

BETTY DUNGEY  
MARY HUMPHRIES  
PEGGY RUESCH

IBLA 2003-8

Decided February 17, 2005

Appeal from a Notice of Noncompliance issued by the Las Vegas (Nevada) Field Office, Bureau of Land Management, pertaining to an occupancy on the Mockingbird mill site. N-71890, NMC 77862.

Affirmed.

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

A mill site claimant who actually disturbs public lands and uses and occupies the site in connection with a putative milling operation is responsible for reclaiming the mill site. The obligation to reclaim the land entails the obligation to remove all structures, equipment, material, and other personal property under 43 CFR Subpart 3715, as well as any other measures required by 43 CFR Subpart 3809 to rehabilitate and stabilize the land and the habitat it contains. When the claimant dies, that unsatisfied obligation becomes an obligation of his estate.

2. Mining Claims: Surface Uses--Surface Resources Act:  
Occupancy--State Laws

Nevada State law prescribes a time and formal procedure for disclaiming a testamentary devise or bequest, absent which the devise or bequest is deemed accepted. When the heirs of a deceased mill site claimant do not aver or proffer evidence that they have complied with such State

law or otherwise show that the statute does not apply to them, the Board properly may assume that they accepted their inheritance of the mill site and the personal property on it and are legally responsible for removing it.

3. Mining Claims: Surface Uses--Surface Resources Act:  
Occupancy--State Laws

As used in 43 CFR 3715.7-1, the pronouns “you” and “your” include persons who acquire property on a mining claim or mill site by transfer, contract, agreement, or by exercise or operation of law, and who exercise or assert dominion and control over that property.

4. Mining Claims: Surface Uses--Surface Resources Act:  
Occupancy--State Laws

When appellants paid the annual maintenance fee for a mill site, they exercised and asserted dominion and control over the mill site to retain possession as against the United States and avoid the consequence of conclusive forfeiture that attends the failure to timely pay the fee or obtain a small miner waiver certification. Where appellants also failed to produce evidence showing that they timely disclaimed the interests in personal property on the mill site that they acquired by operation of law, a notice of noncompliance for failing to remove their property will be upheld.

APPEARANCES: David C. Polley, Esq., Las Vegas, Nevada, for appellants; Mark R. Chatterton, U.S. Department of the Interior, Las Vegas Field Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Betty Dungey, Mary Humphries, and Peggy Reusch, the heirs of James E. Harris (the heirs or appellants), have appealed an August 26, 2002, Notice of Noncompliance (NON) issued by the Las Vegas (Nevada) Field Office, Bureau of Land Management (BLM), pertaining to an occupancy of the Mockingbird mill site

(NMC 77862), located by Harris in secs. 3 and 10, T. 26 S., R. 64 E., Mount Diablo Meridian (MDM), in Clark County, near Nelson, Nevada. The NON was issued pursuant to the provisions of 43 CFR Subpart 3715. Appellants contend that they are not responsible or liable for any of the conditions at the mill site or for the expense of correcting them.

Harris and co-locator Philip G. Harrison located the Mockingbird mill site on February 25, 1972. On September 10, 1991, they submitted a mining notice to BLM pursuant to 43 CFR 3809.1-3 (1991) concerning their use and occupancy of the mill site.<sup>1/</sup> That notice stated that they were “milling for precious metals using [a] ball mill, crusher, concentrator table, and water,” that mining was occurring on patented land, and they were “living on [the mill] site in mobile homes.” (Mining Notice at 1.) Prior to submitting that notice, the claimants had applied for a patent to the mill site. In furtherance of the patent application, they applied for a mineral survey, which was assigned BLM serial number M.S. 5053 in December 1990. (Order for Mineral Survey dated June 15, 1991.) BLM issued a First Half Final Certificate for the Mockingbird mill site on March 22, 1994. (BLM Serial Register Page, Run Date July 2, 2002.)

In 1991, BLM began conducting periodic inspections at the mill site for compliance with surface management regulations. Photographs taken of the site on September 3, 1991, document the presence of a number of outbuildings, house and camping trailers, old vehicles, large metal barrels, hoses, and other debris of various sorts. Inspections made on August 6, 1992, October 15, 1992, November 8, 1993, June 8, 1994, February 7, 1995, July 6, 1995, January 31, 1996, and April 28, 1997, documented little or no change in conditions on site. As early as 1992, BLM inspection reports expressed concern regarding the need to remove various personal property from the mill site and clean it up. See Aug. 6, 1992, Inspection Report (“mill has not operated in some time”). Claimants were never observed milling at the site, although the 1995 inspection report indicates that the mill “was being worked on.” (Nevada 3809 Compliance Inspection Report dated July 6, 1995.)

