

JAY H. FRIEL

IBLA 2002-41 and 2002-266

Decided May 29, 2003

Consolidated appeals from a notice of noncompliance and cessation order issued by the Ridgecrest (California) Field Manager, Bureau of Land Management, pursuant to use and occupancy regulations. CACA-37153.

Affirmed.

1. Millsites: Generally--Mining Claims: Millsites--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

Section 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (2000), bars use of an unpatented claim located under the mining laws for any purpose other than prospecting, mining, or processing operations and uses “reasonably incident thereto.” Under the authority of 43 CFR 3715.7-1(c), BLM properly issues a notice of noncompliance requiring the removal of all personal property from a millsite claim where no minerals are being beneficiated on the site and no observable work is taking place.

2. Millsites: Generally--Mining Claims: Millsites--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

The use and occupancy regulations at 43 CFR Subpart 3715 authorize the issuance of a temporary or permanent cessation order when there is a failure to comply timely with a notice of noncompliance issued under 43 CFR 3715.7-1(c). BLM properly issues a cessation order pursuant to 43 CFR 3715.7-1(b)(ii) where the claimant has failed to comply with a previous notice of noncompliance requiring him to remove property from

a millsite and reclaim the land because his use and occupancy are not reasonably incident to mining or processing operations.

APPEARANCES: Jay H. Friel, Inyokern, California, pro se; Hector A. Villalobos, Ridgecrest Field Manager, Ridgecrest, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Jay H. Friel (appellant) has appealed a notice of noncompliance (NON) issued by the Field Manager, Ridgecrest (California) Field Office, Bureau of Land Management (BLM), dated September 25, 2001, informing him that the Airport Well millsite was not in compliance with the use and occupancy regulations at 43 CFR Subpart 3715. The Field Manager ordered appellant to remove all personal property from the public lands and reclaim the site within 90 days from the date of the decision. That appeal has been docketed as IBLA 2002-41.

Appellant has also appealed a cessation order (CO) issued by the Field Manager dated March 1, 2002, requiring him to immediately and permanently cease occupying the public lands with his “equipment, shed, tools and junk” and to remove all “personal property placed on the public lands during authorized use or occupancy under” 43 CFR Subpart 3715. That appeal has been docketed as IBLA 2002-266.

As these appeals arise from a common factual and legal background, they are hereby consolidated.

Appellant is the locator and owner of the Airport Well millsite (CACA-37153), which was located in the NE $\frac{1}{4}$, sec. 31, T. 29 S., R. 41 E., Mount Diablo Meridian, San Bernardino County, California, on August 22, 1982.^{1/} On November 2, 1982, appellant filed a plan of operations under 43 CFR 3809.1-4 (1982), in which he stated that the mill would process 15 to 20 tons of ore per week; that storage of the ore would be on the ground; that the ore would consist of tungsten from the Midnite Glow claim (which was later abandoned) and gold ore from patented claims owned by others (to be extracted on both a lease arrangement as well as a custom basis); that the plant would employ gravity concentration in conjunction with amalgamation plates when applicable; that transmission lines were in service supplying 460-volt 3-phase power; that grinding equipment would be electrically powered; and that the water supply would be from an existing well on site. Appellant estimated that his

^{1/} The BLM serial number for the Airport Well millsite case file is CAMC-66038. The BLM serial number for the occupancy case is CACA-37153.

operation would be in production by May 1983. BLM approved the plan on December 13, 1982.

On October 11, 1996, appellant filed an existing occupancy notification as required by 43 CFR 3715.4. Subsequent to an inspection of the millsite, BLM issued a NON on July 26, 1996, finding appellant in violation of 43 CFR 3809.3-2(b)(2) because his occupancy of the millsite had exceeded his authorized use, in that his “occupancy has sprawled to include a use area of 600' x 360' (4.9 acres) and includes 6 trailers, 4 of them inhabitable, two junk yards, power poles, a concrete slab, and various other facilities, with no authorization to do so.” BLM held that this “is resulting in unnecessary and undue degradation of the public lands.” The NON directed appellant to (1) submit an upgraded plan of operations; (2) provide a \$9,800 reclamation bond; (3) provide certain specified documents to verify compliance with state, county and local ordinances and rules; and (4) provide any information demonstrating his “on-going and continuous milling operations since 1982,” such as receipts for milling equipment, sales receipts for gold or other precious metals, contracts for milling of ores, or income tax records showing profits made from milling. He was given 30 days to comply.

