DAVIS CREEK MINING COMPANY, LLC  
GREG CLAYTON

IBLA 2015-217  
Decided March 27, 2019

Appeal from a Bureau of Land Management decision which, among other actions, revoked a mining plan of operations and required full reclamation of the mine. FF095787 and FF095788.

Affirmed.

1. Appeals: Burden of Proof;  
   Mining Claims: Plan of Operations;  
   Mining Claims: Reclamation

   In cases in which the Board reviews BLM's findings of noncompliance with the mining regulations, the burden of proving error in the appealed decision is on the appellant.

2. Mining Claims: Plan of Operations;  
   Mining Claims: Reclamation

   Under 43 C.F.R. Subpart 3809, a claimant or operator conducting operations under an approved plan of operations accrues the reclamation obligations required by the plan.

3. Mining Claims: Plan of Operations;  
   Mining Claims: Reclamation

   BLM properly applies joint and several liability to mining claimants and operators on a case-by-case basis under a State's common law principles. There is no requirement for BLM to seek recourse from prior claimants or operators in every instance.

OPINION BY ADMINISTRATIVE JUDGE HAUGRUD

Davis Creek Mining Company, LLC and Greg Clayton (collectively, Appellants or DCMC) appeal from a June 22, 2015, Decision of the Manager of the Central Yukon Field Office (CYFO) of the Bureau of Land Management (BLM). In that Decision, BLM revoked the mining plan of operations for Davis Creek Mine and required full reclamation of the Mine site.

SUMMARY

DCMC is the current operator of the Davis Creek Mine in Alaska. DCMC alleges that BLM’s Decision to revoke the mining plan of operations (Operations Plan or Plan) was unjustified and unlawful because DCMC had complied with the terms of the Plan and all other applicable regulations and directives issued by BLM. DCMC also alleges that BLM exceeded its authority in ordering DCMC to reclaim the entire Mine site when it only operated for one season and most of the mining disturbance requiring reclamation was created by prior claimants and operators of the Mine. Finally, DCMC claims that BLM did not provide it due process before making the Decision.

DCMC has failed to show that BLM erred in issuing its Decision. BLM has a rational basis in the record for finding that DCMC did not comply with the mitigation measures required by the Plan and that it failed to correct the violation within the time specified by BLM. Revocation of the Plan was thus appropriate. BLM also properly required DCMC to reclaim the entire Mine site. Although other claimants and operators had previously disturbed the site and have reclamation liability, DCMC also accrued liability for reclaiming the Mine by conducting mining operations in 2013 that affected all 8.5 acres of the Mine site. BLM’s regulations authorize it to impose joint and several liability on an operator, so the Bureau was not required to apportion reclamation liability among all potentially liable claimants and operators.

Finally, BLM and the Department have provided due process to DCMC. DCMC has been afforded a right to present its evidence and arguments in support of its position, including before this Board. Accordingly, we affirm BLM’s Decision.

REGULATORY BACKGROUND

The Federal Land Policy and Management Act of 1976 (FLPMA) mandates that in managing the public lands the Department of the Interior shall, by regulation or otherwise, “take any action necessary to prevent unnecessary or undue degradation of
the lands.”1 As part of its implementation of this mandate, the Department has issued regulations at 43 C.F.R. Subpart 3809 that govern surface management of mining operations on public lands.2 With limited exceptions where only a “notice” to BLM is required, an operator must submit and obtain BLM approval of a mining plan of operations before beginning mining operations greater than casual use.3 The regulations also prohibit mining activities exceeding casual use without posting an adequate financial guarantee.4

Mining claimants and operators are liable for “obligations” under Subpart 3809 “that accrue while they hold their interests.”5 Those obligations include complying with specified mining performance standards6 and with the terms of the approved plan of operations.7 Both the performance standards and plans of operations require reclamation of mined sites.8 Reclamation of a mine site requires, among other things, measures to control erosion and water runoff; to isolate, remove, or control toxic materials; to reshape and revegetate disturbed areas; and to rehabilitate fisheries and wildlife habitat.9

BLM may take enforcement action if an owner or operator does not comply with the requirements of Subpart 3809 or a provision of a plan of operations.10 An enforcement action may begin either with issuance of a noncompliance order or an immediate temporary suspension order if necessary to protect health, safety or the environment from imminent danger or harm.11 BLM may revoke a plan of operations when it finds a violation of any provision of the plan of operations or of Subpart 3809,

2 43 C.F.R. § 3809.1(a) (stating the purposes of Subpart 3809 includes “establish[ing] procedures and standards to ensure that operators and mining claimants” “[p]revent unnecessary or undue degradation”); see also Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 69,998-99 (Nov. 21, 2000) (final rule) (discussing history of the Subpart 3809 regulations).
3 43 C.F.R. §§ 3809.412, 3809.11(a), 3809.21.
4 Id. §§ 3809.412, 3809.500, 3809.605(d).
5 Id. § 3809.116(a).
6 Id. § 3809.420.
7 Id. § 3809.415(a).
8 See id. §§ 3809.420(b)(3) (reclamation performance standards), 3809.401(b)(3) (requirement for a reclamation plan as part of a plan of operations).
9 Id. § 3809.420(b)(3)(ii).
10 Id. § 3809.601.
11 Id. §§ 3809.601(a) (noncompliance order), 3809.601(b)(2) (immediate temporary suspension).
and the claimant or operator has failed to correct the violation within the time specified
in an enforcement order (or a pattern of violations exists).\(^{12}\) Before revoking a plan,
BLM must notify the claimant or operator of its intent to revoke the plan and provide an
opportunity for an informal hearing with the BLM State Director.\(^{13}\) Once a plan is
revoked, only reclamation and other measures specified by BLM may be conducted at the
mine site.\(^{14}\)

FACTUAL BACKGROUND

Davis Creek Mine consists of several unpatented placer and lode claims for gold
located in the State of Alaska near the confluence of Davis Creek and the South Fork of
the Koyukuk River.\(^{15}\) According to BLM records, the five placer mining claims associated
with the Mine were located in 1982 and 1997.\(^{16}\) The Mine site is located in northern
Alaska and is not accessed by developed roads. Instead, equipment is typically mobilized
to the site during limited time periods in early spring using the South Fork of the
Koyukuk River when it is frozen and snow conditions permit transport.\(^{17}\)

Mining occurred at the site before Appellants became involved with the Mine.
Bonding records show that at the end of 2010 approximately three acres had been
disturbed.\(^{18}\) At that time, the claims were primarily owned and operated by Stephen and
Michael Greene in conjunction with a limited liability corporation known as Green
Resources LLC that had been established by the Greenes and two other individuals.\(^{19}\)
The next year, during the summer of 2011 before the Operations Plan had been

\(^{12}\) Id. § 3809.602(a).

\(^{13}\) Id. § 3809.602(b).

\(^{14}\) Id. § 3809.602(c).

\(^{15}\) Answer at 2; Statement of Reasons (SOR) at 3-4.

\(^{16}\) Order: Petition for Stay Denied (Stay Order) at 2 (Sept. 10, 2015) (stating that Davis
Creek No. 1 (AKFF-080461) and Davis Creek No. 2 (AKFF-080462) were located Feb. 13,
1982; and Davis Creek No. 3A (AKFF-992337), Davis Creek No. 3B (AKFF-092338), and
Davis Creek No. 1 Below Mouth (AKFF-092341) were located May 30, 1997).

\(^{17}\) SOR at 4, citing attached Supplemental Excerpt of Record (SER) at 18, 24, and 153.

\(^{18}\) Because BLM’s administrative record (AR) is not page or document numbered, this
opinion cites to the SER for ease of reference whenever a cited document has been
included in the SER. Documents in the AR but not included in the SER are cited with a
parenthetical notation of “(in AR).”

\(^{19}\) SER at 12-14; see also id. at 15 (BLM inspection report, June 16, 2011, stating that
cuts and settling ponds exist from prior operations).