Harrison died in 1994. (Nevada Compliance Inspection Report dated Feb. 7, 1995.) In 1996, Harrison’s heirs transferred both the patented Mocking Bird Mine claim and the unpatented Mockingbird mill site to Harris, including all “personal property, vehicles, trailers, equipment or other items located on the mill site.” Harris

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<sup>1/</sup> The occupancy was originally assigned BLM serial number N54-91-88N; by notice dated July 3, 2002, BLM assigned the occupancy a new serial number, N-71890.

in turn released Harrison's heirs from "any and all liability associated therewith." (Receipt filed Aug. 15, 1996, in Clark County (Nevada) District Court in *In the Matter of the Estate of Philip G. Harrison, Deceased* (Receipt); Quitclaim Deed from Raymond Harrison and Helen M. Thomas to James Harris executed Jan. 13, 1996 (Quitclaim Deed); Administrator's Deed notarized Dec. 22, 1995 (Administrator's Deed).<sup>2/</sup> Appellants have not come forward with any proof or evidence establishing that the quitclaim was invalid or ineffective to transfer the mill site and the patented claim, and thus we assume that at the time of his death Harris owned the Mocking Bird Mine claim described in the Administrator's Deed by reference to Mineral Survey 2073, APN #600 310 004 90.

Harris died 5 years later, on January 24, 1999. (File Copy, Harris Certificate of Death.) His Last Will and Testament, a copy of which was filed with BLM on August 9, 1999, directed that his just debts and funeral expenses be paid first, "as soon after my death as may be reasonably convenient," and appointed Dungey as his executrix/personal representative. (Harris Will, Items One and Four.) He devised and bequeathed his property, "whether real, personal or mixed and wherever situate" to his daughters, Dungey, Humphries, and Reusch, in equal shares. (Harris Will, Item Three; see also Item Two (personal property)).

On July 1, 1999, Mark Chatterton, a BLM employee, telephoned Dungey to discuss "what would be required to qualify for mineral patent of the mill site." (Conversation Record signed by Chatterton, dated July 1, 1999.) Chatterton reported that Dungey "indicated that she wanted to pursue the MPA [mineral patent application]," even though no milling activity was then occurring and none seemed likely to occur in the next 4 to 6 months. (Conversation Record signed by Chatterton, dated July 1, 1999.) Chatterton met with the heirs at the site on July 13, 1999. Chatterton's notes pertaining to that meeting indicate that he "reviewed the criteria for a patent," discussed "the issues related to putting the property into condition to

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<sup>2/</sup> According to the quitclaim deed and the Administrator's Deed, both the patented claim and the Mockingbird mill site are located in T. 25 S., R. 64 E., MDM. See Quitclaim Deed at 1; Receipt; Administrator's Deed at 2. However, the Mockingbird mill site is located in secs. 3 and 10, T. 26 S., R. 64 E., MDM, near an unpatented lode claim, the "Unlucky" (NMC 778861), which was located by Harris in November 1972, 9 months after the location of the Mockingbird mill site. See Mining Claim Geographic Report, Run Date July 1, 2002; see also Nevada 3809 Compliance Inspection Report dated June 8, 1994. The record does not contain a description of the patented land other than that stated in the quitclaim deed.

qualify for patent,” and “discovered that the mill site claim is no longer dependent.” (Memorandum to File dated July 13, 1999.)<sup>3/</sup> He recommended that they withdraw the patent application. Dungey withdrew the patent application by letter dated July 24, 1999, in which she signed Harris’ name with her initials next to the signature. On August 17, 1999, BLM issued a one-page decision stating that the “withdrawal request is accepted as of August 9, 1999, and the mineral entry for mineral patent application N-56337 has been cancelled in [its] entirety.”

The heirs continued, however, to maintain the mill site in the manner required by the mining laws. Thus, BLM’s records show that Dungey tendered the annual maintenance fees for the mill site until the 2004 assessment year that began on September 1, 2003. See BLM Serial Register Page, Run Date: July 2, 2002; see also BLM Receipt Nos. 532413, 345566, and 162778. Copies of Notices of Intention to Hold (Notices) filed with the Clark County recorder’s office and submitted to BLM with the maintenance fees were signed by Dungey, who represented herself as the “Administrator” of Harris’ estate.<sup>4/</sup> BLM received fees and Notices from Dungey on August 1, 2002, July 27, 2001, and August 3, 2000.

On January 10, 2001, BLM received a telephone call from Tom Richardson, who owned property about 5 miles from the mill site. Richardson had been contacted by Dungey regarding possible removal of equipment and cleanup of the

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<sup>3/</sup> The patenting of non-mineral lands for a dependent lode mill site, *i.e.*, a mill site used or occupied for mining or milling purposes in connection with a specific lode or placer mining claim, is authorized by 30 U.S.C. § 42(a) (2000). “The owner of a patented lode may, by an independent application, secure a mill site, if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.” 43 CFR 3864.1-1(b) (emphasis supplied); see also 2 American Law of Mining (2d ed.), §§ 33.06 and 51.07[4][c]. The record is devoid of information that would clearly establish that Harris and/or Harrison at any time used and occupied the Mockingbird mill site in connection with the patented Mocking Bird Mine claim.

