M/027/007

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Utah State Office
P.O. Box 45155
Salt Lake City, UT 84145-0155

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DIV. OF OIL, GAS & MINING

IN REPLY REFER TO
3809
(UT-931)

OCT 20 1997

CERTIFIED MAIL--Return Receipt Requested

DECISION
Affirmed

Western States Minerals Corporation	:	43 CFR 3809
4975 Van Gordon Street	:	Appeal to the State Director
Wheatridge, Colorado 80033	:	

Background

On July 5, 1983, Western States Minerals Corporation (WSMC) submitted a plan of operations (POO) to the Bureau of Land Management (BLM) to operate the Drum Mine. The BLM approved the POO on August 18, 1983. On September 7, 1983, WSMC notified BLM that WSMC had purchased all rights and responsibilities from Nevada Resources, Incorporated for Yellow Cat Claims No. 1-12, YC Claims 13-183 and RS Claims 1-6.

A POO amendment was filed on January 27, 1984. This amendment to move a waste dump was approved on February 2, 1984. Another POO amendment was submitted on April 12, 1984 to expand the exploration area. This amendment was approved on May 4, 1984. Then on February 1, 1985 WSMC submitted a notice for exploration work on the Mizpah and Sadie claims. This notice was not accepted. Another notice from WSMC to BLM was received on June 10, 1986. This notice for exploration of the Mizpah and Sadie mining claims was accepted on June 15, 1986 and serialized as UT-057-39N. Another notice from WSMC to BLM was received on August 24, 1987 for exploration drilling. This notice was acknowledged on August 28, 1987 and serialized as UT-056-62N. An additional notice was submitted on September 11, 1987 for exploration of the Mizpah and Sadie mining claims. This notice was accepted on September 15, 1987 and serialized as UT-056-64N.

In November of 1988, WSMC sold the Drum Mine to Jumbo Mining Corporation (JMC). A partial permit transfer for the Large Mining Operation (similar to BLM's POO) was accepted by the State of Utah Division of Oil, Gas and Mining (UDOGM). On January 3, 1990, UDOGM granted an extension of time requested by WSMC to resolve the permit and reclamation differences between WSMC and JMC. WSMC indicated that this matter would be resolved in a few weeks.

Unfortunately, this matter was not resolved in that time period. In fact, these differences were litigated in Colorado. The Colorado Court of Appeals affirmed the Jefferson County District Court decision which ordered a quitclaim deed and assignment reformed so that the last sentence of Paragraph 3 of this document reads: "Assignee shall be responsible for all reclamation on the lode mining claims and properties." The assignee in this case is JMC.

On January 17, 1997, BLM sent WSMC a certified letter with a return receipt requested. The letter requested WSMC to submit a POO and bond for mining activity that was not part of the approved POO and approved POO amendments mentioned above. WSMC responded to this letter on March 7, 1997 stating that they would not submit a POO for reclamation of the mine as requested.

On July 14, 1997, a letter responding to WSMC's March 7, 1997, correspondence and a notice of noncompliance was sent to WSMC certified mail return receipt requested. The notice of noncompliance addressed WSMC's failure to file a plan of operations and bond which was requested in the January 17, 1997 letter. The July 14, 1997, letter clarified BLM's position regarding reclamation responsibility [1] at the mine site and surrounding vicinity and added a charge to the notice of noncompliance. WSMC filed an appeal of the July 14, 1997, letter and enclosed notice of noncompliance. The appeal was timely filed.

Findings

WSMC's notice of appeal presents a number of points supporting its allegation of error enumerated as "legal discussion" (section B) and "argument" (section C). I will address each of these points as they appeared in WSMC's notice of appeal.

The first "legal discussion" item concerns the definitions of operator, operations, and the review process for a POO. The definitions from the Surface Management regulations codified at 43 CFR 3809 (hereafter "3809 regulations") were correctly quoted. Also, plans are reviewed to prevent unnecessary or undue degradation. However, WSMC fails to mention that modifications of an approved POO are required for additional surface-disturbing activities. WSMC constructed seven heap leach pads, disturbed the area around the Busby Spring and created two waste dumps without prior approval from BLM. Six of the seven heap leach pads were also not permitted with the State of Utah, Division of Water Quality (DWQ). In addition, the two waste dumps and two of the three low grade heaps were not approved by UDOGM prior to constructing these features.

