



CRAIG MONPAS

178 IBLA 101

Decided August 26, 2009



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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Arlington, VA 22203

CRAIG MONPAS

IBLA 2009-115

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Appeal from a decision rejecting a reclamation cost estimate and requiring an additional financial guarantee for notice-level mining activities. OR 65398.

Decision set aside and remanded.

1. Administrative Practice--Mining Claims: Generally--Rules of Practice: Evidence

Where BLM makes use of computer spreadsheets to justify its rejection of a miner's reclamation cost estimate, it must reveal underlying data sufficient to explain deficiencies in the miner's estimate so that the reasons for BLM's rejection can be ascertained and the miner can understand and either accept or appeal the decision rejecting its cost estimate.

APPEARANCES: Craig Monpas, Canby, Oregon, appellant; Nancy Lull, Field Manager, Baker Field Office, Bureau of Land Management, Baker City, Oregon.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Craig Monpas has appealed the January 12, 2009, decision of the Baker (Oregon) Field Office, Bureau of Land Management (BLM), requiring a \$2,958 financial guarantee for reclamation under mining notice OR 65398 for the Chucker (ORMC 31599) and Upper Chucker (ORMC 74355) mining claims located in sec. 20, T. 12 S., R. 41 E., Willamette Meridian, Baker County, Oregon. We set aside that decision for the reasons discussed below.

Background

Monpas filed a notice of operations with BLM in March 2008, proposing to upgrade and extend an existing road for accessing his exploration site and for

sampling minerals in three trenches to be excavated in 50-foot segments, each 35 feet wide and 8 feet deep (519 cubic yards (yd³)). Administrative Record - Document No. 0 (AR 0) at unpaginated 3-4.¹ Monpas would reclaim each trench segment before excavating the next 50 x 35 x 8 foot segment. *Id.* at 2. Attached to his notice was a reclamation cost estimate. According to Monpas, BLM earlier provided him with local contractor rates for equipment and labor (e.g., \$90 per hour for an operator and a Cat D-7 bulldozer with a production rate of 467 yd³).² He estimated the reclamation work would require 2.1 hours to push excavated material into a trench segment and to rip and scarify the affected area with a Cat D-7. *Id.* at 3-4. He then calculated the cost of using a Cat D-7 for 3 hours, for mobilizing and demobilizing that heavy equipment, for 4 hours of work by a laborer, for seeding the entire disturbance, and for BLM administrative costs, resulting in a reclamation cost estimate of \$965. *Id.*

BLM reviewed Monpas' notice and generated its own reclamation cost estimate using the same number of hours and hourly rates for equipment and labor as had Monpas, but its estimate totaled only \$914 (\$51 less than Monpas' estimate). AR 2 (April 2008 Spreadsheet). By decision dated April 24, 2008, BLM determined Monpas' notice was complete and that his reclamation cost estimate was appropriate, informing him he must provide an acceptable financial guarantee before beginning on-site activities. AR 4. Monpas' bond for \$965 was accepted by BLM and made effective on June 13, 2008. AR 8.

BLM received an amendment to Monpas' notice on July 18, 2008, in which he represented his trench sampling "did not show any values" and that he intended to complete trench reclamation on July 26 and to dig six test holes further to the north. AR 13.³ Monpas filed a second amended notice on August 7, 2008, informing BLM his six test holes had been sampled and reclaimed, but "showed no substantive values" and that he intended to dig 4-6 additional test holes to the northwest, each

¹ Excavated material would be stockpiled for reclamation. Monpas also proposed to construct two ponds, which BLM agreed did not need to be reclaimed because they would have a positive environmental effect. AR 3 at 2.

² This correspondence is not part of the record on appeal. BLM is required to forward the complete, *original* case file for a decision to the Board within 10 business days of receiving a notice of appeal. *Utah Chapter Sierra Club*, 114 IBLA 172, 175 (1990). The case file forwarded to the Board is obviously incomplete and contains only copies of original documents.

³ The record submitted by BLM does not indicate whether it responded to this notice within 15 days or at any time thereafter. *See* 43 C.F.R. §§ 3809.311(a), 3809.330(b).

4 x 10 feet and up to 8 feet deep. AR 19. BLM determined this amended notice was complete and that no additional financial guarantee was required. AR 20.