Appellant first appealed the NON to the State Director under the provisions of 43 CFR 3809.4. The State Director affirmed the Area Manager’s order by decision dated January 6, 1997. Appellant then appealed to this Board, and, by order dated April 11, 2000, we generally affirmed BLM’s decision.

We agreed with BLM that a new plan of operations should be submitted for the claim. We noted that, although the 1982 plan of operations anticipated an average milling production of 15 to 20 tons per week, BLM’s photos of the area did not show that milling was proceeding on the claim on any substantial scale. In view of the obvious difference in the operation described in the 1982 plan and the actual operations on appellant’s millsite, we found that BLM was within its authority in requiring a new plan of operations under 43 CFR 3809.1-7(a). (Order at 2.) Finally, we agreed that, under 43 CFR 3715.4-1(b), BLM could require appellant to submit information to BLM concerning whether his operations are “reasonably incident” to mining as required by 43 CFR 3715.3-2. Id. at 4.

However, we agreed with appellant that BLM’s record did not support its implicit finding that as much as 4.9 acres had been disturbed on the millsite claim. Id. at 6. It appeared instead that appellant’s “use” of much of the site consists of nothing more than placing scrap metal there and that such “use” could be (and apparently already had been during the pendency of the appeal) ameliorated simply by moving the scrap to a central location. Id. at 7. Therefore, we set aside BLM’s decision requiring the posting of a bond covering 4.9 acres and remanded the matter for determination of an appropriate bond. Id.

Subsequent to our order, BLM inspected the site on April 26, 2000. The BLM inspector compared the site with photos taken in 1996 and noted that the site was still occupied and that, although some of the scrap had been picked up and equipment rearranged, the main trailer/residence was still there. On May 19, 2000, BLM notified appellant that a preliminary inspection of the site would be made within a week. BLM enclosed a copy of the surface occupancy regulations (43 CFR 3715) and the surface management regulations (43 CFR 3809) and requested that appellant provide a description of his milling business at the Airport Wells millsite claim within 30 days. BLM listed site-specific questions about his milling operation and requested that appellant's description include answers to these questions.^{2/} BLM informed appellant that it would begin a surface use determination report within the next 30 days.

BLM inspected the site on June 8, 2000. Appellant told the BLM inspector that he could no longer make a living milling and that he intended to move out and vacate the site. He explained that he would move his trailer within the next couple of months and all his equipment and possessions before the end of the year. Appellant's intentions were documented in a letter to BLM on June 26, 2000, in which he stated that he had reviewed the regulations and "concluded that [he is] not eligible for full time occupancy." He said that he would remove the 14-foot by 66-foot mobile home and proposed December 15, 2000, as the deadline for removal, to allow him time to prepare a building site which he had purchased. Appellant pointed out that the millsite has significant value due to improvements such as power, an 800-foot water well, potable water which is piped in from the Water District, and telephone service, but that ownership of the improvements will "take time to sort out." Appellant requested that he be allowed to continue holding the millsite under the status of "temporary suspended operations" for a few years and pay a rental fee while he continued to clean up the excessive amount of material that he had accumulated over the past 20 years. Appellant did not answer the questions BLM had posed in its May 19, 2000, letter.

