

INTERIOR BOARD OF LAND APPEALS

Robert W. Gately

160 IBLA 192 (November 20, 2003)

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ROBERT W. GATELY

IBLA 2000-356, 2000-401

Decided November 20, 2003

Appeals from two decisions of the Field Manager, Kingman, Arizona, Field Office, Bureau of Land Management, the first styled as a “Decision/Notice of Non-Compliance and Cessation Order” and the second styled as a “Determination of Nonconcurrency/Plan of Operation Required,” addressing use and occupancy on the Sun Cloud lode mining claim. AZA-28492.

Decision appealed in IBLA 2000-356 affirmed as modified; petition for stay in IBLA 2000-356 denied as moot; decision appealed in IBLA 2000-401 affirmed.

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

Pursuant to 43 CFR 3809.1-4(b)(3)(2000), an approved plan of operations is required before a mining claimant begins any operation, other than casual use, in a designated area of critical environmental concern and BLM may issue a notice of noncompliance to a mining claimant who fails to file a plan of operations for operations in an area of critical environmental concern.

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

When a mining claimant received approval from BLM to continue his present use and occupancy of a mining claim on public land for the one-year grace period for compliance with the requirements of 43 CFR Subpart 3715 afforded by 43 CFR 3715.4(b), the mining

claimant's use and occupancy must satisfy the applicable requirements of 43 CFR Subpart 3715 following the expiration of that grace period.

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

A BLM determination of nonconcurrence with a claimant's use and occupancy of a mining claim will be affirmed when the claimant fails to provide sufficient information about the proposed activities to show that they are reasonably incident, as required by 43 CFR 3715.2(a).

APPEARANCES: Robert W. Gately, Phoenix, 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

Robert W. Gately, d.b.a. Sun Cloud Mine, Inc. (Gately), has appealed two decisions issued by the Field Manager, Kingman, Arizona, Field Office, Bureau of Land Management (BLM). In the first decision, styled "Decision/Notice of Non-Compliance and Cessation Order" (NNC/CO), issued on June 29, 2000, the Field Manager determined that Gately's use, occupancy, and activities on the Sun Cloud lode mining claim (AMC 338301) failed to comply with both the use and occupancy regulations set forth in 43 CFR Subpart 3715 and the surface management regulations found in 43 CFR Subpart 3809 and ordered him to cease immediately any surface disturbing activities, to remove all mobile homes, including all equipment, parts, and other living arrangements, from the claim, and to make appropriate compensation for the loss of desert tortoise habitat due to activities on the claim. The Board docketed the appeal of this decision as IBLA 2000-356.

The Field Manager issued the second decision, captioned "Determination of Nonconcurrence/Plan of Operations Required" (Nonconcurrence Determination), on August 11, 2000, finding that Gately's proposed occupancy and notice of mining operations failed to meet various conditions set forth in the regulations in 43 CFR Subpart 3715 and 43 CFR Subpart 3809. The Board docketed the appeal of this decision as IBLA 2000-401. BLM has moved for consolidation of the two appeals, and, given the relationship between the appeals, we grant BLM's motion.

BACKGROUND

Gately acquired the Sun Cloud lode mining claim, located in the NE1/4 sec. 9, T. 13 N., R. 10 W., Gila & Salt River Meridian, Yavapai, County, Arizona, in August 1993. ^{1/} By letter dated February 25, 1994, Gately submitted a notice of mining operations pursuant to 43 CFR 3809.1-3, ^{2/} advising BLM that he intended to conduct exploratory operations on existing workings using hand tools with minimal disturbance to the land and that he and other miners would be occupying a trailer and two tents on the claim for housing and storage purposes. (BLM Answer/Motion to Dismiss (IBLA 2000-356), Ex. C.) BLM responded by letter dated March 8, 1994, stating that Gately's proposed level of mining activity appeared to be casual use under 43 CFR 3809.0-5, which did not require submittal of a mining notice. BLM further explained:

Long-term occupancy of the site with a trailer and two tents can be allowed only in conjunction with diligent, active mining operations. Prospecting and "recreational mining" do not constitute sufficient justification for long-term occupancy. In the absence of diligent, full-time mining activity, occupancy is subject to the same limitations as other Federal lands - a limit of fourteen (14) days at one site, as specified in the enclosed Federal Register notice.

^{1/} According to a Feb. 12, 1999, "Geographical Index All Claims" found in the case file, the Sun Cloud claim, owned by "Gately Robert W," located on "9/21/32," and assigned mining claim recordation number AMC 73218 by BLM, was closed on "12/30/95." Gately relocated the Sun Cloud claim on Nov. 25, 1995, filing notice with BLM on Feb. 21, 1996, and receiving mining claim recordation number AMC 338301. Thereafter, on Aug. 15, 1996, he recorded an amendment of the Sun Cloud claim with BLM.

