

INTERIOR BOARD OF LAND APPEALS

Howard Sadler

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HOWARD SADLIER

IBLA 99-393

Decided March 21, 2002

Appeal from two decisions of the Kingman Field Office, Bureau of Land Management, the first styled as a “Decision/Notice of Noncompliance/ Cessation Order,” relating to activities at the Tyro Mill on public lands in Arizona, and the second, styled as a “Notice of Immediate Suspension,” for activities on the same site. AZA-30912.

July 22, 1999, decision set aside; November 24, 1999, decision affirmed.

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

The regulations at 43 CFR 3715.7-1(b) provide that BLM may issue a temporary or permanent “cessation order” in only four circumstances: (1) all or part of the use or occupancy is not reasonably incident to prospecting, mining, or related operations, but that use or occupancy does not endanger health, safety, or the environment; (2) there is a failure to comply timely with a notice of noncompliance issued under 43 CFR 3715.7-1(c); (3) there is a failure to comply timely with an order issued under 43 CFR 3715.7-1(d), relating to activities that are not reasonably incident but may be authorized under 43 CFR Group 2900 or 8300, or as to sites in Alaska, 43 CFR Part 2560; and (4) there is a failure to take corrective action during a temporary suspension ordered under 43 CFR 3715.7-1(a). When none of those circumstances exists, issuance of a cessation order is not the proper enforcement action.

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

The use and occupancy regulations at 43 CFR 3715.7-1(a)(1) authorize BLM to order an “immediate, temporary suspension” when all or part of the use or occupancy is not reasonably incident or is not in compliance with various listed regulations and an immediate, temporary suspension is necessary to protect health, safety, or the environment.

APPEARANCES: Howard Sadlier, Kingman, Arizona, pro se; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Howard Sadlier has appealed two actions by the Kingman Field Office, Bureau of Land Management (BLM). On July 22, 1999, BLM issued a document to Sadlier styled "Decision/Notice of Noncompliance and Cessation Order." Therein, under the heading "Notice of Noncompliance," BLM stated that Sadlier had, pursuant to 43 CFR 3809.1-9, filed a notice with BLM in January 1999 regarding activities at "millsites Rip 1 through 4 (AMC 349437, AMC 349438, AMC 349439, AMC 349440, AMC 349441)," which was to supersede an original plan of operations filed in November 1998. ^{1/} It noted that subsequent inspections had revealed

no indication of any clean-up or reclamation in process, nor is there indication of a gold milling operation as proposed. There is, however, proof of a large amount of additional old and used mining equipment, barrels and miscellaneous parts having been stored (stacked) on site along with scattered piles of chemicals and hazardous materials.

(Decision at 1.)

BLM refused to accept Sadlier's notice of intent to conduct operations because the disturbance exceeded the five acre limit for operations under a notice. See 43 CFR 3809.1-3 (1999). It found Sadlier in violation of 43 CFR 3809.1-3(a), which, it stated, requires that prior to conducting additional operations under a subsequent notice, there must be complete reclamation of previous activities. It also found him in violation of 43 CFR 3715.3-6 for occupying the claim without concurrence from BLM.

Further, under the heading "Cessation Order," BLM directed Sadlier to cease any surface disturbing activities for which he did not have an accepted notice or approved plan of operations. It ordered him to "remove all trailers and cease all residential occupancy by September 1, 1999," and it directed him to cease all mineral processing and chemical and fuel storage on the site because he lacked the necessary health, safety, and environmental permits. (Decision at 1-2.) BLM told him that, before he could resume any of the listed activities, he would have to submit a plan of operations or complete sufficient reclamation to have a total disturbance of less than five acres. Sadlier filed an appeal of that decision, but he did not petition for a stay.

^{1/} Although BLM made reference to the Rip 1 through Rip 4 mill site claims, it listed 5 recordation numbers. The record shows that AMC 349437 is a placer mining claim, the Tyro A, which the location notice identifies as being located in the same section, section 7, T. 21 N., R. 20 W., Gila and Salt River Meridian, as the four mill sites, AMC 349438 through AMC 349441.