BLM prepared a mineral report styled "Surface Use Determination For The Airport Well Millsite" on August 3, 2000, which was approved on October 19, 2000. In a summary on page 2 of the report, BLM offered the following information:

The Airport Well millsite claim is located on public lands as a custom or independent millsite. The claim is also the trailer residence of Mr. & Mrs. Jay Friel. In addition to Mr. Friel's trailer &

^{2/} In its May 19, 2000, letter, BLM also noted that the Board in its Apr. 11, 2000, order had disagreed with some of BLM's decision concerning the July 26, 1996, NON. BLM stated that those portions of the NON (presumably the bonding requirements) were no longer in effect.

miscellaneous equipment, the site also contains a right-of-way [LA-0164135] issued to the Randsburg Community Water District (RCWD) for a water well, storage tank & pipeline. Mr. Friel has a separate but related pipeline right-of-way [CACA-39830] to provide water to his residence. Mr. Friel purchased the water well and storage tank from the RCWD several years ago. However, neither RCWD nor Mr. Friel have amended their rights-of-way to reflect this purchase.

Mr. Friel's operation includes a small crusher, grizzly and separating table, all apparently in working order. However, there does not appear to be any large stockpiles of ore on site. Mr. Friel concedes that he is not now doing enough custom milling to meet the "Use & Occupancy" requirements of 43 CFR 3715. He proposes to remove the trailer and miscellaneous equipment from public lands by December 15, 2000. The RCWD water facilities pre-date Mr. Friel's mining claim. However, the water well and storage tank are now apparently Mr. Friel's personal property.

BLM concluded that appellant's custom milling operation does not meet the requirements of 43 CFR Subpart 3715. BLM also noted that under the interim guidance of BLM Handbook H-3890-3, a custom millsite is invalid if it has only sporadic/occasional use. (Mineral Report at 2.)

BLM noted that the RCWD right-of-way (LA-0164135) was terminated by a BLM decision on September 2, 1998, and that RCWD had been instructed to remove all improvements within 90 days. BLM pointed out that RCWD neither appealed the decision nor removed the improvements. According to BLM, it is unclear whether the electric utilities have any right-of-way authorization because the poles were originally installed to service LA-0164135 which has been terminated. (Mineral Report at 2.)

Subsequently, in its October 23, 2000, letter to appellant, BLM stated that it concurred with his determination that his operation no longer mills enough ore to qualify as a commercial business and fails to meet the standards of operation set forth at 43 CFR Subpart 3715. BLM agreed with appellant's proposal to have the trailer removed and the operation ended by December 15, 2000. BLM informed appellant that it was willing to work with him in scheduling the reclamation and removal of his property. Citing 43 CFR 3715.5-1, BLM stated that, absent written permission, appellant's personal property had to be removed from the site within 90 days from the end of any use or occupancy, and that the 90-day period would commence on December 15, 2000, the last day of occupancy for the millsite claim.

In an inspection report dated January 9, 2001, the BLM inspector noted the presence of a metal tool shed, miscellaneous junk, scrap, and an abandoned vehicle

on the site. He also noted a pig in a pigpen about 8-feet by 20-feet in size and estimated by the size of the bushes along the pigpen fence that it had been there for a long time. The inspector reported that the trailer had been removed, but that the shed, water tank, miscellaneous equipment, and scrap still remained on the site. He described the type of activity on the site as “non-operation.”

The BLM inspector returned to the site on February 5, 2001, and was told by appellant that he wanted as much time as possible to clean up the site.

On April 10, 2001, the site was inspected again. Appellant was not present. The trailer and the pig were gone, but the following items remaining on the site: A water tank, power lines, the “empty husk” of a jeep, an 8-foot by 12-foot trailer/mobile home without wheels, a compressor or engine, the remains of a truck, a mill and grizzly still connected to power, a 12-foot by 18-foot metal corrugated shed, an explosives magazine, and miscellaneous iron and steel. On June 5, 2001, and September 19, 2001, the BLM inspector reinspected the site, each time reporting that there was no change from the last visit.