<sup>4/</sup> Under current Nevada law, an “administrator” is a person “not designated in a will who is appointed by the court to administer the estate.” Nev. Rev. Stat. Ann. § 132.040 (2003); see n.3 supra. The will named Dungey as “executrix/personal representative,” however, and authorized her to conduct “all acts I might do if living such as (without limiting) sell or encumber real or personal property, all without court order [emphasis supplied].” (Harris Will, Item Four.) Dungey apparently acted in that capacity in maintaining the Mockingbird mill site. See Nev. Rev. Stat. Ann. § 32.130 (2003) (“executor” defined).

site. He indicated an interest in the salvage value of the property. (Conversation Record by Rebecca S. Lange, dated Jan. 10, 2001.) The record does not disclose what became of Richardson's interest in the property, and photographs taken by BLM officials at a June 28, 2002, compliance inspection reveal that the site remained littered with "trash, debris, trailers, and old cars." The BLM inspector noted that personal property of various kinds should be removed and the site cleaned up. (July 2, 2002, "Nevada 3809 Compliance Inspection Report.")

By certified letter addressed to Harris at Dungey's address in early July 2002, BLM stated that "there has been very little progress in the removal of items" from the site and that "[w]e are now at the point where cleanup needs to begin." BLM accordingly requested a plan for the "removal of personal property and general cleanup" of the area. (BLM letter to Harris dated July 3, 2002.) Counsel for the heirs responded, stating that Harris's assets consisted solely of the mill site and "some old and worn out equipment on the site." Counsel indicated that since the estate had "no meaningful assets," there was "no justifiable reason \* \* \* to undertake the administration of their father's estate," and thus they did not intend to file a plan to remove the property and materials from the site. (Letter from David C. Polley, Esq., to BLM dated July 29, 2002.)

On August 13, 2002, a BLM inspector observed that the site had been vandalized, a trailer had been burned, and a number of the buildings had been ransacked, including a laboratory building housing small quantities of chemicals, some of which had been thrown on the floor. The inspector noted that a "barrel labeled cyanide is also on site." Photographs taken during that inspection support his observations. The inspection report further noted: "Easy access to this site represents a hazard to the public with the chemicals being unsecured." The inspector concluded: "This site is an attractive nuisance and is causing undue and unnecessary degradation." (Nevada Compliance Inspection Report dated Aug. 14, 2002.) Notwithstanding the vandalism, the inspector concluded that "[t]here is a large amount of equipment, some still in good shape, on the site. These include a ball mill, generators, and a trailer." (Nevada Compliance Inspection Report dated Aug. 14, 2002.)

By decision dated August 26, 2002, while the mill site was still in good standing, BLM issued the NON to "Betty Dungey, et al." pursuant to the provisions of 43 CFR Subpart 3715.7-1(c). The decision noted that "occupancy," as defined by 43 CFR 3715.0-5, includes not only "full or part-time residence of the public lands," but also "activities that involve residence," including the presence of "temporary or

permanent structures” that may be used for residence and mining and/or milling activities, including, but not limited to, “motor homes, trailers, buildings, and storage of equipment or supplies.” (NON at 2.) The decision found that “occupancy is occurring at the Mockingbird mill site claim,” and “consists of several travel trailers, a lab building, storage areas, and storage of equipment, chemicals, old parts, batteries, and scrap.” (NON at 2.) The decision concluded that the occupancy does not meet the requirements of 43 CFR 3715.2. BLM determined that “unnecessary and undue degradation is occurring on site,” as, among other things, the site had fallen into disrepair and was “vandalized extensively,” resulting in a burned trailer, a “ransacked” lab with bottles of chemicals strewn about the floor, old cars with windows broken, and personal items littering the area. (NON at 2.) The decision stated that the site is easily accessible to the public, is an “attractive nuisance,” and represents a hazard to public safety. (NON at 2.) The decision further noted that “there is no substantially regular work or observable on-the-ground activit[y] taking place on the claim,” and that “[e]ven inspections since 1991 have shown no mining related activities taking place on the site.” (NON at 2.)

The NON imposed a compliance schedule, in accordance with 43 CFR 3715.7-1(c), for removing the chemicals, structures, trailers, equipment, parts, scrap, trash, debris, and other items present on site, and it directed the heirs to reclaim all disturbed areas. (NON at 2.) All chemicals were to be removed within 15 days of receipt of the order. The heirs were to start removing all other items within 30 days of receipt of the order, and complete it within 90 days of starting. All disturbed areas were to be reclaimed as required by 43 CFR Subpart 3809.

