

NEVADA MINERAL PROCESSING

IBLA 2002-320

Decided October 3, 2002

Appeal from a decision of the Nevada State Director, Bureau of Land Management, affirming issuance of a notice of noncompliance with respect to various mill sites for failure to post a reclamation bond. N37-86-001P.

Affirmed.

1. Mining Claims: Generally--Mining Claims: Bonds--
Mining Claims: Reclamation

The failure to post a reclamation bond as required by the authorized officer under the authority of 43 CFR 3809.1-9(b) (1996), which bond is based on the claimant's own estimate of the costs of removing existing structures and reclaiming the land, fully supports issuance of a notice of noncompliance.

2. Mining Claims: Generally--Mining Claims: Bonds--
Mining Claims: Reclamation

Under the provisions of 43 CFR 3809.505 (2001), all persons conducting operations on a mining claim or millsite under a plan of operations must submit a financial guarantee (bond) to guarantee reclamation of the claim or millsite.

APPEARANCES: Annelie Hoyer, President, Nevada Mineral Processing, Blaine, Washington, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Nevada Mineral Processing, through its President, Annelie Hoyer, has appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated April 5, 2002, which had affirmed the June 7, 1996, issuance by the Carson City Associate District Manager of a notice of noncompliance with respect to various mill site claims held by appellant. Appellant has filed a notice of appeal and statement of reasons in support thereof,

in which it requests that the Board stay implementation of the decision below pending completion of Board review. However, for reasons set forth below, we believe that the decision must be affirmed.

The mill sites at issue are located northwest of Mina, Nevada. They were the subject of a plan of operations for a custom mill (NV37-86-01(P)) which had been approved on November 22, 1985. We note, because of its relevance to the instant appeal, that the approved plan provided that "[u]pon conclusion of the operation, all equipment, buildings and other materials will be removed and the site leveled and seeded with acceptable grass and sage brush." See 1985 Plan of Operations at 2. Construction pursuant to the approved plan apparently proceeded and an "as built" plot plan, which was surveyed on January 4, 1989, shows the millsite as consisting of 14 structures of various dimensions. However, it is undisputed that full-scale commercial operations have never commenced at the millsite.

By letter dated December 3, 1990, appellant was notified that, as a result of newly adopted State of Nevada reclamation standards, BLM was reviewing all outstanding plans of operations to assure that they contained all the necessary elements under the new Nevada law. Appellant was advised that it would be necessary to upgrade its approved plan to meet the new standards, particularly those facets relating to reclamation and its projected costs, and appellant was provided with an informational packet explaining the new requirements.

By letter dated December 20, 1990, appellant was formally requested to submit a revised plan of operations so that it would meet current standards. In particular, this letter noted that:

there is a requirement that the reclamation section contain a breakdown of the projected costs for each step of reclamation. After analysis by the Bureau of Land Management and by the State of Nevada, those reclamation costs, if accepted, will form the basis for a mandatory reclamation bond.

Letter dated December 20, 1990.

On October 1, 1991, BLM wrote appellant pointing out that, even though there had been various requests on BLM's part, appellant had yet to submit a revised reclamation plan. Accordingly, appellant was advised that BLM was estimating costs of reclamation to be \$35,500. Appellant was afforded 60 days in which to submit a bond to the United States in that amount. However, following a subsequent telephone conversation with the operator, BLM agreed that, if appellant submitted an acceptable

reclamation plan within the 60-day period, BLM would be willing to consider the submission of a bond based on the data contained in the reclamation plan rather than the cost estimates that BLM had used to arrive at the figure of \$35,500. See Letter of October 8, 1991.

Despite BLM's demand for the submission of a bond, none was forthcoming. However, on November 26, 1991, appellant submitted a revised plan of operations. This plan estimated that total reclamation costs would be \$42,734. See 1991 Plan of Operations at 6. It was noted, however, that the total acreage which would be disturbed was 4.9 acres. Id. at 7. The record discloses that, in a meeting between appellant's representatives and BLM employees, BLM advised appellant that, since its operations would only be disturbing 4.9 acres, it would be eligible for an exemption from the fees and reclamation permit process provided for small operators, i.e., operators disturbing less than 5 acres. See Record of Communication dated November 27, 1991.

