

Editor's note: Reconsideration denied by order dated July 19, 1995

DOUGLAS DITTO

IBLA 94-894

Decided May 17, 1995

Appeal from a decision of the California State Office, Bureau of Land Management, affirming a notice of noncompliance requiring removal of personal property from and reclamation of the site of a mining claim. CAMC 262657.

Affirmed.

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

BLM properly issues a notice of noncompliance under 43 CFR 3809.3-2 and requires removal of personal property from a mining claim and reclamation of the claim to a condition that existed prior to surface- disturbing activities when a mining claimant constructs a road before filing a notice under 43 CFR 3809.1-3 and causes unnecessary and undue degradation.

APPEARANCES: Douglas Ditto, pro se; Robert M. Anderson, Deputy State Director, Mineral Resources, Bureau of Land Management, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Douglas Ditto has appealed the August 22, 1994, decision of the California State Office, Bureau of Land Management (BLM), affirming the June 8, 1994, notice of noncompliance issued by BLM's Palm Springs-South Coast Resource Area Manager in connection with Ditto's mining claim located in the NE¼, sec. 32, T. 4 S., R. 4 W., San Bernardino Base Meridian, west of Perris, California, in Riverside County.

The June 8, 1994, notice of noncompliance states in part:

[T]his agency finds you in noncompliance with * * * 43 CFR 3809.1-3 and [43 U.S.C. 1732(b) (1988)] in that you have used heavy equipment to create surface disturbance on your * * * mining claim * * * without notification to this office or authorization by this office. * * * You have removed vegetation to create a trailer pad on the site. In December 1993 grading was done on the site with a frontend loader. You are occupying

public land with residential structures and ancillary facilities, certain equipment and other non-mining related materials. All in total causing unnecessary and undue degradation to the public lands.

You are hereby directed to remove all personal property (including but not limited to – trailer, vehicles, trash, septic tank, fences, toys, household goods, animals, personal property) from the claim within 30 days of receipt of this notice and to reclaim all surface disturbances to a condition that existed prior [to] surface disturbing activities. After removal of all private property and completion of reclamation you must then submit a Notice or Plan of Operations to this office as required by 43 CFR 3809.1-3 or 43 CFR 3809.1-4 if you intend to continue operations under the Mining Law of the United States. No Notice or Plan will be considered until compliance with this directive is confirmed.

BLM's August 22, 1994, decision stated that there were three legal proceedings involving Ditto's claim – (1) a mining claim contest (CACA 31302, filed by BLM in November 1993); (2) citations for destruction of natural features (see 43 CFR 8365.1-5(a)(2)) and for unauthorized use, occupancy, or development of public land (see 43 U.S.C. § 1733(g) (1988)); and (3) the notice of noncompliance issued June 8, 1994 – and that its August 22, 1994, decision concerned the third, Ditto's appeal of the notice of noncompliance to the State Director under 43 CFR 3809.4 (Decision at 2). BLM's decision states:

Your most recent mining notice on record in the Palm Springs Resource Area, dated May 18, 1990, states: "I have never stated to you or to anyone that I intend to occupy the claim." You continue, "I didn't disturb or use any equipment on my claim [–] only shovels, picks and handtools. At the time I develop my mine property to the point of full time operation, I will send a plan of operation."

Site inspections conducted by the Resource Area staff have documented, contrary to your stated intentions, that the site is being occupied, and that holes were dug and trailer pads leveled using mechanized equipment. You have not submitted an updated Notice or Plan, that would describe this increased activity on the Lucky Seven claim.

From the evidence in the record it appears that you are causing unnecessary or undue degradation to the public land. Accordingly, I concur with and affirm the Area Manager's decision instructing you to remove all personal property and reclaim the site. [Y]our request for a stay from the Area Manager's NON is

denied because of the continuing unnecessary and undue degradation on the Lucky Seven mining claim. [Emphasis in original.]

(Decision at 3).

Ditto filed a notice of appeal and an accompanying petition for stay of BLM's decision. See 43 CFR 4.21(a). In it he stated:

The storage trailer has been in place on the Lucky-7 Mining Claim since 1989 due to high theft in that area. * * * Family and friends have been helping to convert [the] storage trailer to office and first aid station. * * * I have discovered a few veins on the Lucky-7, that will be worth filing a plan of operation * * * and take underground classes that OSHA requires for mining operations. I have been on workman comp. since January 1993 for a torn tendon in my right shoulder. I have been restricted more than normal with this injury. * * * I have sent a plan of operation notice to BLM stating, full time mining, starting the month of September, 1993 with petition for stay and appeal CACA 31302 3920-A. I gave plenty of notice to Mr. [Schuster] ([BLM] geologist) on what I was planning in my operations. He just will not communicate with me. He just keeps me flooded with rules and regulation[s], plus paints wrong pictures pertaining to my claim. * * * I'm now looking for someone who is qualified to help me in putting together, and submitting a plan of operation to conform and cause little as possible disturbance in this area surrounding the Lucky-7 Mining-Claim. * * * I will file a plan of operations and reclamation very soon. * * * I have had a lot of set backs in pursuit of discovery and extraction of ore from these discovery's. The continuous harassment and charges I have received from Mr. Schuster (geologist) has cost me a lot of time in putting together a Notice or plan of operations * * *. I have lost a lot of time because of lack of money and an injury to my right shoulder * * *.

(Notice of Appeal and Request for Stay dated Sept. 14, 1994, at 3-4).