On May 17, 2004, BLM issued a decision to the deceased Harris at Dungey’s address declaring the Mockingbird mill site “forfeited and void” for failure to timely submit either the annual maintenance fee or a maintenance fee payment waiver certification for the assessment year that began on September 1, 2003, in accordance with the Maintenance Fee Act, 30 U.S.C. §§ 28f-k (2000), as amended, and implementing regulations at 43 CFR 3833.1-5 and 3833.1-6. In addition, the decision ordered Harris to reclaim the mill site pursuant to the provisions of 43 CFR Part 3809 and advised that failure to remove “structures, material, equipment, and any personal property in accordance with the regulations at 43 CFR 3715.5-1” could result in BLM’s taking action to do so, for which “you will remain liable for the costs.” (May 17, 2004, Decision at 2.) That decision was not appealed by Dungey on behalf of the Harris estate and thus it is final for the Department.

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.” Departmental regulations found at 43 CFR Subpart 3715 implement this statutory provision by addressing the unlawful use and occupancy of unpatented mining claims and mill sites for nonmining purposes. See 61 FR 37115, 37117 (July 16, 1996). These regulations restrict use and occupancy of public lands open to the operation of the mining laws to prospecting, exploration, mining, or processing operations and uses reasonably incident thereto. Under 43 CFR 3715.2, in order to justify occupancy of the public lands (that is, either maintaining a residence and temporary or permanent structures that could be used for residency) for more than 14 days in a 90-day period, the activities that give rise to the occupancy must (a) be reasonably incident to mining; (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 43 CFR 3715.7; and (e) use appropriate equipment that is presently operable. In order to comply with 43 CFR 3715.2, all five of those requirements must be met for occupancy to be permissible. See, e.g., Terry Hankins, 162 IBLA 198, 213 (2004); Dan Solecki, 162 IBLA 178, 192-93 (1994); Robert W. Gately, 160 IBLA 192, 208-09 (2003).

The regulations clarify that unauthorized use and occupancy of public lands are illegal uses that *ipso facto* constitute unnecessary or undue degradation of public lands, as to which the Secretary of the Interior is mandated by law to take any necessary action to prevent. 61 FR at 37117-18; 43 CFR 3715.0-5; see David J. Timberlin, 158 IBLA 144, 152 (2003); Firestone Mining Industries, Inc., 150 IBLA 104, 109 n.5 (1999); see also 43 U.S.C. § 1732(b) (2000).

As a preliminary matter, we note that the heirs neither challenge the facts found by BLM with respect to conditions on the mill site nor assert that the occupancy complies with the Surface Resources Act or 43 CFR 3715.2. We find that issuance of a NON was clearly justified by the facts, and to that extent we generally find no fault in BLM’s action. The heirs contend that they are not liable or responsible for rectifying conditions at the Mockingbird mill site, or for the costs or expenses of correcting them. (Notice of Appeal at 1.) They concede that the Mockingbird mill site claim was “owned by James E. Harris at the time he died,” but aver that “[n]o probate or administration of his estate has been, or is likely to be, undertaken because the estate assets, if any, are non-existent or nominal compared to the debts, liabilities, and obligations of the estate and the deceased.” (Notice of

Appeal at 1.) They argue that “[t]he heirs are neither responsible nor liable for the debts, obligations, and liabilities of their father or his estate.” (Notice of Appeal at 1.) They contend that they have “no interest in any property, real or personal, coming within the jurisdiction” of BLM, and that, as a result, that BLM has no jurisdiction over them. (Notice of Appeal at 1-2.) The heirs therefore take the position that the NON established a legal obligation owed to the United States by Harris or his estate and not them.

In its appeal transmittal letter dated October 1, 2002, BLM responded to the heirs’ contentions:

Since Mr. Harris’ death in 1999, the maintenance fees have been kept current for the claim. As recently as August 1, 2002, the maintenance fee (copy in file) was paid by Betty Dungey. Therefore, the BLM believes that the appellants have and are maintaining an interest in the claim and are liable for any cleanup of the site.

(Appeal Transmittal Letter at 2.)

[1] We begin with Harris and Harrison, who were the mining claimants who actually used and occupied the public lands in connection with their putative mining and/or milling operations. They were responsible for surface-disturbing activities, and it is they who created the conditions constituting undue and unnecessary degradation of the land. The obligation to reclaim the lands they disturbed entails not only the removal of all structures, equipment, material, and so forth, under Subpart 3715, but also includes measures directly relating to the rehabilitation and stabilization of the land and habitat that may be required under Subpart 3809. That obligation therefore was Harrison’s and Harris’, and ultimately it became Harris’ alone by reason of the quitclaim transfer from Harrison’s heirs or successors to him during his lifetime and Harris’ continued occupancy of the site after Harrison’s death. When Harris died, that unsatisfied reclamation obligation<sup>5/</sup> became an obligation owed by his estate. Harris’ Will named Dungey the estate executrix. Assuming she has acted in this matter in that capacity,<sup>6/</sup> Dungey would be required as a fiduciary

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<sup>5/</sup> We use the phrase “reclamation obligation” broadly to include both the removal of personal property and the reclamation of the surface disturbance, unless otherwise stated.

