

JAMES R. MCCOLL

IBLA 99-277

Decided May 29, 2003

Appeal from decisions issuing Notice of Noncompliance and Determination of Concurrence for Reclamation and Permanent Cessation Order regarding surface use and occupancy of mill sites. AZA 24456.

Affirmed in part; reversed in part.

1. Federal Land Policy and Management Act of 1976: Surface Management–Mill Sites: Generally–Mining Claims: Surface Uses --Surface Resources Act: Occupancy

BLM may properly issue a Notice of Noncompliance and Cessation Order pursuant to 43 CFR 3715.7-1 where an appellant's mill site claims are no longer valid and his continued occupancy is not reasonably incident to mining.

2. Federal Land Policy and Management Act of 1976: Surface Management–Mill Sites: Generally--Mining Claims: Surface Uses--Regulations: Interpretation--Surface Resources Act: Occupancy

The Board will not enforce an interpretation of 43 CFR 3715.5-1 and 5-2 that holds a current occupant liable for removal of structures and other materials from the public lands where the current occupant clearly establishes that the structures, etc., existed on site at the time his or her occupancy commenced, as a reasonably prudent prospective or current occupant could reasonably interpret the regulatory language to indicate that he or she is responsible for removing only structures and materials he or she placed there.

APPEARANCES: James R. McColl, Tonopah, Arizona, pro se; Richard R. Greenfield, Esq., U.S. Department of the Interior, Office of the Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

This appeal involves two decisions issued on March 16, 1999, by the Phoenix, Arizona, Field Office, Bureau of Land Management (BLM), pertaining to James R. McColl's continued occupancy of 12 contiguous mill site claims^{1/} which, by 1999, had been declared invalid.^{2/} One decision was styled simply a Notice of Noncompliance with the provisions of 43 CFR Subpart 3715 (Notice Decision), while the other was styled a "Determination of Concurrence for Reclamation and Permanent Cessation Order" (Concurrence Decision). A chronology of events pertaining to McColl's appeal is set forth below.

In 1988, McColl filed a BLM standard form mining notice under 43 CFR 3809.1-3 (1998),^{3/} which BLM serialized as AZA 24456, indicating that he intended to use abandoned facilities and structures located on a previously disturbed mill site area in order to "establish a pilot processing facility, consisting of two power sources, one 10 ft. x 10 ft. gas fired roaster, one 10 in. x 55 ft. gas fired dryer, one 3 ft. x 4 ft. grinding circuit (Ball Mill), one 6 ft. thickener, one 3 ft. Eimco drum filter, 4 agitation tanks and one 500 lb. tilt furnace (smelter)." (Mining Notice filed November 15, 1988, Item 3.) The mining notice was a form notice printed on BLM letterhead, consisting of a list of six items or questions for the mining operator to explain or

^{1/} The mill sites, the Base No. 1 through Base No. 12, were serialized as AMC 277888 through 277899, and are located in secs. 7 and 8, T. 3 N., R. 7 W., Gila & Salt River Base Meridian, Maricopa County, Arizona, next to the Hummingbird Springs Wilderness Area. The mill site claims were located in 1987 by Larry Dietz, from whom McColl acquired them in 1988.

^{2/} The mill sites were declared invalid by operation of law for failure to pay the annual claim maintenance fee due on or before Aug. 31, 1994. (Answer at 4; see also Exhibit (Ex.) D to Answer.)

^{3/} All references to the Code of Federal Regulations (CFR) set forth in this decision pertain to the 1998 edition, which was in effect at the time the decisions appealed from were issued. Subpart 3809 has since been revised extensively, including conversion to "plain English" and a question-and-answer format. 66 FR 54860 (Oct. 20, 2001); 65 FR 70112 (Nov. 21, 2000). At the time the decisions were issued, the provision requiring the filing of a mining notice with BLM for mining or milling operations disturbing 5 acres or less during any calendar year appeared as 43 CFR 3809.1-3. That specific provision remains in effect, but its requirements are now set forth in 43 CFR 3809.21 and 3809.300 through 3809.336 (2002).

answer. In further response to Item 3 of the notice, inquiring as to “activities proposed, type of equipment to be used, and total surface area to be disturbed,” McColl responded: “The purpose of the pilot facility is to test ore materials from associated lode and placer claims and develop a satisfactory commercial process for the recovery of precious and strategic elements contained therein.” McColl did not provide an acreage figure, but attached a handwritten addendum to the notice stating:

The location of proposed activities is at a location of a previously disturbed area. Existing (previously abandoned) facilities include:

1. One 30 ft. x 40 ft. wood & steel framed, two story metal clad building.
2. One two thousand ton capacity, steel constructed ore-bin.
3. Several concrete slabs, used by previous operator as m[a]chine bas[es].
4. One 75 ft. x 350 ft. plastic lined tailings pond, with an associated check dam.
5. Three developed water wells, one presently operating.