However, by letter dated December 8, 1992, BLM informed appellant that it would not be eligible for the small operator exemption since the total enclosed area within its fence aggregated 25.3 acres and field investigations had shown that this entire acreage had been stripped of all vegetation by appellant and must be counted as part of the disturbed area. Additionally, various deficiencies in appellant's cost estimates for reclamation were delineated and appellant was requested to revise its reclamation plan accordingly.

On November 29, 1994, appellant submitted another revised plan of operations and reclamation. This plan estimated that total reclamation costs would be \$116,407.73. See 1994 Plan of Operations, Worksheet. By letter dated December 21, 1994, BLM provided appellant with a list of various perceived deficiencies in its latest plan, particularly questioning various elements used to compute the estimated reclamation costs.

By letter dated February 14, 1995, while appellant was apparently in the process of revising its 1994 plan of operations to deal with BLM's objections, appellant was advised that, in order to bring its operation in line with BLM policy which required all operations in excess of five acres to have reclamation bonds in place, BLM was requiring the posting of an "interim" bond based on appellant's latest cost estimate of \$116,407.73 within 45 days of receipt of the letter. Appellant was further advised that, if the revisions being prepared to respond to the December 21, 1994, letter from BLM resulted in an increase in estimated reclamation costs, the submitted bond should be for the increased amount.

By letter dated March 28, 1995, appellant sought an extension of time for submitting the "interim" bond. Appellant

based its request on its expectation that the revised plan would greatly reduce the dollar amount of the bond because of revisions in its milling facility which would sharply reduce the amount of sodium cyanide used in processing the ore. By letter dated April 5, 1995, BLM, after first noting that attempts to have the existing plan of operations revised to account for reclamation costs had been on-going since December of 1990, advised appellant that an extension of time would not be granted for the posting of a bond. With respect to appellant's expectation that the level of required bonding might be drastically reduced, the Area Manager noted that "[i]f after you have hired a consultant to complete your reclamation plan, it can be determined that the reclamation bond can be reduced, I will consider this possibility." However, the Area Manager insisted that, pending that eventuality, appellant submit an interim bond.

While no bond was ever submitted, the record makes it clear that appellant did not simply ignore BLM's request. Rather, the record discloses that there were, apparently, substantial efforts made by appellant to obtain a bond, either through bonding companies or by obtaining investors who would be willing to post the bond. See Letter dated October 31, 1995, from appellant to BLM. None of these efforts, however, proved successful.

By letter dated January 26, 1996, the Area Manager recognized that appellant had been attempting to secure financing to post an interim bond but concluded that he could not allow the existing situation to continue indefinitely and would not, therefore, grant any additional time for the interim bond without interim reclamation of the site. He noted that extensive amounts of sodium cyanide were stored at the mill site, even though the custom mill had never been operational in the ten years since it was built. He requested that the cyanide be safely removed from the site. He also pointed out that, while there were four trailers at the site, only one trailer was authorized on site for a watchman. Accordingly, he ordered the removal of the other three trailers.

On April 11, 1996, the Area Manager issued a notice of noncompliance based on the long-term storage of cyanide at an inactive facility. This notice directed the immediate removal of the cyanide in accordance with applicable state and Federal regulations. By letter dated April 29, 1996, appellant informed BLM that the cyanide had been removed. By letter dated May 15, 1996, BLM advised appellant that it was revoking its April 11 notice of noncompliance but directed appellant to post a reclamation bond within 15 days, failing in which a new notice of noncompliance would issue. When no bond was tendered, the Area Manager, by decision dated June 7, 1996, issued a notice of noncompliance. On July 3, 1996, appellant formally appealed the notice of noncompliance to the BLM State Director.