<sup>6/</sup> Nothing in the record demonstrates that Dungey declined to act or serve in that capacity. What little objective evidence there is suggests she accepted her father’s  
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to take the actions necessary to marshal the estate's assets, meager as they might be, and apply them to outstanding obligations, including the reclamation liability, before any remainder properly could be distributed to or taken by the heirs.

As to outstanding obligations, it appears that the United States is or was entitled to have that reclamation obligation satisfied by the estate before any other obligation is paid, to the extent of the estate's assets, regardless of any other debt or obligation that may remain to be satisfied: "A claim of the United States Government shall be paid first when-- \* \* \* the estate of a deceased debtor, in the custody of an executor or administrator, is not enough to pay all debts of the debtor." 31 U.S.C. § 3713(a)(1)(B) (2000). Moreover, a "representative of a person or an estate \* \* \* paying any part of a debt of the person or the estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government." 31 U.S.C. § 3713(b)(2000).

Appellants state that the estate is too small to bother probating it, but State law appears to establish the personal representative's duty to take possession of all the real and personal property and to collect its debts. Nev. Rev. Stat. Ann. § 143.030 (2003).<sup>7/</sup> State law also appears to recognize the United States' right to petition for probate to compel an accounting of any estate assets and their disposition. Nev. Rev. Stat. Ann. § 136.070. Indeed, it is established that the United States may, in its discretion, pursue satisfaction of any outstanding obligation in either Federal or State Court, and it is not barred by state statutes of limitations or the defense of laches in pursuing claims against the decedent's estate. United States v. Summerlin, 310 U.S. 414, 416 (1940); Roberts v. Morton, 549 F.2d 158, 163 (9th

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<sup>6/</sup> (...continued)

appointment as the estate's executrix, because she met and conversed with BLM regarding the patent application for the mill site and the sale of the personal property on the claim and cleanup; she consulted with counsel regarding estate assets, as implied by allegations contained in correspondence and the Notice of Appeal; and she filed the annual fees and notices of intention to hold claims necessary to maintain the mining and mill site claims as the estate's "Administrator."

We are aware that Nevada law provides for public administration of estates, see Nev. Rev. Stat. Ann. Ch. 253 (2003), but have not ascertained whether and to what extent such provisions might apply.

<sup>7/</sup> All references to the Nevada Revised Statutes are to provisions in effect at the time of Harris' death, except the definitions quoted herein, which were enacted effective Oct. 1, 1999.

Cir. 1977). Accordingly, at a minimum, it is clear that the United States had or has a right to seek satisfaction of the reclamation obligation to the extent of the assets of the estate.

We now turn to the heirs' contention that they "have no interest in any property, real or personal, coming within the jurisdiction of the [BLM]." (Notice of Appeal at 1-2.) The question underlying this contention is whether the heirs can be required to complete cleanup and reclamation if the value of the estate does not cover the cost of discharging the reclamation obligation.<sup>8/</sup> The answer to that question depends on whether the heirs own the mill site and the property on it, and

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<sup>8/</sup> Appellants state that "the estate assets, if any, are non-existent or nominal compared to the debts, liabilities, and obligations of the estate and the deceased." (Notice of Appeal at 1.) The record before us gives us reason to doubt that, as it shows that the estate likely included at least the patented Mocking Bird Mine claim, as well as the unpatented Unlucky mining claim and Mockingbird mill site. No explanation of the current status or disposition of the patented claim was provided or offered, and no representations regarding its fair market value or any proceeds or income it may have generated have been made to BLM or to this Board. However, a sale or disposition of the patented claim could inure only to the estate, to be applied to its debts and obligations.

As to the personal property, BLM was once of the opinion that some of the equipment was "still in good shape." (Compliance Inspection Report dated Aug. 14, 2002.) That personal property may have some value as salvage, if not as potentially operable and useful equipment, as demonstrated by Richardson's interest in acquiring the property.

There are no specific averments regarding the nature and extent of the purported debts and obligations or income and assets of the estate to support appellants' assertions, and certainly no concrete information regarding such matters was proffered. Thus, it is clear that no accounting of the estate has been provided to BLM so that it could determine the nature and extent of the assets available to satisfy the reclamation obligation. The heirs therefore have not demonstrated that assets are "non-existent or nominal compared to the debts, liabilities, and obligations of the estate and the deceased."

