpart 3715, and from a decision of the Arizona State Office, Bureau of Land Management, forfeiting a bond. MPO 89-K-08; AZB000251.

Decisions vacated and case remanded.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--Mining Claims: Plan of Operations--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

Under 43 C.F.R. § 3715.4-3, “BLM may order the land to be reclaimed to its satisfaction and specify a reasonable time for completion of reclamation under 43 CFR part 3800.” An order to reclaim must articulate the basis for the order under 43 C.F.R. subpart 3809. BLM is without authority to order a mining claimant to immediately and permanently cease all operations and occupancies at the mine site. As long as mining claims remain valid, the claimant retains the right to re-enter its claims for mining, exploration, and/or milling operations, subject to the limitations imposed by 43 C.F.R. subparts 3715 and 3809.

2. Federal Land Policy and Management Act of 1976: Plan of Operations--Mining Claims: Plan of Operations--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

A decision forfeiting a bond will be set aside where BLM has not acted upon a mine plan of operations (MPO) under 43 C.F.R. subpart 3809 or upon a request for occupancy under 43 C.F.R. subpart 3715, and where the claimant’s equipment and occupancy may be needed

for conducting operations under an approved MPO. BLM may not base its decision to forfeit a bond upon an order to reclaim that is deficient under 43 C.F.R. subpart 3809.

APPEARANCES: Jerry L. Haggard, Esq., Phoenix, Arizona, for appellant; John L. Gaudio, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, and Kendra Nitta, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Cottonwood Gold Company (CGC or Cottonwood) has filed a consolidated notice of appeal (NOA) from (1) a February 10, 2009, letter issued by the Field Manager, Kingman (Arizona) Field Office (KFO), Bureau of Land Management (BLM), ordering CGC to immediately and permanently cease all operations and occupancies at the Mojave Mine site in Mohave County, Arizona (docketed by the Board as IBLA 2009-152),¹ and (2) a February 12, 2009, decision issued by BLM's Arizona State Office (ASO), appropriating CGC's "Surface Management Personal Bond" of \$28,000 because CGC failed to submit an application for an Aquifer Protection Permit (APP) to the Arizona Department of Environmental Quality (ADEQ) by December 15, 2008 (docketed by the Board as IBLA 2009-151). For the reasons set forth below, we vacate both decisions and remand the case to BLM for further action.²

¹ By order dated May 12, 2009, the Board denied BLM's motion to dismiss CGC's appeal from the Feb. 10, 2009, letter, ruling that it "is clearly an appealable decision," in that it reinstates the Cessation Order (CO) found deficient by the Board in *Combined Metals Reduction Co.*, 170 IBLA 56 (2006), and imposes a new reclamation schedule dating from receipt of the letter. See 43 C.F.R. § 4.410; *Defenders of Wildlife*, 169 IBLA 117, 127 (2006). The Board also consolidated IBLA 2009-151 and IBLA 2009-152, granted CGC's petitions for stay, and ordered settlement discussions.

² The record forwarded by BLM consists of a folder of loose documents which appear, as indicated by the punch holes at the top, to have been removed from more complete files. With its NOA, CGC provided 39 numbered exhibits which will be cited because they can be uniquely identified, as can exhibits to subsequent filings by CGC and BLM.

BACKGROUND

CGC is the successor-in-interest to Combined Metals Reduction Company (CMRC), the appellant in *Combined Metals Reduction Co.*, in which the Board reviewed a June 16, 2003, CO issued to CMRC by the KFO, ordering it to terminate all operations at the Mohave Mine Project, located in Secs. 16, 20, 21, 27-29, and 32-34, T. 25 N., R. 21 W., Gila and Salt River Meridian, Mohave County, Arizona, and begin reclamation of the site. The Board upheld BLM's issuance of the CO, "bear[ing] in mind that the only applicable authority for issuing a CO, 43 CFR 3715.7-1(b)(1)(i), expressly limits issuance of COs to cases where the targeted occupancy 'is not reasonably incident' and is not endangering." 170 IBLA at 73. The Board stated that it was therefore "limited to whether the record shows that CMRC's use was or was not reasonably incident to mining operations." *Id.* (footnote omitted).³ The Board found that "[t]he relevant period of time for determining whether the level of activity on [CMRC's] mining claims is the time immediately prior to BLM's issuance of the CO." 170 IBLA at 74; *see also, e.g., Terry Hankins*, 162 IBLA 198, 216 (2004).

The Board concluded that "the definition of 'reasonably incident' in 43 CFR 3715.0-5 is not broad enough to encompass the work that the record demonstrates was ongoing for several years preceding issuance of the CO." 170 IBLA at 74-75. It stated:

CMRC was not engaged in prospecting, exploration, defining, developing, mining, or beneficiating valuable mineral deposits. Instead, the record shows that, for a period of some 3 years immediately prior to

³ The regulations define "reasonably incident" as those actions involving the "statutory standard" of "prospecting, mining, or processing operations and uses reasonably incident thereto." 43 C.F.R. § 3715.0-5 (*citing* 30 U.S.C. § 612 (2006)). The term

includes those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit, using methods, structures, and equipment appropriate to the geological terrain, mineral deposit, and stage of development and reasonably related activities. 43 C.F.R. § 3715.0-5; *Combined Metals Reduction Co.*, 170 IBLA at 74; *Patrick Breslin*, 159 IBLA 162, 166 (2003). In *Combined Metals Reduction Co.*, the Board stated that "[t]he extent of permissible occupancy is directly related to the extent of mining activity conducted on the claim; the structures and equipment maintained on site must be related to and commensurate with the operations." 170 IBLA at 74; *see also, e.g., Pilot Plant, Inc.*, 168 IBLA at 217.

the issuance of the CO, CMRC was merely “mothballing” its equipment, while actually dismantling much of its mining infrastructure, thus moving away from the activities comprising “reasonably incident” occupancy under the regulations.

