

CREOLE CORP.

IBLA 97-455, 98-61

Decided October 20, 1998

Appeals from decision of the El Centro Resource Area Office, Bureau of Land Management, canceling tramroad rights-of-way (R 07432 and R 07483) for failure to provide proof of construction and from decision of the California State Director requiring modification of an approved plan of operations (CACA 31933).

IBLA 97-455 stay dissolved, reversed and remanded; IBLA 98-61 affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Generally–Rights-of-Way: Act of January 21, 1895–Rights-of-Way: Cancellation

The regulations require notice and an opportunity to cure an alleged violation of the terms and conditions of a right-of-way grant before the grant can be canceled. Although an earlier BLM decision provided adequate notice of the proposed cancellation of a right-of-way and an opportunity to cure the violation, BLM's subsequent actions in reappraising the right-of-way and collecting rental vitiated whatever notice of cancellation the earlier decision may have imparted.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Generally–Rights-of-Way: Act of January 21, 1895–Rights-of-Way: Cancellation

A mining claimant is not entitled to a hearing before a right-of-way, issued pursuant to the Act of Jan. 21, 1895, can be canceled unless the right-of-way grant is under its terms an easement. Under the regulations in effect when appellant's rights-of-way were granted in 1966, the grants did not constitute easements, but were merely nonexclusive licenses.

3. Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Generally–Rights-of-Way: Act of January 21, 1895–Rights-of-Way: Cancellation

When BLM did not cancel rights-of-way, they remained in effect, and in the absence of a showing that rental payments were not required or in excess of the amount required by applicable law, BLM has no authority to refund them under 43 U.S.C. § 1734 (1994), and the determination that appellant is entitled to a refund of those rental payments will be reversed.

4. Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Generally–Rights-of-Way: Act of January 21, 1895–Rights-of-Way: Cancellation

When the term of a right-of-way grant is "indefinite," the "indefinite" term is merely the opposite of a "fixed" term. It does not confer upon a right-of-way grantee the right to hold an interest in public land in perpetuity without ever undertaking or achieving the purpose for which the right-of-way was granted. That is, the right-of-way must be perfected by realizing the purpose for which it was granted, absent which the grant is properly subject to suspension, termination, or both.

5. Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Generally–Rights-of-Way: Act of January 21, 1895–Rights-of-Way: Cancellation

No principle or authority holds that BLM, in providing a reasonable opportunity to cure a failure to file proof of construction as required by the terms and conditions of a right-of-way grant, is required to take an action that would be tantamount to granting a further extension of years in which construction can be completed.

6. Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Abandonment–Rights-of-Way: Generally–Rights-of-Way: Act of January 21, 1895–Rights-of-Way: Cancellation

Whether a right-of-way has been abandoned is a question of whether the mining claimant has failed to use the right-of-way for the purpose for which it was granted, and if so, whether that failure has continued for a period of 5 years and was due to circumstances beyond the claimant's control. To resolve

these issues requires evidence of the nature and extent of the claimant's actual use measured in light of the averments made in the right-of-way application which formed the basis for the terms and conditions of the grant, not evidence of a general intent and willingness to eventually conduct a mining operation when economic conditions are favorable, or evidence of a more specific intent to retain the right-of-way until that day.

7. Federal Land Policy and Management Act of 1976: Plan of Operations—Federal Land Policy and Management Act of 1976: Surface Management—Federal Land Policy and Management Act of 1976: Wilderness—Mining Claims: Plan of Operations

BLM has the authority to require a modification of an approved plan of operations that fully complies with the provisions of 43 C.F.R. § 8560.4-6. The authorized officer is expected to exercise his or her judgment and discretion in determining the adequacy of an approved plan and the amount of a reclamation bond or other guarantee, and in formulating protective stipulations. BLM is also required to conduct a mineral examination before it can approve a plan of operations or allow operations to continue on unpatented claims in a wilderness area pursuant to an approved plan of operations.

8. Federal Land Policy and Management Act of 1976: Plan of Operations—Federal Land Policy and Management Act of 1976: Surface Management—Federal Land Policy and Management Act of 1976: Wilderness—Mining Claims: Plan of Operations

In the absence of specific information or references relating to revegetation, drainage and hydrology, surface and ground water management, removal of surface improvements, safety measures, and closure of surface openings, for example, the record supports a finding that a plan of operations inadequately describes the measures to be taken to prevent unnecessary or undue degradation of the public lands and the measures to be taken to reclaim disturbed areas.

9. Federal Land Policy and Management Act of 1976: Plan of Operations—Federal Land Policy and Management Act of 1976: Surface Management—Federal Land Policy and Management Act of 1976: Wilderness—Mining Claims: Plan of Operations

The regulation governing modification of plans of operation, 43 C.F.R. § 3809.1-7, contemplates active

mining operations. Where actual mining operations have never been commenced pursuant to a plan of operations approved by BLM in 1981 and the plan has never been updated, the regulation will be interpreted as only generally identifying the kinds of questions that should be answerable by an adequate plan rather than mandating explicit factual findings as a condition precedent to requiring a plan modification. Under 43 C.F.R. § 3809.1-7(c)(2)(ii), it is sufficient in these circumstances that the State Director is persuaded that the disturbance from a mining claimant's operations may become of such significance that a modification is necessary, and it is irrelevant whether the potential disturbance results from activities conducted pursuant to an approved plan of operations or from an unforeseen circumstance.

10. Federal Land Policy and Management Act of 1976: Plan of Operations–Federal Land Policy and Management Act of 1976: Surface Management–Federal Land Policy and Management Act of 1976: Wilderness–Mining Claims: Plan of Operations

A mining plan of operations lacks the basic elements necessary to form an enforceable contract. Approval of a plan of operations does not create a vested right to conduct mining and reclamation operations pursuant thereto without regard to applicable statutory and regulatory requirements. The act of duly approving a plan of operations does not constitute a surrender of BLM's duty to manage the public lands and resources in accordance with the requirements of law as they are established by Congress from time to time.

APPEARANCES: M. William Tilden, Esq., and Penelope Alexander-Kelley, Esq., San Bernardino, California, for Appellant; Terry A. Reed, Area Manager, El Centro Resource Area Office, for the Bureau of Land Management (in IBLA 97-455); Richard Grabowski, Deputy State Director, California State Office, for the Bureau of Land Management (in IBLA 98-61).