BLM clearly is entitled to pursue these questions in determining the nature and proper course of action to obtain satisfaction from estate assets, including the patented mining claim. We express no opinion regarding the viability or forum for such proceedings at this juncture, as that is a matter BLM must take up with the Solicitor's Office.

this in turn depends on whether the provisions of Harris' Will ever were administered, formally or informally.<sup>9/</sup>

Harris' Will devised and bequeathed all his property, "whether real, personal or mixed and wherever situate" to his three daughters in equal shares. (Harris Will, Item Three.) Nevada law relating to the settlement and distribution of the estates of deceased persons defines "property" as "anything that may be the subject of ownership," including "both real and personal property and any interest therein." Nev. Rev. Stat. Ann. § 132.285 (2003). "In the broad and general sense," personal property is "everything that is the subject of ownership not coming under denomination of real estate." Black's Law Dictionary (4th ed. 1968). Absent some defect in the making and execution of his Will, a matter that ordinarily would be raised before a probate court, which the heirs have apparently eschewed, the testamentary disposition was likely effective upon Harris' death. If that is so, the heirs became entitled to receive all Harris' right and title to the unpatented Unlucky mining claim and Mockingbird mill site, the patented Mocking Bird Mine claim, and all the structures, trailers, equipment, vehicles, materials, and any other personal or real property Harris owned at his death.

[2] Under Nevada law, a beneficiary may disclaim any interest in property that he or she is entitled to by devise or bequest, in whole or in part, by filing a written instrument containing the information specified in the statute with the district court in the county in which the estate of the decedent is administered, or with the county clerk of the county in which administration would be proper if the estate is not administered. See Nev. Rev. Stat. Ann. § 120.040 (2003).<sup>10/</sup> Alternatively, he or she can file a waiver of the right to disclaim. Nev. Rev. Stat. Ann. § 120.050(2) (2003). To be effective, the disclaimer must occur "within a reasonable time after the person able to disclaim acquires knowledge of the interest." Nev. Rev. Stat. Ann. § 120.030 (2003). In case of interests created by will, such reasonable period is within 9 months of the death of the testator. Nev. Rev. Stat. Ann. § 120.030(1)(a)

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<sup>9/</sup> In a letter to BLM dated July 29, 2003, at 1, Polley stated: "No justifiable reason exists for the heirs to undertake the administration of their father's estate if worthwhile assets do not exist." Before this Board, Dungey states that "[n]o probate or administration of [Harris'] estate has been, or is likely to be, undertaken \* \* \* ." (Notice of Appeal at 1.)

<sup>10/</sup> Nev. Rev. Stat. Ann. § 120.020 (2003) sets forth what information must be included in a disclaimer; Nev. Rev. Stat. Ann. § 120.040 (2003) provides information concerning where the disclaimer must be filed. Where there is no administration of the estate, the disclaimer is to be filed with "the county clerk of the county in which administration would be proper." Nev. Rev. Stat. Ann. § 120.040 ¶ 1(a)(2003).

(2003). In this case, that 9-month period expired on or about September 25, 1999. “A disclaimer is conclusively presumed not to have been filed within a reasonable time after the person able to disclaim acquired knowledge of the interest” if the interest has been acquired by a “purchaser or encumbrancer for value subsequent to or concurrently with the creation of the interest sought to be disclaimed and before the disclaimer; and” 1 year has elapsed from the date of the death of the person who created the interest by will. Nev. Rev. Stat. Ann. § 120.030(3) (2003). Disclaimer of an interest is precluded when an heir voluntarily assigns or transfers, or contracts to assign or transfer, the interest in whole or in part; executes a written waiver; or sells or otherwise disposes all or any part of the interest pursuant to judicial process. The interest is deemed accepted by such an act. Nev. Rev. Stat. Ann. § 120.070(2) (2003). Acceptance cannot thereafter be disclaimed, except under limited circumstances not relevant here. <sup>11/</sup> When it is effective, a disclaimer binds the beneficiary and all persons claiming by, through, or under him or her. Nev. Rev. Stat. Ann. § 120.050(1) (2003).

The heirs have not provided BLM or the Board with a duly executed and timely filed disclaimer of their inheritance or a waiver of disclaimer, and nothing in the record suggests they may have done so and require merely a further opportunity to submit proof thereof. If they have not timely filed a duly executed disclaimer or waiver of disclaimer, it appears that the time for doing so likely has expired. Therefore, absent evidence to the contrary, we assume that, under State law, the heirs accepted all the real and personal property devised and bequeathed to them, and that acceptance occurred in or about September 1999 and not later than sometime in January 2000. They are therefore individually and personally responsible for reclaiming the mill site and removing their property from the public lands. <sup>12/</sup>

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<sup>11/</sup> Nev. Rev. Stat. Ann. § 120.070 ¶ 1 (2003) provides that “an acceptance does not preclude a beneficiary from thereafter disclaiming all or part of any interest to which he became entitled because another person disclaimed an interest, if the beneficiary had no knowledge of the interest.”