Id. However, the Board ruled that the CO issued to CMRC “overreached the scope of its authority under 43 CFR Subpart 3715.” *Id.* at 76. The CO stated:

If, in the future, [CMRC] should desire to establish a residential occupancy or mining operations on public lands, [CMRC] must be engaged in the activities described by 43 CFR 3715.2, file the information required by 43 CFR 3715.3-2, meet the requirements of 43 CFR Subpart 3809[,] and receive written concurrence from the BLM before beginning an operation or occupancy. *However, as this is a permanent [CO, CMRC] is permanently barred by this [CO] from conducting mining and/or milling operations on the public lands encompassed by MPO-89-K-08.*⁴

Id. at 75-76 (emphasis added). The Board held:

The validity of a mining claim and permissibility of occupancy of the claim are separate questions. As long as the claims remain valid, we hold, a claimant retains the right to re-enter its claims for mining and/or milling operations, subject to the limitations imposed by 43 CFR Subpart 3809 and 3715. BLM’s CO is accordingly modified to reflect that limitation.

Id. at 76.

With regard to reclamation, the CO issued to CMRC stated: “Upon receipt of this order, under the authorities cited, [CMRC] must immediately and permanently cease all operations and occupancies at the site and *begin the full reclamation and remediation of the Mohave Mine and all surface disturbance associated with MPO-89-K-08.*” *Id.* at 77 (emphasis added). While the Board found “adequate support for an exercise of BLM’s authority to order reclamation,” it nevertheless vacated the CO’s order to begin reclamation of the Mohave Mine, stating:

⁴ The Mine Plan of Operations (MPO) that CGC filed with BLM on Nov. 13, 2006, includes a list of 215 claims. CGC’s NOA refers to 352 claims, a number which appears to have been taken from CMRC’s Apr. 24, 1989, MPO. NOA at 4, Ex. 3 at 8 & App. D.

We cannot determine with certainty what provision BLM is applying: On the one hand, it purports to permanently bar CMRC from any mining or milling activity under the approved mining plan, but on the other acknowledges that CMRC could conduct operations, provided it obtained written concurrence and complied with Subparts 3715 and 3809. (CO at 2.) In light of our holding that, so long as the claims remain valid, BLM cannot bar a claimant from re-entering its claims to conduct mining or mining-related operations, it is appropriate to vacate the portion of the CO requiring CMRC to begin the full reclamation and remediation of the Mohave Mine and all surface disturbance associated with MPO-89-K-08 and remand the matter to BLM so that it can decide in the first instance and fully articulate the nature and basis for the order to reclaim the mine site under Subpart 3809.

Id. at 78.

The KFO sent CMRC an October 27, 2006, decision (2006 Decision) stating that it had “chosen 43 CFR 3715 as the authority for requiring reclamation as it is our belief that the 43 CFR 3809 regulations do not apply to the situation at the Mohave Mine.” 2006 Decision at 3. The KFO described the “original intent of the CO” as requiring the cessation of operations, removal of structures and equipment, and reclamation of ground disturbances, “in accordance with the approved mine plan,” and it set forth dates for completing the tasks, including the completion of “all earthwork required to reclaim the lands in accordance with Section 5 of MPO 89-K-08” by September 8, 2007. *Id.* at 4. The decision, however, also noted that “CMRC could, if so desired, make application to the BLM for a new occupancy under 43 CFR 3715 and submit a new filing under 43 CFR 3809,” and “could then initiate use and occupancy of the subject claims (but not under MPO-89-K-08) pursuant to all applicable federal, state, and local permits and approvals for mining operations in Arizona.” *Id.*

CGC submitted a draft MPO under 43 C.F.R. subpart 3809 and an application for occupancy pursuant to 43 C.F.R. subpart 3715, which BLM received on November 13, 2006. NOA, Exs. 13, 14. The KFO acknowledged receipt of CGC’s MPO on November 21, 2006, but stated that it was “not willing to withdraw ‘the CO or 2006 Decision’ without additional financial assurances.” NOA, Ex. 16 at 1. The KFO indicated that it would extend the effective date of that 2006 Decision if CGC would, *inter alia*, comply with the June 16, 2003, CO “by paying into escrow the amount necessary to cover the cost of removing all remaining equipment and structures from the site” *Id.* The KFO subsequently extended the effective date of its 2006 Decision to February 16, 2007, and later to March 16, 2007. Shortly before that deadline expired, BLM informed CGC that it had “determined that a

financial guarantee in the amount of \$32,320.00 would be adequate to pay a third party to remove all equipment from public lands at the Mohave Project.” CGC responded by letter dated April 26, 2007, proposing \$28,000 as the amount of the bond, and expressing “great concern that the BLM [had] neither approved nor proposed modifications to [CGC’s] 3715 and 3809 submittals.” By decision dated May 8, 2007, the KFO replied by requesting additional information “[i]n order for BLM to complete its environmental review” of CGC’s MPO, citing 43 C.F.R. § 3809.401. NOA, Ex. 15.