\(^{20}\) Stay Order at 2 n.3 (describing ownership history of the five placer claims); see also
SOR at 4-5.
approved, Green Resources LLC conducted mining activity at the site, with up to six additional acres being disturbed.\textsuperscript{20} BLM conducted site inspections of Davis Creek Mine following this mining work and notified the operator of record that “current reclamation liability for your operation is nine acres.”\textsuperscript{21}

The proposed Operations Plan was submitted to BLM in March 2011 by Stephen Greene on behalf of Green Resources LLC, seeking approval of gold mining operations on the five placer mining claims of Davis Creek Mine.\textsuperscript{22} The Plan was submitted using the State of Alaska’s Multi-Agency Application for Permits to Mine in Alaska (APMA) for Placer Mining.\textsuperscript{23}

The Plan envisioned that mining operations would occur on all five placer claims.\textsuperscript{24} As described by BLM, the proposed operation would use a “bedrock drain technique,” in which a trench is excavated in the bedrock to serve as a water drain with mining operations then occurring within and adjacent to the original stream channel.\textsuperscript{25} The Plan proposed placing the trench within the existing streambed of Davis Creek starting approximately 1100 feet upstream from its mouth, but then creating a bypass channel away from the streambed starting approximately 100 feet above the creek’s mouth.\textsuperscript{26} The bedrock drain was to be temporary and backfilled at the end of the mining season.\textsuperscript{27} Gravel ore would be extracted from the bed and banks of the Creek, and adjacent bench areas, and run through a diesel-powered wash plant, where gold would be recovered.\textsuperscript{28}

On June 16, 2011, BLM inspected the Mine site and noted that cuts and settling ponds existed from prior operations.\textsuperscript{29} BLM observed that no reclamation of the site had

\begin{itemize}
  \item \textsuperscript{20} SER at 11 (reclamation plan indicating six acres would be disturbed in 2011), 57 (email by Greene describing 2011 mining activity at Davis Mine, stating that 9333 cubic yards had been processed), and 58 (2011 annual reclamation statement stating one acre disturbed in 2011 “on the Family Reserve” (i.e., Davis Creek No. 3A and 3B)).
  \item \textsuperscript{21} Id. at 59.
  \item \textsuperscript{22} Answer at 2; SOR at 4.
  \item \textsuperscript{23} SER at 9-13 (the APMA).
  \item \textsuperscript{24} See id. at 9-10.
  \item \textsuperscript{25} Id. at 24, 38 (Environmental Assessment (EA), DOI-BLM-AK-03000-2011-0045-EA, at unpaginated (unp.) 3, 17).
  \item \textsuperscript{26} Id. at 24.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Id. at 24-26 (EA at unp. 3-5).
  \item \textsuperscript{29} Id. at 15-16 (Field Compliance Inspection Sheet, June 16, 2011).
\end{itemize}
occurred. After completing an Environmental Assessment (EA), BLM approved the Plan on August 25, 2011, assigning it serial number FF095787. BLM’s approval was subject to various reclamation requirements and mitigation measures, including the measures set out in the EA. Mitigation Measure #5 is at the heart of this appeal. Because of the then-existing and planned alteration of Davis Creek, Mitigation Measure #5 required the operator, before beginning mining operations, to have a BLM-approved plan for constructing a stream channel after mining operations that would help to restore Davis Creek to its pre-mining characteristics:

A complete design of the post-mine channel, incorporating the morphological characteristics of the pre-disturbance channel and floodplain (e.g. bankfull and floodprone dimension, meander pattern, design flows and velocity, particles size etc...) shall be submitted and approved by BLM prior to mining. Detailed diagrams showing plan, profile and sectional views of the design along with a written description of the design are to be included. In addition, the submission should describe the location and provide detailed diagrams of how and where bank stabilization and energy dissipating structures are to be installed and describe and diagram how and where riparian vegetation will be restored. A post-construction survey shall be submitted to BLM demonstrating the channel was constructed as designed.

Despite approval of the Plan, no mining was done in 2012. But important changes in the owners and operator of the Davis Creek Mine claims did occur. Appellant Greg Clayton became the owner or co-owner of the five placer mining claims in June of 2012, and he states that in July of 2012 he co-located five lode claims associated with the Mine. On August 2, 2012, unbeknownst to BLM at the time, Green Resources LLC was dissolved. Mr. Clayton organized the Davis Creek Mining Company in September of 2012 for the primary purpose of conducting mining work.

By the summer of 2013, the post-mining channel design required by Mitigation Measure #5 had not been approved, so mining was not authorized under the terms of

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30 Id. at 16.
31 Id. at 17 (Letter from Nichelle Jacobson, CYFO Field Manager, to Green Resources LLC, Aug. 25, 2011) (approving Plan).
32 Id.
33 Id. at 47-48 (EA at unp. 26-27).
34 SOR at 9; SER at 64-71.
35 SOR at 8 (citing SER at 8); see also Answer at 5 n.10.
36 SOR at 9; SER at 72-73.
BLM’s Plan approval. On August 12, 2013, BLM received an email from an agent for Mr. Clayton, Don Keill, that provided “stream survey information” intended to address BLM’s concerns for a complete design of the post-mining channel as required by Mitigation Measure #5.\footnote{37}

Although Mitigation Measure #5 had not yet been satisfied, Appellants admit that “[m]ining operations by Davis Creek Mining Company, LLC, in association with Steve Greene, occurred during part of the summer of 2013.”\footnote{38} BLM did not become aware of the mining operations that were underway until it conducted overflights of the mine site on August 14 and 15, 2013, and then made a follow-up ground site visit on August 19, 2013.\footnote{39} BLM observed an active mine cut, wash plant operations, and turbid discharges entering the South Fork of the Koyukuk River from Davis Creek.\footnote{40} Because BLM had not approved a post-mining channel design, it recognized that these active mining operations violated the approved Plan by failing to comply with Mitigation Measure #5.\footnote{41} Accordingly, on August 23, 2013, BLM issued an Immediate Temporary Suspension Order (ITSO), directing the operator to “cease all mining operations, except for reclamation activities, and successfully meet the conditions outlined in [the 2011 EA].”\footnote{42} BLM referenced the August 12, 2013, submission in its ITSO, stating that it had received an e-mail from Mr. Keill and that it would review the submitted information to determine whether Mitigation Measure #5 had been satisfied.\footnote{43}

BLM issued the ITSO to Green Resources LLC, since at that time BLM’s records still showed the company as the operator of the mine.\footnote{44} Appellants received notice of the ITSO, however, and conducted no further operations at Davis Creek Mine.\footnote{45}

The next action in the chronology is the subject of conflicting interpretations by the parties. On November 21, 2013, Mr. Keill submitted as the agent of Mr. Clayton an APMA seeking approval of mining operations at Davis Creek Mine for 2014-2018.\footnote{46} The

\footnote{37} SOR at 10 (citing SER at 79-105); Answer at 6.
\footnote{38} SOR at 10.
\footnote{39} Answer at 5; SER at 106-108 (Immediate Temporary Suspension Order (ITSO)).
\footnote{40} SER at 106-107.
\footnote{41} Id. at 106.
\footnote{42} Id. at 107.
\footnote{43} Id.
\footnote{44} Answer at 5 n.10.
\footnote{45} SOR at 10.
\footnote{46} Answer, Exhibit A (November 2013 APMA). The APMA is also included in the SER at 109-141 with the first page annotated to state the application was for 2013-2014. BLM’s official copy does not contain the annotation.
APMA listed “Davis Creek LLC” and Mr. Clayton as operators, and also listed Mr. Clayton and Mr. Greene as owners. The proposed mining would occur on four of the five placer mining claims of Davis Creek Mine.\textsuperscript{47} To “supplement the information required in the 2014-2018 APMA,” Mr. Keill submitted a narrative and other information to BLM that included a description of a reclamation plan that included the construction of a post-mining stream channel.\textsuperscript{48} As discussed below, Appellants would later state that the APMA was not intended to be a proposed new plan but rather was intended to supplement the existing Operations Plan by providing the post-mining information required by Mitigation Measure #5 and the ITSO.

BLM, on the other hand, docketed the November 2013 APMA as a new proposed operations plan, assigned it a new file number (FF096740), and reviewed it for completeness.\textsuperscript{49} On January 28, 2014, BLM notified Mr. Clayton of information deficiencies in the APMA, including with the design of the post-mining stream channel, and requested additional information for BLM to deem the proposed operations plan complete.\textsuperscript{50} Soon thereafter, BLM wrote to Messrs. Clayton and Greene asking for clarification on who owned the Davis Creek claims and who was seeking authorization to conduct operations.\textsuperscript{51} BLM had conflicting information on both issues. In response, Mr. Clayton withdrew the November 2013 APMA in correspondence to BLM dated February 24, 2014.\textsuperscript{52} In his letter to BLM, Mr. Clayton acknowledged that he had “been pursuing the necessary permits thru my agent, Don Keill, while Mr. Greene was also moving forward with permitting.”\textsuperscript{53} He also stated his understanding that Mr. Greene had sold some or all of his Davis Creek claims to another party. Mr. Clayton concluded by stating, “I am withdrawing all of my applications concerning the Davis Creek mining claims.”\textsuperscript{54}

BLM notified Mr. Clayton and Stephen Greene, by letter dated June 2, 2014, that the information provided in Mr. Keill’s August 2013 e-mail did not satisfy Mitigation

\textsuperscript{47} Id.
\textsuperscript{48} Id. Mr. Keill’s November 2013 cover memorandum and supplemental information is also included in the SER at 116-141.
\textsuperscript{49} Answer at 6.
\textsuperscript{50} Answer, Exhibit B (Letter from CYFO Field Manager Jacobson to Mr. Clayton, Jan. 28, 2014).
\textsuperscript{51} Letter from Jesse Labenski, BLM Mining Compliance Specialist, to Mr. Clayton and Mr. Green, Feb. 3, 2014 (in AR).
\textsuperscript{52} SER at 167-168 (e-mail from Mr. Clayton to Tyler Cole, BLM, Feb. 24, 2014, with attached Letter from Mr. Clayton to Jesse Labenski, BLM, dated Feb. 24, 2014).
\textsuperscript{53} Id. a 168.
\textsuperscript{54} Id.
Measure #5. The letter explained the deficiencies in the submittal and required that they be corrected no later than June 30, 2014. The letter did not reference the November 2013 APMA. BLM then inspected the Mine site on June 18, 2014, which confirmed that terms of the Operations Plan (and thus the ITSO as well) were not being met and that site stabilization was needed to prevent further degradation of the Creek and River. BLM received no response by the June 30 deadline.