OPINION BY ADMINISTRATIVE JUDGE PRICE

Creole Corporation (Creole) has appealed from the May 16, 1997, Decision of the El Centro (California) Resource Area Office, Bureau of Land Management (BLM), canceling tramroad rights-of-way (ROW's) R 07432 and R 07483 for failure to provide proof of construction of such tramroads by 1986. In addition, that Decision concluded that the ROW's were presumed abandoned by reason of Creole's failure to use the ROW's for a continuous 5-year period. Creole's appeal of the May 16, 1997, Decision was docketed as IBLA 97-455. With its Notice of Appeal, Creole filed a Request for Stay, which was granted on January 14, 1998.

In a separate action, by letter dated April 15, 1997, BLM directed Creole to submit a modification of its plan of operations (POO) for the mining claims related to the ROW's that had been approved in 1981. The modification was requested to prevent unnecessary or undue degradation of public lands within the Coyote Mountains Wilderness Area on which Creole has a number of placer mining claims. When Creole did not submit the requested modification, BLM issued a September 24, 1997, Decision that required Creole to submit the plan modification and informed Creole that until it did so, Creole could not exceed the current level of activity authorized by the existing POO, that being claim maintenance and assessment work, and maintenance of existing roads outside the Coyote Mountains Wilderness Area, provided there were no new disturbances. Creole timely appealed that Decision, which the Board docketed as IBLA 98-61.

Thereafter, Creole resumed its activities in connection with the development of a Portland cement plant, and on April 17, 1998, BLM issued an order to immediately cease activities (cessation order) on the ROW's. Creole submitted a request to resume activities on May 4, 1998. When BLM did not respond to that request, the request was deemed denied 5 days after receipt, as provided by 43 C.F.R. § 2803.3(e). Creole appealed the denial of the request to resume activities, which the Board docketed as IBLA 98-356, and petitioned for a stay of the cessation order. In addition, Creole filed a request for clarification of our January 14, 1998, Order granting an interim stay.

On August 5, 1998, we issued an Amended Order Granting Interim Stay in IBLA 97-455, in which we stated that Creole was not to resume or initiate construction activity on the ROW's, and that the status quo was to be maintained during the pendency of these appeals. We therefore denied the Request for Clarification as moot. After issuing the Amended Order, by separate Order dated August 6, 1998, we declared the cessation order superfluous and vacated it, thus mooted the appeal in IBLA 98-356, which we dismissed. We hereby consolidate IBLA 97-455 and IBLA 98-61 for decision and turn to those appeals, and the facts as they existed when BLM issued its May 16, 1997, Decision.

The ROW's were issued in 1966 to Creole's predecessor-in-interest, Pine Tree Portland Cement Company (Pine Tree), pursuant to the Act of January 21, 1895, ch. 37, § 1, 28 Stat. 635 (formerly codified at 43 U.S.C. § 956 (1976)), repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793. The ROW's expressly were made subject to the regulations that appeared at 43 C.F.R. §§ 2234.1 and 2234.2-3 (1966), and were granted for an indefinite period. Pine Tree owned a number of patented and unpatented mining claims near the ROW's that it intended to mine for calcium carbonate to use in the production of cement.

One ROW was to be used for the purpose of constructing "a tramroad, including a tramway and motor truck road, to be used in connection with mining." (Pine Tree's Application for ROW R O7432 at 2.) In the application, Pine Tree further averred as follows: "All in connection with its

mining activities, Applicant intends to transport by belt conveyor (and also by truck), limestone and other mineral materials as well as equipment, supplies, and other materials, and to move trucks, tractors, flatbeds, cars and other equipment over the right of way." Id. The application for R 07483 also was for a tramroad and contained virtually the same averments, except that the stated purpose was for a railroad to be used in connection with mining. (Pine Tree Application for ROW R 07483 at 2.) By instrument dated June 22, 1966, Pine Tree assigned its interest in the ROW's to Creole.

On April 9, 1971, BLM issued a decision holding R 07432 for cancellation if proof of construction was not submitted within 30 days. The record shows that Creole received extensions of time for filing the proof of construction through 1972, 1977, 1981, and finally, to October 11, 1986. In response to a 1983 request for an extension until 1991, in a letter dated September 13, 1983, BLM informed Creole that no further extensions would be granted. On February 18, 1988, however, BLM conformed one of the ROW's (R 07432) to FLPMA and requested Creole to submit a phased-in adjusted rental for 1988 based on new regulations that became effective in August 1987. In April 1992, BLM issued a decision for R 07483 requesting Creole to submit readjusted rental for the October 1991 - December 1995 period based on the same regulations. The case file does not show that R 07483 also was conformed. ^{1/} Stating that the ROW's should have been canceled in 1987, after the last extension expired in October 1986, BLM also determined in its May 1997 decision that Creole was entitled to a refund of rentals paid from 1987 forward.

In support of its appeal, Creole contends that it was entitled to notice before the ROW's could be canceled. Appellant cites our decision in Western Aggregates of Mineral & Rock, Inc., 34 IBLA 164 (1978), modified, James W. Smith (On Reconsideration), 55 IBLA 390 (1981), and other cases in support of its argument that before BLM can cancel a ROW issued under the Act of January 21, 1895, for violation of a term or condition of the grant, BLM must provide notice and an opportunity to cure the violation. See John and Katherine Caton, 126 IBLA 335 (1993).

In addition to its procedural argument, Creole asserts that the ROW's are indispensable parts of its overall development and operation of a 1.1 million ton per year Portland cement plant that will cost more than \$220,000,000 and provide cement to the Southern California market for a period of about 100 years. (Statement of Reasons (SOR) at 1, 3.) Creole admits that it has not yet commenced construction of the mine or the plant,

^{1/} If R 07483 has not been conformed to FLPMA, BLM should do so on remand. See also 43 C.F.R. § 2801.4, which provides that ROW grants issued before Oct. 21, 1976, are subject to Part 2800 "unless administration under this part diminishes or reduces any rights conferred by the grant or the statute under which it was issued."

or completed construction of the ROW's, *id.* at 2, but asserts that it is currently negotiating contracts to commence the construction of the ROW's (Petition at 2), and has evidence it did not intend to abandon the ROW's. (SOR at 9.)

Conceding that notice and an opportunity to cure the alleged violation are required by 43 C.F.R. § 2803.4, BLM asserts that the notification requirement is satisfied by its April 9, 1971, Decision stating that R 07432 ^{2/} would be canceled without further notice if proof of construction was not timely filed, and by its September 13, 1983, letter advising Creole that no further extension would be granted. BLM notes that there was no appeal from the 1971 Decision and no response to the 1983 letter. As to the presumption of abandonment, BLM counters that there is "no evidence of blading, construction or maintenance of any route authorized by the subject rights-of-way from the proposed plant site to the mining claim area." (Answer at 4.) BLM further argues that while blading may have been performed at the minesite, it was solely to preserve the mining claims under Federal and state law, and that in any event, there has been no use of the ROW's since 1986. *Id.* at 4-5. Indeed, BLM suggests that over the years, Creole actually has used a County road to gain access to its mining claims. *Id.* at 4. According to BLM, Creole has submitted nothing to show that the failure to use the ROW's was due to factors beyond its control.