^{2/} 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. Citations to the 43 CFR Subpart 3809 regulations in this decision will refer to the provisions in effect before the Nov. 21, 2000, amendments. At the time the decisions were issued, the provision requiring the filing of a mining notice with BLM for mining or milling operations disturbing 5 acres or less during any calendar year appeared at 43 CFR 3809.1-3. That specific provision remains in effect, but its requirements are now set forth in 43 CFR 3809.21 and 3809.300 through 3809.336 (2002).

Please be advised that this area is included in the Poachie Desert Tortoise Area of Critical Environmental Concern [(ACEC)] in the Kingman Resource Management Plan [(RMP)]. When this plan takes effect, mining operations will require a Plan of Operations and a reclamation bond. [^{3/}]

By letter dated September 17, 1996, BLM informed Gately that it had received his Existing Occupancy Notification Form ^{4/} and that, under the terms of 43 CFR Subpart 3715, he could continue his present occupancy of the claim until August 15, 1997. ^{5/} BLM added that the grace period would not apply if BLM determined that his use or occupancy was not reasonably incident to mining and that continuing the use or occupancy would be a threat to health, safety, or the environment. BLM also advised Gately that it would be visiting his site to obtain information about his use and occupancy and to ensure compliance with the surface management regulations and would provide him with written notice 30 days in advance of the inspection.

It is not clear from the case record when BLM first visited the Sun Cloud mining claim. However, in a letter dated May 21, 1999, BLM informed Gately that he had been advised by BLM personnel “many times in the past two years” that his occupancy of the Sun Cloud mining claim was unauthorized under both 43 CFR

^{3/}The Kingman Resource Area RMP was approved by the BLM Arizona State Director in February 1995. See BLM’s Answer/Motion to Dismiss (IBLA 2000-356), Ex. O.

^{4/} The record does not contain a copy of this form.

^{5/} Effective Aug. 16, 1996, BLM promulgated the regulations at 43 CFR Subpart 3715 governing the use and occupancy of unpatented mining claims. See 61 FR 37115, 37117 (July 16, 1996). The regulations granted miners occupying public land on Aug. 15, 1996, who notified BLM of the existence of their occupancy by Oct. 15, 1996, a one-year grace period to comply with the regulatory requirements, unless BLM determined that the use or occupancy was not reasonably incident to prospecting, mining, or processing operations and that the continued presence of the use or occupancy was a threat to health, safety, or the environment, in which case BLM would issue an immediate temporary suspension of activities under 43 CFR 3715.7-1(a). See 43 CFR 3715.4(a), (b), and (c).

Subpart 3715 and 43 CFR Subpart 3809, most recently on March 29, 1999.^{6/} BLM noted that, although Gately had told BLM he was planning to submit a mining notice for his activities on the claims, neither a mining notice under 43 CFR Subpart 3809 nor a request for occupancy of the mining claim pursuant to 43 CFR Subpart 3715 had been received. The required mining claim occupancy submission, BLM added, had to show

the permits required by ADEQ [Arizona Department of Environmental Quality] under the Aquifer Protection Program (APP) and possibly required by the Army Corps of Engineers, depending on your location. As required by titles 18 and 27 of the Arizona Administrative Code, a claimant or operator must submit a “Notice of Start-up, Move or Stop for Portable Equipment and Mine Operations.” In addition, Mine Safety and Health Administration (MSHA) requires that you submit form 2000-7.

To summarize, you have neither an approved mining notice nor BLM concurrence for mining claim occupancy, therefore you are in trespass on Federal land. [^{7/}] You have 60 days from the date on this letter to remove all structures, including: mobile homes, vehicles, mining equipment, spare parts and any refuse or trash that might be on your mining claim. Failure to comply with this request will result in further action to protect the interests of the United States.

(May 21, 1999, BLM letter at 1.)

Gately responded by letter dated June 9, 1999, asserting that his occupancy was reasonably incident to the mineral development of the claim. There is no evidence in the case file that BLM responded to Gately or that it took any action based on its May 21, 1999, letter.

The next document in the case record is styled “Compliance Documentation (Mining claim occupancy),” in which BLM recorded the results of a

^{6/} The case file contains a note from C. Cone, BLM Ranger, to Art Smith, Geologist, Kingman Field Office, BLM, stating that Cone had talked to Gately seven times between Dec. 8, 1998, and Feb. 28, 1999.

^{7/} This letter failed to mention the requirement that Gately file a mining plan of operations, rather than a mining notice, because of the location of the claim within the boundaries of the ACEC.