Having still not received a response over three weeks later, BLM issued on July 25, 2014, a Notice of Intent to Revoke (NOITR) the Operations Plan. The NOITR described actions necessary to prevent a revocation of the Operations Plan, which included meeting the terms of the ITSO by September 2, 2014. On August 25, 2014, Mr. Clayton requested an informal hearing before the BLM Alaska State Director concerning the NOITR.

Before the requested informal hearing with the State Director was scheduled, the BLM Field Office Manager and her staff met with Appellants, Stephen Greene, and Mr. Greene’s legal counsel on September 2, 2014, to discuss the NOITR. Ten days later the CYFO Field Manager revoked the Operations Plan but rescinded the revocation in late November 2014 when BLM acknowledged that Appellants and Mr. Greene had not been afforded the informal hearing with the State Director as they had requested. The rescission did not affect, however, the continued validity of the ITSO and NOITR.

The State Director held the requested hearing on December 15, 2014. At the hearing, Appellants provided the State Director with a letter asserting that they had timely complied with the ITSO and Mitigation Measure #5 by submitting to BLM a post-mine stream channel design in November 2013 as part of their (later withdrawn) APMA. Appellants stated that BLM incorrectly considered the November 2013 APMA to be a new proposed plan when it was intended to be a submission, together with Mr. Keill’s August 2013 submission, to satisfy the terms of Mitigation Measure #5 and the

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55 Letter from CYFO Field Office Manager Jacobson to Mr. Clayton and Mr. Greene, June 2, 2014 (in AR).
56 3715 & 3809 Field Compliance Inspection Sheet, June 18, 2014 (in AR).
57 Answer at 6; SER at 148.
58 SER at 147-49.
59 Id. at 148.
60 SOR at 12.
61 SER at 172-76.
62 Id. at 173.
63 Letter from Peter Diemer to State Director Cribley, Dec. 15, 2014 (in AR).
Given BLM’s alleged failure to consider their November 2013 submission, Appellants asked the State Director to rescind the NOITR and direct the CYFO to consider the November 2013 APMA submission, as well as the earlier August e-mail from Mr. Keill to determine whether Mitigation Measure #5 had been satisfied. Appellants noted that they had complied with the remaining terms of the NOITR by submitting a reclamation plan and cost estimate to the BLM Field Office by letter dated December 10, 2014. BLM reported that Appellants also stated their desire at the hearing to complete reclamation of Davis Creek and secure approval to continue mining operations at Davis Creek Mine.

In response to the hearing, the State Director issued a “Notice” on January 6, 2015, to Mr. Clayton, Mr. Greene, and Jonas Hodges (who had been reported to have recently acquired ownership interests in the mining claims from Mr. Greene). In the Notice the State Director summarized the parties’ concerns expressed at the hearing and stated that his “main goal was ensuring the degrading site conditions [at Davis Creek] be stabilized in 2015” and stated that “BLM will re-evaluate data already provided by the Plan operator prior to any potential revocation.”

Regarding stabilization, the State Director required the claimants/operators to develop and implement a stream stabilization plan by July 1, 2015, with mandatory interim deadlines also established. The State Director warned that failure to meet any of the deadlines could result in revocation of the existing Operations Plan and liability for stabilization costs incurred by BLM.

The State Director stated that, once Appellants had mobilized equipment at the Davis Creek Mine to complete site stabilization, BLM would “re-evaluate, in toto, information submitted by the operators/claimants and their representatives regarding

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64 Id. at 2-5.
65 Id. at 5-6.
66 Id. at 4; see also Letter from Peter Diemer to Nichelle Jacobson, CYFO Field Office Manager, Dec. 10, 2014 (in AR) (submitting reclamation plan and reclamation cost estimate).
67 Summary of “Davis Creek Operator Greg Clayton, Informal Hearing with State Director,” Dec. 15, 2014 (in AR) (Appellants’ counsel “identified Greg Clayton’s company (Davis Creek Mining LLC) as interested in completing site reclamation and regaining approval to continue operations. This was seconded by [Mr.] Clayton.”).
68 SER at 152-55 (“Notice” by BLM Alaska State Director Cribley, Jan. 6, 2015).
69 Id. at 153.
70 Id.
71 Id. at 154.
the requirements of the ITSO and the NOITR.”\textsuperscript{72} He stated that this reevaluation would include Appellants’ submissions made in August and November 2013, in December 2014, and any other submissions later provided to BLM.\textsuperscript{73} “Using [this] data, BLM staff will evaluate compliance with the items required in the 2011 Plan authorization, the ITSO, and the NOITR, recognizing that the principals of the Davis Creek placer mine wish to have an opportunity to resume the operation under an approved plan of operations.”\textsuperscript{74}

The State Director concluded his Notice by reminding the claimants/operators that the “ITSO remains in full effect until the required, post-mining channel and floodplain design for Davis Creek is approved by the BLM. Only reclamation activities (including stream stabilization efforts) are currently allowed on those claims covered by the suspended Plan.”\textsuperscript{75}

On January 23, 2015, and February 6, 2015, Appellants submitted a draft and revised stabilization plan, respectively, to the BLM Field Office.\textsuperscript{76} Although expressing significant concerns with the plan, BLM nevertheless approved implementation of the stabilization plan by letter dated March 16, 2015, subject to best management practices and monitoring and reporting requirements.\textsuperscript{77} Appellants state that they brought to the Mine site the equipment needed to implement the stabilization plan by the deadline established in the State Director’s Notice and were prepared to implement “its portion” of the plan.\textsuperscript{78}

Before the stabilization work commenced, a dispute arose between Appellants and BLM over the scope of the work and who would pay for it. BLM had envisioned that Appellants would complete at their own expense all necessary stabilization and reclamation work at the site covering all 8.5 acres of previously mined land. Appellants believed they were responsible only for the land they disturbed in 2013 – the only year they conducted mining operations.\textsuperscript{79} Appellants envisioned that other parties would be

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Draft Stabilization Plan, Davis Creek (Jan. 23, 2015) (in AR); Stabilization Plan, Davis Creek (Feb. 6, 2015) (in AR).
\textsuperscript{77} Letter from CYFO Field Office Manager Jacobson to Steve Greene, Greg Clayton, and Jonas Hodges, March 16, 2015 (in AR).
\textsuperscript{78} SOR at 15 (emphasis added).
\textsuperscript{79} See SER at 177-79 (Letter from Peter Diemer to Assistant CYFO Field Manager Tim Hammond, April 21, 2015).
financially responsible for the stabilization and reclamation work for the pre-existing disturbed area, although Appellants were willing to contract with BLM to do the work.\textsuperscript{80}

This dispute had been foreshadowed by Appellants’ reclamation cost estimate submitted in December 2014.\textsuperscript{81} The cost estimate, prepared by Appellants’ contractor, stated that it would cost approximately $746,536.03 to reclaim the 8.5 acres of public land currently disturbed by mining operations.\textsuperscript{82} But the contractor also stated that “per [Appellants’] instructions we have estimated the 2013 area of operations to comprise 15% of the total area . . . ”\textsuperscript{83} The contractor’s summary table of the estimated reclamation costs states, “Portion of Disturbance associated with Greg Clayton 15%” and lists the prorated estimated cost as $111,980.40.\textsuperscript{84}

Full emergence of the dispute over reclamation liability did not occur until March 2015, when Appellants responded to a BLM e-mail concerning liability. According to Appellants (the e-mail is not in the AR), BLM had stated that Appellants were jointly and severally liable for all reclamation liability associated with Davis Creek Mine. In response, Appellants argued that they had limited responsibility for conditions at the site, and thus limited liability, having only acquired an ownership interest in 2012 and only conducted mining operations in 2013:

While Mr. Clayton has repeatedly expressed his willingness to be responsible for the parameters of his obligation to that accruing after he acquired his interest in Davis Creek Mine and conditions created during his participation in the mining operation, the liability to conduct concurrent reclamation for actions prior to when Mr. Clayton acquired his interests in the mining claims cannot lawfully be imposed on him by BLM.\textsuperscript{85}

\textsuperscript{80} \textit{Id.} at 178.
\textsuperscript{81} Reclamation Cost Estimate (attachment to Letter from Peter Diemer to CYFO Field Manager Jacobson, Dec. 10, 2014 (in AR)).
\textsuperscript{82} \textit{Id.}, attached table summarizing estimate at 1.
\textsuperscript{83} \textit{Id.}, cover letter from contractor at 1.
\textsuperscript{84} \textit{Id.}, attached table summarizing estimate at 1.
\textsuperscript{85} Letter from Peter Diemer to Tim Hammond, CYFO Assistant Field Manager, Mar. 4, 2015, at 2 (in AR). Because Appellants’ Counsel purported to submit the letter under the protection of FRE 408, we note that the Federal Rules of Evidence do not apply to these proceedings and that the letter is being quoted to explain Appellants’ position and not as evidence to establish liability or the validity of the amount of a claim.
The letter also stated that “Mr. Clayton and Davis Creek Mining Company, LLC, no longer desire to participate in mining activity.”