(Attachment to Mining Notice filed November 15, 1988, emphasis in red ink in the original.) The attachment further stated: “In addition to the for[e]going there are existing roads and a substan[t]ially large service and parking, storage area (developed by previous operator) which is contained by a five foot b[e]rm around the entire area. N.B. There will not be any new disturbance outside the area previously disturbed.” Id.

The same surface area, amounting to five acres, had been disturbed by Sierra Amarillo Mining Company (Sierra) as a result of a lead and silver mining operation. (BLM Answer at 3-4; see also Exs. A and M to Answer.) According to an Affidavit submitted to the Board by BLM employee James A. Hutchison, BLM records indicate that Sierra had submitted a plan of operations under 43 CFR Subpart 3809 on August 26, 1983, to mine “2,000 tons per day of lead/silver ore * * * on [nearby] lode mining claims * * *.” (Hutchison Affidavit at Ex. M to Answer, at 2.) Among other things, the plan required BLM’s approval, 43 CFR 3802.1-5 (1982), and should have included “environmental protection and reclamation measures,” 43 CFR 3802.1 (1982).

According to Hutchison, Sierra was to process the ore on a mill site located on portions of sections 7 and 8, T. 3 N., R. 7 W., G&SRM, identified as the Hope mill site (AMC 201894). The Plan listed for the mill site: 70 Humphrey spirals, one dryer plant, one crushing plant, and two trailers. The Plan was approved, based on BLM records, on September 27, 1983.” (Hutchison Affidavit at Ex. M to Answer, at 2.) Id. Hutchison stated that “[t]he file was closed on July 3, 1986[,] according to a letter in BLM’s file indicating that the operations had been abandoned and the company, (i.e., Sierra Amarillo) dissolved. The Hope mill site was declared void on May 12, 1986.” Id. at 3. Hutchison averred that he was “unable to find any inspection reports related to the Sierra Amarillo operation included in BLM’s file, except for two short notations indicating an overflight on September 25, 1987 and an on-site inspection on November 5, 1987,” after the file was closed. Id. If a reclamation bond was furnished by Sierra as required by 43 CFR 3802.2 (1982), BLM obviously failed to secure reclamation before Sierra abandoned its operations and dissolved. Hutchison averred that BLM records indicate that McColl’s “now-invalid mill site claims * * * (AMC-277888 to 277899) had been located on December 5, 1987, by one Larry Dietz, but were subsequently transferred on March 11, 1988 to James R. McColl.” Id. According to Hutchison’s affidavit, McColl’s mining notice encompassed the same area disturbed by Sierra. Id.

Returning to McColl’s mining notice, Item 5 consisted of the following standard form language: “I will complete reclamation of all disturbed sites during my operations in accordance with 43 CFR 3809.1-3(d) and all reasonable measures will be taken to prevent unnecessary or undue degradation of the Federal lands during operations.”^{4/} (Emphasis supplied.) Item 6 consisted of a request for an estimated completion date, in response to which McColl inserted “July 1989,” and the printed statement that “43 CFR 3809.1-3(d)(5) requires that when reclamation is completed, the authorized BLM officer shall be notified so an inspection can be made.”

By letter dated December 5, 1988, the BLM Area Manager acknowledged receipt of the mining notice. Among other things, the letter cautioned McColl that “the area should be kept clean of all trash, garbage, and non-mining related equipment and materials,” and referred to requirements imposed by regulations in 43 CFR Subpart 3809 governing surface management: “I would like to stress that portion of the 3809 Surface Management Regulations which requires that you reclaim the land and to [sic] take reasonable measures to prevent unnecessary or undue degradation of the federal lands during your operations.” (Ex. B to Answer; emphasis added.) Apart from this statement, BLM’s letter did not suggest or explain that McColl would be held responsible for reclaiming Sierra’s disturbance, as well as

^{4/} All operators filing mining notices are required by 43 CFR 3809.1-3(c)(4) to certify that they will complete reclamation “of all areas disturbed” and protect against unnecessary and undue degradation of the public lands “during operations.”

his own, and McColl apparently did not inquire as to the nature and extent of his obligation to reclaim the site.

