

JASON S. DAY

IBLA 2006-73

Decided February 14, 2006

Appeal from a decision of Phoenix District Office, Bureau of Land Management, finding use and occupancy of the Winter Gold lode mining claim, AMC-62597, to be not reasonably incident to the prospecting, mining, or processing of minerals, and ordering immediate cessation of all operations and occupancies in accordance with an established schedule. AZA-25846.

Affirmed; petition for stay denied as moot.

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

A mining claimant is not entitled to use and occupy a mining claim or mill site unless such use and occupancy justifiably can be considered reasonably incident to prospecting, mining, or processing operations. The possibility that mining or milling might commence sometime in the future does not justify current occupancy of a mining claim or mill site.

APPEARANCES: David Wm. West, Esq., Maricopa, Arizona, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Jason S. Day has appealed from and petitioned for a stay of the effect of an October 18, 2005, decision of the District Manager, Phoenix District Office, Bureau of Land Management (BLM), styled a "Permanent Cessation Order," finding Day's use and occupancy of the Winter Gold lode mining claim, AMC-62597, to be not reasonably incident to the prospecting, mining, or processing of minerals, and otherwise in violation of 43 CFR Subpart 3715, and ordering him to "immediately cease all operations and occupancies," and to "begin the reclamation and remediation

of all disturbances and improvements you created on the claim,” in accordance with an established schedule. (Decision at 8.)

Day is the current owner of the claim, which was originally located by William C. Falk on March 29, 1958, in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 2, T. 1 N., R. 8 E., Gila and Salt River Meridian, Pinal County, Arizona, near Apache Junction, Arizona. Falk filed a mining notice for the claim in May 1981. BLM serialized that notice as AZA-25846. Day acquired the claim and the adjacent Summer Gold lode mining claim, AMC-62598, from Falk’s successors-in-interest (Jeannette L. Falk and David H. Falk) by quitclaim deed, dated June 20, 1994. Day did not file a transfer of interest for the two claims with BLM until January 4, 2000. He later transferred the Summer Gold claim to Jerry L. and Lynette K. Stansbury. That claim is not at issue in this proceeding.

From January 20, 2000, to September 7, 2005, BLM inspected the Winter Gold claim on seven occasions, finding little or no evidence of any surface or underground mining activity.^{1/} However, it found considerable evidence that Day was living on the claim. In fact, Day told BLM personnel in January 2000 that he had occupied the “site for in excess of 15 years,” predating his purchase of the claim. (Jan. 20, 2000, Inspection Report at 1.) BLM described Day’s “domicile” on the claim as measuring 40 feet by 30 feet by 9.5 feet, being constructed of wood and block with a porch area measuring 7 feet by 24 feet. (Jan. 14, 2004, Inspection Report at 15.) During the various inspections, BLM found, *inter alia*, a residential trailer or trailers, a sizeable plastic water tank or tanks, a head frame, a hoist house/storage shed and/or other structures, pickup trucks and/or other vehicles, and a forklift and/or other industrial equipment, a 32-foot long trailer on a 20-foot long by 8-foot wide concrete pad, along with a generator, boiler tank, air compressor, grader, commercial trailers, cement mixer, diesel fuel tank, a furnace and other household equipment, a semi-trailer partially full of clothing and other household items, a 350-foot deep water well (with 6-inch surface casing), as well as assorted junk and other refuse. BLM stated in its January 14, 2004, Inspection Report at 1 that “[a]t the time of the inspection there were 5 people living on the claim. They consist of Mr. Day, Andy the watchman/gatekeeper, his wife and two boys approximately 11 and 8 years old * * *.” At the time of the April 13, 2005, inspection, Day had erected a new electric, automatic gate across the only public road access to the claim. On September 7, 2005, BLM found that Day had installed a hot tub next to the house and placed a backhoe on the claim.

^{1/} The claim was inspected by BLM on Jan. 20, 2000, May 31, 2002, Jan. 13, 2003, Jan. 14, 2004, and Feb. 8, Apr. 13, and Sept. 7, 2005.

BLM notified Day on numerous occasions of the necessity to file a new mining notice or a plan of operations for the claim, in accordance with 43 CFR Subpart 3809, and to comply with the use and occupancy regulations of 43 CFR Subpart 3715. On January 15, 2003, BLM received a letter from Day stating that he planned to extract gold, disturbing less than five acres, and was proceeding to clean up the site from the condition it was left in by the previous owner. By decision dated January 21, 2003, BLM informed Day that it considered his letter to be a request to extend mining notice AZA- 25846, in accordance with 43 CFR 3809.333. It stated, however, that the request was incomplete and that it needed additional information relating to reclamation, including a reclamation plan and reclamation cost estimate. It noted that failure to provide the information would result in a declaration that the notice had expired. Day never filed the requested information.

On July 25, 2003, BLM issued a decision styled "Notice Expired," stating that, in accordance with 43 CFR 3809.300, mining notice AZA- 25846 had expired in January 2003. The decision required that Day, within 30 days of receipt of the decision, either file a new mining notice or a plan of operations, or immediately cease operations and begin reclaiming the affected land. Day did not appeal that decision or file a new mining notice or plan of operations. Moreover, Day never sought BLM's concurrence with his occupancy of the claim, as required by 43 CFR Subpart 3715.