On April 21, 2015, Appellants reasserted their position of limited liability, providing photographs of the Mine site marked with an outline of the area, denoted as the “DCMC Area,” for which they accepted financial liability:

[W]e have demarked the area of the [ Mine] site which Mr. Clayton contends is the 2013 area of operations and new disturbance by Davis Creek Mining Company, LLC, in association with Steve Greene, and which is the area defining the total stabilization and reclamation responsibilities of Davis Creek Mining Company, LLC, and Mr. Clayton under applicable law (hereinafter the “DCMC Area”). Appellants reiterated that they “no longer desire to participate in mining activity” and stated that they would “perform the stabilization of the DCMC Area in accordance with the approved [stabilization] plan.” Appellants made clear, however, that they would not stabilize or reclaim the entire disturbed area of the Mine, asserting that “[t]o the extent that additional or different construction is required to complete the stabilization of the entire site . . . , this is the responsibility of those operators, lessee(s) and claimants who operated, leased or held the relevant claims at the time of the disturbance . . . .”

BLM inspected the Mine site by air on May 15, 2015, documenting turbid discharge into the South Fork of the Koyukuk River from Davis Creek. In a follow-up site visit on May 27, 2015, BLM measured turbidity levels both upstream and downstream of the Mine site along Davis Creek. Levels at the confluence of the Creek and the River were found to be “100 NTU [nephelometric turbidity unit] greater than turbidity levels 50 feet above the uppermost mine disturbance on Davis Creek.” BLM reported this “potential violation” of State water quality standards to the Alaska Department of Environmental Conservation.

On June 22, 2015, BLM issued the Revocation Decision on appeal, addressed to the known owners and operators of the mining claims, namely Mr. Clayton, Davis Creek

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86 Id. at 3.
87 SER at 178.
88 Id.
89 Id.
90 Id. at 160 (BLM Revocation Decision at unp. 4).
91 Id.
92 Id.
Mining LLC, Mr. Greene, and Jonas Hodges. BLM’s Decision highlighted that Appellants had stated that they no longer desired to participate in mining activity and that they would not implement the stabilization plan except in limited areas of the Mine site. BLM based the revocation on several “pertinent facts,” including that Appellants had conducted mining operations in 2013 without meeting the terms of Mitigation Measure #5 and had failed to comply with that measure and the other terms specified in the ITSO and NOITR by the ultimate deadline of September 2, 2014. With regard to Mitigation Measure #5, BLM referenced Appellants’ August 2013 submission but did not mention Appellants’ November 2013 APMA or any subsequent submissions.

In addition to revoking the Operations Plan, BLM ordered DCMC to submit within 10 days for BLM approval an updated Reclamation Plan that addressed the deficiencies previously identified by BLM; to begin full reclamation of the Davis Creek Mine immediately upon approval of the Reclamation Plan, with equipment needed to complete reclamation to remain on site; and to continue implementation of the Stabilization Plan while reclamation is ongoing.

The Decision specifically addressed the assertion by Mr. Clayton that his liability for stabilization and reclamation is limited to the “DCMC Area.” BLM found it “implausible” that the DCMC Area was mined without associated use and disturbance of the entire mine site: “[I]t is clear that during the course of disturbing [those] areas, Mr. Clayton also used the mine access, occupancy and camp facilities, fuel storage and transfer facilities, settling ponds and processing facilities.” BLM also found that the operations contributed to the degradation of areas downstream from the mining. Given its finding that DCMC’s operations affected the entire Mine site, BLM determined DCMC bears reclamation liability for the full 8.5 acres of disturbance on the site.

On June 26, 2015, Appellants wrote to BLM objecting to the Decision, arguing (among other things) that BLM acted before completing the “in toto” review ordered by the State Director of all documents submitted by Appellants concerning Mitigation

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93 Id. at 157-61.
94 Id. at 158.
95 Id. at 158-59.
96 Id. at 159-61.
97 Id. at 160.
98 Id.
99 Id.
100 Id.
101 Id. at 183-88.
Measure #5. BLM did not respond. On June 29, 2015, Appellants requested an informal hearing before the State Director. BLM declined the request, informing Appellants that BLM had already afforded them, in accordance with 43 C.F.R. § 3809.602(b), an informal hearing in response to issuance of the NOI/ITR and was not obligated to hold another hearing. Appellants then appealed the Decision to this Board and sought a stay of the Decision. The Board denied the stay by Order dated September 10, 2015.

While this appeal was pending, responding to a letter from Appellants' counsel dated January 6, 2017, BLM sent a letter to Appellants' counsel stating that it "has re-evaluated, in toto, information submitted by the operators/claimants and their representatives regarding the requirements of the [ITSO]." Based on this review, BLM concluded "that the data provided by DCMC to date is not sufficient to meet the requirements of mitigation measure number 5 in the environmental assessment . . . and the associated revoked [plan of operations]." Appellants moved to supplement the record with this letter, arguing that it constitutes an admission "that the in toto review required by the State Director's January 6, 2015, Order had not occurred and that as a corrective action it had completed the review as of the date of the letter – more than two years after the revocation which is the subject of this appeal." The Board granted the Motion, stating that it will "give the letter such weight as we deem appropriate" in considering the merits.

DISCUSSION

Appellants challenge two major aspects of BLM’s Decision. First, they assert that BLM improperly revoked the Operations Plan, primarily arguing that BLM failed to conduct an in toto review of their submissions and thus had no rational basis for concluding that Appellants failed to comply with the terms of the ITSO and NOI/ITR. Second, they challenge BLM’s order to reclaim the entire 8.5-acre Mine site. Appellants believe this directive exceeds BLM's authority because it requires DCMC to reclaim pre-existing conditions for which they were not responsible. Appellants assert that the

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102 SOR at 15.
103 Id.
104 Id.; “Notification” from Wayne Svejnoha, BLM, to Peter Diemer (undated) (in AR).
105 Counsel’s letter has not been provided to the Board.
106 Appellants’ Motion to Supplement Record, Exhibit A, at 1 (Letter from CYFO Manager La Marr to Peter Diemer, April 21, 2017).
107 Id. at 2.
108 Motion to Supplement Record at 2.
reclamation responsibility for these pre-existing disturbances rests with the prior owners and operators who created the disturbance.

Appellants also argue that BLM improperly required an individual financial guarantee and that BLM violated their due process rights in the course of issuing its revocation Decision. Each of Appellants’ arguments is addressed separately below. We conclude that Appellants have not shown that BLM erred in issuing its Decision.

A. **Burden of Proof and Standard of Review**

[1] In cases in which the Board reviews BLM’s findings of noncompliance with the mining regulations, the appellant has the burden of proving error in the appealed decision. The Board will uphold a BLM enforcement decision when the record shows that BLM has a rational basis for its factual findings and has acted based on a rational connection between the facts found and the choice made. The Board reviews BLM’s legal conclusions under a *de novo* standard.

B. **Appellants have not shown that BLM erred in revoking the plan of operations.**

1. **BLM’s Decision does not conflict with the State Director’s Notice.**

Appellants first argue that BLM’s revocation violated the State Director’s “Order” to the BLM Field Office to re-evaluate, *in toto*, all the submissions submitted by Appellants and their agents, including the November 2013 APMA and its associated stream channel design information. Appellants are referring to the State Director’s “Notice” issued on January 6, 2015, in which the State Director stated that “BLM will re-evaluate data already provided by the Plan operator prior to any potential revocation.” Appellants assert that the BLM Field Office never completed the *in toto* review until two years after revoking the Plan, submitting as evidence BLM’s letter to Appellants’ counsel dated January 6, 2017, in which BLM states that it “has re-evaluated, *in toto*, information

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112 See *U.S. v. Michael D. Scavarda and Thomas J. Tella II*, 189 IBLA 9, 13 (2016) (“[W]hen we have before us – as we do here – solely a question of law, we review that issue *de novo.*”). *See also Statoil Gulf of Mexico, 42 OHA 261, 289 (2011)* (discussing the Board’s *de novo* review authority and holding that the Board is not “obliged to defer to [a bureau’s] legal interpretations.”).