Monpas filed his third amended notice in November 2008. AR 21. He informed BLM that an earlier excavation was still open and only partially reclaimed and that he intended to complete reclamation of that site in the spring and then begin excavating a new 150 foot trench near the southern boundary of his claim. He stated “[n]o new road construction is required” and that he would excavate this trench in 50-foot segments, reclaiming each before the next was begun (as under his original notice and BLM-approved cost estimate), but that they would be somewhat smaller (20 x 7 vs. 35 x 8 feet) and that less material would be stockpiled for reclamation (519 yd³ vs. 296 yd³). After “BLM concurs that reclamation is acceptable,” Monpas would then excavate two additional trenches in segments (*i.e.*, each would be reclaimed before excavating the next trench segment). He estimated 1.1 hours of additional work would be required to refill, scarify, and seed an additional trench segment and calculated an added cost of \$167, using the same hourly rates earlier provided by BLM for a Cat D-7. His calculations estimated a total reclamation cost of \$1,132.

BLM determined Monpas’ amended notice was incomplete⁴ and that his reclamation cost estimate was “not appropriate in this case.” AR 22. BLM represented it generally accepts cost estimates generated by its “Reclamation Bond Calculation Spreadsheet” software, provided a copy to Monpas, and requested him to use that software to complete his notice. *Id.* at 2. Monpas replied by providing additional, more detailed costs for filling and scarifying (rounding up 2.3 hours of work to 3), planting grass seed (\$20), and BLM administrative costs (\$34), which increased his revised estimate to \$1,222 (\$257 more than his current bond). AR 23 at 3-4. His estimate was based on the estimate earlier approved and accepted by BLM,⁵ rather than its software program, because that software “did not appear to apply to my small reclamation sites.” *Id.* at 4.

By decision dated January 12, 2009, BLM determined Monpas’ reclamation cost estimate was unacceptable and inadequate under 43 C.F.R. §§ 3809.552(b) and

⁴ BLM directed Monpas to indicate whether all three trenches would be worked at the same time, the dimension of the stockpile(s), and whether he would be constructing or improving any roads. Monpas reiterated his earlier representations in reply. *See* AR 23 at unpaginated 1-2.

⁵ He detailed his earlier approved cost estimate, explaining since a trommel was not retained on site (\$104) and he never stockpiled 500 yd³, his original estimate “is more than would be needed to reclaim the original disturbances from last summer.” AR 23 at 3.

3809.554(b), because its “Reclamation Bond Calculation Spreadsheet” software identified \$2,958 as the proper amount. AR 24 at 1; *see* attached December 2008 Spreadsheet.⁶ Without analysis or further explanation, BLM stated that if Monpas failed to submit an additional financial guarantee of \$1,993 within 60 days (the difference between \$2,958 and the current bond of \$965), “BLM will take the appropriate enforcement action against you.” AR 24 at 1.⁷ Monpas timely appealed on February 5, 2009.⁸

Monpas filed a 1-page Notice of Appeal (NOA) which avers:

I calculated the new bond amount in the exact same manner that I calculated my original financial guarantee estimate last year when I submitted my Notice March 27, 2008. For that calculation, BLM provided me . . . with the hourly rate that I must use for equipment, and they provided me with the production rate for that equipment. There was no guesswork involved, my estimate was accepted, and my bond was posted. Eight months later, BLM now states that my new estimate does not meet the requirement of [43 C.F.R. § 3809.552], even though I calculated it in the same manner as I calculated my original bond.

. . . I haven’t excavated my new trenches, and I find nothing in [43 C.F.R. § 3809.601] that says my notice can be terminated or suspended, simply because I fail to provide the additional bond money. It seems to me that BLM should not be threatening me, just because I didn’t calculate the bond the way they wanted.

BLM elected not to file an answer.

⁶ BLM later supplemented the administrative record with the December 2008 Spreadsheet that had been attached to its decision; BLM did not include its “Reclamation Bond Calculation Spreadsheet” software in the record on appeal.

⁷ BLM there cited 43 C.F.R. § 3809.601, which authorizes it to issue noncompliance and/or suspension orders for any violation of 43 C.F.R. Subpart 3809.