Because the record was unclear about the name and serial number of the claim, we stayed the effect of BLM's decision and requested BLM to file a response to appellant's notice of appeal and petition by order dated November 10, 1994. BLM responded on December 12, 1994. 1/ Ditto

1/ When originally located in 1989, the Lucky Seven claim bore serial number CAMC 222272. It was relocated in 1994 and given serial number CAMC 262657. "Restaking and refiling a new claim on the same property does not alter the fact that Mr. Ditto caused surface disturbing activities using earth moving equipment on the claim without filing a notice or

filed replies to BLM on January 11 and 13, 1995. On February 2, 1995, BLM filed a copy of the January 5, 1995, decision by Administrative Law Judge Ramon M. Child in United States of America v. Ditto, the contest filed by BLM against appellant charging that his occupancy of the claim constituted unnecessary and undue degradation of the land and was in violation of 30 U.S.C. § 612 (1988). ^{2/} BLM suggested "possible case consolidation" of this decision because it "involved the same issues."

Ditto did not appeal Judge Child's decision, so we do not have jurisdiction over an appeal from it that we could consolidate with his appeal of BLM's August 22, 1994, decision. We may, however, take official notice of Judge Child's decision and of the transcript of the May 23, 1994, hearing in that contest, which BLM submitted along with the administrative record for this appeal. See 43 CFR 4.24(b).

[1] BLM's June 8, 1994, notice stated appellant was not in compliance with 43 CFR 3809.1-3. That regulation requires an operator whose operations cause 5 acres or less of cumulative surface disturbance in a calendar year to "notify the authorized officer in the District office of [BLM] having jurisdiction over the land in which the claim(s) or project area is located." Notice must be given before operations commence. Karry D. Klump, 123 IBLA 377, 380 (1992). Operations means all functions, work, facilities, and activities in connection with prospecting, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws and all other uses reasonably incident thereto, whether on a mining claim or not, including but not limited to the construction of roads across Federal lands. 43 CFR 3809.0-5(f).

Failure to file a notice under section 3809.1-3 subjects the operator to a notice of noncompliance or injunction by court order. 43 CFR 3809.3-2. "The operator shall also be responsible to reclaim operations conducted * * * prior to the filing of a required notice." Id. Reclamation means taking such reasonable measures as will prevent unnecessary or undue degradation of Federal lands, including reshaping land disturbed by operations to an appropriate contour and, where necessary, revegetating disturbed areas so as to provide a diverse vegetative cover. 43 CFR 3809.0-5(j). Unnecessary or undue degradation means surface disturbance

fn. 1 (continued)

plan with BLM in violation of 43 CFR 3809" (Letter of Dec. 6, 1994, from Robert M. Anderson, Deputy State Director, BLM, filed Dec. 12, 1994).

^{2/} 30 U.S.C. § 612(a) (1988) provides: "Any mining claim hereafter 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."

greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses. 43 CFR 3809.0-5(k).

BLM's June 8 notice also stated appellant was not in compliance with 43 U.S.C. § 1732(b) (1988). That statute requires the Secretary to take any action necessary to prevent unnecessary or undue degradation of public lands. BLM properly issues a notice of noncompliance under 43 CFR 3809.3-2 when the evidence shows an operator has failed to prevent unnecessary or undue degradation. B. K. Lowndes, 113 IBLA 321, 325 (1990). When a party appeals from a BLM determination affirming a notice of noncompliance, it is the obligation of the appellant to show that the determination is incorrect. Id.

The record in this case adequately supports BLM's notice of noncompliance and its August 22, 1994, decision affirming it. Photographs submitted by appellant in May 1990 show the trailer he moved onto the claim on undisturbed ground. Photographs accompanying a February 5, 1991, mineral report prepared by BLM geologist Frederick P. Schuster show the interior of the trailer in disrepair. A report by BLM ranger Mark Chandler states that on December 27, 1993, a front-end loader created a road 14 feet wide by 500 feet long that ends in a circle approximately 30 feet in diameter. The depth ranges from a few inches to 7 feet where the hillside was cut out.

At the contest hearing, which was held before BLM issued the notice of noncompliance, BLM geologist Schuster introduced photographs taken on May 19, 1994, showing the trailer located on an area of dirt cleared of vegetation and surrounded with black plastic bags, a tricycle, and various household effects. See May 23, 1994, Transcript of Proceedings in United States of America v. Douglas Ditto, CACA 31302, at 10, 11. Pictures taken by Schuster in April 1994 show a picnic table, chair, and a barbecue grill. Id. at 13. Another picture taken May 19, 1994, shows a Volkswagen without an engine. Id. at 17, 22. Photograph G-3K shows where the front-end loader removed part of the hillside. Id. at 18, 26. Schuster testified that no plan of operations or notice was filed with BLM before the trailer was moved onto the land. Id. at 8. In his January 5, 1995, decision Judge Child found that "[t]he presence of the trailer, non-operating automobiles, and other debris on the subject claim constitutes unnecessary or undue degradation * * * [that] should be removed from the surface of the subject claim" (Jan. 5, 1995, Decision at 5). 3/

3/ Judge Child also found: "The undisputed evidence shows that contestee has engaged in little or no prospecting, mining, or processing activity on the subject claim. There is no evidence to show that the trailer, nonoperating automobiles, and other debris are being used for purposes reasonably incident to such activity." Id. at 3-4.

We conclude that the evidence of constructing a road before filing a notice and of causing unnecessary and undue degradation of public lands supports BLM's June 8, 1994, notice of noncompliance, and that appellant has not shown error in BLM's August 22, 1994, decision affirming that notice. We also conclude that BLM's requirement that appellant remove all personal property from the claim and reclaim all surface disturbances to a condition that existed prior to surface-disturbing activities is authorized by the regulations and is reasonable under the circumstances. 43 CFR 3809.2-3, 3809.0-5(j).

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's August 22, 1994, decision is affirmed.

Will A. Irwin
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