On July 31, 1990, BLM inspected the site and in a letter to McColl dated August 16, 1990, commented that McColl had brought a “significant amount of equipment to the premises without any site development as yet.” That letter also stated: “[Yo]u may be required, after an extended period of non-operation to remove all structures, equipment and other facilities and reclaim the site.” (Answer at 4; see also Ex. C to Answer.) This statement is the first communication from BLM to McColl that could possibly be interpreted as a suggestion that McColl’s reclamation responsibilities could extend to Sierra’s structures and disturbance, but is far from clear in light of the subject and genesis of the letter, which was the equipment brought to the site by McColl.

BLM next inspected the site on November 16, 1994. As a result of that inspection, appellant was directed to resolve certain conditions to prevent unnecessary or undue degradation of the public lands, including, among other things, removing and disposing of “all household trash and junk dumped into the dry wash on the East side of the residential trailer;” removing and disposing of the “old disabled automobiles and the bus stored on site;” removing all “non mining related equipment from your millsite;” labeling “all containers with content labels according to standard industry practices;” storing “all containers in such fashion that will protect and prevent deterioration of the containers, contents, and labels;” and “recontaineriz[ing] all materials including mineral material concentrates that are presently in deteriorated containers such as 55 gallon drums.” (Ex. E to Answer.)

When BLM inspected the site on November 17, 1998, it found no measurable improvement, although the residential trailer had apparently been removed. (Ex. F to Answer.) This inspection report noted that the site was behind a locked gate, with public access provided “around the west side of the mill site.” The report continued:

There are signs posted warning against poisonous chemicals and a no Trespassing sign.

The site of the old residence is quite trashy. Immediately adjacent to and to the west is a dump situated in a drainage. A few feet further west are some other old structures, 55 gal drums and more trash.

Continuing on toward the mill buildings I found an abandoned van and bus. Along with numerous 55 gal drums, vats, hoppers, 5 gal pails, refrigerators, a stove, structural steel and other trash. None of the equipment appeared operational.

On the west side of the mill building there is an abandoned pickup truck, crane, mobile home, cement mixer, welder, lathe, tools, unknown dry powder chemicals and lots of junk.

On the North side of the site we found a water storage tank on top of a rubber tire berm. Off the east of this there are over 100 55 gal drums full of concentrates, dirt or some similar material.

Id. The report provided photographs supporting the inspector's statements.

At that time, the BLM inspector recommended that enforcement action under 43 CFR Subpart 3715 be initiated, as “[t]here is no mining or milling being conducted at the present time nor has there been any in the recent past.” Id. Accordingly, in January 1999, BLM sent McColl a letter in which BLM concluded that the conditions discussed in the July 1990, November 1994, and November 1998 inspections persisted. (Ex. G to Answer.) That letter, which referred to McColl’s “notice to operate these facilities,” noted that “the millsite is not in operation and has not been utilized for ore beneficiation recently.” (Letter to McColl dated January 6, 1999, at 1.) The letter informed McColl that “the structures, storage or equipment, and other portions of your operations require concurrence from the BLM to remain on public lands.” (Emphasis added.) Id. Further, it advised that to “retain these facilities,” McColl was required to demonstrate that they were reasonably incident to mining activities, and to provide an “estimated period of use of these facilities and a schedule for removal and reclamation when operations end.” Id. at 2. Confusingly, however, the letter also stated that “[s]ince there has been no observable use of the facilities, the mill sites have been abandoned, and you have not made the appropriate submission of information pursuant to 43 CFR 3715, we believe that the facilities may be abandoned.” Id. BLM accordingly cautioned that if McColl abandoned the mill sites without reclaiming them, pursuant to 43 CFR 3715.5-2, he would be liable for BLM’s costs in doing so, and, if he had not abandoned the mill sites, again instructed McColl to submit the requested information to BLM pursuant to 43 CFR 3715.3-2.^{5/} There is no record in the file showing that McColl responded to this letter.

^{5/} BLM’s letter actually referred to 43 CFR 3715.2-3 instead of 3715.3-2. 43 CFR 3715.2-3 pertains to temporary occupancy; it does not require operators to submit specific information to BLM. 43 CFR 3715.3-2 requires mining or mill site operators to provide detailed maps of their sites, and to document how their proposed occupancy of the site is reasonably incident to mining, and to provide, among other things, the location of and reason for temporary or permanent structures, fences, gates, signs, access routes, and other appurtenances. We therefore conclude that BLM’s reference to 43 CFR 3715.2-3 in the letter is merely a typographical error.

In commenting on McColl's use of Sierra's facilities, this letter comes closer to explicitly stating that McColl had assumed Sierra's liability than previous exchanges between the parties, except the letter seems to acknowledge that McColl never really conducted operations using the facilities, and also refers to "your" operations.