Lastly, BLM notes that there have been changes in public policy since the issuance of the ROW's. Moreover, BLM argues, portions of the ROW's may cross the habitat of a threatened species and one ROW crosses a portion of a wilderness area. (SOR at 4; Answer to Petition for Stay at 4.) These latter points are made in response to Creole's assertion that the designation of a wilderness area in October 1994 is subject to Creole's valid existing rights.

The regulations implementing FLPMA, like the 1966 regulations to which the ROW's were made subject, ^{3/} specifically provide for notice and

^{2/} The case file does not contain a companion decision pertaining to R 07483, but we assume that R 07483 is in the same posture as R 07432.

^{3/} The applicable regulation, 43 C.F.R. § 2234.2-3(b)(21) (1966), styled Causes for termination of permittee's rights, formerly was codified as 43 C.F.R. § 115.176 (1963). When former Chapter I of Title 43 of the C.F.R. was redesignated as Chapter II, 29 Fed. Reg. 4302 (Mar. 31, 1964), the text of section 2234.2-3(b)(21)(ii) (1964), which specifically pertained to termination for default under the terms and conditions of the ROW grant, was garbled in part. The garbled text was duplicated in section 2234.2-3(b)(21)(ii) (1966) and carried forward for some years. As section 115.176(b), the regulation provided that:

"The authorized officer, in his discretion may elect to terminate any permit or [ROW] issued under §§ 115.154 to 115.179 [ROW's for tramroads for use in mining or quarrying, or cutting and manufacturing timber pursuant to the Act of Jan. 21, 1895, *supra*], if the permittee shall fail to comply with any of the provisions of such regulations or make default in the

an opportunity to cure: ^{4/}

(b) [T]he authorized officer may suspend or terminate a right-of-way grant or temporary use permit if he determines that the holder has failed to comply with applicable laws or regulations, or any terms, conditions or stipulations of the right-of-way grant or temporary use permit or has abandoned the right-of-way.

(c) Failure of the holder of a right-of-way grant to use the right-of-way for the purpose for which the authorization was issued for any continuous five-year-period shall constitute a presumption of abandonment. The holder may rebut the presumption by proving that his failure to use the right-of-way was due to circumstances not within the holder's control.

(d) Before suspending or terminating a right-of-way grant pursuant to paragraph (b) of this section, the authorized officer shall give the holder written notice that such action is contemplated and the grounds therefor and shall allow the holder a reasonable opportunity to cure such noncompliance.

43 C.F.R. § 2803.4.

fn. 3 (continued)

performance or observation of any of the conditions of the permit, and such failure or default shall continue for 60 days after service of written notice thereof by the authorized officer."

The regulation also required the authorized officer to specify the failure or default involved, and to serve such notice personally or by registered mail. 43 C.F.R. § 2234.2-3(b)(21)(iii) (1964); cf. 43 C.F.R. § 2812.8-1(c).

In addition, 43 C.F.R. § 2234.1-4(b) (1966) provided as follows:

"Use of right-of-way. (1) Proof of Construction. A period of 5 years from the date of the approval of the right-of-way is usually allowed for construction unless a different period is provided by statute. * * * (2) Nonconstruction, abandonment or nonuse. Unless otherwise provided by law, rights-of-way are subject to cancellation by the authorized officer for failure to construct within the period allowed and for abandonment or nonuse."

^{4/} The 1966 regulation did not employ the phrase "opportunity to cure." The authorized officer could not act to terminate a ROW, however, unless the failure or default continued for 60 days following written notice to the grantee. Thus, within that 60 day period the grantee could cure his failure or default, and this would moot the basis for terminating the grant. In effect, the regulation afforded an opportunity to cure deficiencies in performance.

In addition to notice and the opportunity to cure, the regulation provides:

(e) In the case of a right-of-way grant that is under its terms an easement, the authorized officer shall give written notice to the holder of the suspension or termination and shall refer the matter to the Office of Hearings and Appeals for a hearing before an Administrative Law Judge pursuant to 43 CFR part 4. If the Administrative Law Judge determines that grounds for suspension or termination exist and such action is justified, the authorized officer shall suspend or terminate the right-of-way grant.

Id.

[1] In our view, although the 1971 Decision in form provided adequate notice of the proposed cancellation of the one ROW and an opportunity to cure the violation, BLM's subsequent actions in reappraising both the ROW's and collecting rentals vitiated whatever notice of cancellation it may have imparted. Furthermore, when the 1983 letter was issued, Creole still had more than 3 years to satisfy the conditions of the grant. At the end of that period, had BLM then decided to cancel the grant in 1986, another notice would have been required to provide the ROW holder an opportunity to cure the alleged violation. As it is clear from 43 C.F.R. § 2803.4 that BLM is required to provide written notice of its intent to cancel the ROW's, we reverse the Decision in IBLA 97-455 because the required notice was not provided to Creole and remand the case file for further action.

[2] We note in passing that there is no entitlement to a hearing before BLM can take action to cancel Creole's ROW's. No hearing is required unless the ROW grant "is under its terms an easement." 43 C.F.R. § 2803.4(e). The regulations in effect at the time the ROW's were granted provided that "[p]ermits for rights-of-way for tramroads * * * do not constitute easements. * * * The permits are merely non-exclusive licenses * * *." 43 C.F.R. § 2234.2-3(a)(4) (1966). Accordingly, no hearing is required to cancel the ROW's.

[3] BLM's decision to cancel Creole's ROW's in part is apparently premised on its view that it had no authority to grant further extensions after 1986. The Decision refers to the letter dated September 13, 1983, in which Creole was advised that no extensions beyond the last approved date would be allowed. In that letter, BLM stated that it had no authority to grant further extensions to file proof of construction on the ROW's. 5/

5/ Although the Department cannot extend the initial 5-year period for construction on ROW's issued under the Act of Mar. 3, 1891, Fred Markle, 6 IBLA 52 (1972), the ROW's in the instant appeal were issued pursuant to the Act of Jan. 21, 1895, supra, which placed no limitation on the time in which construction must be completed. We have found no provision in FLPMA

Consistent with BLM's statement that the ROW should have been canceled in 1986 after the expiration of Creole's last extension, the Decision under appeal determined that Creole was entitled to a refund of rentals paid after 1986. Regardless of whether the ROW's should have been canceled in 1987, BLM did not do so and thus the ROW's remained in effect. In the absence of a showing that the rentals tendered after 1986 were "not required or * * * in excess of the amount required by applicable law," BLM has no authority to refund them under 43 U.S.C. § 1734(c) (1994). Therefore, BLM's determination that Creole is entitled to a refund of those rentals is also reversed.