<sup>12/</sup> It may be that the heirs can establish subsequently that they disclaimed or filed a waiver of the right to disclaim the inheritance, or that some other provision of law relieves them of this requirement. We assume that in undertaking such a showing, whether separately or in connection with an accounting of estate assets, they would also be required to demonstrate that they have made no use of or impaired, or transferred, leased, disposed of, or contracted for the transfer, lease, or disposal of, any of the estate assets, including the patented Mocking Bird mining claim and any property on it, and that these and all other assets are available for application to the  
(continued...)

[3] This brings us to the NON issued to “Betty Dungey, et al.” BLM exercised enforcement authority pursuant to 43 CFR 3715.7-1, which states the response to the question “**What types of enforcement action can BLM take if I do not meet the requirements of this subpart?**” That regulation consistently refers to “you” and “your use or occupancy.” Thus, an immediate suspension order is appropriate to end all or any part of “your use and occupancy” if “[y]ou are conducting an occupancy under a determination and occurrence” and “[y]ou fail at any time to meet the requirements of this subpart.” See 43 CFR 3715.7-1(a). The provisions relating to cessation orders and NON’s are similarly constructed, with the same use of the same pronouns. See 43 CFR 3715.7-1(b) and (c). The regulation further provides that “[i]f you are conducting an activity that is not reasonably incident but may be authorized under [other regulatory provisions], BLM may order you to apply \* \* \* [under such provisions].” 43 CFR 3715.7-1(d).

This case thus presents another aspect of the central issue considered by this Board in James M. McColl, 159 IBLA 167 (2003). Unlike the instant appeal, McColl concerned the long-abandoned property of, and surface disturbance by, an unrelated predecessor and what amounted to an effort to hold McColl strictly liable for reclaiming the mill site pursuant to the provisions at 43 CFR 3715.5-1 and 3715.5-2, despite what we judged to be his inconsequential use of the personal property and site and the absence of any genuine mining, milling, or beneficiation operation or activity by him. It appeared to the Board that the pronouns and plain language of those provisions described only property left on a mining claim or mill site by the claimant and did not clearly embrace claimants who had not placed property on the claim, caused the surface disturbance at issue, or made any significant use of the property or actually undertaken any mining or milling activity using it. We explicitly noted that, while 43 CFR 3715.5-1 and 3715.5-2 appeared to be consistent with each other, it was not clear that they were also consistent with other regulatory provisions in 43 Subpart 3715. 159 IBLA at 181. We otherwise found no support in the preamble for the rulemaking for imposing liability in the facts of that case, and instead invoked the rule that “a regulation should be sufficiently clear, [so] that there is no basis for noncompliance with it.” 159 IBLA at 182, citing Maria C. Cawley, 61 IBLA 205, 208 (1982), and cases cited.

The Board struggled to square the obligation to remove property imposed by 43 CFR 3715.5-1 and 3715.5-2 and/or 3715.7-1 with situations involving occupancies created by individuals other than the current mining or mill site claimant. We have thus considered varying degrees of use and occupancy of property

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<sup>12/</sup> (...continued)  
estate’s obligations.

abandoned by unrelated successor claimants (McCull); property acquired by transfer or purchase (Karen Clausen, 161 IBLA 168 (2004) and Dan Solecki, 162 IBLA 178 (2004)); an agreement to remove property, but expressly made subject to the need to sort out ownership of various improvements (Jay H. Friel, 159 IBLA 150, 153 (2003)); and even a failed attempt to transfer the obligation to remove property and reclaim the mining claim (David J. Timberlin, 158 IBLA 144 (2003)). However, in Marietta Corp., 164 IBLA 360 (2005), this Board recently announced that it would construe the pronouns of 43 CFR 3715.5-1 and 3715.5-2 to include persons who lawfully acquire property on mining claims or mill sites by contract, agreement, transfer, or operation of law, and who exercise or assert dominion and control of such property. Under the rule thus articulated in Marietta Corp., the obligation to clean up a claim site imposed by 43 CFR 3715.5-1 and 3715.5-2 applies to legal successors-in-interest, without regard to the fact that they did not themselves place the property on the claim or disturb its surface, provided they exercise or assert dominion and control over such property. While Marietta Corp. settles the construction of the pronouns used in 43 CFR 3715.5-1 and 3715.5-2, it did not by its terms address orders issued pursuant to 43 CFR 3715.7-1.