BLM again inspected the site on February 2 and March 4, 1999, and concluded that little had changed. (Exs. H and I to Answer.) Thus, on March 16, 1999, BLM issued its Notice Decision alleging noncompliance with the provisions of 43 CFR Subpart 3715. (Ex. J to Answer.) Citing 43 CFR 3715.2, the Notice Decision charged that McColl's use of the public land did not constitute substantially regular work reasonably calculated to lead to the extraction and beneficiation of minerals, and that McColl was not engaged in any observable mining activities. Citing 43 CFR 3715.5(b), the Notice Decision cautioned that, in accordance with the provisions of 43 CFR Part 3800, McColl was required to conform his use to applicable state and Federal environmental standards and obtain all necessary permits. Further, the Notice Decision enumerated the particulars of McColl's noncompliance in detail.

Also on March 16, 1999, BLM issued its Concurrence Decision. (Ex. K to Answer.) That decision set forth the results of the inspection conducted on February 2, 1999, and specified four immediate actions to be taken by McColl before he commenced occupancy under the terms of the Concurrence Decision, including cessation of all mining, milling and processing operations as well as transportation of additional mineral commodities and chemicals to the site (section I). Additionally, the Concurrence Decision stated three conditions which McColl must satisfy in order to obtain BLM's concurrence, effective April 1, 1999, in a residential occupancy on the mill sites during reclamation operations (section II). It specified a deadline of 60 days from April 1, 1999, for termination of chemical storage at the site and compliance with BLM requirements regarding on-site water wells (section III), and it established a long-term reclamation schedule (section IV) assigning various dates from September 1999 through August 2000 by which certain actions were to be completed, including removal of all scrap metal, equipment and supplies and all permanent structures, as well as reclamation of all leachate ponds and recontouring and scarifying the entire site to approximate original contour, including reseeding. Lastly, the Concurrence Decision advised:

If BLM determines that the conditions in sections I, II, III, or IV have not been met, this decision will serve as a cessation order under 43 CFR 3715.7-1(b). Under this order you must cease all activities on the site, remove all remaining personal equipment and terminate your occupancy. Any property remaining on public lands 30 calendar days from the date BLM determines that you have failed to achieve the conditions of this decision may, at the discretion of BLM, become the property of the United States and will be subject to removal and

disposition by the BLM. You will be liable for the costs the BLM incurs in removing and disposing of this property (see 43 CFR 3715.5-2).

(Ex. K to Answer at unnumbered 3; emphasis added.)

On April 9, 1999, McColl appealed both decisions. In his Statement of Reasons (SOR) for appeal, McColl did not dispute that various pieces of inoperable equipment, debris, vehicles, chemicals, tailing impoundment, and mineral concentrates have been present on the mill site. Instead, he questioned BLM's characterization of some violations,^{6/} and argued that previous occupants of the land were responsible for much of the surface disturbance. Nonetheless, by letter dated April 19, 1999, McColl notified BLM that action to eliminate the conditions in sections I, II, III, and IV had commenced:

Section (I) - is in compliance

Section (II) - no watchman at present

Section (III) - Item 1. is complete; Item 2. is under study

Section (IV) - portions of this section and Section (III) are being appealed.

(Ex. L to Answer.)

In June 1999, BLM began a series of inspections of the mill sites to determine McColl's compliance with the Concurrence Decision. Inspections were conducted on June 15, 1999, September 9, 1999, May 4, 2000, June 6, 2000, August 25, 2000, October 31, 2000, February 6, 2001, June 7, 2001, October 9, 2002, and November 4, 2002.

By June 1999, McColl had removed all trash and debris from the site and land fill area as well as the drums of mineral concentrates, and had capped three of the four water wells. McColl had removed all chemicals from the "mill building, loft, and lower levels;" there was no evidence that "any processing had been occurring," and there was no new equipment on the site. (June 15, 1999, 3809/3715 Inspection

^{6/} For example, McColl asserted that it is "geologically impossible to have bulk mill tailings with a 35 percent arsenic content" (SOR at 2), and argued that the facility BLM termed a leaching facility in fact is a "gravity separation facility (Humphrey Spirals)." (SOR at 3.) Additionally, he alleged that the charge that water wells on the land were not properly registered and capped or abandoned was unfounded. Most of McColl's factual challenges are now moot, as will become evident infra.