113 SOR at 16-18.

114 SER at 153.
submitted by the operators/claimants and their representatives regarding the requirements of the [ITSO].”\textsuperscript{115}

The record shows that BLM did evaluate each of Appellants’ submissions, but there is no evidence that BLM did so in toto until after issuing its revocation Decision. BLM reviewed the August 2013 submission from Mr. Clayton’s consultant and found it deficient to comply with Mitigation Measure #5 and the ITSO, as explained in the Field Office’s June 2, 2014, letter to Mr. Clayton and Mr. Greene.\textsuperscript{116} The November 2013 information was separately analyzed because it was submitted as part of an APMA.\textsuperscript{117} BLM notified Mr. Clayton by letter dated January 28, 2014, of that submission’s deficiencies, including deficiencies in the stream channel design.\textsuperscript{118} But the record does not reflect that BLM reviewed the submissions, along with subsequently provided information, together before issuing the revocation Decision.

Nevertheless, BLM did not violate the State Director’s instructions by issuing the revocation without conducting an in toto review of Appellants’ submissions. The State Director’s Notice was premised on the fact that “the principals of the Davis Creek placer mine wish to have an opportunity to resume the operation under an approved plan of operations.”\textsuperscript{119} He conditioned BLM’s forbearance on Plan revocation on Appellants completing a number of required actions within certain time deadlines. Those actions included implementing an approved stabilization plan by July 1, 2015.\textsuperscript{120} When Appellants announced in April 2015 that they “no longer desire to participate in mining activity” and would only complete stabilization of the “DCMC Area,”\textsuperscript{121} there was no question that the stabilization plan would not be fully implemented by July 1 or any other deadline. The State Director was clear that if his deadlines were not met, BLM could take immediate action to address the situation, including the option of revoking the Plan:

\textsuperscript{115} Motion to Supplement Record, Exhibit A at 1 (Letter from CYFO Manager La Marr to Peter Diemer (April 21, 2017).
\textsuperscript{116} Letter from CYFO Field Office Manager Jacobson to Mr. Clayton and Mr. Greene, June 2, 2014 (in AR).
\textsuperscript{117} SER at 109-141 (described as a “supplement” to the “survey data” in SOR at 10-11 and at 19).
\textsuperscript{118} Answer, Exhibit B.
\textsuperscript{119} SER at 154 (Notice at 3).
\textsuperscript{120} Id. at 153.
\textsuperscript{121} Id. at 178 (Letter from Peter Diemer to CYFO Assistant Manager Hammond, Apr. 21, 2015, at 2).
Failure to meet the timeline provided above will result in BLM actions to ensure stabilization of Davis Creek is conducted. These actions may include Revocation of the [Operations] Plan, a move to Bond Forfeiture, and BLM-initiated action to perform corrective measures on the site. Both current and past, claim owners and operators may be held liable for costs incurred should BLM find it necessary to initiate on-site corrective actions.\textsuperscript{122}

While Appellants assert they met the Notice's timeline because they had an approved stabilization plan and had mobilized equipment to complete stabilization measures within the DCMC Area, they did not comply with the Notice because of their unequivocal statement that they would limit their stabilization efforts to the DCMC Area and thereby not implement the full stabilization plan by July 1\textsuperscript{st}. Because the State Director’s conditions were not met, BLM did not violate the Notice by revoking the Plan without first completing an in toto review of Appellants' submissions.

Appellants also contend that BLM's Decision conflicts with the Notice because it "effectively overrules" the State Director's stabilization efforts by imposing immediate reclamation requirements.\textsuperscript{123} But stabilization and reclamation are not mutually exclusive, and the Decision specifically directs the operators "to continue implementation of the Stabilization Plan as authorized while reclamation is ongoing."\textsuperscript{124} Anticipating potential overlap of the actions, the Decision also provides that "[i]f a point is reached where reclamation activity . . . should logically replace components of the Stabilization Plan then the BLM may approve a substitution of components on a case-by-case basis."\textsuperscript{125} In short, the Decision complements rather than conflicts with the State Director's objective of site stabilization.

2. BLM properly concluded that Appellants failed to comply with the ITSO by the deadline of September 2, 2014.

Appellants argue in the alternative that BLM improperly revoked the Plan because they had in fact complied with the terms of the ITSO and NOITR for avoiding revocation.\textsuperscript{126} The NOITR listed two required actions to prevent revocation of the Plan:

In order to prevent a revocation of your plan of operations the following actions must be completed:

\textsuperscript{122} Id. at 154 (Notice at 3).
\textsuperscript{123} SOR at 17.
\textsuperscript{124} SER at 160.
\textsuperscript{125} Id.
\textsuperscript{126} SOR at 18-19.
1. Meet the terms outlined in the Immediate Temporary Suspension Order . . . by September 2, 2014.

2. BLM is requiring all parties involved to meet at the Fairbanks District office . . . at a date no later than September 2, 2014. This meeting will address your joint responsibility of the mining operation as outlined in 43 CFR 3809.116. BLM will also require the submittal of an interim management plan as well as a reclamation cost estimate (RCE) and an individual financial guarantee.\footnote{\textsuperscript{127}}

Concerning the ITSO compliance requirement, Appellants argue that they had complied by the deadline because they had submitted to BLM their post-mining stream channel design plan on August 12, 2013, and what they characterize as a “supplement” to the initial submission in November 2013.\footnote{\textsuperscript{128}} Appellants argue that BLM failed to even consider the latter information and thus had an inadequate basis for its conclusion that Mitigation Measure \#5, and hence the ITSO, were not complied with by the deadline.\footnote{\textsuperscript{129}}

But BLM had an adequate basis for concluding that the ITSO deadline had been missed. Mitigation Measure \#5, incorporated into the ITSO, required submission \textit{and} \textit{BLM approval} of a stream channel design.\footnote{\textsuperscript{130}} By September 2, 2014, Appellants had submitted a design but not received approval. They thus missed the deadline established in the NOI/ITR for compliance with the ITSO.

Appellants’ objection that BLM did not review their November 2013 “supplement” does not excuse the failure to have an approved design by the September 2\textsuperscript{nd} deadline. BLM did review their November 2013 submission, albeit separately from the August 2013 submission, and notified Mr. Clayton of its deficiencies by letter dated January 28, 2014.\footnote{\textsuperscript{131}} BLM appropriately conducted the review separately because Mr. Clayton’s agent submitted the reclamation and channel design information as part of an APMA with no indication that it was a supplement to the August 2013 filing but instead saying that it

\footnote{\textsuperscript{127} SER at 148 (NOITR at unp. 2).}
\footnote{\textsuperscript{128} SOR at 19.}
\footnote{\textsuperscript{129} \textit{Id.}}
\footnote{\textsuperscript{130} SER at 47-48 (EA Mitigation Measure \# 5) (“A complete design of the post-mine channel . . . shall be submitted and approved by BLM prior to mining.”); SER at 106-07 (ITSO at 1-2).}
\footnote{\textsuperscript{131} Answer, Exhibit B.}
was submitted to “supplement the information required in the 2014-2018 APMA.”

After BLM informed Appellants in January 2014 that the November 2013 filing was deficient for processing the APMA, Appellants did not state that the stream channel information was a supplement to its earlier, August 2013 submission. Instead, Mr. Clayton withdrew “all of my applications concerning the David Creek mining claims” by letter dated February 24, 2014, which necessarily meant that BLM would no longer consider the withdrawn submission.

In June 2014, when BLM told Appellants that their August 2013 submission was deficient to comply with the ITSO, Appellants did not ask BLM to re-evaluate with the November 2013 submission as a supplement. Even when BLM issued the NOITR on July 25, 2014, and specifically reiterated that the August 2013 submission did not comply with the ITSO, Appellants did not raise the November 2013 filing. The first mention that BLM should consider the November 2013 submission as a “supplement” to the August 2013 submission came in December 2014 in a letter from Appellants’ counsel to the BLM Alaska State Director, asserting the position months after the September 2, 2014, deadline had lapsed.

Given these facts, BLM’s consideration of the August and November submissions separately in 2014 was logical and justified. Moreover, there is currently no factual issue as to whether the submissions together satisfied Mitigation Measure # 5 because BLM completed an in toto review in 2017 and reported to Appellants’ counsel that “the data provided by DCMC to date is not sufficient to meet the requirements of mitigation measure number 5 . . . .” In sum, BLM committed no procedural error in reviewing Appellants’ submissions, and its conclusion that Appellants did not have an approved post-mining stream channel design as required by the ITSO is supported by the record.

Appellants also present an argument concerning the NOITR’s requirement to submit the interim management plan, RCE, and individual financial guarantee. They argue that September 2, 2014, was not a deadline for submitting those three documents, but instead was merely the date for meeting with BLM. The NOITR is ambiguous on

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132 SER at 116.
133 Id. at 168.
135 SER at 148 (NOITR at unp. 2).
137 Motion to Supplement Record, Exhibit A at 2 (Letter from CYFO Manager La Marr to Peter Diemer, Apr. 21, 2017).
138 SOR at 18-19.
this point and could be interpreted as suggested by Appellants. Even accepting Appellants’ interpretation, however, BLM did not err in issuing its revocation Decision because it did not depend on this second deadline to justify its revocation. Rather, BLM’s Decision was “based on the finding that [Appellants’] operation has failed to correct violations outlined in the Immediate Temporary Suspension Order sent on August 23, 2013, within the time specified.”139 This failure to timely comply with the terms of the ITSO was the basis for the revocation, not the failure to timely submit the interim management plan, RCE, and individual financial guarantee by that date. While BLM’s Decision does list as one of its “pertinent facts” that Appellants failed to meet the NOITR’s deadline for submission of the three documents,140 BLM did not base its Decision on this finding, so it is not an essential fact in BLM’s Decision. Thus, even accepting Appellant’s interpretation of the NOITR on this issue, they have not shown error in BLM’s Decision to revoke the Plan.