The record submitted by BLM does not indicate that anything further occurred until December 27, 2007, when it issued a decision approving CGC’s financial guarantee of \$28,000. NOA, Ex. 19. In that December 27 decision, BLM noted it had previously “outlined information necessary to complete processing” CGC’s MPO, and stated that, when it received the information, CGC would be required to submit a financial guarantee to cover the cost of final reclamation of the Mohave Project, at which time “the first bond for removal of equipment will be released to [CGC].” *Id.* at 2. Under cover letter dated January 23, 2008, CGC provided BLM with a copy of a proposed bond form and a list of personal property at the mine site, and stated that it would appeal BLM’s December 27, 2007, decision unless BLM granted a 30-day period to obtain and submit the actual bond after BLM’s acceptance of the bond form. *See* NOA, Ex. 20. Five days latter, CGC’s counsel requested review of the December 27 decision by the State Director under 43 C.F.R. § 3809.800(a) and a stay pursuant to 43 C.F.R. § 3809.808. BLM Opposition, Ex. 1

In a letter dated March 11, 2008, the State Director informed CGC that KFO’s decision had “erroneously included appeals procedures” under 43 C.F.R. subpart 3809. NOA, Ex. 21 at 1. He explained that BLM was attempting to implement the CO affirmed in *Combined Metals Reduction Co.* by allowing CGC to post an adequate bond to cover the cost of structure and equipment removal while CDC sought an approved MPO for the mine. He indicated that the KFO’s December 27, 2007, decision “merely stated the bond amount that BLM and Cottonwood had mutually determined would be adequate,” and “was an outgrowth of BLM’s informal agreement with Cottonwood to forestall removal operations pursuant to BLM’s earlier order under 43 CFR Subpart 3715.” *Id.* Nevertheless, the State Director stated, he had “reviewed the proposed amended bond Form 3809-1 and generally [found] it acceptable” with the addition of three provisions. *Id.* at 2. They were (1) that CGC respond within 90 days to any request from BLM for additional information; (2) that by May 30, 2008, CGC apply to the ADEQ for an APP and make any additional filings needed to obtain the permit within 90 days of an ADEQ request; and (3) apply to the U.S. Army Corps of Engineers for a Section 404 permit by May 30, 2008, and respond

within 90 days to any request for additional filings.⁵ Each provision specified that upon failure to comply, “BLM may begin procedures to collect on the bond.” The State Director stated that BLM would “not take any actions to reclaim the mine site for at least 90 days,” and that if CGC could not post an adequate bond within that time, BLM would “proceed to enforce” the 2003 CO. *Id.*

By letter to CGC dated July 28, 2008, the KFO pointed out that CGC had neither provided BLM with an acceptable bond that contained the ASO’s specified provisions nor applied for APP and Section 404 permits. NOA, Ex. 22 at 2. The KFO informed CGC that it had 30 days to provide copies of its permit applications, “a financial guarantee in the amount of \$28,000[,] and an amended 3809-1 bond form” that included the conditions. *Id.* Recognizing that the permit deadline set by the ASO had passed, but assuming that CGC could submit the permit applications within that 30-day period, the KFO stated that the bond condition would require CGC to respond within 90 days to any request from BLM, the ADEQ, and/or the Army Corp of Engineers, and that if CGC failed to do so, “BLM will, at its discretion, enter the Mohave Mine site and take any action specified in its [2003 CO].” *Id.*

CGC responded by letter dated August 14, 2008, stating that the requirement to obtain an APP should not be included as a bond condition. CGC explained that CGC had contracted with Westland Resources (Westland) to file the APP application and that it was “quite likely” that Westland could do so within 90 days of beginning its work; however, CGC stated that it could not have Westland begin work without an “assurance that BLM [would] not make demand on either of Cottonwood’s bonds during the permitting process.” *See* NOA, Exs. 27, 28. CGC’s counsel also asserted the three ASO conditions were not authorized by the regulations.⁶

The KFO responded on September 4, 2008, by pointing out that it had revised the State Director’s formulation of the three bond conditions and, in particular, removed the May 30, 2008, compliance date. In regard to BLM’s authority, the KFO stated that because CGC “is not under a notice or plan of operations,” the 3809

⁵ “Section 404” refers to the portion of the Clean Water Act codified at 33 U.S.C. § 1344 (2006) which governs permits for the discharge of dredged and fill material into navigable waters, the authority over which rests with the Secretary of the Army acting through the Corps of Engineers.

⁶ Counsel pointed out that while 43 C.F.R. §§ 3809.552(a), 3809.553(a)(2), and 3809.580(a) allow for a financial guarantee to assure that BLM recovers reclamation costs, and 43 C.F.R. § 3809.420 requires compliance with Federal and state environmental laws, “there is no authority under the bonding regulations to allow BLM to require the forfeiture of a bond for a delay in applying for state environmental permits.”

regulations it cited “are not at issue here.” Moreover, BLM explained, it had offered CGC the option of posting the \$28,000 bond as a means “to forestall BLM’s enforcement of the earlier cessation and reclamation order,” and that, “[i]f Cottonwood chooses not to post the bond because it believes BLM lacks authority to require the described bond, the BLM will enforce the earlier cessation and reclamation order.” BLM allowed CGC until September 15, 2008, to post the bond, after which BLM stated that it “may seek to reclaim the Mohave Project and enforce the earlier cessation order.”