Report,^{7/} and accompanying photographs, received by the Board on June 29, 1999.) BLM determined that, with the exception of removing two abandoned vehicles, McColl had complied with the provisions of paragraph 1 of Section IV of the Concurrence Decision, and, with the exception of capping all water wells, he had complied with Section III. On September 29, 1999, BLM documented the results of a follow-up inspection, which occurred on September 9, 1999. In this report, BLM determined that McColl had complied with all requirements of paragraph 1 of Section IV of the Concurrence Decision.

The next 3809/3715 Field Inspection Form in the record, dated May 4, 2000, covered compliance with paragraph 4 of Section IV of the Concurrence Decision. The report acknowledged some cleanup had occurred, but also stated that none of the ponds had been reclaimed, and “in excess of one-third of the equipment” and all the structures remained on-site. Photographs were appended to the report showing the presence of “thickners and ball mills, over 100 loose scrap tires,” the mill building and equipment, and the unreclaimed tailings pond. (May 4, 2000, 3809/3715 Inspection Report, Figures 1-4.)

BLM returned to the site on June 6, 2000. According to a June 7, 2000, memorandum, McColl failed to achieve compliance with the June 1, 2000, deadline, and the site was still littered with equipment and debris. The report noted that McColl stated that he had been under the impression that he had until September 1, 2000, to remove any remaining personal property and debris. By letter dated June 7, 2000, McColl requested an extension of time “to rectify any and all disturbances I feel responsible for.” (June 7, 2000, letter to Michael Taylor, BLM, at 2.) The request was granted by letter dated June 14, 2000, in view of the progress that had been made by McColl. BLM did not question, challenge, or correct the limitation on liability thus expressed by McColl.

Because no further inspection report was received by the Board, by order dated January 24, 2001, we requested a status report from BLM regarding events in the case since the June 6, 2000, inspection. On February 21, 2001, BLM filed the requested status report, and appellant was allowed 15 days from receipt thereof to file a response if he wished to do so. Nothing was received from McColl.

According to BLM's February 2001 submission, on August 24, 2000, in a memorandum documenting a telephone conversation record with McColl, Scott Murrellwright, BLM geologist, stated that McColl had a crew on the site to remove the “material bin, crane, and mill building,” but that McColl had “no intention of

^{7/} Only the June 1999, September 1999, and May 2000 inspections were reported on forms captioned “3809/3715 Field Inspection Form.” All other inspection reports were in the form of memoranda or notes to the file.

removing the tires, concrete pad, or reclaiming the ponds.” BLM performed an inspection on August 25, 2000, leading to the granting of a further extension to December 31, 2000. On October 31, 2000, a field inspection showed that reclamation continued, but on December 11, 2000, McColl's contractor telephoned BLM to request an extension from December 31, 2000, to June 1, 2001, due to severe flooding affecting his private property and business. In a letter dated February 7, 2001, BLM agreed to extend the deadline for removing equipment from the site to June 1, 2001. McColl's contractor orally agreed to return in March 2001. (Murrelwright Memorandum re “Status of McColl Clean-up” dated Feb. 7, 2001.) According to Murrelwright, “[p]resently, the task of removing the concrete slabs, tire removal, utility poles, berms and reclamation of the settling pond is being coordinated by BLM with interagency programs and possibly outside contractors. Mr. McColl maintains that he is not responsible for these items.” (Murrelwright Memorandum re “Telecom with Frank Parkerson” dated Feb. 7, 2001.) BLM continued to assert that McColl “should be allowed the additional time stated in the agency’s February 7, 2001 letter to address his reclamation responsibilities, [and] at the same time, BLM restated its position that the March 16, 1999 decisions under appeal were (and are) correct under 43 CFR Subpart 3715.” (February 21, 2001, status report at 10.)

On June 7, 2001, BLM conducted another inspection, and on July 5, 2001, reported the status of reclamation activity to the Board. According to BLM, McColl’s contractor had made “substantial progress in cleaning up the site and ha[d] begun dismantling the structures,” but reclamation had not been completed. (Ex. A to BLM’s July 5, 2001, status report.) The June 7, 2001, inspection report noted that appellant or his contractor had performed most of the clean-up work; however, BLM had removed “numerous” tires and rims from the site and berm during March 2001. It remained BLM’s position that appellant should be afforded “certain limited additional time to complete his reclamation responsibilities,” but, because he had not withdrawn his appeal, the Board should uphold BLM’s decisions.

On March 3, 2003, the Board received a final status report from BLM regarding the condition of the site. Photographs taken October 9, 2002, and November 21, 2002, reveal that general cleanup had been completed, including removal of the berm, but the mill building and ore bin remained in essentially the same condition as reported in the June 7, 2001, inspection. There was no report concerning the status of the tailings ponds.