On September 25, 2001, BLM issued the NON citing appellant for noncompliance with Federal regulations for failure to remove property from his millsite claim. BLM informed appellant that its last inspection showed that the site had not been cleaned up as required by 43 CFR 3715.5-1; that no minerals were being beneficiated; that no observable work was taking place; and that much of the equipment and property was not usable in a custom millsite. Therefore, BLM determined that the Airport Well millsite was not in compliance with 43 CFR 3715.2, 3715.5-1, and 3844.1. To correct the noncompliance, BLM required appellant to remove all personal property from the public lands and reclaim the site. BLM ordered the removal to begin within 30 days and to be accomplished within the next 90 days, which was approximately December 31, 2001. BLM advised appellant that, after December 31, 2001, the presence of his property at the site would be deemed and treated as an unauthorized occupancy of the public lands.

Appellant appealed the NON and order to remove property, but did not request that its effect be stayed pending appeal. See 43 CFR 4.21. Accordingly, as the site remained in noncompliance, BLM retained authority to proceed to issue the CO dated March 1, 2002, requiring him to immediately and permanently cease occupying the public lands with his personal property and to remove all “personal property placed on the public lands during authorized use or occupancy under” 43 CFR Subpart 3715. As noted above, appellant separately appealed the CO.

In his appeal from the NON, appellant reiterates that he could and would remove a substantial portion of the equipment and other unusable items stored at the millsite beginning in early November 2001. He appeals BLM’s requirement that he

remove all improvements, asserting that this will cause hardship and the destruction of \$100,000 worth of much needed improvements.^{3/} Appellant states that the millsite was his home for 20 years until BLM issued its decision that his occupancy was in violation of the regulations. He explains that during the past year his time has been divided between his work and trying to develop a new home, which is still without water or power.

BLM did not file an answer, but its transmittal letter dated October 29, 2001, directly bears on the substance of the appeal.^{4/} BLM states therein that it found no mineralization being processed at the millsite and no visible sign of any commercial operations. (Oct. 29, 2001, Letter at 2-3.) BLM points out that appellant's admission/allegation of the installation of \$100,000 worth of improvements to the public lands was an admission of his knowing and willful trespass, as none of the improvements had been authorized under Federal regulations. *Id.* at 3. BLM referred to the record, which shows that appellant was directed in the fall of 2000 to remove his personal property from the site and to have the site reclaimed by March 2001 and that appellant conceded that he does not meet the requirements of occupancy under 43 CFR Subpart 3715. BLM expressed its belief that appellant had had a more than reasonable amount of time to remove his property and reclaim the land, and that there was no need to further extend his term of occupancy or timeframe for cleanup. BLM stated that 43 CFR Subpart 3715 requires ongoing, observable, substantially regular work leading to the extraction and beneficiation of minerals using appropriate and operable equipment in an environmentally sound manner and that appellant had failed to meet this standard. According to BLM, appellant's millsite is not an independent/custom millsite because a millsite without customers cannot qualify as a custom millsite. *Id.*

[1] 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

^{3/} According to appellant, the improvements were purchased from the RCWD and included the water well, pumps, a 20,000-gallon water storage tank, and access to the 460-volt 3-phase power grid. He states also that he added the "City" water system and phone and septic systems.

^{4/} In connection with his appeal from the CO, appellant asserts that he has been denied due process because he was not initially served with that letter. However, we served a copy of the Oct. 29, 2001, letter on appellant and allowed him an opportunity to respond. He has not shown that he has been prejudiced by the delay in receiving a copy of the letter. See *Red Thunder, Inc.*, 117 IBLA 167, 172-73, 97 I.D. 263, 266 (1990). Accordingly, the initial failure to serve the letter is without legal consequence.

thereto.” The Department promulgated 43 CFR Subpart 3715 to implement that statutory provision and to address the unlawful use and occupancy of unpatented mining claims or millsites for non-mining purposes. Those regulations provide restrictions on the use and occupancy of public lands administered by BLM that are open to the operation of the mining laws, limiting such use and occupancy to prospecting or exploration, mining, or processing operations and reasonably incidental uses. The regulations clarify that unauthorized uses and occupancies on public lands are illegal uses that ipso facto constitute “unnecessary or undue degradation of public lands,” which degradation the Department is mandated by law to prevent. Firestone Mining Industries, Inc., 150 IBLA 104, 109 (1999). ^{5/}

In its September 25, 2001, NON, BLM stated that the millsite was not in compliance with 43 CFR 3715.2, which provides:

What activities do I have to be engaged in to allow me to occupy the public lands?