January 27, 2000, inspection of the Sun Cloud mining claim by two BLM employees. That document states that Gately and another person were present on the claim; that there was no exploration or mining activity; that Gately stated that he had moved onto the claim; that the inspectors informed Gately that he was occupying the claim without permits or an approved plan; that Gately said that he was planning to send BLM a revised plan; and that there were no sanitary facilities available at Gately's trailer at the time of the inspection.

BLM again inspected the claim on March 14, 2000. The compliance documentation for that inspection states that the inspectors did not find any mining activity; that Gately's trailer was still there and appeared to be lived in, although no one was present; and that sanitation facilities still did not appear to be available at the trailer. When reinspecting the claim on June 7, 2000, BLM discovered an individual removing boulders from the claim for resale in Phoenix, pursuant to a contract with Gately, and advised him to cease removing the boulders until further notice. See June 8, 2000, e-mail from Art Smith, Geologist, Kingman Field Office, BLM, to two other Field Office employees. The record contains numerous photographs taken during all three of these inspections showing various trailers, cars, equipment, tires, trash, and junk piles on the claim.

On June 29, 2000, the Field Manager issued the NNC/CO, effective June 30, 2000.^{8/} In the NNC portion of the decision, after reciting the findings of the three inspections described above, the Field Manager further noted that the Sun Cloud mining claim occupied prime Category 1 desert tortoise habitat within the designated Poachie Desert Tortoise Habitat ACEC established in the Kingman RMP. He stated that, under current BLM policy, habitat loss in the ACEC due to residual, unmitigated impacts from surface disturbing activities had to be compensated by replacing the disturbed sites with four to six acres for every one acre of disturbed area.

The Field Manager reiterated that, although Gately had been notified by BLM personnel numerous times regarding his noncompliance with the regulations in both 43 CFR Subparts 3715 and 3809, he had not submitted the plan of operations required by 43 CFR Subpart 3809, obtained the permits required for occupancy

^{8/} In his decision, the Field Manager at times refers to "your mining claims" or "your claims," e.g., "[o]n January 27, 2000, * * * my staff made an inspection of your mining claims," "disturbed tortoise habitat on your claims." (NNC/CO at 1, 2.) However, we construe the decision as relating to only one mining claim, the Sun Cloud lode mining claim (AMC 338301).

under 43 CFR Subpart 3715, or “made compensation” for the loss of desert tortoise habitat.

The CO portion of the decision ordered Gately to cease the following activities:

1. You must cease immediately any surface activities as you do not have an accepted mining plan for such activity within an ACEC as required by 43 CFR 3809.
2. You are required to remove all mobile homes including all equipment and/or other living arrangements from your claim and cease all residential occupancy by August 1, 2000, as you do not have concurrence under 43 CFR 3715.
3. You must make appropriate compensation for the loss of desert tortoise habitat that exists on your claim. The amount of compensation will be calculated by the Bureau of Land Management for the disturbed tortoise habitat on your claims.

(NNC/CO at 2.) The CO further informed Gately that before beginning or resuming activities, he had to:

1. Have a plan of operations approved by the Kingman BLM Field Office.
2. Have all required permits for occupancy under 43 CFR 3715 and receive concurrence from the Kingman BLM Field Office.
3. Make appropriate compensation for the loss of desert tortoise habitat and for the unauthorized sale of boulders from your mining claim which will be determined by the Kingman BLM Field Office.

(NNC/CO at 3.)

Gately responded to the NNC/CO by letter dated August 4, 2000, and also enclosed a document, dated July 18, 2000, titled “Notice of mining under 43 CFR 3809 surface management regulations, (operations of 5 acres or less of surface disturbance).” (July 18, 2000, Notice).^{2/} The notice described planned surface disturbing activities on the Sun Cloud claim, including road upgrades and

^{2/} Gately did not receive the June 29, 2000, NNC/CO until July 24, 2000.

construction, water well and containment pond construction, underground mining operations from surface staging and holding areas, milling operations and ore and waste rock stockpiling on cleared areas, temporary assay structure erection, and core sample drilling at various locations. (July 18, 2000, Notice at 1-2.) The notice also delineated the planned occupancy of the claim:

During the course of this notice, several travel type trailers will be on site to accommodate miners employed in the mining process. The number of persons occupying the site will be two to four persons during early development stages, with up to ten during full production period. The location of current trailers is indicated on the site map in Appendix A. Occupancy and mining will not hinder public access to the area. If during mine operations areas are determined to be hazardous to the public, signs will be posted warning of such hazards.

(July 18, 2000, Notice at 3.)