We follow the holding in Marietta Corp. to conclude that the pronouns “you” and “your” in 43 CFR 3715.7-1 include persons who acquire property on a mining claim or mill site by transfer, contract, agreement, or exercise or operation of law, and who exercise or assert dominion and control over that property. It follows that BLM appropriately issued the NON to the heirs if they are such persons.

[4] We now consider the NON issued to “Betty Dungey, et al.,” that is, to the heirs. As stated, it is BLM’s view that the payment of claim maintenance fees for a period of time demonstrates that the heirs “have and are maintaining an interest in the claim and are liable for any cleanup of the site.” (Appeal Transmittal Letter at 2.) Thus, the question before us is whether this single fact provides an adequate basis in law for holding the heirs responsible for resolving the occupancy pursuant to the NON under 43 CFR 3715.7-1.<sup>13/</sup> Although the record contains no indication that the heirs ever intended to initiate a milling operation on the site, the fact remains that, by paying the maintenance fee, they effectively asserted dominion and control over the mill site and thus retained possession as against the United States, because by statute, the failure to timely pay the fee or obtain a small miner waiver certification subjects the mill site to conclusive forfeiture. See, e.g., Hale Mining Co., 161 IBLA 260, 261-62 (2004); W. Douglas Sellers, 160 IBLA 377, 378 (2004); Jerry D. Grover d.b.a. Kingston Rust Development (Grover IV), 160 IBLA 261, 266 (2003); Robert B. Hoke,

<sup>13/</sup> We acknowledge that Dungey also discussed the possibility of perfecting the patent application for the mill site, for which a First Half Final Certificate had been issued prior to Harris’ death, and ultimately decided to abandon it.

160 IBLA 220, 223 (2003); James W. Sircy, 158 IBLA 234, 232-35 (2003). <sup>14/</sup> Because there is no evidence that the heirs timely complied with State law to disclaim their inherited shares of the Harris estate, we are satisfied that they acquired the mill site and the property on it by operation of law, and, having paid the maintenance fees to hold the site well beyond the expiration of the period for disclaiming the inheritance, we find that these facts show that they exerted dominion and control over the mill site to the exclusion of the United States. The NON therefore was correctly issued to them as individuals under the rule of construction announced herein. <sup>15/</sup>

As to the obligation to reclaim the site pursuant to the provisions of 43 CFR Subpart 3809, a mining claimant retains responsibility for obligations and conditions that were created while the claimant or an operator was responsible for operations on the mill site or mining claim. 43 CFR 3809.116(a). <sup>16/</sup> When Harris died, that obligation passed to his estate. As noted above, appellants ostensibly accepted their inheritance by reason of the failure to disclaim it, and, coupled with their exercise of dominion and control over the site well beyond the time allowed to disclaim it, they accepted the estate's debts as well, including the obligation to reclaim the mill site. <sup>17/</sup>

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<sup>14/</sup> The fact that BLM eventually declared the claim forfeited for failure to pay the maintenance fee does not affect the obligation to resolve the occupancy as described herein. Marietta Corp., 164 IBLA at 371-72. The NON ultimately may be enforced under the provisions of 43 CFR 3715.5-1 and 3715.5-2, which provide for the removal of the property by BLM at appellants' expense, or it may ripen into an action under 43 CFR 3715.8, which authorizes criminal and civil penalties for knowing and willful violations of 43 Subpart 3715.

<sup>15/</sup> A refusal to remove the property results in a trespass with the same result. BLM can remove their property from the mill site, but BLM's costs to do so will be charged to the owners thereof. 43 CFR 2920.1-2 and 43 CFR 9239.1-3.

<sup>16/</sup> Those obligations may be transferred, but the mining claimant remains responsible until BLM receives documentation showing that the transferee accepts responsibility and BLM accepts a financial guarantee to cover all outstanding obligations. 43 CFR 3809.116(b) and (c).

<sup>17/</sup> The regulation at 43 CFR 3809.420 establishes performance standards applicable to mining notices and plans of operation. Regulation 43 CFR 3809.605 sets forth the acts prohibited by 43 CFR Subpart 3809, which includes causing unnecessary or undue degradation. Regulation 43 CFR 3809.601 describes the kinds of enforcement actions available to BLM if claimants do not meet the requirements of 43 CFR

(continued...)

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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T. Britt Price  
Administrative Judge

I concur:

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Lisa Hemmer  
Administrative Judge

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<sup>17/</sup> (...continued)

undue degradation. Regulation 43 CFR 3809.601 describes the kinds of enforcement actions available to BLM if claimants do not meet the requirements of 43 CFR Subpart 3809 that govern mining notices and plans of operation. The regulation at 43 CFR 3809.604 provides for a civil action in Federal court for injunctive relief and damages resulting from unlawful acts, and 43 CFR 3809.700 authorizes criminal penalties for the failure or refusal to comply with the requirements of the Subpart.