In order to occupy the public lands under the mining laws for more than 14 calendar days in any 90-day period within a 25-mile radius of the initially occupied site, you must be engaged in certain activities. Those activities that are the reason for your occupancy 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 § 3715.7; and
- (e) Use appropriate equipment that is presently operable, subject to the need for reasonable assembly, maintenance, repair or fabrication of replacement parts.

The regulations define “reasonably incident” as “prospecting, mining, or processing operations and uses reasonably incident thereto.” 43 CFR 3715.0-5, citing 30 U.S.C. § 612 (2000). The term “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, using methods, structures, and

^{5/} The preamble explains that “unnecessary or undue degradation,” within the meaning of those regulations, includes uses not authorized by law, specifically including those activities that are not “reasonably incident” and are not authorized under any other applicable law or regulation. 61 FR 37118 (July 16, 1996); see also Firestone Mining Industries, Inc., 150 IBLA at 109 n.5.

equipment appropriate to the geological terrain, mineral deposit, and stage of development and reasonably related activities.” Id.

BLM also cited 43 CFR 3715.5-1, which provides:

What standards apply to ending my use or occupancy?

Unless BLM expressly allows them in writing to remain on the public lands, you must remove all permanent structures, temporary structures, material, equipment, or other personal property placed on the public lands during authorized use or occupancy under this subpart. You have 90 days after your operations end to remove these items. If BLM concurs in writing, this provision will not apply to seasonal operations that are temporarily suspended for less than one year and expected to continue during the next operating season or to operations that are suspended for no longer than one year due to market or labor conditions.

Finally, BLM cited 43 CFR 3844.1, which provides:

A millsite is required to be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode or placer claim with which it is associated. A custom or independent millsite may be located for the erection and maintenance of a quartz mill or reduction works.

We agree with BLM that appellant is not in compliance with 43 CFR 3715.2. Review of the case file reveals that appellant has admittedly not been engaged in milling activities. His plan of operations submitted in 1982 stated that the mill would process 15 to 20 tons of ore per week, but the inspection reports repeatedly failed to document that such activity occurred in recent years. BLM’s May 19, 2000, letter gave appellant an opportunity to show BLM that he had a legitimate custom milling operation by responding to specific questions relating to his use and occupancy of the millsite. In his response filed on June 26, 2000, appellant admitted that he was not eligible for full time occupancy and, although he indicated that he was still doing some custom milling, did not supply any of the information requested by BLM that would corroborate that the site was still in use. Instead, he stated that he wished to “continue holding” the millsite in his name under the status of “temporary suspended operations” and requested more time to clean up the site.

We find that appellant’s activities on the millsite claim are not “reasonably incident” to prospecting, mining, or processing operations within the meaning of 43 CFR 3715.0-5. See also 43 CFR 3844.1. Appellant has made no showing that the

water tank, shed, explosives bunker, water well and assorted junk present on the site are “reasonably incident” to processing operations as required for a millsite by 43 CFR 3715.2(a). See John B. Nelson, 158 IBLA 370, 378 (2003). Other than his uncorroborated assertion that he operated the millsite as a custom mill “with diligence for years” for small local miners (see Mar. 20, 2002, notice of appeal from CO), appellant has presented no evidence that he has done anything on the millsite with respect to “processing operations and uses reasonably incident thereto.”