By letter dated August 11, 2000, the Kingman Field Manager, BLM, advised Gately that his August 4, 2000, submission did not meet the requirements of the NNC/CO that he submit a plan of operations, obtain all necessary permits for operation, and make appropriate compensation for tortoise habitat. The Field Manager also stated that an appeal from the NNC/CO had to be filed no later than August 23, 2000. On August 21, 2000, Gately filed a timely appeal of the NNC/CO.^{10/}

Contemporaneously with the August 11, 2000, letter to Gately, the Field Manager also issued his Nonconcurrency Determination.^{11/} Based on his review of the occupancy portion of Gately's July 18, 2000, notice of mining operations, the Field Manager declined to concur with that occupancy, and directed Gately not to engage in the "placement, construction, maintenance, or operation of any travel type trailers or other residential occupancy," or the "construction of any ponds, roads,

^{10/} Gately also petitioned for a stay of the NNC/CO. By order dated Oct. 2, 2000, the Board took Gately's petition for stay under advisement. Our resolution of these appeals renders the petition for stay moot and we therefore deny it.

^{11/} The regulations provide at 43 CFR 3715.4-1(a) that "BLM will visit your site during the normal course of inspection to obtain the information described in § 3715.3-2 [What information must I provide to BLM about my proposed occupancy?]. After the visit, BLM will make a determination of concurrence or non-concurrence."

structures or the placement and/or storage of any equipment on public lands in Township 13N, Range 10W, Section 9, Gila and Salt River Meridian.” (Nonconcurrency Determination at 1.) The Field Manager found that Gately’s proposed occupancy and notice failed to meet the conditions of 43 CFR Subpart 3809 because his claim was located in Poachie Desert Tortoise Habitat ACEC and he was required to file a plan of operations in accordance with 43 CFR 3809.1-4(b)(3). He also found Gately’s proposed occupancy and notice did not meet the requirements of 43 CFR Subpart 3715 because Gately had failed to show that his activities were reasonably incident ^{12/} and he had not obtained all necessary permits, as required by 43 CFR 3715.5(b). On August 22, 2000, Gately filed a response to the Nonconcurrency Determination, which BLM construed to be a notice of appeal.

APPEAL OF NNC/CO (IBLA 2000-356)

In his notice of appeal of the NNC/CO, Gately denies that he told BLM during the January 27, 2000, inspection that he was residing on the claim without proper health or sanitation facilities, pointing out that if unsanitary or unhealthy conditions had existed, the BLM inspector would have issued a citation or given him a verbal warning at that time, neither of which the inspector did. Gately contends that he informed BLM that he was actively engaged in exploration, development, extraction, and other uses consistent with 43 CFR 3809.1-3, which required him and other miners to be on site. He asserts that, rather than “residing” on the claim as BLM alleges, he has been occupying the property while performing activities directly related to the development of the claim. Gately adds that he offered the inspectors certified assays and consulting geologist correspondence as proof of the value of his claim, but they declined to review those documents.

Gately interprets BLM’s September 17, 1996, letter as approving his occupancy of the claim “until such time as an inspection was requested by the BLM.” (Notice of Appeal (IBLA 2000-356) at 3.) According to Gately, BLM implicitly acknowledged the propriety of his occupancy when it failed to reply to his June 9, 1999, response to its May 21, 1999, letter finding him in violation of 43 CFR Subparts 3715 and 3809. (Notice of Appeal (IBLA 2000-356) at 3.)

Gately admits that he disposed of quartz/granite waste rock from the claim, but insists that the sale conformed to 43 CFR 3809.0-5(b) and (c), the regulations defining “[c]asual use” and “Federal lands.” He also concedes that BLM notified him

^{12/} “Reasonably incident” is a shortened version of the statutory standard found at 30 U.S.C. § 612 (2000), “prospecting, mining, or processing operations and uses reasonably incident thereto.” 43 CFR 3715.0-5.

in the March 8, 1994, letter that the area embracing his claim was being considered for ACEC designation; however, he maintains that he was never informed that the area was actually included in the ACEC or that the RMP was ever put into effect. He denies that the claim is in Category 1 desert tortoise habitat within the ACEC or that there were any residual, unmitigated surface impacts from surface disturbing activities on the claim. (Notice of Appeal (IBLA 2000-356) at 1, 3-4.)

In sum, Gately asserts that, except for the May 21, 1999, letter, the BLM inspectors did not advise him that he was in noncompliance with 43 CFR Subparts 3809 and 3715; that the inspectors declined to review the proof he offered during each visit to show that the occupancy complied with those regulations; that his use, occupancy, and activities conform to those regulations; and that the filing of his notice of mining operations pursuant to 43 CFR 3809.1-3(a), (b), and (c) fulfills his statutory and regulatory responsibilities. (Notice of Appeal (IBLA 2000-356) at 3.) ^{13/}

In its answer, BLM maintains that the record clearly demonstrates that Gately failed to comply with the use and occupancy regulations at 43 CFR Subpart 3715. BLM asserts that, although 43 CFR 3715.5(b) and (c) require that uses and occupancies conform to all applicable Federal and state environmental standards and that a miner obtain all necessary permits before beginning use or occupancy, BLM's inspection reports evidence Gately's deficiencies in these areas. (Answer/Motion to Dismiss (IBLA 2000-356) at 17, 18-19, 20.) BLM discounts Gately's contention that he has never "resided" on the claim, arguing that the presence of the trailers and related buildings, equipment, and other materials constitutes an occupancy as defined by 43 CFR 3715.0-5, which requires BLM concurrence to initiate and continue. (Answer/Motion to Dismiss (IBLA 2000-356) at 19, 24.)

