

GAYLE M. AND ROBERT G. HUTCHESON

IBLA 98-350

Decided September 22, 1999

Appeal from a decision of the California State Office, Bureau of Land Management, affirming a Notice of Noncompliance issued for mining operations on public land. CAMC 112216; CACA 33043.

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

When there has been an extended period of nonoperation under an approved mining plan, the Departmental regulation at 43 C.F.R. § 3809.3-7 requires a claimant to either gain written permission to maintain structures, equipment, and other facilities or remove them and reclaim the site of operations. The failure to reclaim the site of the operations after an extended period of nonoperation constitutes undue or unnecessary degradation of the public lands, and a notice of noncompliance is properly issued under 43 C.F.R. § 3809.3-2.

APPEARANCES: Gayle M. and Robert G. Hutcheson, Desert Hot Springs, California, pro sese.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Gayle M. and Robert G. Hutcheson (the Hutchesons) have appealed an April 17, 1998, decision issued by the Deputy State Director, Division of Energy and Minerals, California State Office, Bureau of Land Management (BLM), affirming a Notice of Noncompliance issued by the Area Manager, Barstow Resource Area, BLM. The Area Manager decision was based on the Hutchesons' failure to perform reclamation in the manner set out in Mining Plan of Operations CACA 33043. Mining Plan of Operations CACA 33043 had been filed to permit mining operations on the Alma No. 2 placer mining claim CAMC 112216, and concentration operations on an unidentified millsite.

The record shows that the Hutchesons filed a plan of operations for mining operations which would disturb less than 5 acres with the Barstow Resource Area Office, BLM, on October 16, 1989. ^{1/} The plan called for mining mineral material containing iron-free tungsten and gold from the Alma No. 2 claim and processing the mined material at the Hutchesons's millsite. Among other things, the Hutchesons proposed:

Repair of the wash road between the camp and the mine site, in the sand wash.

Facilities will consist of the existing house, cabin, generator shed and shop. The corral and adjacent structures are being dismantled. Useless equipment and junk are being removed, and a major equipment-junk removal plan has been activated.

* * * * *

Reclamation of all areas to be disturbed will be completed to the standard described in Subpart 3809.1-3(d) of 43 CFR, and reasonable measures will be taken to prevent unnecessary or undue degradations of Federal Lands during operations.

Responding to a BLM request, further information was supplied in a filing submitted to BLM on December 1, 1989. BLM approved the Hutchesons' plan of operation on April 5, 1990, subject to 21 written stipulations. Stipulation number 18 provides:

All operators shall maintain the site, structures, and other facilities of the operation in a safe and clean condition during any non-operating periods. The operator will be required, after an extended period of non-operation for other than seasonal operations, to remove all structures, equipment, and other facilities, and to reclaim the site of operations, unless he/she receives permission, in writing, from the authorized officer to do otherwise. For the purpose of 43 CFR 3809.3-7, an extended period of non-operation is considered to be one year.

The Hutchesons maintain several other claims and millsites in the immediate area. These claims are situated at the old Jeff Davis mine,

^{1/} Under 43 C.F.R. § 3809.1-4, approval of a mining plan of operations is required prior to commencing any operation in a California Desert Conservation Area designated as "controlled" or "limited" use area. The environmental assessment prepared for the instant mining plan, CA-068-0-60, indicates that the subject lands are considered Class L—public lands within the California Desert Conservation Area identified for limited use.

which was discovered in 1866 and worked for at least 50 years. (Jan. 20, 1997, Archeologist Report at 1.) In about 1942, an application for a desert land entry was filed for the area now covered by the Lost Springs No. 1 millsite, CAMC 20337. Gayle Hutcheson's grandfather acquired this desert land entry claim, including the then existing structures, in 1947. The desert land entry application was denied in 1978. Her grandfather then located the Lost Springs Nos. 1 and 2 millsite claims. A BLM field exam in June 1997 revealed that three of the structures maintained on the Lost Springs No. 1 millsite claim appear to date to the early 1940's and debris on the Hutchesons' claims range "in age from the 1930's into the 1990's." Id. at 1.

On July 3, 1997, the Barstow Resource Area Manager issued a Notice of Noncompliance, stating the following basis for issuance:

On May 7, 1996, an inspection of the claim by personnel of the Barstow Resource Area revealed that there has been no mining since the plan was approved and there has been no reclamation. In addition, other activities and your use of adjacent claims (Lost Springs millsites, Alma 3 and 4) reflect an absence of diligent mining and contain inoperable equipment, junk and debris.