⁸ A claimant may appeal a decision issued under 43 C.F.R. Subpart 3809 to “OHA” under 43 C.F.R. 3809.801(a); the Board of Land Appeals is a component of the Department’s Office of Hearings and Appeals (OHA). *See Ferrell Anderson*, 171 IBLA 289, 291 n.1 (2007).

Discussion

A financial guarantee for reclamation work under a mining notice or plan of operations must be based on estimated costs that would be incurred if BLM were to contract with a third party to reclaim the site according to the reclamation plan, including construction and maintenance costs, plus BLM's administrative costs. See 43 C.F.R. §§ 3809.552(a), 3809.554(a). Based on the facts of this case, reclamation work would include: backfilling a partially reclaimed trench segment and the new trench segment Monpas intends to excavate; flattening the stockpile(s); scarifying trenches, roads, and stockpiles; and seeding the disturbed area. The reclamation cost estimate would then include the cost of that work at standard industry rates and costs, plus mobilization, demobilization, and administrative charges. See Oregon/Washington State Office Instruction Memorandum (IM) OR-2009-032 at 19, dated May 5, 2009; IM No. OR-2007-057, dated May 2, 2007.

Monpas does not deny he is required to increase the \$965 reclamation bond currently in place, but objects to the \$1,993 increase required by BLM. As in *Pilot Plant, Inc.*, 168 IBLA 193 (2006), which also involved reclamation work under a mining notice, “[a]n individual challenging the amount of a reclamation bond or financial guarantee required by BLM must show error in BLM’s decision. More than a conviction that BLM’s estimate is excessive is necessary to prevail.” 168 IBLA at 199 (citations omitted); accord *Ferrell Anderson*, 171 IBLA at 293. In challenging BLM’s computer-generated cost estimate of \$2,958, as reflected in the December 2008 Spreadsheet attached to its decision, Monpas contends his reclamation cost estimate should have been accepted because it was calculated in the same manner and used the same production/hourly rates earlier approved and provided by BLM.

[1] The December 2008 Spreadsheet was generated by a software program not included in the record on appeal. In reviewing decisionmaking supported by computer analysis, we earlier held:

The running of a computer program is not a substitute for evaluation of the issue at hand but rather support for the decision made. BLM may not simply report the results of its computer analysis; it must reveal the underlying facts used to obtain the result and the assumptions on which the computer program is based and it must demonstrate why its facts and assumptions, and therefore its result, are more reasonable than the applicant’s or offeror’s, as the case may be. See *Southern Union Exploration Co.*, 41 IBLA 81 (1979). The applicant must be given some basis for understanding why his or her plans do not meet the requirements of the law and applicable regulations.

Roger K. Ogden, 77 IBLA 4, 8, 90 I.D. 481, 484 (1983) (*Ogden*). We there found BLM's decision deficient because it failed to explain how its computer printouts were generated (e.g., "where the data came from"), whether they provided a reasonable basis for evaluating Ogden's proposal, and what distinguished its printouts from his proposed plan. 77 IBLA at 8-9, 90 I.D. at 484.⁹ *Ogden* was later applied to BLM cost estimates in *Bookcliff Rattlers Motorcycle Club*, 171 IBLA 6 (2006) (*Bookcliff*), which holds:

Where BLM makes use of computer spreadsheets to accumulate data upon which a cost estimate . . . is based, it must reveal underlying data sufficient for the applicant being charged to ascertain the justification for its conclusions; otherwise, the applicant has no basis upon which to understand and accept the decision or, in the alternative, to appeal and dispute it.

171 IBLA at 21. As in *Ogden*, BLM supplemented the record with additional documents and the affidavit of a BLM employee, which we found "provide the underlying rationale for BLM's cost estimates." *Id.* at 23. The only supplementation provided by BLM in this case was to provide its December 2008 Spreadsheet. *See supra* note 6.

When it is not possible to determine whether the data upon which a cost estimate is based were supported by the record, the Board will set that decision aside. *See, e.g., Mark Patrick Heath*, 175 IBLA 167, 187-95 (2008). Such is this case because, unlike *Ogden* and *Bookcliff*, BLM has not supplemented the record with underlying data or assumptions, explanatory documents or affidavits, or otherwise explained its cost estimate or why it rejected Monpas' cost estimate. Moreover, we find many unanswered questions surround BLM's decision and its supporting December 2008 Spreadsheet.