Thereafter, on October 28, 1999, BLM conducted an inspection of the site to determine the extent to which Sadlier's previous activities may have degraded health, safety, and environmental conditions at the site. In a letter dated November 24, 1999, BLM notified Sadlier that, based on its inspection, he had "engaged in improper storage of chemicals and that there is clear reason to believe that a release of chemicals, in excess of reportable quantities, has occurred." It stated that it had reported the release to the National Response Center, and that it believed conditions at the site warranted alerting the Arizona Department of Environmental Quality, the United States Environmental Protection Agency, and other Federal, state, and local regulatory agencies of the suspected violations. (Nov. 24, 1999, letter at 2.) BLM continued: "Because BLM has such a strong reason to believe that unnecessary and undue degradation is occurring, attached to this letter is a formal immediate Suspension Order issued pursuant to 43 CFR 3715.7-1 * * *." Id.

Accompanying that letter was a decision, styled as a "Notice of Immediate Suspension," detailing a list of various chemicals, including strong acids and bases, as well as flammable materials, which were being stored with oxidizers. BLM stated that explosions and spontaneous fires were possible and that highly toxic chemicals, such as sodium cyanide and thiourea, a known carcinogen, were present. BLM also stated, inter alia, that hazardous waste was found on hillsides above the mill; corroding drums with unknown residues were found; caustic soda sacks had dissolved; fuel storage tanks had leaked; and six electrical transformers possibly containing polychlorinated biphenyl (PCB) oil, a toxic waste, were on the site. BLM stated that Sadlier was in violation of 43 CFR 3715.5(b) for failing to conform to all applicable Federal and state environmental standards and obtain all necessary permits and authorizations.

BLM ordered Sadlier to immediately cease the transportation of chemicals and fuels to the Rip 1 through Rip 4 mill sites and adjoining public lands. It also directed him, within 30 days of receipt of the order, to remove all stored chemical and fuels on site and remove any contaminated soils. "You shall not resume any level of chemical or fuel storage on site until you have completely met the conditions specified in our Cessation Order of July 22, 1999." (Decision at 8.) Sadlier filed a timely appeal of that decision and petitioned for a stay. 2/

The Board did not assign Sadlier's appeal of the November 24, 1999, decision a new docket number. Instead, in an order dated December 17,

2/ The regulations at 43 CFR 3715.9-1 provide that an appeal to the Board of "an order requiring an immediate, temporary suspension of occupancy issued under § 3715.7-1(a)" does not suspend the effect of that order "before the appeal or while it is pending." The regulation states that the stay provisions of 43 CFR 4.21(a) expressly do not apply to such an order. Thus, BLM's "notice of immediate suspension" was effective upon receipt by Sadlier and was not stayed by Sadlier's appeal. Nevertheless, the Board does have the authority to entertain a petition for stay in such a case. See Robert E. Oriskovich, 128 IBLA 69, 70 (1993).

1999, the Board denied the petition for stay. ^{3/} BLM seeks expedited consideration of Sadlier's appeals because of the deteriorating conditions on the site. That request is granted.

Sadlier located the mining claim and four mill sites in question in November and December 1997 and filed location notices for them with BLM in January 1998. The area in question is referred to in the record as the Tyro Mill or Tyro Mill Site. In his appeal of BLM's July 1999 decision, Sadlier asserts that he was denied possession of the Tyro Mill "until July of 1999 as it was being occupied by others until that date." (Statement of Reasons (SOR) at 1.) He states that the mill has been located at its present site since 1920; that at the time he took possession the site was non-operational; and that debris was scattered over approximately 15 acres. Sadlier states that he filed a notice in January 1999 pursuant to BLM regulations and that at no time until receipt of the July 1999 decision "did any offices or individuals employed by BLM notify Appellant that said notice had not been accepted." (SOR at 2.) He asserts that he relied on that fact to conclude that he "was in compliance with the notice of less than five acre disturbance requirement." *Id.* He states that he "continued clean up of the area, purchase of equipment, and the making of improvements to get the mill operational for the process of ore from Appellant's mining claims." *Id.* Sadlier argues that the decision is erroneous because it relies on a public access road passing through the site to conclude that the disturbance exceeds five acres. He also claims that occupancy of the site is by others and outside the limits of his five acre notice.

In response to Sadlier's SOR, BLM provides documentation of Sadlier's links to the site, including the fact that he was identified as the "claimant" in a "Plan of Operations and Reclamation Plan Amendment for the Tyro Mill Site MPO-88-KO-9," dated June 1998, and filed with BLM. (Answer, Ex. B at 3.) That plan proposed an operation of approximately 20 acres situated on 4 unpatented mill sites each totaling 5 acres. According to the plan, "[m]illing and processing of ore would occur on approximately 6 acres." *Id.* at 4. On January 25, 1999, without any explanation for the change, Sadlier filed with BLM a document styled "Howard Sadlier Mine Plan of Operations for Tyro Mill[,] Bullhead City[,] Mohave County[,] Arizona[,] 'Notice' Disturbance of Five Acres or Less." (Answer, Ex. C.)