In her October 2005 decision, the District Manager detailed the results of BLM's field inspections and review of its public-land records, concluding that Day's use and occupancy of the claim was not reasonably incident^{2/} to any prospecting, mining, or processing operations, and otherwise not in compliance with 43 CFR Subpart 3715.^{3/} She based her conclusion on the inactivity of the operation and lack

^{2/} "Reasonably incident" is defined by 43 CFR 3715.0-5 to include "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 equipment appropriate to the geological terrain, mineral deposit, and stage of development and reasonably related activities."

^{3/} The District Manager cited Day with having violated nine provisions of the 43 CFR Subpart 3715 regulations: 43 CFR 3715.2(a) and 3715.5(a), because his use and occupancy was not reasonably incident to prospecting, mining, or processing operations; 43 CFR 3715.2(b) through (d), because he was not engaged in substantially regular work, reasonably calculated to lead to the extraction and beneficiation of minerals and involving observable on-the-ground activity; 43 CFR 3715.3-6 for failure to obtain BLM's concurrence before he began occupancy; 43 CFR
(continued...)

of necessary operating permits. The District Manager determined, however, that, while Day's use and occupancy was not reasonably incident, it did not endanger health, safety, or the environment, and she ordered Day to cease all operations and occupancies of the claim upon receipt of the decision, and to begin the reclamation and remediation of the claim in accordance with a schedule set forth in the decision. (Decision at 8; see 43 CFR 3715.7-1(b)(i).) The District Manager stated that failure to comply with these directives might result in BLM reclaiming the site and removing and disposing of all property left by Day, at his cost, and in taking further action pursuant to 43 CFR 3715.7-2 and 3715.8, including seeking to exact civil and/or criminal penalties.

Day appealed and petitioned for a stay of the decision. He states that "[t]he only practical and effective way to have the property restored is to leave [him] in possession." (Petition at 2.) BLM filed a response opposing the granting of a stay. It also filed an answer to Day's statement of reasons (SOR).

On appeal, Day does not directly challenge BLM's determinations. Instead, he outlines his proposal to now initiate mining operations on the claim. He states that he has devised a different approach to mining than that employed by Falk. He states that he will focus on an "abundant" quantity of water containing "newly discovered gold," which continually invades the underground mine workings on the claim. (Petition at 1.) Day notes that Falk regarded the water as a nuisance, causing him to suspend mine operations, but that Day regards the water as a potential source of recoverable gold. He explains that he believes that the water is "likely" to be coming in an "underground stream," by way of several "fault lines," from the nearby "Mammoth Mine," which "produced over \$50 million in gold" in the 1890's and which is situated "only some 2,000 feet" east of the subject claim. Id.; see Ex. H ("Mining Process") attached to SOR. ^{4/} He states at page 1 of his SOR that he

^{3/} (...continued)

3715.6(a) for placing, constructing, maintaining, and using residences or structures for occupancy not meeting the standards of occupancy under 43 CFR 3715.5; 43 CFR 3715.6(b) for beginning occupancy before filing and receiving approval for a plan of operations; and 43 CFR 3715.6(g) for placing, constructing, or maintaining enclosures, gates, or fences intended to exclude the general public, without BLM's concurrence.

^{4/} Exhibit H consists of a one-page document entitled "Mining Process," and three pages evidently copied from a reference work, which briefly sets forth the history of the Mammoth Mine. While productive of a considerable quantity of gold from its
(continued...)

“believes he has made significant efforts to clean up the property. Work remains to be done and [he] is willing to do it provided he [is] permitted to remain on the claim.”

Section 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (2000), provides: “Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.” Among the regulations implementing section 4(a) of the Surface Resources Act in 43 CFR Subpart 3715 is 43 CFR 3715.5(a), which states that “use or occupancy [of a mining claim] must be reasonably incident.” “Occupancy” is broadly defined at 43 CFR 3715.0-5 to mean “full or part-time residence on the public lands,” as well as

activities that involve residence: the construction, presence, or maintenance of temporary or permanent structures that may be used for such purposes; or the use of a watchman or caretaker for the purpose of monitoring activities. Residence or structures include, but are not limited to, barriers to access, fences, tents, motor homes, trailers, cabins, houses, buildings, and storage of equipment or supplies.

43 CFR 3715.2 provides that, in order to occupy a claim for more than 14 calendar days in any 90-day period, a claimant must be engaged in activities that (a) are reasonably incident, as defined by 43 CFR 3715.0-5; (b) constitute substantially regular work; (c) are reasonably calculated to lead to the extraction and beneficiation of minerals; (d) are observable on-the-ground and verifiable by BLM; and (e) use appropriate equipment that is presently operable. We have stated that to be permissible under 43 CFR 3715.2, the occupancy must meet all five of those requirements. Las Vegas Mining Facility, Inc., 166 IBLA 306, 312-13 (2005); Betty Dungey, 165 IBLA 1, 8 (2005). In addition to fulfilling all the requirements of 43 CFR 3715.2(a) through (e), a claimant must show that its occupancy involves one or more of the elements set forth in 43 CFR 3715.2-1(a) through (e). Robert W. Gately, 160 IBLA 192, 208 n.21 (2003). Furthermore, in order to justify occupancy of a claim or site by a caretaker or watchman, one must meet the requirements of 43 CFR 3715.2-2.