Citing 43 CFR 3715.4, which addresses uses and occupancies existing on the August 15, 1996, effective date of the 43 CFR Subpart 3715 regulations, BLM acknowledges that Gately provided the requisite notice of his existing use and occupancy to entitle him to the one-year grace period for compliance with those regulations, and that its September 17, 1996, letter informed Gately that he could continue that use and occupancy until August 15, 1997. BLM notes, however, that Gately never did obtain the necessary permits for his occupancy, and that the grace

^{13/} In a letter dated Aug. 21, 2000, Gately advised BLM that he had discontinued the removal of the quartz/granite waste rock as ordered and would discuss with BLM why it considered such material to be a salable rather than a locatable mineral and that, if his interpretation were wrong, he would pay BLM for the material removed from the claim between May 22 and June 7, 2000.

period has long since passed. (Answer/Motion to Dismiss (IBLA 2000-356) at 19-20.) According to BLM, Gately's inability to show that his use and occupancy are reasonably incident, his lack of the necessary permits, and his failure to receive written BLM concurrence for his use and occupancy clearly demonstrate that he is not in compliance with 43 CFR Subpart 3715. (Answer/Motion to Dismiss (IBLA 2000-356) at 22, 23-26.)

BLM argues that Gately also has not complied with the requirements of 43 CFR Subpart 3809. While acknowledging that Gately has filed a notice of mining operations under 43 CFR 3809.1-3, BLM contends that, because the Sun Cloud mining claim lies within the Poachie Desert Tortoise Habitat ACEC, Gately had to file a plan of operations pursuant to 43 CFR 3809.1-4(b)(3), which requires a plan of operations for activities other than casual use within an ACEC, regardless of the number of acres involved. Gately's denial that the claim falls within the ACEC fails, BLM maintains, because the maps in the record clearly depict the claim as located within Category 1 desert tortoise habitat, citing Exhibits O and P attached to its Answer/Motion to Dismiss (IBLA 2000-365). (Answer/Motion to Dismiss (IBLA 2000-365) at 22, and Exs. O and P.) BLM further submits that Gately had ample notice that his claim was included within the Poachie Desert Tortoise Habitat ACEC, as identified in the Kingman RMP, citing its March 8, 1994, letter. Since Gately did not submit a plan of operations, BLM asserts that it properly found Gately in noncompliance with the surface management regulations at 43 CFR Subpart 3809. (Answer/Motion to Dismiss (IBLA 2000-356) at 16-17.) ^{14/}

BLM's NNC/CO found Gately in noncompliance with the regulations at 43 CFR Subpart 3809 because he did not have an approved plan of operations for his mining activities in the Poachie Desert Tortoise Habitat ACEC and with the regulations at 43 CFR Subpart 3715 because he did not have the required permits and BLM concurrence for occupancy. We will address each of these findings in turn.

^{14/} BLM contends that the quartz/granite boulders removed from the claim fall within the definition of common variety mineral material not subject to location under the mining laws, citing 30 U.S.C. § 601 *et seq.* (2000). BLM further posits that the boulders form a prime constituent of desert tortoise habitat and that his removal of the boulders in the ACEC required a plan of operations which Gately did not have. BLM states that it is continuing an investigation of this activity. (Answer/Motion to Dismiss (IBLA 2000-356) at 22-23.) Since BLM has not issued a final decision as to the removal of the boulders, this issue is not yet before us and will not be addressed further.

[1] Regulation 43 CFR 3809.1-4(b) required an approved a plan of operations before beginning any operation, except casual use, in a designated ACEC.^{15/} Although Gately originally contended that his claim was not within the Poachie Desert Tortoise Habitat ACEC, he later conceded that it was, while continuing to complain about lack of notice that the Sun Cloud claim was included in the ACEC. See Notice of Appeal (IBLA 2000-401) at 2.