[2] In the event of noncompliance, BLM may either order a claimant to cease (temporarily or permanently) all or any part of his use or occupancy (43 CFR 3715.7-1(b)) or issue a NON requiring corrective action. 43 CFR 3715.7-1(c). The extent of permissible occupancy is directly related to the extent of processing activity conducted on a millsite claim: The structures and equipment maintained on site must be related to and commensurate with the operations. John B. Nelson, 158 IBLA at 379; David E. Pierce, 153 IBLA 348, 358 (2000); Bradshaw Industries, 152 IBLA 57, 63 (2000). That rule is consistent with the requirements that occupancy must constitute substantially regular work (43 CFR 3715.2(b)), that it be reasonably calculated to lead to the beneficiation of minerals (43 CFR 3715.2(c)), and that it involve observable on-the-ground activity that BLM may verify under 43 CFR 3715.2(d) and 3715.7. In view of the absence of processing activity on this millsite, the presence of the structures and items found on the site is not justified, and BLM properly directed appellant to remove his equipment from the site. 43 CFR 3715.5-1; John B. Nelson, 158 IBLA at 379. Its decisions issuing the NON and CO are both well founded in the law and must be affirmed.

As to the issuance of the CO, we note that, since items remained on the site beyond December 31, 2001, appellant failed to comply with the NON. The use and occupancy regulations authorize the issuance of a temporary or permanent CO when there is a failure to comply timely with a NON issued under 43 CFR 3715.7-1(c). 43 CFR 3715.7-1(b)(ii); Firestone Mining Industries, Inc., 150 IBLA at 111. Therefore, BLM’s CO was properly issued.

We note that BLM also advised appellant in the context of the CO that it intended to request discontinuance of electrical service to this site and, apparently, to require removal of power poles crossing the public lands in the near future. Although appellant has objected to that portion of the CO, his objections are premature since BLM has not yet issued an order to remove the poles.

Appellant contends that it is impossible to remove all his property from the millsite by April 1, 2002. However, based on his previous actions on this claim, it

appears that appellant is simply seeking permission to remain on the site indefinitely. This is confirmed by his letters to BLM dated March 18, 2002, and October 10, 2001, in which he states his desire to continue use of the site, as a property that he had developed, for essentially personal use. The mining laws of the United States do not and were never intended to provide homesites for personal uses of Federal lands. Appellant requested in his supporting documents for both appeals that he be allowed to rent, lease, or purchase the property, or exchange other property for it, in order to maintain occupancy at the site. Any such special use would have to be authorized by BLM and may not be implemented by this Board in the context of the present appeal.

BLM has already given appellant more than sufficient time to remove his property since it began enforcement action against him. In its letters of October 23, 2000, and January 10, 2001, BLM set March 15, 2001, as the deadline for removing his property and reclaiming the site. The September 25, 2001, notice of noncompliance extended the time for compliance to December 31, 2001. On that date appellant's authorization to use and occupy the millsite ended, with appellant having received more than sufficient time in which to comply.

Appellant repeatedly complains about the costs to him of abandoning the site. Since BLM has correctly ruled that he is not authorized to reside on his claim, it seems clear to us that the loss of any financial investment he has made in improving the site for residential use must be borne by him, as must the costs of "remov[ing] all permanent structures, temporary structures, material, equipment, or other personal property placed on the public lands during authorized use or occupancy." 43 CFR 3715.5-1. That would appear to cover most of the property mentioned by BLM in its NON and CO, since it was placed on the claim during appellant's long authorized use of the claim. To the extent that he is concerned about costs of reclaiming the land and removing improvements and fixtures associated with the terminated powerline and waterline rights-of-way on the site, that question remains unanswered pending issuance of any decision by BLM under its regulations concerning removal of any of those improvements. ^{6/}

^{6/} BLM should consider the applicability of 43 CFR 3715.5-1 in any such decision.

Appellant contends that BLM's inspection of the site was an attempt to coerce him to stop his investigations of BLM's handling of a mine expansion by another company and its effect on the water supply or to retaliate against him for action taken in connection with that matter. We have previously held that these allegations were unfounded (Jay H. Friel, IBLA 97-279 (Order dated Apr. 11, 2000, at 5)) and do not revisit them now.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

David L. Hughes
Administrative Judge

I concur:

Lisa K. Hemmer
Administrative Judge