* * * * *

Based on investigations of mine sites and a review of the mining history for the area in Burns Canyon, where your claims are filed, sufficient mineralization has never been found to support a valid discovery. [2/] The few current operations within the canyon can only be described as recreational mining or occupancy.

The Area Manager gave the Hutchesons 30 days to reclaim this site. He specifically stated that the reclamation should include:

1. Ripping and scarifying any roads you constructed under your plan of operations.
2. The clean-up and removal of inoperable equipment, junk and debris. Trash is not to be buried on-site but removed to an authorized land fill.
3. If a water well and/or septic system exists on this site they are to be reclaimed in accordance with California State regulations.

2/ The question of whether there is sufficient mineralization to support a valid discovery is not properly raised in the context of action under 43 C.F.R. § 3809.3-7, and we have not examined that issue or relied on any statement regarding the quality or quantity of mineralization on the claims.

4. Removal of personal property at "millsite."

The Hutchesons appealed the notice to the State Director.

In their appeal to the State Director, the Hutchesons argued that the "[s]tatements concerning the mining, sufficient mineralization, and reclamation (debris removal) are inaccurate." They also asserted that "there is continual mining activity associated with the subject claims," and alleged that, with respect to reclamation, "[m]any of the trenches have been filled and are returning to their natural state." They also claimed that BLM had given permission to keep the remaining equipment on the claim. Photocopies of photographs of "Buddy Ether digging trenches," BLM Geologist Kenneth S. Schulte's assay notes dated September 27, 1978, for desert land entry application C-06825 (one sample being taken from the Alma No. 2 claim), a January 31, 1959, U.S. Geological Survey report suggesting that "the land may be valuable for tungsten," photographs showing cleanup activities, and their recorded proofs of labor for the assessment years ending on September 1, 1990, 1991, and 1993 through 1997, declaring, *inter alia*, work performed on the Alma No. 2 claim were submitted in support of their allegations.

In an April 17, 1998, decision, the Deputy State Director reviewed the arguments and evidence submitted by the Hutchesons and concluded "that there has been no continuous mining and no final reclamation at this site." He observed:

The submission of documents and photos in your statement of reasons does not overcome the conclusions reached by the Manager in his Notice of Noncompliance. On the contrary, the photos show no substantial regular mining activity, and the claims appear to contain trenches, shacks, inoperable equipment and junk.

(Decision at 2.) The issuance of the Notice of Noncompliance was found to be warranted and proper.

On May 27, 1998, the Hutchesons appealed the California State Office decision, asserting in their notice of appeal that, "We feel we have sufficient evidence of mineralization to support continuation of mining efforts on the subject lands." In support of their appeal they contend that "[t]he tungsten report by your office shows a sufficient concentration for mining." In their notice of appeal they stated that a statement of reasons would be filed and that the statement of reasons would include "[a] contract for sale of white limestone deposit, plan of operation, and recent assay reports," arguing that "[u]nlike any efforts to recover tungsten the limestone deposit core drilling and excavations are clearly visible." A newly proposed plan of operations, dated June 1, 1998, was submitted in June 1998. This mining plan outlined proposed limestone extraction activities on the Limeade Nos. 1 and 2 placer claims and the

Lost Springs Nos. 1 and 2 millsite claims. No activity was described in the area of the Alma No. 2 claim. No further documents were filed in support of the Hutcheson appeal.

[1] Section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA) directs the Secretary of the Interior to take action deemed by him to be necessary to prevent unnecessary or undue degradation of the lands. 43 U.S.C. § 1732(b)(1994); see Charles S. Stoll, 137 IBLA 116, 125 (1996), and cases cited therein. This requirement was expressly recognized as applicable to the Department's administration of the Mining Law of 1872. See 43 U.S.C. § 1732(b)(1994); Fred Wilkinson, 135 IBLA 24, 25-26 (1996). The surface management regulations of 43 C.F.R. Subpart 3809 were promulgated pursuant to this authority. Arthur Farthing, 136 IBLA 70, 73 (1996); Differential Energy, 99 IBLA 225 (1987).