In a BLM compliance inspection report relating to a December 4, 1998, inspection, BLM noted that four persons were observed onsite, including Sadlier. (Answer, Ex. H.) No mining or milling was taking place and "[t]here was no indication that any progress was being made to repair and/or operate the existing mill." *Id.* BLM also includes inspection reports prepared following inspections by it on May 5, 1999 (Answer, Ex. E), and July 5, 1999 (Answer, Ex. F). In addition, a BLM contractor inspected the site on March 5, 1999, and prepared a report. (Answer, Ex. G.) These reports documented occupancy of the site and included photographs of equipment, materials, and debris scattered over the site.

^{3/} In its order, the Board assumed the applicability of the stay provisions of 43 CFR 4.21(a). Clearly, they do not apply. *See* note 2, *supra*.

In the July 5, 1999, report, BLM stated: “There appeared to be persons living at a trailer parked at mill site * * * Nobody was working at the site.” (Answer, Ex. F.) BLM also included with its answer affidavits of several BLM employees confirming the on-ground status of the mill sites. In one, John Jamrog, Program Manager, Non-Renewable Resources, Kingman Field Office, BLM, described conditions at the site during a September 29, 1999, inspection. He stated:

There were at least four mobile homes or travel trailers present, three at the gate along the access road and one at the mill. A Winnabago Camping Van was also present at the mill. All were occupied. Seven people, including Howard Sadlier, were present. Several pickup trucks were parked at the mobile homes and travel trailers.

(Answer, Ex. L.) Jamrog noted that, after reviewing pictures of the mill site taken by other BLM employees on previous inspections, he offered his opinion that “there was no apparent difference in what was present at the mill site. The only apparent difference was the absence of the one travel trailer * * *.” Id. He also concluded the violations cited in the July 22, 1999, decision “continue to the present.” Id.

In a reply to BLM’s answer, Sadlier continues to argue the limited nature of his contacts with the site, contending that others should be responsible for cleaning up the site. In a response thereto, BLM argues and provides evidence of Sadlier’s connection with the Tyro Mill, dating back to 1990, as an official of various corporations or entities holding mining claims or mill sites for the area. (Response at 13-15, Exs. K through P.)

In his appeal of the November 24, 1999, Notice of Immediate Suspension, Sadlier, in essence, complains that BLM is requiring him to clean up an area that is not his responsibility. He asserts that other individuals and entities created the situation and that, if BLM wants those things cleaned up, it should pursue those entities and individuals. He contends that “[t]he BLM inspector fails to consider that the mill site is being lawfully used for the processing of ore.” (SOR at 2.)

BLM answers by citing all the previous documentation in support of its position that Sadlier is required to obtain all necessary Federal and state permits prior to commencing operations and that the site is causing unnecessary and undue degradation to public lands. BLM emphasizes the fact that storage of chemicals at the site and disposal of chemical wastes generated on the site are of critical importance and justified the issuance the notice of immediate suspension.

Sadlier has filed a reply to BLM’s answer and in response to that reply BLM has provided a mineral report styled as “Surface Use Determination for the operation known as the 'Tyro Mill',” dated June 13, 2000. (Response, Ex. B.) Therein, BLM stated that several BLM employees inspected the site on May 15-18, 2000, assisted by a consulting firm, RMCAT Environmental Consultants, hired by BLM. “This inspection revealed

significant and imminent threats to public health and safety and emergency action to remediate these threats began on May 24, 2000.” Id. at 3.

In a summary on page 1 of the report, BLM offered the following conclusions:

- a. There is no readily identifiable source of mill feed for the operation. The claimant identified the operation as both a custom and personal milling service.
- b. There is no clear plan to establish a milling circuit. In his many submissions, the claimant/operator makes reference to a cyanide process, electrowinning process, and bromine process. Ultimately, it is unclear exactly what is intended.
- c. The mill as it sits at the present time is completely inoperable. The crushing circuit is incomplete and in disrepair and the leach tanks are clogged with dried residues and/or sludges. The residues remaining in the tanks in general have high cyanide concentrations and high pH levels. The plumbing for the original leaching operation has been dismantled and the remaining pieces have suffered severe degradation from the sun. Much of the plumbing is leaking. Leakage from process tanks and improperly stored chemicals ha[ve] contaminated the facility and surrounding area with cyanide, heavy metals and low pH mixtures posing a threat to health[,] safety and the environment.
- d. The mill lacks all necessary health, safety and environmental operating permits and has not operated to any extent since 1984.