^{4/} (continued)

inception in the 1890's, the Mine evidently ceased operation in 1925, 15 years after being reopened following a 13-year lull.

With respect to occupancies in existence at the time of initial promulgation of the Subpart 3715 regulations on August 16, 1996, the occupancy had to meet the regulatory requirements by August 18, 1997, and thereafter remain in compliance. 43 CFR 3715.4(a); Leadville Corp., 166 IBLA 249, 254 (2005).

Where any use or occupancy of a claim is not reasonably incident to prospecting, mining, or processing operations, it is precluded by section 4(a) of the Surface Resources Act and 43 CFR 3715.5(a). See, e.g., Precious Metals Recovery, Inc., 163 IBLA 332, 340-41 (2004); Thomas E. Smigel, 156 IBLA 320, 323 (2002). Further, 43 CFR 3715.7-1(b) authorizes BLM to “order a temporary or permanent cessation of all or any part of your use or occupancy if * * * [a]ll or any part of your use or occupancy is not reasonably incident but does not endanger health, safety or the environment to the extent it is not reasonably incident[.]” See 43 CFR 3715.4(a) and 3715.4-3. BLM is also authorized to order that the land affected by unauthorized use and occupancy be reclaimed under 43 CFR Part 3800 within a specified, reasonable time period. 43 CFR 3715.4(a) and 3715.4-3(b); see 43 CFR 3809.5 (defining “*Reclamation*”).

One challenging a BLM decision that is based on a finding that a claimant or operator’s occupancy of a mining claim or mill site is not reasonably incident to prospecting, mining, or processing operations bears the burden to prove that the use or occupancy is, in fact, in compliance with section 4(a) of the Surface Resources Act and 43 CFR 3715.5(a). Leadville Corp., 166 IBLA at 255.

The overwhelming evidence in this case supports BLM’s action. Appellant has not challenged BLM’s findings of occupancy of the claim. In fact, according to the record, appellant informed BLM personnel in January 2000 that he had occupied the claim for over 15 years, predating his purchase of the claim from Falk. He makes no allegation of having conducted any mining activities on the claim. Instead, he asserts that he is now planning to extract gold from underground waters on the claim, an assertion that is undercut by evidence offered by BLM in the form of declarations by Joseph A. Dixon, a BLM geologist who was previously Chief Geologist for Weir International Mining Consultants for six and one-half years. Dixon states that “Mr. Day presents no evidence that gold has been leached from the nearby Mammoth Mine * * *, nor is there any evidence that the groundwater is flowing from the mine towards Mr. Day’s claim. Further, Mr. Day has never been able to provide the BLM with any observable or tangible evidence of gold produced from the claim.” (Dixon Declaration, dated Jan. 20, 2006 (2006 Dixon Declaration) (Ex. A attached to BLM Answer), at 4.). Dixon also states that “there is no evidence of the direction of groundwater flow in the area, and gold is much too heavy and dense to be simply carried along in slow moving groundwater.” (Dixon Declaration, dated Dec. 14,

2005 (Ex. B attached to BLM Response to Notice of Appeal and Petition for Stay), at 8-9.)

Dixon correctly summarizes Day's occupancy:

The case file record, the Permanent Cessation Order and the previous Declaration all document that Mr. Day has done little or nothing to clean up the property. Indeed, the inspections since January 20, 2000, the first performed with Mr. Day as the claimant, document a substantial and increasing occupancy with ever more non-mining related items on site or with some things simply moved around the claim.

(2006 Dixon Declaration at 3.)

[1] Simply put, a mining claimant is not entitled to use and occupy a mining claim or mill site unless such use and occupancy justifiably can be considered reasonably incident to prospecting, mining, or processing operations. Rivers Edge Trust, 166 IBLA 297, 303 (2005); Precious Metals Recovery, Inc., 163 IBLA at 340-41; Thomas E. Smigel, 156 IBLA at 323. Appellant appears to labor under the mistaken impression that, even though he is not engaged in any active mining operations or mine-related activity, he is justified in maintaining structures and otherwise occupying the claim, so long as the claim may, in the future, be used in mining. However, the fact that appellant is not engaged in active mining operations or mine-related activity means that he cannot occupy the claim. The possibility that mining or milling might commence sometime in the future does not justify current occupancy of a mining claim or mill site.^{5/} Las Vegas Mining Facility, Inc., 166 IBLA at 313.

Accordingly, 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. The petition for stay is denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

^{5/} Appellant's obligation to remove property extends to all property to which he claims title and/or over which he has exercised dominion and control. Peter Blair, 166 IBLA 120, 126 (2005); Betty Dungey, 165 IBLA at 14-15.

I concur:

H. Barry Holt
Chief Administrative Judge