[4] In support of its appeal, Appellant notes that the term of each ROW grant is "indefinite." To the extent Creole may be suggesting that BLM may indefinitely postpone the date when proof of completed construction must be filed, such that Creole may also defer initiating and completing the construction for which the ROW's were granted, we note that for present purposes, an "indefinite" term is merely the opposite of a "fixed" term. It does not confer upon the ROW grantee the right to hold the interest in the land in perpetuity without ever undertaking or achieving the purpose for which the ROW was granted. That is, the ROW must be perfected by realizing the purpose for which it was granted, absent which the ROW is properly subject to suspension, termination, or both.

There are several points raised by the parties' arguments that deserve brief comment. The violation at hand is Appellant's failure to file proof of construction within the specified period as extended and as specified in the second term and condition of the two ROW grants. In the more typical case, where construction has occurred but the ROW holder has failed to file the proof thereof within the required period, BLM provides an opportunity to cure the violation by allowing the holder to file the documentary evidence or proof of whatever construction has occurred. There is no possibility of curing the violation, however, if Creole cannot complete the construction for which "proof" can be filed, and the applicable regulation affords the ROW grantee only a "reasonable opportunity to cure such noncompliance."

[5] Creole alleges a number of circumstances and reasons to justify the passage of decades without action, show that a further extension is warranted, and rebut the presumption of abandonment. Although BLM may consider these allegations and any evidence thereof it may require or Creole may offer in weighing whether Creole has rebutted the presumption, such representations are not dispositive of whether Creole has filed the required proof of construction or whether it would be able to do so, given

fn. 5 (continued)

or in Part 2800 that specifically pertains to extensions of time in which to comply with terms and conditions, and no provision addressing extensions of construction where construction activity has not even begun. We also found no statutory or regulatory prohibition against granting extensions of time.

a reasonable opportunity. By its own admission, it is impossible for Creole to comply at this time or in the immediately foreseeable future. We are not aware of any principle or authority that holds that in providing a "reasonable" opportunity to cure the violation, BLM performance is required to take an action that would be tantamount to granting a further extension of years in which construction can be completed. ^{6/}

Appellant has offered a number of reasons why it has not utilized the ROW's, all principally economic in nature. Although we found no cases precisely on point, this Board nevertheless has shown its firm reluctance to hold that adverse economic conditions constitute circumstances beyond the control of the proponent of an extension so as to justify or require the granting of such extension. See, e.g., Robert B. Arnold, 125 IBLA 158, 161-62 (1993) (extension of filing of final proof in desert land entry); American Pozzolan Corporation, 6 IBLA 344, 345 (1972) (contract for sale of cinders); Nordic Veneers, Inc., 3 IBLA 86, 88 (1971) (timber sale contract); Clark Canyon Lumber Company, 3 IBLA 247, 248 (1971) (timber sale contract). To hold that adverse economic conditions alone justify an extension would create an obvious anomaly: the longer economic conditions frustrated the purpose for which the ROW's were granted, the longer the ROW's would exist. That proposition must be rejected, because these ROW grants were issued for a specific purpose, not as a place-holder by which interests in land can be retained for speculative purposes for decades in anticipation of a change in economic conditions that may never materialize.

The final matter to be addressed in IBLA 97-455 is the presumption of abandonment. See 43 U.S.C. § 1766 (1994); 43 C.F.R. § 2803.4(c). Creole argues that it did not and does not intend to abandon its ROW grants, as demonstrated by its physical maintenance of the ROW areas and its timely payment of the annual rental, and various activities over the years designed to realize the mining and cement production operations. No evidence that Creole is currently negotiating contracts to commence construction, as it alleges (Petition for Stay at 2), is included in the record in IBLA 97-455, and none has been submitted to this Board by Appellant. As discussed, BLM argues that no physical maintenance has occurred, that this is confirmed by ground and aerial examinations contained in the record, that any blading that may have been performed in fact was for the purpose of maintaining Creole's unpatented mining claims, and that there has been no action to use the ROW's since 1986. Photographs of the ROW's have been submitted by BLM, and these do not show any recognizable evidence of maintenance or construction activity.

^{6/} It should be noted that BLM has invited Creole to apply for new ROW's pursuant to FLPMA when it is actually ready to commence construction and development. (Sept. 13, 1983, Letter to E. Leroy Tolles from Sharon N. Landis.) Since the ROW's here at issue are nonexclusive, we perceive no undue disadvantage to Creole in applying for new ROW grants if on remand BLM decides to pursue termination, with due regard for procedural requirements.

[6] Creole's intentions are not dispositive of the matter. Assuming BLM continues to rely on abandonment as an additional basis for terminating the ROW's, the issues under 43 C.F.R. § 2803.4(c) are whether Appellant has failed to use the ROW for the purpose for which it was granted, and if so, whether that failure has continued for a period of 5 years and was due to circumstances beyond its control. To resolve these issues requires evidence of the nature and extent of Creole's actual use measured in light of the averments set forth in Pine Tree's ROW applications from which the terms of the ROW grants were fashioned, not evidence of Creole's general intent and willingness to eventually conduct a mining operation and build a cement plant when economic conditions are favorable, or its more specific intent to retain the ROW's until that day. See Theron E. Coon, 129 IBLA 30 (1994).

The remaining appeal, IBLA 98-61, concerns the BLM State Director's Decision dated September 24, 1997, requiring modification of Creole's POO, which was approved in 1981, as it pertains to Appellant's Carrizo mining claims within the Coyote Mountains Wilderness Area. ^{7/} Citing the provisions of 43 C.F.R. § 3809.1-7, the Decision stated that "[t]he modification was requested because operations which have not yet been initiated would now cause unnecessary or undue degradation to public land." The State Director enumerated the following reasons why a modification was necessary: (1) apart from road and claim maintenance, there has been no mining activity on the Carrizo claims since 1981; (2) as provided by 43 C.F.R. § 3809, Creole is required to submit a detailed reclamation plan, with reclamation costs certified by a registered professional engineer, and a bond covering reclamation costs; (3) for those claims within the Coyote Mountains Wilderness Area, Creole is required to submit a POO modification showing how access is to be obtained and mining is to be conducted, following which BLM will "conduct a validity examination to determine whether Creole Corporation has valid existing rights to proceed with activities as proposed" in the modified plan; and (4) the proposed modification would furnish the basis for developing reasonable stipulations designed to protect the public lands and its resources. (Sept. 24, 1997, Decision at 1-2.)