By letter dated September 10, 2008, CGC explained that, after receiving the State Director’s March 11, 2008, letter, CGC “immediately added the requested language to the bond text,” but that its “underwriter disavowed any further interest in writing [the] bond.” NOA, Ex. 38. CGC stated that it would be unable to provide a bond by September 15 because of the “oppressive” and “ambiguous” language of the three provisions; that it nevertheless could provide a bond by September 30; and that it would file a cash bond directly with BLM “if necessary in order to meet that date.” *Id.* at 2. CGC faxed another letter to BLM the next day stating that it had located another bonding company that could make a decision on its bond application within 10 days; that CGC was transmitting \$28,000 to its attorney’s trust account to secure the bond; and, alternatively, that it could “sign and submit the bond with counsel’s check by the end of the month.”

On September 19, 2008, the KFO notified CGC that the 2003 CO “is in full force and effect” and that it must “immediately and permanently cease all operations and occupancies at the site and begin the full reclamation and remediation of the Mohave Mine and all surface disturbance associated with MPO 89-K-08.” NOA, Exs. 9 at 3, 23 at 2. BLM provided a schedule similar to that in the 2003 CO and in its 2006 Decision, *i.e.*, 1 year for CGC to “complete all earthwork required to reclaim the lands in accordance with Section 5 of MPO 89-K-08.” NOA, Ex. 23 at 2. BLM further informed CGC that, if it did not complete reclamation, it would “seek to hold Combined Metals [sic] liable for the costs BLM may incur in removing and disposing of the property,” and could “result in BLM initiating action pursuant to 43 CFR 3715.8, which provides procedures for arrest and trial” under various statutes. *Id.*

CGC responded on September 22, 2008, by informing the KFO that it had put \$28,000 into its attorney’s trust account, and by providing a bond form which included the three ASO conditions. *See* BLM Opposition, Ex. 6. CGC requested that BLM confirm that, upon receipt of the executed bond from an accredited bonding company by September 30, it would rescind its September 19, 2008, letter. Regarding the reclamation schedule set forth in that letter, CGC pointed out that “[t]here has not been, and is not now, any residential occupancy of the Mohave Mine,” but that its watchmen “take shelter in the office trailer in inclement weather.”

CGC also noted that there were “no chemicals, fuels or explosives on the Mohave Mine property.”

The State Director issued a decision dated December 4, 2008, stating that it had received a surety bond from CGC on September 29, 2008, “which was secured by a cashier’s check in the amount of \$28,000,” but that it had requested a personal bond. NOA, Ex. 25. The decision further noted that a personal bond form had been received and accepted on November 4. *See* NOA, Ex. 24. Condition 15 of the approved form states that if CGC fails to apply for an APP “by Dec. 15, 2008, or fails to make additional filings with the ADEQ within 90 days of any ADEQ request, BLM may begin procedures to collect on the bond.” Condition 16 specified that a Section 404 permit must be applied for by November 15, 2008. Neither the letter nor any other document in the record indicates that BLM rescinded or suspended its September 19, 2008, letter.

CGC provided BLM with a copy of its Section 404 permit application on November 17, 2008. NOA, Ex. 26. By letters dated December 18 and 31, 2008, CGC reported the progress on preparation of its APP application and sent an e-mail to BLM on February 6, 2009. NOA, Exs. 30, 31. Despite those efforts and that progress, a geologist in the KFO had sent a January 30, 2009, e-mail to the ASO stating that CGC had failed to comply with condition 15 of its bond agreement requiring an APP application and requesting that procedures be initiated to collect on the bond. The request appears to have led to issuance of the February 12, 2009, decision at issue in IBLA 2009-151. In the meantime, the KFO had issued its February 10, 2009, letter which is the subject of IBLA 2009-152.

Prior to filing its appeal, CGC sent the KFO a letter dated February 17, 2009, pointing out that it had informed BLM of Westland’s progress in preparing an APP application, the draft of which was four inches thick as of December 1, and that Westland had advised CGC that it could be filed by March 31, 2009. CGC requested that BLM extend its permitting deadline to that date. *See* NOA, Ex. 34 at 3-4. In regard to the reclamation schedule, CGC again noted that no one was residing at the mine site, that it had never stored explosives, chemicals, or fuel at the site, and that the trailers at the site were office trailers “needed for preparation of the APP application and for subsequent operations.” *Id.* at 2.⁷

CGC received the KFO’s response on March 5, 2009, which stated that BLM would not forgo appropriating CGC’s financial guarantee; that it considered the 2003 CO “to be once again in full force and effect”; and that it had “decided to make

⁷ On Mar. 4, 2009, CGC submitted another application for occupancy pursuant to 43 C.F.R. subpart 3715.

two concessions regarding the permissible activities and deadlines.” NOA, Ex. 33 at 1. One was to extend “the deadline for removal of all mobile residential structures.” The other was that BLM would not prevent CGC from conducting geologic or engineering surveys and studies provided it filed “a Notice under 43 C.F.R. § 3809.21.” *Id.* at 1-2. The KFO also stated that it would process the MPO filed by CGC upon receipt of the additional information, and after CGC had obtained all “required environmental permits from pertinent local, state and federal agencies.” *Id.* at 2. CGC could then “request BLM’s concurrence for occupancy of your mining claims under authority of 43 C.F.R. Subpart 3715.” *Id.*