The map of the ACEC clearly shows all of sec. 9, T. 13 N., R. 10 W., Gila & Salt River Meridian, Yavapai, County, Arizona, the site of the Sun Cloud mining claim, as lying within the ACEC. See Answer/Motion to Dismiss (IBLA 2000-356), Ex. P; see also Answer/Motion to Dismiss (IBLA 2000-356), Ex. O (Kingman Resource Area Proposed RMP and Final Environmental Impact Statement (1993) and February 1995 Record of Decision for the RMP). Gately should not have been surprised by the inclusion of the claim within the ACEC since BLM had warned him in its March 8, 1994, letter that the claim was situated within the ACEC as delineated in the Kingman RMP and that once the RMP took effect, mining operations on the claim would require a plan of operations and a reclamation bond. Gately's complaint about lack of notice does not change the fact that the claim falls within the ACEC. Nor does it excuse Gately from complying with the regulatory requirements. Since the claim lies within the ACEC, BLM properly concluded that Gately was required to have an approved plan of operations for his mining activities on the claim and that his failure to have such an approved plan constituted noncompliance with 43 CFR Subpart 3809.^{16/}

[2] Section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000), provides that claims located under the mining laws of the United States "shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." The regulations in 43 CFR Subpart 3715 implement this statutory provision by addressing the unlawful use and occupancy of unpatented mining claims for nonmining purposes.

^{15/} The requirement to file a plan of operations for mining activities greater than casual use in an ACEC still exists. See 43 CFR 3809.11(c)(3) (2002).

^{16/} Compensation for the loss of desert tortoise habitat apparently will be part of BLM's review of the required plan of operations. See Oct. 26, 2000, BLM letter responding to Gately's Oct. 6, 2000, plan of operations, at 3 (attached as Ex. H to BLM's Reply to the Board's order dated Oct. 2, 2000 (BLM Reply)).

Regulation 43 CFR 3715.4 explicitly states that the use and occupancy regulations found in 43 CFR Subpart 3715 apply to uses or occupancies existing on August 15, 1996, the effective date of those regulations. See David J. Timberlin, 158 IBLA 144, 152 (2003), and cases cited. It also provides for a one-year grace period for occupancies existing on August 15, 1996. 43 CFR 3715.4(b). Gately took advantage of that regulation by timely filing the proper form, as required by 43 CFR 3715.4(b)(1). While BLM acknowledged that filing and informed Gately that he could continue his occupancy during the grace period, it conditioned that approval, stating that, if it determined that the occupancy was not reasonably incident and such occupancy was a threat to health, safety, or the environment, it would order an immediate temporary suspension of activities. See 43 CFR 3715.4(c). BLM made no such finding during the grace period.

The regulations at 43 CFR 3715.4(a) state that “[b]y August 18, 1997, all existing uses and occupancies must meet the applicable requirements of this subpart.” Thus, as of that date Gately’s use and occupancy of the Sun Cloud claim was required to meet the applicable requirements of 43 CFR Subpart 3715. ^{17/} See Gerald A. Henderson, 156 IBLA 84, 87 (2001). In addition, Departmental regulation 43 CFR 3715.3-1 admonishes a mining claimant not to begin occupancy until

(a) You have complied with either 43 CFR part 3800, subpart 3802 or 3809 and this subpart, and BLM has completed its review and made all the required determinations under the applicable subparts, and

(b) You have obtained all federal, state and local mining, reclamation, and waste disposal permits, approvals, or other

^{17/} Although Gately contends that he never “resided” on the claim, he admits that he has placed trailers and other material and equipment on the claim. The regulations define “occupancy” as “full or part-time residence on the public lands. It also means activities that involve residence; the construction, presence, or maintenance of temporary or permanent structures that may be used for such purposes; or the use of a watchman or caretaker for the purpose of monitoring activities. Residence or structures include, but are not limited to, barriers to access, fences, tents, motor homes, trailers, cabins, houses, buildings, and storage of equipment or supplies.” 43 CFR 3715.0-5. Since Gately’s trailers and other equipment clearly fall within the regulatory definition of occupancy, his use and occupancy of the Sun Cloud mining claim must comply with 43 CFR Subpart 3715.

authorizations for the particular use or occupancy as required under this subpart.

See also 43 CFR 3715.5(b) and (c) (a claimant must obtain all required permits before beginning use and occupancy, including permits required under 43 CFR Part 3800).

At the expiration of the grace period, Gately was required to have an approved plan of operations and all necessary permits in order to continue the occupancy. He had neither. Therefore, the record clearly shows that BLM properly concluded that Gately did not comply with the regulations at 43 CFR Subpart 3715. See Gerald A. Henderson, 156 IBLA at 87-88.

The remaining question, however, is whether BLM's issuance of the NNC/CO was the proper enforcement action under the circumstances of this case in which BLM cited Gately with violations of both 43 CFR Subpart 3809 and 43 CFR Subpart 3715 in the same enforcement action. The regulations at 43 CFR 3809.3-2 provided for the issuance of a notice of noncompliance to an operator for failing to file a plan of operations required by 43 CFR 3809.1-4. Gately was required by 43 CFR 3809.1-4(b)(3) to file a plan of operations. Thus, a 43 CFR Subpart 3809 notice of noncompliance was a proper enforcement action for Gately's failure to file a plan of operations.