The report further stated at page 1 that, because the Tyro Mill did not “in any measurable sense conform to standard engineering practices,” the operation was not reasonably incident to mining, milling, or processing, did not conform to the geologic terrain or stage of development of the facility, and, because of an absence of production and necessary operating permits, did not constitute substantially regular work. The report recommended that an immediate suspension order be issued requiring the complete and immediate reclamation of the site because of its immediate threat to health, safety, and the environment. Id.

We commence our review of BLM’s actions by looking first at the July 22, 1999, decision challenged by Sadlier. Therein, BLM included a notice of noncompliance and a cessation order. BLM apparently based its notice of noncompliance on violation of two regulations, 43 CFR 3809.1-3(a) (1999) and 43 CFR 3715.3-6, although it did not cite the authority under which it was issuing the notice. ^{4/}

^{4/} On Nov. 21, 2000, BLM amended the regulations in 43 CFR Subpart 3809. These regulations became effective Jan. 20, 2001. See 65 FR 69998. BLM again amended 43 CFR Subpart 3809 with publication of final rulemaking in the Federal Register on Oct. 30, 2001, effective Dec. 31, 2001. See 66 FR 54834.

BLM stated that Sadlier's disturbance exceeded five acres and that he was in violation of 43 CFR 3809.1-3(a) (1999), which required that "[p]rior to conducting additional operations under a subsequent notice covering substantially the same ground, the operator shall have completed reclamation of operations which were conducted under any previous notice." The problem with BLM's action based on that regulation is that there is no evidence in the record of "any previous notice" being filed "covering substantially the same ground." A plan of operations had been filed in November 1998 for a larger area, but no evidence exists of the filing of a previous notice.

However, 43 CFR 3809.3-2(a) (1999) did provide that failure of an operator to file a notice under 43 CFR 3809.1-3 or a plan of operations under 43 CFR 3809.1-4 would subject the operator to being served a notice of noncompliance or enjoined by a court order from continuation of such operations. In this case, Sadlier had filed a notice and, under the regulations at 43 CFR 3809.1-3(b) (1999), "[a]pproval of a notice, by the authorized officer, is not required." Accordingly, Sadlier was "operating" under the notice filed with BLM in January 1999. But, by concluding that the disturbance described in the notice exceeded five acres, BLM essentially held that Sadlier was in noncompliance for failure to file a plan of operations.

A notice of noncompliance issued under 43 CFR 3809.3-2 (1999) was required to describe how the operator was failing or had failed to comply with applicable regulations, specify the actions which were in violation of the regulations, the actions to be taken to correct the noncompliance, and the time, "not to exceed 30 days, within which corrective action had to be started." BLM did not include any of that information under the heading "Notice of Noncompliance" in its decision. While it did provide some of that information under the caption "Cessation Order" in its decision, the 43 CFR Subpart 3809 (1999) regulations did not contemplate the issuance of a cessation order by BLM. Under 43 CFR 3809.3-2(c) (1999), failure to comply with a notice of noncompliance within the specified time might result in being "enjoined by an appropriate court order from continuing such operations." To the extent BLM issued the notice of noncompliance under 43 CFR Subpart 3809, it was procedurally inadequate to address BLM's concerns.

BLM also cited the regulation at 43 CFR 3715.3-6, requiring the concurrence of BLM prior to beginning occupancy, in support of its notice of noncompliance. The Subpart 3715 regulations govern use and occupancy under the mining laws. The regulations at 43 CFR 3715.7-1 identify the four types of enforcement actions that BLM may take if the requirements of 43 CFR Subpart 3715 are being violated. They are issuance of (1) an immediate suspension (43 CFR 3715.7-1(a)), (2) a temporary cessation order (43 CFR 3715.7-1(b)), (3) a permanent cessation order (43 CFR 3715.7-1(b)), and (4) a notice of noncompliance (43 CFR 3715.7-1(c)).