In the February 10, 2009, letter at issue in IBLA 2009-152, the KFO stated that it had asked the ASO to collect the bond funds, and further that it deemed the June 16, 2003, CO to be “again in full force and effect as of the date you receive this letter.” *Id.* at 1-2. Further, quoting the CO, the KFO instructed CGC to “[i]mmediately and permanently cease all operations and occupancies at the site and begin the full reclamation and remediation of the Mohave Mine and all surface disturbance associated with MPO 89-K-08.” *Id.* at 2. The letter also recites the CO’s schedule for removing “all chemicals, fuels and explosives,” “all mobile residential structures,” “all mobile equipment and permanent structures,” and the completion of “all earthwork required to reclaim the lands in accordance with Section 5 of MPO 89-K-08.” *Id.* The Board docketed CGC’s appeal of the February 10, 2009, letter as IBLA 2009-152.

In the February 12, 2009, decision at issue in IBLA 2009-151, the ASO informed CGC that BLM had forfeited the \$28,000.00 security for a personal bond (AZB000251). The ASO stated that it had been notified by the KFO that CGC had not complied with bond condition 15 requiring it to submit an APP application to the ADEQ by December 15, 2008. The Board docketed CGC’s appeal of the ASO’s decision as IBLA 2009-151.

On July 16, 2009, the Board received a status report from BLM stating that the parties had met to discuss settlement,⁸ and had agreed that CGC would prepare an “action plan’ to outline the outstanding tasks necessary for BLM to review a Notice and a Mining Notice and Plan of Operations and to propose a schedule for completion of those tasks.” BLM also stated that subsequently CGC had provided a memorandum entitled “Completion of Mohave Mine Permitting,” which BLM was reviewing. On August 25, 2009, BLM filed a “Request to Resume Review on the Merits” (Request to Resume Review). In that Request, BLM claims that “the parties

⁸ BLM identifies the meeting date as June 29, 2009. The correct date appears to be June 30.

agreed that the first step in bringing Appellant into compliance with BLM's regulations was for Appellant to provide the remaining information needed to complete its mining notice." Request to Resume Review at 2-3. BLM states that, after receiving CGC's memorandum, its counsel sent CGC's attorney an e-mail on July 16, 2009, informing him that the "memorandum still did not provide the specific information previously requested by BLM to complete Appellant's notice," and allowed CGC until August 17, 2009, to provide it. *Id.* at 3. BLM acknowledges receiving a July 23, 2009, letter from CGC "which purported to supply the information necessary to complete its mining notice"; however, BLM states that it responded by letter dated August 5, 2009, identifying "the information still required under BLM's regulations to complete Appellant's mining notice and authorize Appellant's occupancy." *Id.* at 3-4; *see* Exs. C, D. BLM also claims that an August 4, 2009, letter from CGC's counsel "did not provide any additional information for the mining notice." Request to Resume Review at 4; *see* Ex. E.

CGC does not oppose BLM's Request for Resume Review, but has a different view of the history. In its response, CGC states that it left the June 30, 2009, settlement meeting "believing that the discussions were cordial, productive and with good progress having been made." Response to Request at 3-4. CGC states that, as agreed at the meeting, it provided BLM with a "proposed schedule of dates for future submissions and proposed permitting actions." *Id.* CGC explains that it was surprised to receive the July 16, 2009, e-mail from BLM's counsel because its July 23, 2009, letter, "with an attached new Proposed Notice for environmental test drilling . . . provided all information BLM had requested." *Id.* at 4-5; *see* Ex. L. Furthermore, CGC claims that by letter dated August 4, 2009, its counsel had provided "all items of the information" BLM had requested in an April 13, 2009, letter, and had "identified under each item the information in response to that letter that had already been provided." Response to Request at 5; *see* Exs. N, O. CGC also notes that it responded to the KFO's August 5, 2009, decision by providing "the additional requested information by letter dated August 31, 2009." Response to Request at 9; *see* Ex. R.

In regard to its attempts to comply with the regulations in 43 C.F.R. subparts 3715 and 3809, CGC asserts that it has filed three 3809 MPO's, two 3809 Notices, and four 3715 surface occupancy requests, but has received from BLM "never ending demands for more information." *Id.* at 8. CGC claims that it has provided all of the information requested by BLM; is uncertain as to how to proceed; and suggests that the Board remand the case to BLM with instructions to review the entire record for compliance with 43 C.F.R. subparts 3715 and 3809, similar to the action ordered in *Ron Coleman Mining Inc.*, 168 IBLA 252, 302 (2006). *Id.* at 9-10.

DISCUSSION

A. IBLA 2009-152 (The Letter of February 10, 2009)

[1] Based upon the record, such as it is, we conclude that the posture of this case is remarkably similar to what the Board addressed in considering the 2003 CO in *Combined Metals Reduction Co.* The KFO has twice issued instructions to CGC stating an intent to implement that CO and this Board's decision, but those instructions have been inconsistent with our decision, unclear as to what CGC has been ordered to accomplish, and opaque concerning the authority under which BLM has acted.