Finally, Appellants argue that the State Director’s Notice superseded the deadlines established in the ITSO and NOITR.141 But the Notice was clear that the “ITSO remains in full effect until the required, post-mining channel and floodplain design for Davis Creek is approved by the BLM.”142 Thus, the deadlines remained in place and were properly enforced when Appellants failed to meet the State Director’s conditions for continued forbearance of revocation.

C. BLM did not err by requiring DCMC to reclaim the mine site.

BLM’s Decision requires Davis Creek Mining LLC to complete “full reclamation of the Davis Creek mine immediately upon approval of [its] Reclamation Plan.”143 Appellants argue that BLM cannot properly hold them responsible for reclaiming all 8.5 acres of the mine site given that the site had been extensively mined prior to their ownership or other involvement; they disturbed little more than 1 acre during the two months they operated in 2013; and they rejected BLM’s attempts to have them assume liability of past owners and operators.144 They assert that BLM’s governing regulation, as previously interpreted by BLM and this Board, only allows BLM to require reclamation for disturbance caused while they were claimants and operators, not for pre-existing disturbance.145 Accordingly, DCMC asserts that it is responsible for reclaiming only the

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139 SER at 158 (Decision at 2).
140 Id. at 158-59.
141 Reply at 9.
142 SER at 154.
143 Id. at 159.
144 SOR at 20-27.
“DCMC Area” – the 15% of the Mine site that was directly disturbed by mining operations undertaken by it in the summer of 2013.\textsuperscript{146}

In presenting their argument, Appellants spend considerable effort to show that the bulk of the mining disturbance and associated environmental degradation at the Mine occurred before they assumed ownership of the mining claims or conducted operations in 2013.\textsuperscript{147} We do not read BLM’s Decision as contesting that mining operations before 2013 substantially altered and degraded the Mine site.\textsuperscript{148} BLM’s position is that Appellants are nevertheless responsible for reclaiming this pre-existing disturbance under the approved operating plan because their operations in 2013 not only directly disturbed one acre but involved the use of roads, ponds and other facilities, as well as contributed to degraded conditions, over the entire mine site.

We explain below how reclamation liability accrues under BLM’s regulations and permitting procedures. We conclude that BLM properly required DCMC to reclaim the Mine site.

1. \textbf{Under BLM’s regulations, mining claimants and operators may accrue a reclamation obligation for pre-existing disturbances under the terms of their operations plan without accepting the transfer of a predecessor’s liability.}

Appellants misconstrue BLM’s regulations in Subpart 3809 by arguing that they only have a duty to reclaim disturbances they create unless they have voluntarily agreed to assume the reclamation liability of a predecessor claimant or operator. As discussed

\textsuperscript{146} Reply at 11 (Appellants ask for “a declaration that Appellants’ concurrent site stabilization reclamation obligations do not include the whole mine but are limited to the Appellants’ new disturbance which occurred in July-August of 2013 . . .”).
\textsuperscript{147} See, e.g., SOR at 4-9 and 20-22; Reply at 4-6.
\textsuperscript{148} See SER at 31 (EA at unp. 10) (“The active channel and floodplain of Davis Creek within the area of the proposed action has been severely altered by past mining.”); 3715 & 3809 Field Compliance Inspection Sheet (June 16, 2011) (in AR) at 1-2 (in 2011, BLM observed that “cuts and ponds exist from prior operations”; “compliance questions exist regarding previous operators and total acreage disturbed”; and no reclamation had occurred from past operations to date); 3715 & 3809 Field Compliance Inspection Sheet (Aug. 27, 2012) (in AR) at 1-2 (in 2012, BLM observed that the area “had a lot of trash, suction dredge equipment, [and] camp material strewn all around,” and that “dirt work and restoration of stream morphology is necessary”; BLM also observed that “stream morphology has been severely altered,” and there needs to be “a stream stabilization plan that addresses future mine operations and restorative efforts.”).
earlier, mining claimants and operators are liable for “obligations” under Subpart 3809 “that accrue while they hold their interests.”149 The claimant or operator remains liable for these obligations, even if it transfers the mining claim, until BLM both receives documentation that the transferee accepts responsibility for the transferor’s previously accrued obligations and accepts an adequate replacement financial guarantee to cover the previously accrued obligations and the transferee’s new obligations. 150

For mining activities which require an operations plan,151 the obligations imposed by Subpart 3809 include complying with the terms of the approved plan of operations152 and with specified mining performance standards.153 The operations plan and the performance standards work together to require reclamation of mined sites.154 An approved mining operations plan must include a reclamation plan that ensures accomplishment of reclamation performance standards and describes the equipment, devices or practices proposed to be used for all aspects of reclaiming the mine site.155 The performance standards, in turn, generally require “complete reclamation at the earliest economically and technically feasible time” of disturbed areas that will not be disturbed further. 156 BLM may also include terms and conditions in the operations plan that have additional reclamation requirements to mitigate impacts.157

Under this regulatory system, a claimant or operator of a pre-existing mine site may accrue liability for reclamation in at least three ways. First, as acknowledged by Appellants, the reclamation plan and incorporated performance standards require a

149 43 C.F.R. § 3809.116(a).
150 Id. § 3809.116(c).
151 See id. § 3809.10 (dividing mining operations into three categories: casual use, notice-level operations, and plan-level operations).
152 Id. § 3809.415(a).
153 Id. § 3809.420.
154 See id. §§ 3809.401(b)(3) (requirement for a reclamation plan as part of a plan of operations), 3809.415(a) and (c) (requirement to comply with terms of operation plan, performance standards, and special area reclamation requirements to prevent unnecessary or undue degradation), 3809.420(a)(1) and (b)(3)(requirement to meet reclamation performance standards), and 3809.605 (prohibiting operations that fail to comply with operation plans, performance standards, or reclamation requirements, among other things).
155 Id. § 3809.401(b)(3).
156 Id. § 3809.420(a)(5); see also id. § 3809.420(b)(3) (specific performance standards applicable to reclamation).
157 See id. §3809.420(a)(4) (requirement to comply with mitigation measures specified by BLM).
mining claimant or operator to reclaim—at the earliest feasible time—areas it disturbs when conducting mining operations.  

Second, as also acknowledged by Appellants, the current claimant or operator of a mine site may voluntarily accept the transfer of reclamation liability from a predecessor under 43 C.F.R. § 3809.116(c). By doing so, the new claimant or operator becomes solely liable for reclamation of pre-existing mining disturbance at the site as well as for new disturbance. The regulation does not state that a new operator can only assume such liability through a transfer.

Appellants suggest that these are the only two ways that a claimant or operator becomes liable for reclamation—i.e., they can be liable only for reclaiming conditions they create while they hold their interests, or when they formally accept the transfer of the reclamation liability of a predecessor claimant or operator.  Because they refused transfer of liability, Appellants believe they cannot be responsible for reclamation of any pre-existing conditions outside of the area they newly mined in 2013.

[2] But Appellants overlook the third way that reclamation liability may accrue while they hold their interests—by the terms of their plan of operations with which they must comply. If the approved operations plan requires reclamation of previously disturbed areas, then an operator conducting operations under that plan has the obligation to comply with that reclamation provision.  This reclamation obligation remains even when a plan of operations is revoked.

BLM does not violate the transfer regulation or Board precedent if it requires a new operator to reclaim pre-existing disturbances when approving operations under a Plan. Appellants misconstrue the legal effect of 43 C.F.R. § 3809.116(c) when they assert that a transfer of liability is required before they can be held liable for pre-existing disturbances.  Subsection (c) provides a means by which former operators and claimants may be released from their accrued reclamation obligations, but it does not state that a new operator only assumes such liability through a transfer. Rather, the new

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158 See id. §§ 3809.420(a)(5) and (b)(3).
159 SOR at 20-23.
160 See 43 C.F.R. §§ 3809.415(a) (requiring compliance with operations plan to prevent unnecessary or undue degradation of public lands), 3809.605 (prohibiting action that causes unnecessary or undue degradation, that is outside of the approved plan of operations, or that abandons operations without complying with required reclamation).
161 See, e.g., id. § 3809.602(c) (If BLM “revokes your plan of operations, you must not conduct operations . . . except for reclamation and other measures specified by BLM.”).
162 SOR at 22-23.
operator may also accrue the obligation to reclaim pre-existing disturbances through the regulatory requirement of complying with the reclamation provisions of an approved plan of operations. In that situation, the absence of a transfer under § 3809.116(c) means that the prior operator also remains liable for reclamation of the pre-existing disturbance.