Noting that Creole had been advised of these requirements in an April 15, 1997, letter from the El Centro Resource Area Office, and that Creole had been given 30 days in which to comply, the State Director requested submission of the requested information to the El Centro Office within 30 days.

^{7/} The Decision did not specifically identify the claims by claim number or BLM serial number. By our count, there are a total of 57 Carrizo claims, and these are located in secs. 22, 23, 25, 26, 27, 34, 35, and 36, T. 15 S., R. 9 E., San Bernardino Meridian, California. The claims are within the California Desert Conservation Area (CDCA), of which the Coyote Mountains Wilderness Area is a part. California Desert Protection Act of 1994, Pub. L. No. 103-433, Title I, sec. 102(16), 108 Stat. 4474 (Oct. 31, 1994); 16 U.S.C. § 1132 (1994).

The Decision expressly advised Creole that:

Until a plan modification is approved, your current plan of operation is limited to the current level of activities conducted on the property, which appears to be limited to maintenance of mining claim monuments, non-surface disturbing geologic, geophysical, or geochemical work authorized and filed in accordance with the Act of September 2, 1958 (30 USC 28-1, 28-2), and maintenance of existing roads outside wilderness areas that do not disturb new ground. This road and claim maintenance cannot exceed the level of activity of your past operations (e.g., grading within the existing area of disturbance). Any activity associated with widening of existing roads, or creating new roads, will have to be approved by the BLM under a plan modification.

(Decision at 2.) Creole did not submit the required information, and instead filed its Notice of Appeal on October 29, 1997.

In its SOR, Creole advances a number of arguments in support of its basic contention that BLM cannot now require modification of its duly approved POO. Creole argues that BLM has failed to specifically identify the activities that would cause undue or unnecessary degradation. It argues further that the State Director's determination that the 1981 stipulations do not adequately protect public lands and resources is inconsistent with the Area Manager's conclusion to the contrary. According to Appellant, this demonstrates that the State Director

wholly fail[ed] to state facts showing that the El Centro BLM acted contrary to its authority in 1981 in approving CREOLE's PoO. Absent an analysis of such malfeasance by the El Centro BLM, the Decision is incomplete and CREOLE is deprived of its due process rights to present facts and argument to show that the Decision is incorrect and invalid.

(SOR at 9-10.)

Appellant next argues that its failure to engage in any actual mining activity under the approved POO is not an appropriate basis for requiring a modification of the POO. In particular, Creole argues that it has a 50-year period in which to commence mining activity, because Creole's

Mining and Reclamation Plan approved by Imperial County, and reviewed by the BLM in 1981 and made a part of its PoO approval file, provides that the life of the operations at its approved California portland cement mine would be 50 years. Thus, it follows that the BLM considered that CREOLE's PoO would cover the same 50 year life, and the BLM cannot now assert that CREOLE's operations are restricted to a shorter time period, or that the failure of the operator to commence operations has violated the terms of its approval.

(SOR at 10.)

Creole also contends that its POO is "a contract with the government to develop, during a 50-year period, a portion of public lands to produce a valuable commodity." (SOR at 10.) As Creole has not sought a modification or initiated any operations that conflict with the approved POO, Creole argues, "BLM's attempt to unilaterally alter that contract" is not supported. (SOR at 10.) It is further argued that because BLM was aware of the wilderness study designation when it approved the POO, that designation cannot now provide a basis for requiring a modification. (SOR at 11.) More particularly, Appellant argues that the subsequent designation of the Coyote Mountains Wilderness Area is not a proper ground for requiring a modification because it was not an "unforeseen circumstance" within the meaning of 43 C.F.R. § 3809.1-7(c)(2)(ii).

Creole's concluding argument is that the Decision is flawed because it fails to identify reasonable means of minimizing surface disturbances as required by 43 C.F.R. § 3809.1-7(c)(iii). According to Appellant, BLM's true intention is "to require CREOLE to submit a completely revised plan of operations and discard the existing, approved PoO. In fact, just such a statement was made directly to representatives of CREOLE by the BLM El Centro office personnel." (SOR at 13-14.)

In its Answer, BLM identifies the statutory and regulatory changes since 1981 that affect Appellant's mining claims, and explains its reasoning for requiring a plan modification. It is noted that when the Coyote Mountains were designated as a Wilderness Study Area (WSA), Creole's patented and unpatented claims were excluded from the WSA. In designating the WSA as a part of the National Wilderness Preservation System, however, Congress changed the boundaries of the WSA and, as a result, some of Creole's unpatented mining claims are now within the wilderness area, thus subjecting them to the regulations that govern management of wilderness areas. As BLM notes, the regulations that implement the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1994), enumerate a number of activities that are prohibited in wilderness areas, subject to valid existing rights. These include construction of temporary and permanent roads, use of motorized equipment and vehicles, commercial enterprises, structures and installations, and dwellings. 43 C.F.R. § 8560.1-2.

BLM further argues that 43 C.F.R. §§ 8560.4-3(b), 8560.4-3(c), and 8560.4-6(j) require Creole to submit "a detailed accounting of where, when, and how Creole will conduct mining operations within the wilderness area, and a detailed map with a description of all routes Creole proposes to use through the wilderness area." (Answer at 3.) When this information has been supplied in the form of a proposed plan modification, BLM will examine the unpatented mining claims to determine whether they are valid. (Answer at 3.)

BLM further buttresses its request for a plan modification by citing 43 C.F.R. § 3809.1-9, which requires a financial guarantee sufficient to cover 100 percent of the estimated cost of reclamation and specifies how the cost estimate is to be developed and approved. Noting that Creole

posted its bond for \$35,000 just months before the new bonding regulations became effective, BLM states that it must now determine whether the bond amount is adequate. (Answer at 4.)