In *Combined Metals Reduction Co.*, the Board modified the portion of the CO which purported to permanently bar mining operations, holding that "a claimant retains the right to re-enter its claims for mining and/or milling operations, subject to the limitations imposed by 43 CFR Subpart 3809 and 3715." 170 IBLA at 76. In response to the KFO's October 27, 2006, decision, which recognized this right, CGC submitted both an MPO under 43 C.F.R. subpart 3809 and an application for occupancy pursuant to 43 C.F.R. subpart 3715. NOA, Exs. 12 at 3, 13, 14. The regulations required BLM to review CGC's MPO within 30 days of receipt and notify the applicant of its findings. 43 C.F.R. § 3809.411(a). The KFO did not formally respond until May 8, 2007, almost 6 months after receiving the document, at which time it requested additional information. NOA, Ex. 15. It is unclear from the record whether the KFO acknowledged receipt of CGC's occupancy requests. See 43 C.F.R. §§ 3715.3-3, 3715.3-4, 3715.3-5.⁹

Following receipt of the Board's decision., the KFO issued a decision entitled "Regarding June 23, 2003, Cessation Order—IBLA Ordered Modification and Articulation of Basis for Reclamation." NOA, Ex. 12. In a section entitled "Articulation of Basis for Reclamation," the KFO stated that its intent was to have all ground disturbances at the Mohave Mine reclaimed pursuant to 43 C.F.R.

⁹ After the decisions on appeal were issued, CGC sent another application for occupancy under cover letter of Mar. 4, 2009. Response to Motion, Ex. A. The KFO acknowledged receipt in an Apr. 6, 2009, letter, but informed CGC that it could not determine whether the proposed occupancy was "reasonably incident" until it received a notice or MPO. Response to Motion, Ex. E. CGC responded in an Apr. 14, 2009, letter that its Nov. 10, 2006, MPO and occupancy request had been pending for 28 months and it had filed a revised MPO on Apr. 2, 2009. Response to Request, Ex. S at 1. In addition, CGC filed an Apr. 3, 2009, "Notice For Surface Sampling and Geologic Mapping." Response to Motion, Ex. C.

§ 3715.4-3(b) within 1 year. *Id.* at 3. The KFO explained that it had “chosen 43 CFR 3715 as the authority for requiring reclamation as it is our belief that the 43 CFR 3809 regulations do not apply to the situation at the Mohave Mine.” *Id.*

This belief is clearly mistaken. As discussed in *Combined Metals Reduction Co.*, 43 C.F.R. § 3715.7-1(b)(2)(ii) allows BLM to specify the actions a claimant must undertake to correct a noncompliance. The only explicit reference to reclamation appears in 43 C.F.R. § 3715.4-3, which provides that, when use or occupancy is not reasonably incident, “BLM may order the land to be reclaimed to its satisfaction and specify a reasonable time for completion of reclamation under 43 CFR part 3800.” See *Combined Metals Reduction Co.*, 170 IBLA at 77 n.13. Because CMRC’s activities at the Mohave Mine were not “reasonably incident,” § 3715.4-3 allowed BLM to require reclamation “under” the regulations in Part 3800, in particular subpart 3809 which governs Federal lands that are not in wilderness review areas. *Jason S. Day*, 167 IBLA 395, 400 (2006); see 43 C.F.R. §§ 3809.5, 3809.10(a), 3809.301(b)(3), and 3809.401(b)(3).

The KFO further stated that the CO’s “original intent” had been for CMRC to cease use and occupancy, remove structures and equipment, reclaim ground disturbances, and possibly “make application to the BLM for a new occupancy under 43 CFR 3715 and submit a new filing under 43 CFR 3809. . . .” NOA, Ex. 12 at 4. As in the June 16, 2003, CO, the KFO set forth a series of dates by which CGC was to remove various items from the minesite and complete “all earthwork required to reclaim the lands in accordance with Section 5 of MPO 89-K-08.” *Id.* However, the KFO has been unclear about the items it wanted removed, suggesting at one point that because CGC had removed many of them, the financial guarantee submitted by CGC was excessive, and later that certain items could remain on the mine site should they be needed in CGC’s future mining or reclamation operations.¹⁰

As described above, the KFO’s February 10, 2009, decision refers to an undated letter CGC received on September 24, 2008, stating that the June 16, 2003, CO was in full force and effect and, quoting the CO, instructing CGC to “immediately and permanently cease all operations and occupancies at the site and begin the full reclamation and remediation of the Mohave Mine and all surface disturbance associated with MPO 89-K-08,” allowing 1 year to

¹⁰ We question why BLM would instruct CGC to remove “chemicals, fuels and explosives” and “mobile residential structures” when CGC has informed BLM that it does not have any chemicals, fuels, or explosives at the minesite and that its trailers are not residential. See NOA, Ex. 34 at 2. Further, BLM instructed CGC to remove “all mobile equipment and permanent structures” within 90 days, when the record does not show that there are any permanent structures at the minesite.

“complete all earthwork required to reclaim the lands in accordance with Section 5 of MPO 89-K-08.” NOA, Ex 23 at 1-2. The February 10, 2009, letter itself informed CGC that the CO would be “again in full force and effect as of the date you receive this letter.” NOA, Ex. 1 at 2. The KFO again quoted the portion of the CO requiring CGC to “[i]mmediately and permanently cease all operations and occupancies at the site and begin the full reclamation and remediation of the Mohave Mine and all surface disturbance associated with MPO 89-K-08,” and also quoted the CO’s schedule for removing property from the minesite and reclaiming it within 1 year. *Id.*

The KFO was without authority to order CGC to “immediately and permanently cease all operations and occupancies at the site.” *Combined Metals Reduction Co.*, 170 IBLA at 76; *see also, e.g., Trueman Hulegaard*, 173 IBLA 213, 223 (2007); *Red Thunder, Inc.*, 129 IBLA 219, 237-38, 101 I.D. 52, 62-63 (1994).