As best we can discern from comparing BLM's December 2008 Spreadsheet (AR 26) with its earlier April 2008 Spreadsheet (AR 2) for similar reclamation work,¹⁰ they appear to be based on different assumptions and to have been generated by different software programs. The April 2008 Spreadsheet assumed reclamation of

⁹ BLM supplemented the administrative record on appeal with additional documents, which we found "provides the missing support for its data and points out the deficiencies in appellant's plan." *Ogden*, 77 IBLA at 9, 90 I.D. at 485.

¹⁰ The April 2008 Spreadsheet was for reclaiming 1,600 feet of a 12-foot wide road and a 50 x 35 x 8 foot trench segment; the December 2008 Spreadsheet was for reclaiming only 750 feet of a 10-foot wide road, a smaller trench segment (50 x 20 x 14 feet), and an earlier, partially reclaimed trench segment.

the road and a trench segment would require one operator using one piece of heavy equipment, whereas the December 2008 Spreadsheet assumed this work would require two operators using two different pieces of heavy equipment.¹¹ The April 2008 Spreadsheet identifies a rate of \$90 per hour for a Cat D-7 (including its operator) and 2.1 hours to do the work, plus mobilization/demobilization costs of \$406; the December 2008 spreadsheet mobilization/demolization costs are comparable (\$380), but its labor and equipment costs are radically different, largely (but not exclusively) based on two operators using two pieces equipment.

For example, the December 2008 Spreadsheet segregates reclamation activities for each piece of equipment and rounds up to the next full hour. Using a Cat D-6 for road recontouring, flattening slopes, and ripping “dump top” would take 0.4, 0.2 and 0.2 hours, but since the software program rounds each up to a full hour, it assumes 0.8 hours of work would take 3 hours; using a Cat 938 to fill the trench segments would take 2.2 hours, which is also rounded up to 3 hours. It therefore appears BLM assumes it would be charged 6 hours for two operators using two pieces of equipment (plus an additional two hours for each operator to reach the site), resulting in a direct labor and equipment cost of \$1,689 to do 3 hours of work. By contrast, Monpas’ revised estimate identified a single, larger Cat D-7 which would take up to 4 hours to do the work at an hourly rate of \$90 (inclusive of an operator), like BLM did in its April 2008 Spreadsheet; he also identified two contractors in the area who do not charge for travel time to/from a work site. These differences are unexplained in the record, as is BLM’s rejection of a reclamation cost estimate based on the same methodology and rates it had approved and provided to Monpas just eight months earlier.¹²

The recipient of a BLM decision is entitled to a reasoned and factual explanation that provides a basis for understanding and either accepting or appealing

¹¹ The April 2008 Spreadsheet assumed use of a single Cat D-7 (production rate - 467 yd³/hr); the December 2008 Spreadsheet assumed using both a Cat D-6 (production rate - 280 yd³/hr) and a Cat 938 (production rate - 237 yd³/hr). It is worth noting we affirmed a reclamation cost estimate based on using a Cat D-6 (rather than the miner’s proposed use of a Cat D-7) in *Ferrell Anderson*, 171 IBLA at 294, because that record supported BLM’s conclusion that transporting a heavier Cat D-7 over existing roads “would cause unnecessary and undue degradation of public lands” and that using a larger bulldozer with a longer tread base would be “an inappropriate choice for the reclamation of Anderson’s operations.” There is no similar claim, conclusion, or record support in this case.

¹² BLM administrative costs reflected in the April 2008 Spreadsheet were \$120 (*i.e.*, 15.1% of its estimated contractor cost); its December 2008 Spreadsheet indicates these costs would be \$447 (*i.e.*, 17.8% of its increased estimate of contractor costs).

that decision. Since BLM furnished Monpas no such explanation, we set its decision aside and remand this case to BLM for further action consistent herewith. Accordingly, we need not address Monpas' further argument regarding the possible suspension or termination of his mining notice or plan of operations.

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 decision appealed from is set aside and the case is remanded to BLM for action consistent with this decision.

_____/s/_____
James K. Jackson
Administrative Judge

I concur:

_____/s/_____
Geoffrey Heath
Administrative Judge