Contrary to Appellants’ contention, the Board has not previously endorsed a different interpretation. Appellants contend that the Board held in Del M. Ackels d/b/a Gold Dust Mines that a “mining operator is only responsible for the reclamation liability during their time at the operation, absent a contractual assumption to reclaim the prior disturbance in total.” But Ackels did not so hold. Rather, in construing predecessor Subpart 3809 regulations, the Board held that BLM could properly require an operator to complete the reclamation work required by the approved plan of operations even though he did not own the claims: “an operator who is not the owner of a claim is properly issued a notice of noncompliance for failure to complete the reclamation required under an approved plan of operations.” The approved plan in Ackels apportioned reclamation responsibilities between the current and former operators of the mine site. The issue of whether BLM could require the most recent operator to reclaim a prior operator’s disturbance never arose because BLM in fact had required in the approved plan of operations that the prior operator (Ackels) reclaim his disturbance. Thus, Ackels upheld BLM’s authority to enforce an operations plan that apportioned reclamation liability between operators, but the Board did not hold or imply that BLM lacks authority to require the current operator to reclaim pre-existing disturbances.

In fact, BLM’s Surface Management Handbook relies upon BLM’s authority to require reclamation of pre-existing disturbance when approving plans of operation. It specifically instructs BLM officials to ensure that new operators are responsible to reclaim pre-existing disturbances under an approved plan of operations:

Operators wishing to conduct mining operations under the Mining Law are not authorized to use or occupy pre-existing facilities or to affect pre-existing disturbances without BLM authorization. The BLM is not obligated to and will not authorize an operator to use or occupy pre-existing facilities or to affect pre-existing disturbances unless the operator agrees to comply with reclamation requirements of both 43 CFR 3715 and 43 CFR 3809 with regard to those facilities and disturbances as follows:

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164 SOR at 24-25.
165 128 IBLA at 75.
- Pre-existing disturbances - Under 43 CFR 3809, an operator is responsible for reclamation of all portions of pre-existing disturbances that his or her operation will affect.\(^{166}\)

The Handbook provision highlights that BLM anticipates that liability for reclamation pre-existing conditions may be imposed through the plan of operations as well as the other regulatory mechanisms.

In sum, an operator such as DCMC may accrue liability for reclamation pre-existing disturbances by conducting mining operations under an Operations Plan that requires such reclamation. As discussed below, BLM properly interpreted the approved operations plan in this case to require DCMC to reclaim pre-existing conditions at the Mine that its 2013 operations affected.

2. BLM properly concluded that, by conducting operations in 2013 that affected the entire Mine site, DCMC had accrued the obligation to reclaim the entire site under the approved operations plan.

Appellants assert BLM erred because DCMC newly disturbed only a small portion of the mine site in 2013 – the “DCMC Area” – and thus should be responsible only for reclamation of that area. BLM, on the other hand, construed the Operations Plan approved in 2011 as requiring the reclamation of pre-existing disturbances at the Mine for all areas of the site that DCMC newly disturbed and for those areas used or impacted by DCMC in its mining activities, including pre-existing access roads, settling ponds and processing facilities. BLM’s construction comports with the terms of the Plan’s reclamation requirements and BLM’s prior interpretation of those requirements.

BLM was clear before DCMC conducted any mining operations that the 2011 Plan required reclamation of the entire mine site. Shortly after Mr. Clayton became a co-owner of the mining claims in 2012, BLM notified the operator of record that the “current reclamation liability for your operation is 9 acres.”\(^{167}\) This reclamation obligation necessarily included the specific requirement imposed by Mitigation Measure #5 to reclaim the pre-existing disturbance to the mine site’s stream channel by constructing a post-mining channel that “incorporate[ed] the morphological characteristics of the pre-disturbance channel and floodplain . . .”\(^{168}\)

\(^{167}\) SER at 59 (Memorandum from CYFO Manager to Mr. Greene (Sept. 17, 2012)).
\(^{168}\) Id. at 47.
Rather than concluding that the Operations Plan required DCMC to reclaim the entire site regardless of the extent of its operations, BLM instead more narrowly interpreted the Plan as imposing its reclamation obligations on DCMC to the extent its operations in 2013 affected the mine site. This approach is consistent with the Handbook guidance that BLM should ensure reclamation of “all portions of pre-existing disturbances that [an] operation will affect.”\textsuperscript{169} BLM concluded that DCMC accrued reclamation liability for the entire site under the Plan because its activities in 2013 affected the entire mine by newly disturbing some areas, using or occupying existing facilities on other parts, and contributing to degraded conditions at the remaining areas of the mine site:

[I]t is clear that during the course of disturbing the [DCMC Area], Mr. Clayton also used the mine access, occupancy and camp facilities, fuel storage and transfer facilities, settling ponds and processing facilities. In addition, the disturbed areas indicated have contributed to degradation of downstream areas. These facts are substantiated by documentation contained in the administrative record, such as site inspection reports, photographs and correspondence. It is implausible that the areas indicated were mined without associated use and disturbance of the entire [] mine site.\textsuperscript{170}

The administrative record shows that this factual conclusion has a rational basis.\textsuperscript{171} In addition to Appellants' submitted photographs outlining the “DCMC Area” which they admit to disturbing in 2013,\textsuperscript{172} BLM has information in its files on the extent of operations in 2013, including its own reports from August 2013 consisting of two overflights and a follow-up onsite inspection.\textsuperscript{173} This information substantiates BLM’s conclusion that the 2013 operations used, disturbed or affected the 8.5 acres for which the 2011 Operations Plan requires reclamation. For example, BLM’s narrative and photographs from its first August 2013 overflight show operations occurring outside of the DCMC Area, including structures, equipment (e.g., a haul truck and excavator at a

\textsuperscript{169} See generally Handbook H-3809-1 (Rel. 3-336) § 8.8 at 8-16 (Sept. 17, 2012).
\textsuperscript{170} SER at 160.
\textsuperscript{171} See Franklyn Dorhofer, 155 IBLA at 54 (record must show that BLM has a rational basis for its factual findings and has acted based on a rational connection between the facts found and the choice made).
\textsuperscript{172} SER at 180-81 (Appellants’ Apr. 21, 2015, letter to Asst. Field Manager, attachments: photographs).
wash plant), and turbid settling ponds.\textsuperscript{174} Moreover, BLM’s follow-up site inspection in 2014 provides evidence that the upstream areas where mine cuts occurred in 2013 were contributing to downstream erosion and sediment deposition into the South Fork of the Koyukuk River.\textsuperscript{175} Even Appellants seem to acknowledge that they used much of the Mine site,\textsuperscript{176} but disclaim any legal liability to reclaim pre-existing disturbances or features they used but did not create (e.g., the access road, camp pad, and settling ponds). Accordingly, BLM had a rational basis documented in the record for concluding that DCMC’s 2013 operations disturbed, used, or contributed to degradation of all 8.5 acres of the mining site for which reclamation is required by the 2011 Plan.

In concluding that BLM had a rational basis for finding that DCMC had affected the entire Mine site with its 2013 operations, we have not relied on the facts alleged in the affidavit of Mr. Greene which was submitted as an attachment to BLM’s Answer. Appellants have objected to the affidavit, disputing the facts alleged in it and arguing that any reliance on it would be procedural error.\textsuperscript{177} Although we have not relied on the facts in the Affidavit, the Affidavit is properly part of the administrative record of this case because the Board has authority to “take cognizance of evidence submitted for the first time on appeal . . . .”\textsuperscript{178} Under a similar rationale, we granted Appellants’ request for consideration of a post-decision document.\textsuperscript{179}

3. \textit{BLM was not required to apportion liability among all claimants and operators liable for reclamation.}

Appellants’ final line of argument is that BLM does not have authority to hold them entirely liable for reclamation when other parties are also, and in their view, primarily liable for the pre-existing disturbances.\textsuperscript{180} In effect Appellants

\textsuperscript{174} Id., attachments: photographs.
\textsuperscript{175} 3715 & 3809 Field Compliance Inspection Sheet (with accompanying photographs), Aug. 29, 2014, at 2 (“Davis [Creek] is currently in an unstable condition causing erosion and sedimentation into S. Fork Koyukuk River.”) (in AR).
\textsuperscript{176} See SOR at 22 (“BLM greatly overstates the ‘use’ of the site by Appellants. . . . The so-called ‘use’ of the site was that of the pre-existing road and gravel pad.”)
\textsuperscript{177} Reply at 5-6.
\textsuperscript{178} \textit{Southern Utah Wilderness Alliance}, 191 IBLA 37, 45-46 n.56 (2017) (quoting \textit{W&T Offshore, Inc.}, 148 IBLA 323, 359 (1999)).
\textsuperscript{179} Order: Motion to Supplement Record Granted (Apr. 23, 2018).
\textsuperscript{180} SOR at 20-21 (“Shockingly, in the absence of a transfer [of reclamation liability], the BLM has willfully failed to place all such potentially responsible parties on notice of their previously accrued obligations.”)
argue that BLM lacks authority to hold them jointly and severally liable for the reclamation of pre-existing mining disturbance:

BLM has completely and totally failed to present this Board with any legal authority in support of its contention . . . that mining operators and claimants are jointly and/or severally liable for total mine reclamation without regard to whether the conditions arose from their operations or those of prior claimants, operators and lessees.\[^{181}\]

As discussed above, BLM properly construed the Operations Plan and applied its Subpart 3809 regulations to hold Appellants liable for reclaiming pre-existing conditions at the Mine site. Thus, even though other parties may also be liable, there would need to be some statutory or regulatory prohibition to imposing joint and several liability to conclude that BLM erred in requiring DCMC to reclaim the entire 8.5 acres. There is no such prohibition.