While the case file was duly submitted to the State Office for State Director review, where it was received on July 12, 1996, it seems likely that the file was misplaced since the record discloses no action until July 2, 2001, when the State Office issued a decision affirming the actions of the Area Manager. Service of the above decision was not effected on appellant until April 5, 2002. Appellant duly appealed this decision to the Board.

In the appeal before the Board, Hoyer, as President of Nevada Mineral Processing, largely reiterates the points which she made before the State Director. Thus, she recounts at length the various financial difficulties which have beset the millsite and which, she notes, have cost her in excess of 2.5 million dollars. She argues that she is attempting, as she has in the past, to obtain investors and is also "looking for a qualified person capable of rewriting the reclamation plan on this Millsite to bring it in compliance for any prospective buyer." Statement of Reasons for Appeal at 3. At the present time, however, she states that, in view of her past expenditures, she simply cannot afford to post a bond in the amount requested. Together with the notice of appeal, appellant submitted a request that the Board stay implementation of the decision below on the ground that Hoyer "would be financially devastated if this stay is not granted."

[1] Our review of the record convinces us that not only is the requested stay properly denied, but the decision being challenged must be affirmed. The applicable regulation in effect when the Associate District Manager issued his original decision in June 1996, 43 CFR 3809.1-9(b) (1996), provided, in relevant part, that:

[a]ny operator who conducts operations under an approved plan of operations as described in § 3809.1-5 of this title may, at the discretion of the authorized officer, be required to furnish a bond in the amount specified by the authorized officer. The authorized officer may determine not to require a bond in circumstances where operations would cause only minimal disturbance to the land. In determining the amount of a bond, the authorized officer shall consider the estimated costs of reasonable stabilization and reclamation of areas disturbed.

While the first sentence of this regulation suggests that the authorized officer had discretionary authority to require the furnishing of a bond covering reclamation costs but was not obligated to do so, the second sentence makes it clear that such discretion to forego requiring submission of a bond was clearly circumscribed by the requirement that the actions being proposed "would cause only minimal disturbance to the land." Considering simply the number of structures already in place on the millsite, that finding would be impossible to make. Clearly, under this regulation, the authorized officer was required to insist upon the furnishing of a reclamation bond and, since the authorized officer based the bonding requirement on appellant's own estimates of reclamation costs, estimates which have never been revised, there would be no basis for reversing his actions under the former regulation.

[2] In 2000, however, 43 CFR Subpart 3809 was drastically revised. See generally 65 FR 70112 (Nov. 12, 2000). Of particular importance herein, these revisions required the posting of a bond (now yclept "a financial guarantee") for all new operations under a notice and for all operations conducted under a plan of operations. See 43 CFR 3809.503, 3809.505. Thus, under the new regulations, the authorized officer would have absolutely no authority to waive the requirement that appellant submit an individual financial guarantee, i.e., a bond. We note that the subsequent October 30, 2001, revisions of this subpart did not change the overall financial guarantee requirements in the 2000 rule. See 66 FR 54842 (Oct. 30, 2001).

In view of the foregoing, it is obvious that the authorized officer was totally correct in requiring the submission of a bond/financial guarantee for appellant's millsite. And, while we may sympathize with appellant's financial difficulties, it is equally clear that BLM properly issued a notice of noncompliance when appellant failed to furnish the required reclamation guarantee.

The record fully establishes that BLM tried its best to make allowances for appellant's financial difficulties, even in the face of repeated failures by appellant to submit the necessary financial guarantees. More than a decade has passed since BLM first sought to obtain a reclamation bond. Further delay cannot be justified. BLM's decision finding appellant to be in noncompliance must be affirmed. In light of our disposition of the appeal, appellant's petition for stay is properly denied as moot.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed and the petition for stay is denied as moot.

James L. Burski
Administrative Judge

I concur:

David L. Hughes
Administrative Judge