The second "legal discussion" item concerns change of operator as mentioned in the 3809 regulations. WSMC correctly states that 43 CFR 3809.1-6 (e) addresses a change of operator. This section states, "In the event of a change of operators involving an approved plan of operations, the new

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[1]The record is not specific as to assignment of reclamation responsibility. Based on the record and further investigation the following reclamation responsibilities are assigned to WSMC: lo-grade heap #1, lo-grade heap #2, lo-grade heap #3, hi-grade heap #6, high-grade heap #7, one 3.6 acre waste dump, one 5.2 acre waste dump, disturbance around Busby Spring, an unplugged drill hole above Busby Spring, UT-057-39N, UT-056-64N, UT-056-062N, an unserialized notice submitted December 13, 1983, and an unserialized notice submitted February 1, 1985.

operator shall satisfy the requirements of section 3809.1-9 of this title as it relates to bonding." Since WSMC requested an extension of time from UDOGM to correct permit inconsistencies (additional disturbances not included in the original plan of operations) and reclamation differences (e.g.,deficiencies such as shortage of topsoil material for final reclamation, reclamation responsibility of each party, etc.) the permit was never completely transferred. Therefore, this resulted in a partial transfer of reclamation responsibilities according to UDOGM Minerals Reclamation Program records.

According to the Warm Springs/House Range Resource Area records, JMC notified BLM on November 30, 1988 that JMC had acquired the working interest at the Drum Mine and would operate under the guidelines of the POO submitted by WSMC. The intent of the 3809 regulations is to ensure all operations are reclaimed by the operator who conducts the earth-disturbing activity unless a new operator informs the BLM that it accepts all outstanding reclamation responsibilities left by the previous operator. As stated above JMC notified BLM only of its intent to operate under the existing POO filed by WSMC and in later correspondence accepted reclamation responsibility for two additional heap leach pads.

WSMC's first "argument" contends that WSMC is not obligated to prepare an additional POO amendment[2] for a site it no longer owns and on which it is not conducting, and does not propose to conduct operations. According to BLM records, there are three outstanding notices where earth-disturbing activity was conducted by WSMC which have not been reclaimed. The new operator, JMC, notified BLM only of its intent to be responsible for the reclamation of the POO filed by WSMC and two additional heap leach pads. The reclamation responsibility for the outstanding notices and work completed in noncompliance by WSMC is the responsibility of WSMC until and unless the BLM is duly notified by an assignee that it has assumed this responsibility. The contract between WSMC and JMC does not provide this notice. The United States was not a party to this contract or subject to the jurisdiction of the Colorado Courts that interpreted it. If WSMC believes that this contract delegates JMC to assume all reclamation responsibility at the subject site, it is up to WSMC to compel JMC, through litigation or otherwise, to properly notify BLM that JMC assumes this responsibility. The BLM does not have the authority, expertise, or resources to resolve private contract disputes involving the assignment of operations subject to the 3809 regulations. Consequently, it is reasonable for BLM to require the assignee of such a contract to notify BLM of the scope of reclamation responsibilities that it has assumed.

WSMC's second "argument" alleges that WSMC operated under an approved POO and therefore denies the allegation that WSMC violated sections 3809.1-4(a), 3809.2-2(b), 3809.2-2, 3809.1-1,

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[2]The Warm Springs/House Range Resource Area requested a plan of operations for the following features:

Lo-Grade Heaps #1, 2 and 3
Hi-Grade Heaps # 6 and 7
One 3.6 acre waste dump, and
One 5.2 acre waste dump

These features disturbed a total of 24 acres. All these features were completed without prior notification to BLM and therefore they were never approved. Since the activity was conducted by WSMC in noncompliance, the Resource Area Manager has the authority to require a plan of operations for the reclamation of these features (43 CFR 3809.1-1 and 43 CFR 3809.1-4(a)).

3809.1-5(c)(2), 3809.1-5(c)(4), 3809.1-5(c)(5), and 3809.1-5(c)(6). As stated above, this is not the case. Numerous surface disturbances occurred without appropriate state and federal permits. The perched aquifer underneath one of the heaps was contaminated while WSMC was the operator.

WSMC's third "argument" claims that BLM is barred by the five-year statute of limitations cited at 28 U.S.C. #2462 from bringing an action to enforce compliance. This is incorrect. This statute applies only to fines and penalties. It does not affect the BLM's authority to enforce its reclamation regulations.