In fact, the preamble to the final rule promulgating 43 C.F.R. § 3809.116 makes clear that BLM has authority to impose joint and several liability on a case-by-case basis. In the preamble, the Department explained it had decided to eliminate an express provision imposing joint and several liability under this regulation, instead leaving the apportionment of liability to be made on a case-by-case basis under “state common law” principles:

The apportionment of liability among various responsible persons, including operators and mining claimants, will be established on a case-by-case basis under state common law principles, depending on the specific actions and express responsibilities of the entities involved. In some instances, mining claimants, as the entities who located the claims and have the development rights associated with the mining claims, could have the ultimate responsibility for reclamation if an operator is not available to complete its obligations.\[^{182}\]

[3] Alaska, like many states, adopted joint and several tort liability as part of its common law.\[^{183}\] Under the common law doctrine, joint and several liability applies

\[^{181}\] Reply at 3-4.
\[^{183}\] Sowinski v. Walker, 198 P.3d 1134, 1149-50 (Alaska 2008) (detailing the history of legislative changes in Alaska to its common law of joint and several liability);
where the independent conduct of two or more persons is a legal cause of an indivisible injury.\textsuperscript{184} Under such circumstances, the injured party may maintain a single action against one, some or all of them.\textsuperscript{185} Although by statute Alaska no longer follows the common law doctrine,\textsuperscript{186} BLM properly applies joint and several liability on a case-by-case basis under the State’s common law principles in accord with the Department’s preamble to the regulation. Accordingly, even though other parties conducted mining operations prior to 2013 and have concurrent reclamation obligations, BLM properly required DCMC to reclaim the entire Mine site. There is no requirement for BLM to seek recourse from prior claimants or operators in every instance. Appellants may seek contribution from other claimants or past operators to the extent authorized by State law.

Appellants also argue that the Decision to require DCMC alone to reclaim the site is contrary to the State Director’s Notice.\textsuperscript{187} But the State Director did not mandate that BLM would seek relief from all prior claimants and operators. Instead, the State Director used permissive language, stating that “[b]oth current and past, claim owners and operators may be held liable for costs incurred should BLM find it necessary to initiate on-site corrective actions.”\textsuperscript{188} While this statement reflects and retains BLM’s options to assess costs on past claimants and operators, it does not commit BLM to apportioning reclamation duties among DCMC and other current or past claimants and operators.

D. \textit{BLM did not require Appellants to post an individual financial guarantee.}

Appellants contend that BLM erred in issuing its Decision because it improperly required DCMC to post an individual financial guarantee when the State bond pool is an

\begin{itemize}
  \item \textbf{Restatement (Third) of Torts: Apportionment of Liability, § 15 (2000); Restatement (Second) of Torts, § 875 (Contributing Tortfeasors – General Rule) (1979).}
  \item \textbf{Restatement (Second) of Torts, § 879 (Concurring or Consecutive Independent Acts); see also Restatement (Third) of Torts: Apportionment of Liability, § 17; Arctic Structures v. Wedmore, 605 P.2d 426, 429-37 (Alaska 1979) (common law rule of joint and several liability applied despite legislative enactment of a comparative negligence system for the apportionment of damages among tortfeasors); see also Turner Construction Co. v. Scales, 752 P.2d 467, 471 (Alaska 1988) (discussing Arctic Structures).}
  \item \textbf{Restatement (Second) of Torts, § 882 (Joinder of Parties).}
  \item \textbf{Sowinski, 198 P.3d at 1150.}
  \item \textbf{SOR at 20 (heading), 23.}
  \item \textbf{SER at 154 (emphasis added).}
\end{itemize}
appropriate alternative. BLM has twice responded that the Decision does not require Appellants to post an individual guarantee. More specifically, BLM acknowledges that it did require DCMC to post an individual financial guarantee to avoid revocation of the Plan, but states that “BLM did not include the requirement in the Decision because the Decision revoked the plan of operations and requires reclamation to be conducted immediately upon BLM's approval of Appellants' reclamation plan.” In our order denying Appellants' petition for stay, we addressed this issue and concluded that the Decision did not require submission of an individual guarantee. Appellants have provided no evidence or argument to change this conclusion. Given BLM's verification that its Decision does not require posting of an individual guarantee, we find no error in BLM's Decision on that basis.

E. BLM provided due process before revoking the Plan.

Appellants argue that BLM violated their due process rights because the Bureau failed to consider all the materials submitted by Appellants; made its decision before hearing all the facts and arguments presented by Appellants; and failed to afford Appellants an informal hearing with the State Director after issuing the revocation Decision. We addressed above the propriety and sufficiency of BLM's review of Appellants' submissions and find no error in the review leading to the revocation.

With regard to Appellants' claim of an improperly pre-determined outcome, their evidence of BLM's “foregone conclusion” is an e-mail dated December 1, 2014, in which the Geologist/Mineral Material Program Lead of BLM's Alaska State Office discusses a request from Mr. Greene to attend the informal hearing granted to the Appellants with the State Director. Mr. Greene had missed the deadline for requesting

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189 SOR at 26 (“To the extent that the . . . decision requires posting of an individual financial guarantee in lieu of the state bond that BLM approved, the decision is unsupported by law.”).
190 See BLM Opp. to Appellants' Petition for Stay at 14-15; Answer at 20.
191 See 2014 NOITR (requiring posting of individual guarantee) and Letter from CYFO Field Office Manager Jacobson to Steve Green, Greg Clayton, and Jonas Hodges, Mar. 10, 2015 (in AR) (reiterating NOITR requirement).
193 Stay Order at 12.
194 SOR at 27-28.
195 See footnotes 119-122 and accompanying text.
196 SOR at 27.
197 Id. (citing SER at 150, Robert Ellefson’s e-mail to BLM counsel).
an informal hearing. In concluding that Mr. Greene should be allowed to attend, the State Office official stated, “In the end however, we are intending to revoke a Plan [of Operations] which they are all apparently party to.” Appellants contend that this e-mail, written two weeks before the informal hearing with the State Director, shows that BLM had made its decision prior to the hearing in violation of Appellants’ due process rights.

BLM counters that the official’s remark that BLM was “intending to revoke a Plan” was not reflecting a final decision but simply a shorthand reference to BLM’s NOITR that had been issued to Appellants and Mr. Greene. Viewed in context, we agree that the e-mail does not show that the BLM Alaska State Office had made a pre-determined decision to revoke the Plan. The official’s remark merely reflected BLM’s previously stated position in its NOITR that it would revoke the plan unless corrective actions were taken. This conclusion is buttressed by the fact that BLM did not revoke the Plan after holding the informal hearing. Instead, the State Director issued his “Notice,” which provided a conditional pathway for reinstating the Plan.

Finally, Appellants suggest that due process required the State Director to hold an additional informal hearing after the revocation Decision was issued. No such hearing is required by BLM’s regulations. The regulations instead require BLM to hold an informal hearing after issuance of a NOITR but before a revocation decision is made, which BLM did on December 14, 2014. No additional informal hearing is required after a revocation decision. Rather, the claimant or operator may request review of the revocation decision by the State Director or by the Board. The appeal to this Board satisfies any possible due process concern by providing Appellants the opportunity to have BLM’s Decision reviewed by an impartial decision-maker in accord with Departmental regulations.

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198 Answer at 21.
199 SER at 150 (Robert Ellefson’s e-mail to BLM counsel).
200 SOR at 27-28.
201 Answer at 21.
202 SOR at 28.
203 43 C.F.R. § 3809.602(b).
204 Id. § 3809.804.
205 Id. § 3809.801.
206 See, e.g., Christopher L. Mullikin, 180 IBLA 60, 73-74 (2010)(and cases cited therein).
CONCLUSION

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,\textsuperscript{207} we affirm the BLM Field Manager's June 22, 2015, Decision.

/s/

K. Jack Haugrud
Administrative Judge

I concur:

/s/

Silvia Riechel Idziorek
Acting Deputy Chief Administrative Judge

\textsuperscript{207} 43 C.F.R. § 4.1.