Finally, BLM states that section 5 of the 1981 POO addresses prevention of undue degradation and reclamation measures, but characterizes the content as nothing more than a "general overview of reclamation measures Creole will implement during mining operations," rather than a "detailed accounting of surface disturbance and reclamation measures in the area of operation." Referring to its April 15, 1997, letter, BLM reiterates that the 1981 POO "did not adequately address issues associated with reclamation of mine development activity (development and definition drilling, mining, processing, and ancillary facilities) on public lands," or the "current standards for reclamation in California * * * [or] the regulatory assessments of the cost of all liabilities through a registered engineer's certification." (Answer at 4.) BLM further states that the "current standards for reclamation" are set forth in BLM Manual Handbook H-3042-1, the Solid Minerals Reclamation Handbook, and notes that these standards were published on February 2, 1992, and thus were not available in 1981. (Answer at 4.)

We begin by noting that it is undisputed that initially none of Creole's Carrizo claims, virtually all of which were pre-FLPMA locations, were included within the boundaries of the Coyote Mountains WSA, or that Congress thereafter re-drew the boundaries upon designating it a Wilderness Area and thereby included a number of the Carrizo claims, as well as access to some of the claims. Inclusion in the wilderness area therefore subjected such claims to the provisions of the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1994), and its implementing regulations at 43 C.F.R. Part 8560. Those regulations provide, among other things, that "[n]o mining operations shall be conducted on Bureau-administered wilderness areas without an approved plan of operations where required by subpart 3809 of this chapter." 43 C.F.R. § 8560.4-6(b).

It is also undisputed that Creole's claims are within the CDCA, a designated management area established by section 601 of FLPMA, 43 U.S.C. § 1781 (1994), and that, subject to valid existing rights, it is to be managed to "protect the scenic, scientific, and environmental values of the public lands of the [CDCA] against undue impairment, and to assure against pollution of the streams and waters within the [CDCA]." 43 U.S.C. § 1781(f) (1994). Thus, without question, a POO is required, because any operation (excluding casual use) in a designated wilderness or in the CDCA requires an approved POO. 43 C.F.R. § 3809.1-4(b)(1) and (4).

In addition, all mining claimants are obligated to comply with reasonable stipulations established by the authorized officer designed to protect resources in accordance with the general purposes of maintaining the wilderness unimpaired for future use and enjoyment as wilderness and preserving its wilderness character, consistent with the use of the lands for mineral exploration and development. 43 C.F.R. § 8560.4-6(e). This

includes stipulations that control the utilities, mechanized transport and equipment, and facilities necessary to mining and processing operations. Id.

The same regulation clearly establishes BLM's authority and discretion to "require the posting of a cash or surety bond or other guarantee in such amount as the authorized officer determines to be sufficient to defray the costs of reclamation." 43 C.F.R. § 8560.4-6(g). Moreover, the regulation provides that in developing and operating their claims, "claimants shall, to [the] extent practicable as determined by the authorized officer and consistent with the use of lands for mineral development, prevent erosion, deterioration of the lands, impairment of their wilderness character, and the obstruction, pollution, or siltation of the streams, lakes and springs." 43 C.F.R. § 8560.4-6(h) (emphasis supplied). As the emphasized language shows, the determination of what is practicable and consistent with the competing objectives of mineral development and preserving wilderness and the resources of the public lands ultimately rests exclusively with the authorized officer.

The regulation also states the following with respect to approval of plans of operation:

(j) Where there exists no current approved mineral examination report concluding that unpatented mining claims are valid, prior to approving plans of operation or allowing previously approved operations to continue on unpatented mining claims after the date on which the lands were withdrawn from appropriation under the mining laws, the authorized officer shall cause a mineral examination of the unpatented mining claim to be conducted by a Bureau of Land Management mineral examiner to determine whether or not the claim was valid prior to the withdrawal and remains valid. If the approved mineral examination report concludes that the claim lacks a discovery of a valuable mineral deposit, or is invalid for any other reason, the authorized officer shall either deny the plan of operation or, in the case of an existing approved operation, issue a notice ordering the cessation of operations and shall promptly initiate contest proceedings to determine the status of the claim conclusively. However, neither the adverse conclusions of an approved mineral examination report nor the pendency of contest proceedings shall constitute grounds to disallow a plan of operations to the extent the plan proposes operations that will cause only insignificant surface disturbance and are for the purpose of: (1) Taking samples or gathering other evidence of claim validity * * *, or (2) performing the minimum necessary annual assessment work.

43 C.F.R. § 8560.4-6(j) (emphasis supplied).

[7] As the foregoing review demonstrates, BLM has the authority to require a POO that fully complies with the provisions of 43 C.F.R. § 8560.4-6 for claims in a designated wilderness area, and the authorized officer is expected to exercise his or her judgment and discretion in determining the adequacy of a plan, the amount of a reclamation bond or other guarantee, and in formulating protective stipulations. It is equally clear that BLM is required to conduct a mineral examination before it can approve a POO or allow operations to continue on unpatented claims in a wilderness area pursuant to an approved POO. Moreover, from the perspective of the interests protected by 43 C.F.R. Parts 3809 and 8560, it is irrelevant that Creole has not initiated mining operations pursuant to the 1981 POO. The issue is whether the plan as approved fully complies with current statutory and regulatory requirements so that Creole could lawfully commence operations. Although Creole adverts to its valid existing rights as further ground for insisting that BLM cannot require a plan modification, it remains to be seen whether the unpatented Carrizo claims within the Coyote Mountains Wilderness Area supported discoveries as of October 21, 1976, and if so, whether they continue to be valid. Cf. Richard C. Behnke, 122 IBLA 131, 139-40 (1993), quoting 43 C.F.R. § 3802.0-5(k).

In addition to the requirements imposed by the Wilderness Act, supra, BLM correctly argues that the claims here at issue are subject to the regulations pertaining to surface management set forth at 43 C.F.R. Part 3809. As discussed above, claims within the designated wilderness area are subject to the provisions of Part 3809 pursuant to 43 C.F.R. § 8560.4-6(b). Part 3809 generally governs plans of operations, including modification thereof and bonding requirements. A version of Part 3809 was in effect when Creole's POO was approved in 1981. As BLM states, however, 43 C.F.R. Part 3809 was amended, effective March 31, 1997. 62 Fed. Reg. 9093 (Feb. 28, 1997). New § 3809.1-9, Financial guarantees, provides that no operator can initiate or conduct operations without first providing a certification, prepared by a registered professional engineer, that reclamation activity is secured by a financial guarantee sufficient to cover 100 percent of the estimate of costs of reclamation, and these are to be calculated, whether operations are conducted pursuant to a notice or a POO, "as if third party contractors were performing the reclamation," 43 C.F.R. § 3809.1-9(c) and (h), or on the basis of certain amounts per acre or fraction thereof of disturbance. 43 C.F.R. §§ 3809.1-9(d)(4) (notices) and 3809.1-9(h) (POO).