The last item concerns WSMC's request for a stay of the Resource Area Manager's decision pending the appeal. This decision renders WSMC's stay request moot. In any event, WSMC's request for a stay is inappropriately based on the Memorandum of Understanding (MOU) between BLM, DOGM, and Forest Service Region 4 dated September 5, 1989, regulating mining and reclamation. According to WSMC, the MOU states that "BOGM (Board of Oil, Gas and Mining) has primary responsibility for regulating the conduct of operations and reclamation on federal lands." This is incorrect. The MOU actually states that BLM will be the lead agency for operations on BLM lands. (Copy of the MOU is enclosed.) There is a provision in the MOU for the agency with surface management jurisdiction to ask UDOGM to act as the lead agent. The Drum Mine occurs on federal land administered by BLM. The BLM has never requested that UDOGM be the lead agent for this operation. In addition, BLM cannot abdicate its obligation to prevent unnecessary or undue degradation which underlies its responsibility to ensure reclamation.

Ruling

The Resource Area Manager's decision is affirmed and the request for a stay of the decision pending appeal is denied.

Appeals

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition (request) [pursuant to regulation 43 CFR 4.21 (58 FR 4939, January 19, 1993)] for a stay (suspension) of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision, to the Interior Board of Land Appeals, and to the appropriate Office of the Solicitor (see 43 CFR §4.413) at the same time the original documents are filled with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

1. The relative harm to the parties if the stay is granted or denied,

2. The likelihood of the appellant's success on the merits,

3. The likelihood of immediate and irreparable harm if the stay is not granted, and

4. Whether the public interest favors granting the stay.

If you have any additional questions regarding this decision, please call Terry McParland at (801) 539-4026.

G. William Lamb
State Director

2 Enclosures:
1. MOU (14 pp)
2. Form 1842-1 (1 pp)

cc: Dan Moquin, UDOGM
Wayne Hedberg, UDOGM

(9-5-89)

FS Control #: (110451088901)

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UTAH DIVISION OF OIL, GAS AND MINING
AND THE
USDA FOREST SERVICE, REGION 4
AND THE
USDI BUREAU OF LAND MANAGEMENT, STATE OF UTAH
CONCERNING REGULATION OF MINERALS MINING AND RECLAMATION

THIS MEMORANDUM OF UNDERSTANDING, hereinafter referred to as the MOU, is entered into between the Utah Division of Oil, Gas and Mining, hereinafter called the DOGM; the USDA Forest Service, Intermountain Region, hereinafter called the USFS; and the USDI Bureau of Land Management, hereinafter called the BLM.

A. PURPOSE

The intent of this MOU is to establish and improve locatable minerals administration between DOGM, USFS, and BLM on USFS and BLM administered lands. This will be accomplished through more efficient use of agency resources and through reduction of duplicative and burdensome regulations on the mining public.

B. AUTHORIZATION

1. DOGM is authorized to regulate minerals activities in accordance with:
   a. Utah Mined Land Reclamation Act, Section 40-8-1, et. seq., Utah Code Annotated, (1953, as amended), and
   b. Utah Administrative Code, R613-001 thru R613-005.
2. USFS administers proposals for locatable mineral operations under the 36 CFR 228, Subpart A regulations.
3. BLM is authorized under acts of Congress, the 43 CFR 3802 and the 43 CFR 3809 regulations.

C. REQUIREMENTS FOR MOU

The Director, DOGM; the Regional Forester, USFS; and the Utah State Director, BLM, affirm that they will comply with all of the provisions of this MOU and will continue to meet all of the conditions and requirements specified in this document. Nothing in this MOU should be construed as allowing abrogation of the authority of DOGM, USFS, and BLM.

To the extent authorized and practicable, all provisions of this MOU will be conducted with consideration for (1) multiple use and sustained yield of resources and environmental integrity, protection and enhancement; (2) all program activities of the agencies involved; and (3) consistency with State, local and Federal land use plans and zoning ordinances, so long as the rights granted under the mining laws are preserved.

D. DEFINITIONS

1. Authorized- Officer - DOGM, USFS, or BLM employee having the Line Authority to review and accept a Notice of Intent or approve a Plan of Operations.

2. Bureau of Land Management Lands - Land areas administered by the BLM.

3. Compliance Enforcement - Activities which pursue administrative and legal remedies for violations of provisions of accepted notices or approved plans and bond forfeiture in accordance with an agency's applicable laws and regulations.

4. Cooperating Agency - That agency which cooperates with and assists the lead agency.

5. Exploration and Mining Operations - Those mineral related activities requiring a Plan or Notice within the jurisdiction of DOGM, USFS, and BLM, and in accordance with DOGM statute and rules, UCA 40-8-1 et seq., UAC R613-100 thru R613-005, USFS regulations 36 CFR 228.3(a), and BLM regulations 43 CFR 3802 and 43 CFR 3809.