A notice of noncompliance may be issued if the use and occupancy is not in compliance with any requirements of the subpart and BLM has not issued an immediate suspension. 43 CFR 3715.7-1(c)(1). In this case, the

record shows that Sadlier failed to obtain a determination of concurrence from BLM under 43 CFR 3715.3-4 prior to establishing occupancy of the site. Such concurrence is required under 43 CFR 3715.3-6. Thus, the record shows a violation.

The regulations also describe what will be included in a notice of noncompliance, including a description of how the requirements of the subpart are not being met, the actions necessary to correct the noncompliance, the time within which to start corrective action, and the time within which to complete corrective action. 43 CFR 3715.7-1(c)(1)(i), (ii), and (iii). The regulations make clear at 43 CFR 3715.7-1(c)(2) that failure to start and complete the corrective action within the time limits established by the notice of noncompliance may result in BLM's issuance of an immediate suspension (43 CFR 3715.7-1(a)) or a cessation order (43 CFR 3715.7-1(b)).

[1] In this case, BLM did not follow the regulatory dictates for issuance of a notice of noncompliance by including therein a time to start and complete corrective action, failing in which other enforcement action would be taken. Rather, BLM includes in the same document a "cessation order." However, the use and occupancy regulations authorize the issuance of a temporary or permanent "cessation order" in only four circumstances: (1) all or part of the use or occupancy is not reasonably incident, but that use or occupancy does not endanger health, safety, or the environment; (2) there is a failure to comply timely with a notice of noncompliance issued under 43 CFR 3715.7-1(c); (3) there is a failure to comply timely with an order issued under 43 CFR 3715.7-1(d), relating to activities that are not reasonably incident but may be authorized under 43 CFR Group 2900 or 8300, or as to sites in Alaska, 43 CFR Part 2560; and (4) there is a failure to take corrective action during a temporary suspension ordered under 43 CFR 3715.7-1(a). None of these four circumstances appears to have existed at the time BLM issued its decision on July 22, 1999.

While the record clearly shows that all or part of the use or occupancy of the site on July 22, 1999, was not reasonably incident to mining or related operations 5/, the record shows that such use or occupancy did endanger health, safety, or the environment. In fact, the "cessation order" expressly requires the cessation of all mineral processing and chemical and fuel storage on the site because of a failure to obtain "all necessary health, safety and environmental permits." (July 1999 Decision at 2.) Under such circumstances, the regulations dictate the issuance of an immediate suspension, not a cessation order. See 43 CFR 3715.7-1(a). Likewise, there was no failure to comply timely with a notice of noncompliance because the only notice of noncompliance was included in the same decision. No order had been issued under 43 CFR 3715.7-1(d) and no temporary suspension had been ordered prior to

5/ BLM's regulations define "reasonably incident" as being "prospecting, mining, or processing operations and uses reasonably incident thereto" and "includes those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit * * *." 43 CFR 3715.0-5.

July 22, 1999. Thus, while the activities at the Tyro Mill clearly justified enforcement action by BLM on July 22, 1999, the issuance of a notice of noncompliance under the use and occupancy regulations, which did not establish a time for commencement and completion of corrective action, failing in which other enforcement action would be taken, was not justified. Nor, based on the record, was issuance of a “cessation order” under the use and occupancy regulations appropriate.

Accordingly, we conclude that the notice of noncompliance was procedurally deficient under both the 43 CFR Subpart 3809 (1999) regulations and the 43 CFR Subpart 3715 regulations, and that BLM did not have the authority under either 43 CFR Subpart 3809 (1999) or 43 CFR Subpart 3715 to issue the cessation order. Accordingly, the decision of July 22, 1999, is set aside.

[2] We turn now to BLM’s November 24, 1999, decision incorporating the notice of immediate suspension. Such an enforcement action may be taken by BLM under the use and occupancy regulations when all or part of the use or occupancy is not reasonably incident or is not in compliance with various listed regulations (including 43 CFR 3715.5, which requires, in subsection(b), conformance to “all applicable federal and state environmental standards” and the obtaining of “all required permits before beginning”), and “an immediate, temporary suspension is necessary to protect health, safety or the environment.” There is no reasonable question, base on the record, that Sadlier’s use and occupancy was not reasonably incident and that he was in violation of 43 CFR 3715.5(b). Moreover, the record clearly supports a finding that an immediate, temporary suspension was necessary to protect health, safety, or the environment. For that reason, we affirm BLM’s November 24, 1999, decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM’s July 22, 1999, decision is set aside. Its November 24, 1999, decision is affirmed. The case is remanded to BLM for further appropriate enforcement action.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Burski
Administrative Judge