The regulation at 43 C.F.R. § 3809.3-7 provides that when an operator of a mine or related facility located on an unpatented mining claim or millsite has not operated the facility for an extended period of time, the Department may direct the operator to either gain written permission from the authorized officer to maintain unused structures, equipment, and other facilities, or to remove those structures, equipment, and other facilities and reclaim the site of the operations. This requirement was made a part of the Hutchesons' plan of operations in the stipulations added by BLM. Thus, if the Hutchesons failed to conduct meaningful operations pursuant to the plan of operations for a period of 1 year, there is sufficient cause for BLM to issue a notice of noncompliance. ^{3/} After conducting several investigations, BLM employees reported that they found no evidence of mining activities having been conducted pursuant to the plan of operations. Inoperable equipment and debris was observed on and near the area covered by the plan of operations. The apparent abandonment of the mining plan without having undertaken reclamation was deemed to have resulted in undue degradation of the public lands.

When there is evidence that an operator has failed to prevent undue or unnecessary degradation, BLM may issue a notice of noncompliance in the manner set out in 43 C.F.R. § 3809.3-2. A party appealing from a decision affirming the issuance of a notice of noncompliance must show that the decision is incorrect. Dale Daugherty, 139 IBLA 56, 65 (1997); Charles S. Stoll, *supra* at 126; B.K. Lowndes, 113 IBLA 321, 325 (1990).

The Hutchesons have challenged BLM's conclusion that (1) they are not diligently mining pursuant to the plan of operations and (2) the area of operations is littered with inoperable equipment and debris. A statement of reasons for appeal must point out affirmatively why the decision under appeal is in error. This requirement is not satisfied if the appellant "has merely reiterated the arguments considered by the [decisionmaker

^{3/} Stipulation No. 18 specifically states that "for the purpose of 43 CFR 3809.3-7, an extended period of nonoperation is considered to be one year."

below], as if there were no decision * * * addressing these points." See Oregon Natural Resources Council, 139 IBLA 16, 20 (1997); In Re Eastside Salvage Timber Sale, 128 IBLA 114, 116 (1993); Shell Offshore, 116 IBLA 246, 250 (1990). Therefore, the Hutchesons bear the burden of showing error in the decision they have appealed, and the decision will be affirmed if they do not make this showing. The Hutchesons must show that operations were being actively conducted pursuant to the mining plan, that the reclamation activities had been carried out when the notice was issued, or that they had received written permission from the authorized officer to maintain the remaining structures, equipment, and other facilities on the land subject to the mining plan of operations.

The record shows that at various times since approval of the Hutchesons' plan of operations BLM has investigated the site of operations and observed a lack of activity and unexplained debris. In its appeal to the State Office, the Hutchesons presented evidence that trenching was undertaken and that they had removed debris. We find no reason to doubt that the trenching was undertaken or that debris was removed from the area. However, the California State Office concluded that there had been no activity pursuant to the mining plan of operations for a period of 1 year prior to issuance of the notice of violation, that trenches remained unreclaimed, and that there was debris on the claims. The Deputy State Director's assessment of that evidence appears to be accurate. The photographs show very little activity of the type or nature described in the mining plan of operations, but do definitely show that there is "assorted junk spread over the claims." (Decision at 1.) The Geological Survey report and the BLM geologist report proffered by the claimants both predate the date of approval of the mining plan of operations, and neither supports a conclusion that there was ongoing activity pursuant to the mining plan of operations. Nothing in the proof of labor filings filed after 1991 indicated any mining activity on the Alma No. 2 claim. Finally, there is nothing in the record showing that the authorized officer gave written authorization to the Hutchesons allowing them to retain the assorted junk observed by BLM personnel on the claims. After reviewing the evidence in the record, including the documents filed by the Hutchesons in support of their appeal to the State Office and this Board, we find the Deputy State Director's determination to be reasonable and supported by the evidence.

We deem it appropriate to comment on the proposed plan of operations to extract limestone submitted in support of the appeal to this Board. This document does not answer the issues raised by the Notice of Noncompliance. We do not consider a plan to extract limestone in an area other than the Alma No. 2 claim to be a continuation of the operations outlined by the approved mining plan of operations, and the proposed plan of operations has no direct bearing on the requirement to rip and scarify roads constructed under the approved plan of operations, or the clean-up and removal of inoperable equipment, junk and debris, the reclamation of water wells and/or septic system on the site of the approved plan of operations, or the removal of personal property from the millsite. Therefore, the

Hutchesons should undertake the reclamation of the land subject to the approved plan of operations for the extraction and processing of gold and tungsten in the manner stipulated in the regulations and mining plan. Measures to ensure compliance when carrying out the proposed limestone mining operation must still be negotiated. Cf. Charles S. Stoll, supra at 125 (it is reasonable and proper for BLM to condition approval of a subsequent mining plan upon compliance with the stipulations contained in an earlier one).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

R.W. Mullen
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