6. Land Affected - Surface and subsurface of an area within the state where mining operations are being or will be conducted, including, but not limited to: (a) land excavations; (b) exploration sites; (c) drill sites or workings; (d) refuse banks or spoil piles; (e) evaporation or settling ponds; (f) stockpiles; (g) leaching dumps; (h) placer areas; (i) tailings ponds or dumps; (j) work, parking, storage, or waste discharge areas, structures, and facilities.

7. Land Managing Agency - The agency responsible for the management of that surface land. For the purposes of this agreement, the Forest Service and BLM are the "land managing agency" on those lands each administers.

8. Large Mining Operations (LMO) - Mining operations which have a disturbed area of more than five surface acres at any time. For BLM or USFS, this will require the filing of a Plan. For DOGM this will require filing a Notice of Large Mining Operation, or equivalent Plan.

9. Lead Agency - That agency which accepts lead responsibility for management of a Notice of Intent or Plan of Operations.

10. Locatable Minerals - All "valuable mineral deposits" are locatable under the General Mining Law of 1872, except those specifically excluded by the Leasable and Salable mineral acts.

11. Mineral Related Activities - Activities conducted by an operator, relating to the exploration, and/or development of locatable minerals, and the reclamation of surface disturbance caused by such exploration and development.

12. National Forest System Lands - Land areas administered by the U.S. Forest Service.

13. Notice of Intent (Notice - BLM/USFS)/(SMO or LMO - DOGM) or Plan of Operation (Plan) - Formal notification that requires review and acceptance or approval (as indicated below) to conduct operations, including reclamation on Federal lands.

USFS/BLM/DOGM SMO Notice: requires acknowledgement but does not require a reclamation surety.

USFS/BLM Plan/DOGM LMO Notice: requires approval by the authorized officer. A reclamation surety is usually required.

14. Off-site Activities - All mining related activities including access from private ways, roads and railroads that are conducted outside the boundaries of the area defined as "land affected" by a mining operation.

15. Reclamation - Procedures and standards that will be conducted, where applicable, in accordance with UCA 40-8-1 et seq., UAC R613-100 thru R613-005, 36 CFR 228.8 (g), 43 CFR 3802.3-2(h) and 43 CFR 3809.1-1.

16. Small Mining Operations (SMO) - Mining operations which have a disturbed area of five or less surface acres at any time. For BLM, this will usually require the filing of a Notice. For USFS, this may require filing of a Notice or Plan. For DOGM, this will require filing a Notice of Small Mining Operation, or equivalent Notice or Plan.

E. LEAD AGENCY

1. For operations on National Forest System lands, USFS will be the lead agency, and its Authorized Officer will be the lead agent.

2. For operations on Bureau of Land Management lands, BLM will be the lead agency, and its Authorized Officer will be the lead agent.

3. For operations on state trust lands, fee lands, other state-owned lands, and federal minerals within Stockraising Homestead lands, DOGM will be the lead agency and its Authorized Officer will be the lead agent.

4. Where the agency with surface management jurisdiction agrees, DOGM may act as lead agent, irrespective of parts 1 or 2, above.

F. NOTICES AND PLANS

1. The lead agency will:

a. Upon receipt of a BLM Notice or Plan, or a Forest Service Plan, submit copies to the cooperating agency. The time frame for agency review of the Notice or Plan and response to the operator, will begin upon receipt of the Notice or Plan by the lead agency. All responses to the operator will be coordinated through the lead agency.

b. Upon receipt of and prior to approval of, the Plan/LMO, or any revision thereof, give due consideration to timely comments from the cooperating agency. The lead agency will proceed independently in processing the Plan/LMO, if the cooperating agency cannot provide comments within 30 days of the lead agency's receipt of the plan. Under extenuating circumstances, the cooperating agency may be granted an additional 20 days for comment. If the cooperating agency cannot meet this schedule, the lead agency will proceed independently in processing the plan.

c. Not allow mining operations to commence, under a Plan/LMO, until the reclamation surety is received and approved by the lead and cooperating agencies.

d. When there is disagreement between cooperating agency and lead agency, take the lead in conducting whatever meetings or negotiations are necessary to resolve the problems, including raising the problem to the directors of the agencies for resolution, if necessary. These negotiations will not restrict an agency from taking actions in accordance with its authority. If agreement cannot be reached between the agencies, the lead agency will notify the operator to work independently with the agencies.

e. Inspect for compliance with the approved Notice or Plan. This may be done with the cooperating agency.

f. Promptly notify the cooperating agency of operations not complying with the approved Notice or Plan.

g. When warranted, inform the cooperating agency of any other pertinent matters regarding the general conduct of the operation.

h. Coordinate with the cooperating agency on standards of reclamation for compliance with both State and Federal laws, rules, and regulations on mineral related activities.