However, BLM's combined NNC/CO does not appear to have been the proper enforcement action for the identified violations of the 43 CFR Subpart 3715 regulations in this case. In Bruce M. Lewis, 156 IBLA 287, 295 (2002), we stated that the regulations at 43 CFR 3715.7-1 identified the four types of enforcement actions that BLM may take when 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))." Under 43 CFR 3715.7-1(c), a notice of noncompliance is appropriate if (1) a claimant's use and occupancy is not in compliance with 43 CFR Subpart 3715 and (2) BLM has not issued an immediate suspension. Such a notice is to set forth how the claimant has failed to comply and establish a time deadline, not to exceed 30 days, within which to comply, failing in which BLM may issue an immediate suspension or a cessation order.

In this case, BLM identified the acts of noncompliance and directed Gately to immediately cease any surface disturbing activities, to remove all mobile homes, including all equipment, parts, and/or other living arrangements by August 1, 2000,

and to cease all residential occupancy by that same date. The regulation governing cessation orders, 43 CFR 3715.7-1(b), provides, however, that such an order is appropriate when use or occupancy is not reasonably incident “but does not endanger health, safety or the environment” or when a claimant has failed to (1) timely comply with a notice of noncompliance or (2) take corrective action dictated by an immediate suspension order. Thus, a cessation order is appropriate in two circumstances: (1) when use and occupancy is not reasonably incident, but only if that use and occupancy does not endanger health, safety, or the environment, or (2) when there is a failure to comply with an earlier enforcement action under 43 CFR Subpart 3715. ^{18/}

Under the circumstances of this case, it appears that an immediate suspension was appropriate for Gately’s failure to meet the requirements of 43 CFR Subpart 3715 because his use and occupancy was not reasonably incident and such a suspension was necessary to protect health, safety, and the environment in the ACEC. See 43 CFR 3715.7-1(a)(1)(i) and 43 CFR 3715.7-1(a)(1)(ii). Accordingly, we hold that a notice of noncompliance was appropriate for Gately’s failure to comply with 43 CFR Subpart 3809 and an immediate suspension was the proper enforcement action for Gately’s failure to comply with 43 CFR Subpart 3715. ^{19/} The substance of BLM’s June 29, 2000, enforcement action is supported by the record. For that reason, we affirm BLM’s June 29, 2000, decision as modified.

^{18/} While BLM’s May 21, 1999, letter to Gately could be construed as some type of enforcement action, it was not styled as such. Nor did BLM refer back to it in the NNC/CO.

^{19/} The situation presented here is distinguishable from that addressed in the Board’s decision in Skip Myers, 160 IBLA 101 (2003). In that case, the Board set aside a BLM immediate suspension order because BLM had not made the requisite finding that an immediate suspension was necessary to protect health, safety, or the environment nor could such a finding be presumed. 160 IBLA at 110-11. Although the Board noted that BLM’s decision could more properly be deemed a notice of noncompliance, we chose not to exercise our de novo review authority and remanded the case to BLM to determine whether the circumstances of that case warranted an immediate suspension order or notice of noncompliance. Id. at 112.

The facts of the present case warrant the exercise of our de novo review authority and, pursuant to that authority, we find that Gately’s use and occupancy in the ACEC justifies an immediate suspension order to protect health, safety, and the environment.

APPEAL OF NONCONCURRENCE DETERMINATION (IBLA 2000-401)

In the Nonconcurrency Determination, the Field Manager found three flaws in Gately's notice of operations: the insufficiency of the submitted information to establish that Gately's proposed use and occupancy were reasonably incident as required by 43 CFR 3715.2(a); the dearth of any evidence that Gately had obtained all necessary permits as directed by 43 CFR 3715.5(b) and (c); and the lack of the plan of operations mandated by 43 CFR 3809.1-4(b)(3) for Gately's mining activities within the Poachie Desert Tortoise Habitat ACEC. He also directed Gately not to place, construct, maintain, or operate any travel type trailers or other residential occupancy; not to construct any ponds, roads, or structures; and not to place or store any equipment on the claim.

On appeal, Gately states that pending the outcome of his appeal in IBLA 2000-356 he will not "place, construct, maintain, operate or occupy the owner[']s travel type trailers or the one assay lab/equipment & supplies trailer located on the Sun Cloud claim." (Notice of Appeal (IBLA 2000-401) at 1.) He also notes that he has cancelled the construction outlined in his notice due to BLM's determination that a plan of operations is required for activities on the claim. In order to support his contention that his use and occupancy is reasonably incident, he resubmits information previously tendered to BLM, which had been evaluated prior to issuance of the Nonconcurrency Determination.