BLM filed its Answer and Motion to Dismiss on June 4, 1999, in which it responded to a number of the factual disputes, and argued that the decisions should be affirmed and the appeal dismissed. On November 5, 2002, the Board issued a final briefing order to both parties. Having received BLM’s Reply to Board Order on December 13, 2002, and having received documentation that McColl was served with

BLM's March 3, 2003, status report, and having received no reply to either from appellant, we now proceed to the merits of the case on the basis of the record before us.

As we noted supra, many of appellant's specific factual contentions are now moot, as BLM inspection records document that, as of June 7, 2001, appellant had fully complied with all requirements of sections I and III of the Concurrence Decision (which required cessation of all operations and transportation of materials, equipment, chemicals, etc., to the site) and Item 1 of section IV (pertaining to removal of debris, trash, mineral concentrates, etc. already on site, and capping water wells).^{8/} Consistent with appellant's position that he should not be responsible for removing structures admittedly placed on the site by Sierra, however, the mill building, ore bin and their supporting structures are still present.^{9/} Accordingly, the Board will address only the issue of whether McColl is responsible for removing Sierra's mill building, ore bin, tailings pond, berms and other physical reinforcements and restoring the site "to its approximate original condition" (Concurrence Decision at 3) as it was before Sierra disturbed it, including recontouring, scarifying and reseeding, or for reimbursing BLM for its costs in doing so.

In his SOR, McColl argues that "[i]t is obvious, and there can be no question, that the water well drilling, all building construction, and all land disturbances were completed and in place at least five years prior to my having any knowledge or involvement with this property." (SOR at 3.) He maintains that he should not be held responsible for removal of structures or disturbances created by prior mill site operators, and includes among these conditions "perimeter berms, elevated crusher dump site, tailings impoundment (pond) and check pond, the two-and-one-half story mill building and the 2,000-ton fine ore bin, plus [disposing of] a significant amount of scrap metal." (SOR at 3.) He contends that, in issuing the Noncompliance Decision, BLM chose to "disregard and ignore the known facts that all cited land

^{8/} Likewise, there is no need to address BLM's Answer insofar as it disputes factual allegations not relevant to this particular question. We do address, however, BLM's characterization of the applicable standard of review for the Board to apply in appeals of Departmental decisions as whether the decisions are "arbitrary, capricious, or an abuse of discretion." (Answer at 18.) This is not correct. As BLM notes, this is the standard established by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000), with respect to judicial review of the Department's final decisions. The Board in fact exercises de novo review authority to determine whether the record in a case supports the action taken by BLM. See, e.g., National Wildlife Federation, 145 IBLA 348, 362 (1998); U.S. Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983).

^{9/} Recent BLM status reports do not indicate whether the utility poles and settling pond have been removed.

disturbances, including concrete floors and slabs, mill building, fine ore bin, tailings pond, check pond, perimeter b[e]rms, ore dump ramps, etc., were, in fact, accomplished by others at least four or five years before I had any knowledge of or interest in the said Mill Sites.” (SOR at 8.) He argues that he is not the proper party to be held responsible for removing disturbances “committed by corporations, partnerships, and/or individuals” long before his involvement at the site. In essence, McColl argues that the land-disturbing activity occurred when Sierra constructed and operated its mine, and while he occupied the site, he did not further disturb the land. In short, he takes the position that his obligation is to restore the site to the condition in which he found it.

[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 thereto." In addition, 30 U.S.C. § 625 (2000) provides that all mining claims and mill sites located on public lands "shall be used only for the purposes specified in section 621 of this title and no facility or activity shall be erected or conducted thereon for other purposes."

Effective August 16, 1996, BLM adopted 43 CFR Subpart 3715 to implement those statutory provisions by addressing the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. See 61 FR 37115, 37116 (July 16, 1996). These regulations set forth restrictions on the use and occupancy of public lands administered by BLM open to the operation of the mining laws, limiting such use and occupancy to those involving prospecting or exploration, mining, or processing operations and reasonably incidental uses to such activities. They also establish procedures for beginning occupancy, standards for reasonably incidental use or occupancy, prohibited acts, and procedures for inspection and enforcement, and for managing existing uses and occupancies. 61 FR 37116 (July 16, 1996). Additionally, 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. The Secretary of the Interior is mandated by law to take any action necessary to prevent unnecessary or undue degradation of the public lands. 61 FR 37117-18 (July 16, 1996); see 43 U.S.C. § 1732(b) (2000); see also Firestone Mining Industries, Inc., 150 IBLA 104, 109 (1999).