2. Information received by DOGM, USFS, or BLM specifically marked "confidential" shall remain confidential in accordance with applicable laws and regulations, unless released in writing by the applicant. In the event confidential information is necessary for approval of a Notice by either the lead agency or cooperating agency, the applicant shall comply independently with the requesting agency's laws and regulations.

G. COMPLIANCE ENFORCEMENT

1. Each agency shall have the responsibility for enforcement of its applicable regulations, rules, and laws. The lead agency acts as the principal contact when working with the operator. If the cooperating or lead agency recognizes a violation of the approved Notice or Plan, that agency will contact the Authorized Officer or representative of the cooperating or lead agency and inform them of the violation. If the lead agency does not/cannot resolve the problem with the operator, the cooperating agency has the option to resolve the violation.

2. All instances of disputed or stalemated issues shall be referred to the directors of the affected agencies for resolution.

3. None of the agencies are obligated to the other agencies for personnel or expenditures of funds that are not within their appropriation or allotments.

H. RECLAMATION SURETY

1. The lead agency in cooperation with the cooperating agency, will have the responsibility to determine the reclamation standards and set the form and amount of surety required for the reclamation work.

2. If the operation is a Large Mining Operation, the form and amount of surety designated by DOGM must be approved by the Utah Board of Oil, Gas and Mining.

3. If the lead agency and cooperating agency cannot agree on the form or amount of surety, the operator shall post additional surety covering the difference with the agency requiring the larger amount.

4. In the event one agency finds it necessary to make a claim against a surety being held by the other, the agency holding the surety agrees to take collection action, to the extent provided by its laws and rules or regulations.

5. If a surety is forfeited or relinquished, the two agencies will coordinate reclamation. It is further agreed that the agency holding the surety will act on behalf of the other agency on any matters concerning the surety, to the extent provided by its laws and rules or regulations.

6. The lead agency will assume the responsibility of receiving and holding the surety, unless otherwise agreed upon by the agencies. If the operator wants to post a surety with the lead agency, and that agency cannot accept it under its laws, rules or regulations, then by mutual agreement between the agencies, the cooperating agency can receive and hold the surety provided that it can do so within its regulatory authority.

   It is intended that DOGM will receive and hold the reclamation surety for mining operations on BLM administered land. If the surety amount calculated by the BLM exceeds that required by DOGM, the operator shall post the additional surety amount with the BLM.

7. The agency holding the surety agrees not to release the surety until the reclamation work required by the Notice/Plan has been completed in a manner satisfactory to both agencies, as documented in writing.

8. Reclamation sureties for operations over 5 acres of surface disturbance, will be issued jointly, in the name of the State of Utah, Division of Oil, Gas and Mining, and the respective Federal land managing agency (U.S. Department of the Interior, BLM, and/or U.S. Department of Agriculture, USFS).

I. LIMITATIONS

This agreement is not intended to waive or otherwise limit any Federal or State laws, rules, or regulations, or any other requirements or duties under such laws, rules, or regulations. All operators shall fully comply with all applicable Federal and State laws, rules, and regulations pertaining to exploration, mining and related reclamation.

J. COORDINATION

The agencies will promptly inform the other parties to the MOU of any new or possibly heretofore unknown mineral related activities that will involve the lead or cooperating agency(ies). Each agency will promptly inform the other parties to the MOU of any changes in rulemaking and policy.

K. EFFECTIVE DATE

This MOU shall become effective upon signature by the Director of DOGM, Regional Forester for the Intermountain Region of the Forest Service, and Utah State Director for the BLM, and will remain in force unless formally terminated by any agency after 60 days written notice to the other agencies of its intention to do so.

In the event the agreement is terminated, each agency agrees to maintain the existing sureties until such time as an agreement can be reached between the operator, DOGM, and USFS, or BLM to replace or release the surety.

L. AMENDMENTS

Amendments to this agreement may be proposed at any time by any party to the agreement and shall become effective upon written approval by all parties to the agreement.

IN WITNESS WHEREOF, the parties have executed the Memorandum of Understanding in triplicate originals, on this 9th day of September, 1989.

for Robert A. Joslin
Regional Forester
Intermountain Region
U.S. Forest Service

Dianne R. Nielson
Director
Division of Oil, Gas and Mining
State of Utah

James M. Parker
Director
Utah State Office
U.S. Bureau of Land Management

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