As for the order that CGC begin full reclamation and remediation, the Board remanded this issue to BLM so that it could “fully articulate the nature and basis for the order to reclaim the mine site under Subpart 3809.” *Combined Metals Reduction Co.*, 170 IBLA at 78; *see* May 12, 2009, Order at 3-4. BLM did not do so in its October 27, 2006, decision, in the letter CGC received on September 19, 2008, or in the KFO’s February 10, 2009, decision. Each quotes the reclamation requirement of the June 16, 2003, CO as if it had been properly reinstated, and without addressing relevant provisions of the subpart 3809 regulations. We again vacate the order to reclaim the Mohave minesite. BLM has failed repeatedly to articulate what provision of the regulation it is applying.

B. IBLA 2009-151 (The Decision to Forfeit CGC’s Bond)

[2] The KFO may have delayed addressing CGC’s MPO under subpart 3809 and its application for occupancy under subpart 3715 because the parties were pursuing BLM’s proposal to establish an escrow account for the costs of removing equipment and structures from the minesite, but such delay makes little sense given BLM’s statement that it would determine “whether the new plan would require use of the equipment and structures already on site.” NOA, Ex. 16 at 1. The KFO appears to have delayed enforcement of its decisions while CGC was in the process of establishing a financial guarantee, and CGC was content to let its MPO linger by not responding to BLM’s May 8, 2007, decision requesting additional information.

At some point, CGC and BLM became aware that CGC would need to file an APP application with and obtain a permit from, the ADEQ. That need became incorporated as a condition of CGC’s bond. It is unclear when CGC realized that Westland needed drilling samples in order to complete the APP application, but in an

undated letter received by CMRC on or about July 14, 2003, the KFO stated that the June 16, 2003, decision “prohibited [a]ny attempt . . . to engage in ‘geologic and engineering analyses consisting of sampling, or [sic] minor maintenance.’” NOA, Ex. 32.¹¹ CGC seems to have first raised the subject of sampling in its November 17, 2008, letter providing a copy of its Section 404 permit application when it asked BLM to allow it to “undertake that work as required.” NOA, Ex. 26. After several requests that BLM provide written assurance that it would not enforce the prohibition received only a cautionary response,¹² CGC submitted the May 1, 2009, “Notice for Surface Drilling on Existing Roads Within Mine Pit Perimeters on the Mohave Mine Property” which became the subject of the KFO’s May 20, 2009, decision and BLM’s request that the Board resume review on the merits. Response to Request, Exs. M, T.

We can only assume that BLM considered the effective date of its decision to have been suspended or extended indefinitely. See Motion to Dismiss at 14, 20. CGC’s April 26, 2007, letter seems to have been sent in lieu of filing an appeal and BLM did not respond to it until December 27, 2007, 8 months later. NOA, Ex. 19. By then, even extended deadlines for removing structures, equipment, and other property would have expired. See NOA, Ex. 12 at 4; 43 C.F.R. §§ 3715.5-1, 3715.5-2. The KFO’s December 27, 2007, decision noted that CGC had removed some mining equipment, but rather than asserting that any remaining equipment was in violation of its June 16, 2003, and October 27, 2006, decisions, it stated that the bond amount might be “excessive” and suggested that CGC provide a new estimate. NOA, Ex. 19 at 1. Even the ASO’s March 11, 2008, letter allowed CGC 90 days before BLM would “proceed to enforce its June 16, 2003, order.” NOA, Ex. 21 at 2; see also Motion to Dismiss at 14.

At the same time, it is difficult to understand why CGC did not respond to the KFO’s May 8, 2007, decision requesting additional information until almost 2 years later, after BLM had already issued the decisions at issue in this appeal. CGC has provided the Board with a “Plan of Operations (Revised)” dated March 31, 2009, which indicates that there was an “Initial Filing: 11-10-06.” Response to Motion to

¹¹ The KFO’s letter responds to, and apparently quotes, a July 8, 2003, letter from CMRC which is not part of the record.

¹² In a letter CGC received on Mar. 5, 2009, the KFO informed CGC that “BLM will not prevent you from conducting geologic or engineering surveys and studies at the site, so long as your activities are restricted to casual use, as defined in 43 C.F.R. § 3809.5,” but that if CGC’s “activities will cause more than negligible surface disturbance,” it would need to obtain authorization by filing a Notice under 43 C.F.R. § 3809.21. See NOA, Ex. 33. The copy of the letter CGC provided is incomplete. The copy BLM included in the record with a return receipt card attached appears to be complete, but has a different font.