Activities justifying occupancy of a mining claim must (a) be "reasonably incident" to mining activity; (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; and (e) use appropriate equipment that is presently operable. 43 CFR 3715.2; Thomas E. Swenson, 156 IBLA 299, 304 (2002). Where a mining claimant is unable to establish

that his or her activity meets these criteria, BLM may order a suspension or cessation of all or part of the use or occupancy under 43 CFR 3715.7-1, and may order the land to be reclaimed to its satisfaction and specify a reasonable time for completion of reclamation under 43 CFR Part 3800. See 43 CFR 3715.4-3.

By filing a mining notice with BLM pursuant to 43 CFR Subpart 3809, McColl represented to the Department that he intended to conduct ore processing operations pursuant to the mining laws. His mining notice indicated that he intended to “test ore materials from associated lode and placer claims and develop a satisfactory commercial process for the recovery of precious and strategic elements contained therein.” While McColl may have initiated his occupation of the mill site intending to conduct a milling or processing operation, it appears that he never did so. He has provided no evidence, either to BLM or the Board, that his occupancy was ever, in fact, “reasonably incident” to mining, nor does the record provide support for such a finding.^{10/} Accordingly, BLM properly proceeded under 43 CFR 3715.7-1 to terminate the occupancy.

[2] From the first enforcement overture, McColl had no objection to removing his property or correcting any disturbance he caused. However, when it became clear that BLM meant to hold him responsible for Sierra’s facilities and disturbance, he objected strenuously and has maintained those objections since. Appellant thus does not dispute BLM’s determination that he has no basis for a continuing occupancy, but instead claims that he is not required to remove structures or conditions created by the prior occupant. BLM maintains that 43 CFR 3715.5-1 requires McColl to fully reclaim the site, including removal of structures and conditions that were present on site when McColl initiated occupancy or, pursuant to 43 CFR 3715.5-2, incur liability for BLM’s costs in doing so. We do not believe we can fairly hold appellant responsible for removing the structures and facilities admittedly abandoned by Sierra under 43 CFR 3715.5-1 and 5-2, for the reasons stated below.

Our first difficulty is that communication between the parties was ambiguous from the start. The language in BLM’s standard notice form did not clearly put McColl on notice that, by entering onto the Sierra site and using it to store equipment, materials, and such, he became responsible for the reclamation Sierra should have performed. McColl’s addendum to the notice with its redlined emphases appears to be an attempt to distinguish between Sierra’s disturbance and any he proposed. BLM could have easily questioned McColl’s addendum or clarified the

^{10/} As stated in the preamble to the proposed rule pertaining to use and occupancy, industrial uses of the public lands that have the “look and feel of mining” are not “reasonably incident” to mining, and are therefore prohibited uses. See 57 FR 41846. See also 43 CFR 3715.6(j).

nature and extent of the reclamation responsibility before McColl went onto the public lands, but did not do so. McColl could be expected to be charged with knowledge of regulatory provisions, but if these did not reasonably impart notice of the broad interpretation BLM urges, there would be little or no basis for a concern on his part, since nothing to the contrary is readily apparent from the parties' early exchanges. If BLM did not directly inform appellant of its expectations in correspondence at a point in time when McColl could choose not to initiate occupancy, the reclamation obligation as BLM interprets it must be found in the regulations in Subpart 3715.

The preamble to the final rule pertaining to use and occupancy under the mining laws indicates that the proposed rule was recast in "plain English," which, according to the preamble, is a "specific writing technique that communicates the information and legal requirements of regulations * * * through the use of question-and-answer headings, [and] active voice," among other things. 61 FR 37116, 37117 (July 16, 1996). The final rule adopts a conversational tone written in first and second person that includes broad use of the personal pronouns "I," "my," "you," and, occasionally, "your," all "intended to increase the clarity and understandability of the rule," and "any substantive changes that BLM * * * made in the final rule [were] fully described in the following discussion," meaning the preamble to the final rule. 61 FR 37117. The preamble states that 43 CFR 3715.5-1 and 5-2 were adopted from the proposed rule as the final rule "with minor editorial changes." BLM therefore intended the language in the final rule to remain substantively consistent with the proposed language.

The relevant language from the proposed rule is found at section 3715.4(f) and 4(f)(2), as follows:

(f) Unless expressly allowed in writing to remain on the public lands by the authorized officer, all permanent structures, temporary structures, material, equipment, or other personal property placed on the public lands during the use or occupancy covered by this subpart shall be removed * * *.

* * * * *

(2) Any such property left on the public lands * * * shall become the property of the United States and shall be subject to removal and disposition by the authorized officer * * *. The owner of any such property removed and disposed of * * * shall be liable for the costs incurred by the Government in such removal and disposal.