In reply, BLM argues that Gately should be deemed to have admitted those elements of the Nonconcurrency Determination he has not specifically addressed, including the requirement to obtain necessary environmental and other permits. (BLM Reply at 5.) BLM disputes Gately's contention that his use and occupancy are reasonably incident, averring that the record contains no evidence of any prospecting, mining, or processing operations or uses to which the occupancy could be reasonably incident. The lack of any observable on-the-ground activity such as spoil piles, tailings piles, or large open cuts, BLM asserts, supports its conclusion that, except for the removal of the quartz/granite boulders, Gately's use of the site is little more than recreational and thus is not reasonably incident as defined by 43 CFR 3715.0-5. (BLM Reply at 6.)

We have already addressed and upheld BLM's determinations in the NNC/CO that Gately needed the requisite permits and an approved plan of operations to bring his use and occupancy of the Sun Cloud mining claim into compliance with 43 CFR Subparts 3715 and 3809, and our analysis of those issues applies and controls here,

as well. ^{20/} It is also clear that the case record supports BLM's determination, made implicitly in the NNC/CO and explicitly in the Nonconcurrency Determination, that Gately's use and occupancy of the Sun Cloud claim is not reasonably incident to mining activities.

[3] The activities justifying an occupancy of public lands under the mining laws for more than 14 calendar days in any 90-day period must:

- (a) Be reasonably incident;
- (b) Constitute substantially regular work;
- (c) Be reasonably calculated to lead to the extraction and beneficiation of minerals;
- (d) Involve observable on-the-ground activity that BLM may verify under [43 CFR 3715.7]; and
- (e) Use appropriate equipment that is presentably operable, subject to the need for reasonable assembly, maintenance, repair or fabrication of replacement parts.

43 CFR 3715.2. ^{21/}

The regulations define "reasonably incident" as being a shortened version of the statutory standard "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 * * * and reasonably related activities." 43 CFR 3715.0-5. Any occupancy proposed by a mining claimant, therefore, must be reasonably related to actual activities on the claims involving prospecting, mining, or processing operations, and the extent of any permissible

^{20/} We note that on Oct. 5, 2000, Gately submitted a plan of operations for the Sun Cloud mine, dated Sept. 1, 2000, to BLM. See BLM Reply, Ex. G. By letter dated Oct. 26, 2000, BLM pointed out some deficiencies in that plan that need correction, addition, or revision. See BLM Reply, Ex. H.

^{21/} In addition to fulfilling all the requirements of 43 CFR 3715.2(a) through (e), the occupancy must also involve one or more of the elements set forth in 43 CFR 3715.2-1(a) through (e).

occupancy directly relates to the magnitude of the mining and related activities conducted on the claim. Thomas E. Smigel, 156 IBLA 320, 324 (2002). Thus, the structures and equipment housed onsite must be related to, and commensurate with, the mining and related operations. Id.; see David E. Pierce, 153 IBLA 348, 358 (2000); Bradshaw Industries, 152 IBLA 57, 63 (2000).^{22/}

Gately has not provided any additional information on appeal that was not before BLM to support his claim that his occupancy is reasonably incident. The burden of proving error in a BLM decision involving a mining claim rests on the claimant, as does the burden of proving that use and occupancy are reasonably incident to mining. Thomas Swenson, 156 IBLA 299, 310 (2002). Gately has not made the necessary showing in this case. Accordingly, we affirm the Field Manager's Nonconcurrency Determination in its entirety.

To the extent not specifically addressed herein, Gately's other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 29, 2000, decision styled as a NNC/CO is affirmed as modified; the petition for stay of the NNC/CO is denied as moot; and the August 11, 2000, Nonconcurrency Determination is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

^{22/} Absent mining or mining related activities, no right to use the surface of a mining claim exists. Firestone Mining Industries, Inc., 150 IBLA 104, 110 (1999); Richard Oldman, 146 IBLA 220, 223 (1998); see Mr. & Mrs. Michael Bosch, 119 IBLA 370, 374 n.8 (1991). Thus, if no actual mining or mining related operations are taking place, use and occupancy of a claim are not reasonably incident. Firestone Mining Industries, Inc., 150 IBLA at 111. While the inspection reports contained in the case file amply demonstrate that little, if any, mining activity (other than boulder removal) has recently occurred on the claim (see, e.g., Jan. 27, and Mar. 14, 2000, Compliance Documentations), and BLM's Reply stresses this lack of mining activity, the Nonconcurrency Determination does not address past events but focuses on the use and occupancy proposed in Gately's notice of mining operations. BLM's arguments in this regard are therefore irrelevant to the issues in this appeal.

I concur:

Gail M. Frazier
Administrative Judge