On May 13, 1998, in Northwest Mining Association v. Babbitt, Civ. No. 97-1013 (JLG), the U.S. District Court for the District of Columbia issued an order that, among other things, remanded the final rule to the Department for promulgation in accordance with the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1994). 8/ Despite the present

8/ Specifically, the court invalidated the definitions of "small entity" and "small miner" used by the Department to certify that the final rule did not significantly impact small entities, holding that the Department lacked discretion to adopt a definition other than the one utilized by the Small

status of the new version of 43 C.F.R. § 3809.1-9, BLM still has ample authority to determine whether to require a bond or other financial guarantee and to determine the amount thereof. As the District Court noted in rejecting the Department's arguments in support of continued enforcement during the remand, large open-pit mines are already subject to discretionary bond requirements as plan level operations, and "to protect the environment against the most potentially dangerous mining operations, the BLM need only exercise its existing powers." (Memorandum and Order of May 13, 1998, at 13-14.) See also 43 C.F.R. §§ 3809.1-9 and 8560.4-6(g). Accordingly, we find that it is well within BLM's discretion to review Creole's bond in light of the requested plan modification and, if appropriate, to require an additional bond amount sufficient to cover the reclamation costs that may be revealed or suggested by a detailed POO.

With respect to applicable reclamation standards, BLM refers to its Manual Handbook H-3042-1, which was published more than 10 years after Creole's POO was approved. The record contains a POO that apparently is a summary of the mining and reclamation plan submitted to Imperial County. It is obvious from even a cursory review that the POO does not contain the detail from which it could be concluded that the proposed reclamation will satisfy those standards. Section 5 of Appellant's POO, styled PREVENTION OF UNDUE DEGRADATION AND RECLAMATION MEASURES, comprises the following:

The reclamation will consist of an attempt to make the area after quarrying is completed compatible in use to the surrounding area. Considering the rugged character of the landscape that exists in the area, that task is not expected to be a difficult one.

* * * Creole intends to take several measures to return the area to a condition that will be compatible in appearance and potential uses * * *.

(a) The terraces will be drilled and blasted near each face in such a manner that will destroy the rectangular character of the [quarry] terraces.

(b) Rubble left by blasting of faces will be left at the toe of each face in order to present a more natural appearance.

(c) Spoils and quarrying waste will be place in low-lying areas and in any other areas that would soften man-made contours to more natural ones.

fn. 8 (continued)

Business Administration and the Small Business Act, 15 U.S.C. § 632 (1994), and implementing regulations at 13 C.F.R. § 121.201. In addition, the court concluded that continued enforcement of the rule while on remand was not in the public interest.

(d) All slopes will be left in a condition that is as safe as the pre-quarrying conditions.

(e) Buildings, machinery and equipment, utilities, and other above ground installations will be removed.

(f) Overburden remaining (if any) will be placed in low-lying places consistent with the areas where soils may be found in surrounding un-quarried areas.

As areas of the quarry become of no further use to Creole, the work required to comply with the preceding steps will be completed as soon after quarrying has ceased as is practical and before abandonment occurs.

(1981 approved POO at 2.)

[8] In the absence of specific information or references relating to revegetation (e.g., amount and quality of topsoil to be saved, alternatives to spreading topsoil, storage location and duration of storage); drainage and hydrology (e.g., erosion prevention and control, subsurface drainage systems, water diversions); surface and ground water management; removal of surface improvements; safety measures; and closure of surface openings, for example, we have no difficulty in sustaining the State Director's conclusion that the approved POO merely states a "general overview of reclamation measures," and that it does not contain "[i]nformation sufficient to describe or identify the type of operations proposed, how they will be conducted and the period during which the proposed activity will take place," or the "[m]easures to be taken to prevent unnecessary or undue degradation and measures to reclaim disturbed areas * * * including the standards listed in § 3809.1-3(d)." 43 C.F.R. § 3809.1-5(c)(4), (5).

Notwithstanding the absence of detail necessary to ensure Appellant will adequately reclaim the area, Creole argues that BLM failed to identify "which particular component of CREOLE's planned operations will result in disturbances of a significant level to cause unnecessary or undue degradation" (SOR at 8), and that it therefore failed to articulate the reasons for recommending a plan modification. (SOR at 6-7.) Appellant takes the position that a State Director cannot take action on a recommended plan modification unless he expressly finds (1) that the authorized officer took all reasonable measures to ensure operations would not cause unnecessary or undue degradation at the time the POO was approved; (2) that the disturbance from approved operations or from unforeseen circumstances is or may become so significant that a modification is "essential" to preventing unnecessary or undue degradation; and (3) that the disturbance can be minimized using reasonable means. See 43 C.F.R. § 3809.1-7(c)(2). Having failed to make these explicit findings, Creole contends that the Decision cannot be upheld.

In urging this construction of the regulation, Creole ignores the fact that the regulation is drafted in contemplation of an active mining operation: "At any time during operations under an approved plan, the operator * * * may modify the plan or the authorized officer may request the operator to do so." 43 C.F.R. § 3809.1-7(a) (emphasis supplied). Plan modifications are required only for significant changes in on-going operations, ^{9/} and the regulation obviously is structured to ensure that a plan modification is required only where significant change is involved, that the modification is adequately supported by the facts, and that it can be reviewed before implementation is required.

Creole admits it has no active mining operation to which section 3809.1-7 could apply. Indeed, because there are no mining operations, Creole's situation factually is more closely akin to that of the initial approval of a POO. However, even in the case of BLM's rejection of an initial POO because the proposed operations will result in unnecessary or undue degradation of lands within the CDCA, this Board has held that the questions on review are whether the decision was reasonable and whether it is supported by the record. Eric L. Price, 116 IBLA 210 (1990). We recognize that a plan was duly approved, but we are unwilling to adopt Appellant's theory of how the regulation should govern this case. The virtual impossibility of making explicit factual findings where mining operations have never been initiated and where the approved plan is 17 years old and has never been updated should not, in our opinion, provide support for Creole's assertion that no plan modification therefore can be justified or required. Accordingly, the argument is rejected.

[9] We hold that 43 C.F.R. § 3809.1-7 does not establish rigid limitations on the exercise of the State Director's discretion in acting on the recommendation to require a plan modification. On the contrary, in a case such as the one before us, we view them as only generally identifying the kinds of questions that should be answerable by an adequate POO rather than mandating the explicit factual findings urged by Creole. The key to the regulation lies in the considerable flexibility and discretion afforded by 43 C.F.R. § 3809.1-7(c)(2)(ii) — it is sufficient that the State Director is persuaded that the disturbance from a mining claimant's operations may become of such significance that a modification is necessary, and in such circumstances it is irrelevant whether the actual or potential disturbance results from activities conducted pursuant to an approved POO or from an unforeseen circumstance.