(57 FR 41850 (Sept. 11, 1992; emphasis supplied.)

The final rule contains the following language, in pertinent part:

Sec. 3715.5-1 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.

Sec. 3715.5-2 What happens to property I leave behind?

Any property you leave on the public lands beyond the 90-day period described in Sec. 3715.5-1 becomes property of the United States and is subject to removal and disposition at BLM's discretion consistent with applicable laws and regulations. You are liable for the costs BLM incurs in removing and disposing of the property.

(Emphasis supplied.)

The language of final rule 3715.5-1 clearly refers to property placed on the land by the occupant during his or her operations, and final rule 3715.5-2 equally clearly refers to property left by the occupant during his or her occupancy. These regulations are consistent with each other, but must also be consistent with the rest of the regulations, in particular including references to “your use and occupancy” throughout Subpart 3715. Given that most people naturally expect to be liable only for their own activities, it seems to us that a person consulting the regulations to ascertain his or her responsibilities before initiating an occupancy would not conclude that any use of abandoned mining and milling facilities -- in this case largely storage, dumping and residency in trailers without any mining or milling activity -- renders them liable for removal of such facilities and reclamation of the acreage disturbed by predecessors.

We do not mean to suggest that the regulatory construction that BLM advances on appeal is either unthinkable or impossible. Opposite and equally plausible views merely reflect the inherent elasticity of “plain English,” especially when used as legal jargon. Nor do we mean to suggest that BLM could not appropriately choose to adopt a rule that imposes liability in circumstances like those before us, even using “plain English” to accomplish it, but our review of the rulemaking for Subpart 3715 persuades us that the regulations simply were not drafted with downstream liability of this magnitude in mind. Even if we were willing to assume that BLM envisioned a broad sweep of liability, however, the regulations as drafted do not clearly announce any such intention, nor do they furnish a clearly

sufficient basis for dismissing appellant's interpretation as unwarranted or unsupported.^{11/}

In other contexts, the Department has stated that if a regulation is ambiguous, any doubt as to its meaning should be resolved in favor of the individual seeking a statutory right or benefit. See, e.g., The Moran Corp., 120 IBLA 245, 259 (1991); Dennis W. Belnap, 112 IBLA 243 (1989); Beard Oil Co., 97 IBLA 66 (1987); James M. Chudnow, 82 IBLA 262 (1984); Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 627 (1981); Wallace S. Bingham, 21 IBLA 266, 82 I.D. 337 (1975); Mary I. Arata, 4 IBLA 201, 78 I.D. 397 (1971); A. M. Shaffer, 73 I.D. 293 (1966); Donald C. Ingersoll, 63 I.D. 397 (1956). Similarly, we have held that "a regulation should be sufficiently clear, [so] that there is no basis for noncompliance with it." Maria C. Cawley, 61 IBLA 205, 208 (1982) and cases cited; see Johnson v. Udall, 292 F. Supp. 738, 750 (C.D. Cal. 1968). Accordingly, absent the requisite regulatory directive, we decline to interpret 43 CFR 3715.5-1 and 5-2 in the manner here advocated.

Therefore, 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 reversed insofar as they require McColl to remove Sierra's structures and facilities and reclaim the land disturbed by Sierra in erecting and operating such facilities. The decisions are affirmed in all other respects. McColl is properly held responsible for removing any and all structures and property he placed on the mill sites and for reclaiming the land to the extent it exceeds Sierra's disturbance.

^{11/}We had previously signaled doubt about such an expansive interpretation. In Tony and Pamela Fabor, IBLA 2000-220, in an order granting a motion for stay, this Board determined that it was unlikely that a BLM decision requiring a current occupant to remove a cabin placed on a mining claim 50 years prior to the current occupancy could be sustained on the merits. (Order in IBLA 2000-220, dated June 6, 2001.) In that order, we stated:

"[W]hether Subpart 3715 would require removal/relocation of the cabin requires a clearer analysis of 43 CFR §§ 3715.5(d) and (e), 3715.5-1, and 3715.5-2. BLM implies that they necessarily mean that the Fabors must remove a pre-existing cabin that BLM itself describes as 'historical,' and museum quality. BLM's suggestion * * * that the Fabors, at their own expense, should dismantle the cabin and transport, reconstruct, and donate it to a museum * * * is questionable under these regulations. Again, the pronouns are critical in answering questions about a pre-existing building." The case was subsequently remanded at the request of BLM.

T. Britt Price
Administrative Judge

I concur:

James F. Roberts
Administrative Judge