Dismiss, Ex. B. It states that the original MPO “has been modified to include the additional information” requested in the KFO’s May 8, 2007, letter. *Id.* at 4. CGC claims that over 12 million dollars have been invested at the Mohave Mine and that millions were spent acquiring ownership incident to CMRC’s bankruptcy; it appears that CGC annually pays claim maintenance fees on over 200 mining claims; and CGC asserts that it maintains a payroll of \$176,00 per year. NOA at 6, 21-22; *see* Ex. 8 (affidavit of Lawrence T. Atkinson). The only way CGC can recover its expenditures, let alone make a profit, is by mining, and CGC can conduct the kind of mining operations it proposes only after BLM has approved an MPO. *See* 43 C.F.R. § 3809.412. Despite its investment, CGC seems to have been content to let the time extend, contributing to that delay by raising concerns about the bond amount and appealing to the State Director. Given its problems in obtaining a commercial bond, it is unclear why CGC did not propose another mechanism to provide a financial guarantee, in particular an escrow account as BLM originally proposed. *See* NOA, Ex. 16 at 1.

Which brings the discussion to the bond itself and the ASO’s February 12, 2009, decision appropriating the security because CGC had not submitted an APP application by December 15, 2008, as called for by bond condition 15. Whether or not the ASO was correct that the KFO had erroneously stated that CGC could appeal the December 27, 2007, decision under 43 C.F.R. subpart 3809,¹³ CGC did not object to the provisions until 5 months later when its attorney sent his August 14, 2008, letter to the KFO. Motion to Dismiss, Ex. 2. In addition, the specific wording of condition 15 requiring CGC to file an APP application by December 15, 2008, appears to have been written by CGC and included in the bond form CGC sent to the KFO with its September 22, 2008, letter. *See id.*, Exs. 3, 4, 6 (bond form signed Sept. 26, 2008). The KFO had modified the ASO’s version of condition 15 to state: “If Cottonwood fails to make all additional filings necessary to obtain an Aquifer Protection Permit within 90 days of any . . . (ADEQ) request, BLM may begin procedures to collect on the bond.” NOA, Ex. 22 at 2. CGC had met with Westland about preparing an APP application in May of 2008 and had signed a contract on October 2, 2008. NOA, Exs. 27, 28.

BLM, however, did not quickly approve the bond. For reasons not explained in the record, the ASO determined that it could not accept the “Surface Management Surety Bond” form CGC had used, even though CGC had sent the form to the KFO with its January 23, 2008, letter and was presumably the form the ASO reviewed and found to be “generally” acceptable. NOA, Exs. 20, 21, 25; *see* Motion to Dismiss,

¹³ In the alternative CGC may have been entitled to appeal to the Board. *See* 43 C.F.R. § 3715.9. By requiring the bond to include the three conditions, the State Director’s decision was itself subject to appeal. *See* 43 C.F.R. § 4.410(a).

Ex. 6 at 3-4. Instead, the ASO required CGC to use a “Surface Management Personal Bond” form. That form was signed by CGC on November 3, 2008, and was received by the ASO the next day. NOA, Ex. 24. Unfortunately, it was not until 30 days later, December 4, 2008, that the ASO issued a decision accepting it. NOA, Ex. 25. By then, CGC had filed its Section 404 permit application, and 11 days later Westland had yet to complete work on CGC’s APP application. *See* NOA, Exs. 26, 30, 31. Despite these measures, the KFO requested the ASO to forfeit CGC’s bond, setting up the present appeal.

No matter how we rule on the February 12, 2009, decision forfeiting CGC’s bond, CGC’s Notices will remain pending before BLM, as will CGC’s revised MPO, along with one or more applications for occupancy filed pursuant to 43 C.F.R. subpart 3715. *See* Response to Motion, Ex. A; Response to Request, Ex. L. The parties’ disagreements as to whether CGC’s July 23, 2009, response satisfied the May 20, 2009, decision, and whether the revised MPO provides the information specified in the KFO’s April 13, 2009, request for additional information, will remain unresolved. *See* Response to Request, Exs. N, O. When it proposed that CGC establish a financial guarantee, BLM recognized that CGC may need to use its equipment to conduct approved mining operations. NOA, Ex. 16 at 1-2. It seems equally likely that the trailers and other equipment at the site will be needed if CGC is to undertake reclamation. Neither the removal of personal property nor reclamation of the minesite would preclude BLM from approving the Notice, MPO, or CGC’s other filings, but either would be counterproductive.

We are aware that CGC’s suggested alternative of remanding as in *Ron Coleman Mining Inc., supra*, with an instruction for BLM to review the record under subparts 3715 and 3809, amounts to requiring BLM to do what it should have already done and very well may result in another appeal to the Board. However, at this point, based upon this record, we see no alternative to setting aside BLM’s decision to forfeit CGC’s bond, at least until BLM has acted upon CGC’s MPO under subpart 3809 and its request for occupancy under subpart 3715. We fail to see the wisdom in allowing BLM to forfeit the bond now for the removal of equipment that may be needed for conducting operations under an approved MPO, should that happen. Accordingly, we vacate BLM’s February 12, 2009, decision.

CONCLUSION

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the February 10, 2009, letter at issue in IBLA 2009-152 is vacated to the extent it effects an immediate and permanent bar of CGC’s mining operations and occupancy of the mine site, and to the extent it orders CGC to begin reclamation and remediation. The decision at issue in

IBLA 2009-151 is vacated on the basis that it fails to comply with the regulations at 43 C.F.R. §§ 3809.595 through 3809.599. This matter is remanded to BLM for action consistent with this order.¹⁴

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge

¹⁴ BLM and CGC clearly have differing views of the reasonableness of BLM's requests for information and the adequacy of CGC's responses. Once again, it appears that the situation could benefit from negotiations between the parties. Discussions in the presence of a neutral party might clarify their differences, and facilitate resolution of their dispute through mediation.