We reiterate that we do not agree that in the circumstances of this appeal the regulation requires BLM to explicitly identify the specific activities or activity components that would result in undue or unnecessary degradation or to attempt to articulate a threshold level of disturbance where mining operations have never been initiated. Indeed, to

^{9/} 45 Fed. Reg. 78902, 78907 (Nov. 26, 1980).

do so would require BLM to assume or make innumerable mining and operational decisions that belong to the mining claimant in the first instance. Thus, it is the claimant or operator who properly is required to submit a "detailed accounting" of how it intends to conduct actual operations, in the form of a proposed plan modification which BLM can review and upon which it can act, and it is well within BLM's authority to require such detail, especially where there is a lack of actual data or experience because there are no actual mining operations. See Ray Rothbard, 137 IBLA 159, 162 (1996).

We also do not agree with Appellant's perception of the procedure underlying the State Director's Decision. There has been no allegation, no showing and no evidence suggesting that in approving the POO in 1981 the authorized officer failed to take reasonable measures to ensure Creole's operations would not cause undue or unnecessary degradation, 10/ and consequently we see no reason to hold that the absence of an express finding that there was no such failure in 1981 vitiates the Decision here at issue or the procedure leading to it. Based upon its belief that an affirmative finding on this point is required by 43 C.F.R. § 3809.1-7(c), as discussed, Appellant makes much of what it perceives as a "discrepancy" between the Area Manager's opinion in support of his recommendation to require a plan modification (Apr. 15, 1997, letter from the Area Manager to Creole, at 2) and the State Director's opinion that the 1981 stipulations were inadequate to protect the public lands. (Decision at 2.)

We do not share Creole's interpretation of the two statements, however. The Area Manager stated his belief that the "level of environmental review" provided an adequate basis for the original conclusion in 1981 that the proposed POO would not cause undue or unnecessary degradation, while the State Director was of the opinion that the stipulations did not adequately protect the public lands and resources. We find no discrepancy, however, because the Area Manager also explained that "site specific activity that was addressed in the 1980-1981 plans [sic] of operation, but [sic] not detailed enough to meet current review standards." (BLM letter to Creole dated Apr. 15, 1997, at 2.) Similarly, there is a larger context for the State Director's statement, which we quote in full:

4. At the time of the original approval in 1981, the stipulations did not adequately protect public land and resources. A modification is now needed to fully address the implications from * * * major surface mining operations so that reasonable stipulations may be applied to protect public land and resources, and assure that operations do not [cause] unnecessary or undue degradation.

(Decision at 2.) The State Director's conclusion, taken in context, is sufficiently consistent with the opinion expressed by the Area Manager,

10/ Even if Creole's characterization was a fair one, it would hardly support a charge of "malfeasance" based on the record in this case.

and even if the point is arguable, it is nonetheless within the State Director's prerogative to take a different view of the record and the issues in deciding to accept and act upon the authorized officer's recommendation to require a plan modification. Moreover, BLM's authority entails not only acting to avert unnecessary or undue degradation before it occurs, but also acting to abate it if it develops after a plan is approved. Red Thunder, Inc., 129 IBLA 219, 236-37, 239 (1994).

The remaining arguments to be addressed are based on the perceived applicability of the law of contracts to a POO. Appellant first argues that the POO contains neither a termination date nor a date by which mining operations shall begin, and since Creole's mining and reclamation plan, which was approved by Imperial County (California) in 1981 after BLM's review and reportedly specifies a 50-year life of mine operations, Creole argues that "it follows that the BLM considered that CREOLE's PoO would cover the same 50 year life, and the BLM cannot now assert that CREOLE's operations are restricted to a shorter time period, or that the failure of the operator to commence operations has violated the terms of its approval [of the POO]." (SOR at 10.)

Appellant continues its argument with the related contention that the approved POO constitutes a "contract with the government to develop, during a 50 year period, a portion of the public lands to produce a valuable commodity," which BLM cannot "unilaterally alter." Erroneously assuming that a POO is an enforceable contract, Creole reasons that since it has not requested a modification and has not commenced any operations that conflict with the operations described in the approved POO, the level of impacts has not changed, and therefore there is no factual basis for requiring a modification.

[10] Appellant's assertions are without merit. First, there can be no genuine question that a POO lacks the basic elements of offer, a meeting of the minds, consideration, acceptance and proper execution that are essential to the formation of an enforceable contract. Second, Creole's position ignores the fundamental questions of whether the approved POO complies with current law, and if it does not, whether there is any legal basis for exempting Appellant's operations from complying with such requirements. Third, approval of a POO does not create a vested right to conduct mining and reclamation operations pursuant to the plan as approved, without regard to applicable statutory and regulatory requirements. ^{11/} Nor does the act of approval constitute a surrender of BLM's duty to manage the public lands and resources in accordance with the requirements of law as they are established by Congress from time to time. To the contrary, a POO generally is nothing more than a description of how an operator proposes to conduct various activities on the public land.

^{11/} We note that failure to comply with applicable law constitutes unnecessary or undue degradation. 43 C.F.R. § 3809.0-5(k). See 43 C.F.R. § 3809.2-2 for a partial list of the Federal and state laws affected.

Despite its arguments, Creole does not dispute the applicability of the statutes supporting the provisions of 43 C.F.R. Part 3809, see 43 C.F.R. § 3809.0-3, and it has not cited any provision to show that it is exempt from such statutory and regulatory authority. Creole similarly does not seriously dispute that there have been changes in the law and implementing regulations in the almost two decades since the POO was approved. Instead, Creole argues a procedural and substantive construction of 43 C.F.R. § 3809.1-7, which, if sustained, would be tantamount to an exemption. We do not take such a mechanical view of regulatory requirements in the circumstances here presented, and we conclude that BLM has amply demonstrated that it was appropriate to require a plan modification. We hold that BLM has properly informed the operator of the necessity for a plan modification and adequately fulfilled its obligation to explain the reasons for doing so.

To the extent not expressly addressed herein, other arguments raised by Appellant have been considered and rejected.

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 interim stay in IBLA 97-455 is dissolved and the Decision reversed, the Decision in IBLA 98-61 is affirmed, and the case files are remanded to BLM for further action in accordance with the opinion expressed herein.

T. Britt Price
Administrative Judge

I concur.

Will A. Irwin
Administrative Judge

