

ROBERT B. WINELAND

IBLA 2004-89

Decided June 27, 2006

Appeal from decision of the Las Vegas, Nevada, Field Office, Bureau of Land Management, declaring mining Notice of Operations expired and from Notice of Noncompliance issued by the same office declaring occupancy of mining claims in violation of 43 CFR Subpart 3715. N-71921.

Affirmed.

1. Mining Claims: Surface Uses--Mining Claims: Surface Management: Mining Notice

Under 43 CFR 3809.332, a mining notice remains in effect for 2 years unless extended or terminated. Under 43 CFR 3809.503(a), an operator whose notice was on file with BLM on January 20, 2001, was not required to file a financial guarantee or bond unless he modified or extended the notice under 43 CFR 3809.333. After 2 years, however, the operator may extend the notice under 43 CFR 3809.333, but “must notify BLM in writing on or before the expiration date and meet the financial guarantee requirements of § 3809.503.” The financial guarantee “must cover the estimated cost as if BLM were to contract with a third party to reclaim your operations * * * .” 43 CFR 3809.552.

APPEARANCES: Robert B. Wineland, Acton, California, pro se; Jared C. Bennett, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Robert B. Wineland has appealed from a November 7, 2003, decision, styled as a Notice of Noncompliance (NON), issued by the Las Vegas, Nevada, Field Office, Bureau of Land Management (BLM), finding that occupancy of four mining claims

was not reasonably incident to prospecting, mining, or processing operations within the meaning of the regulations in 43 CFR Subpart 3715 governing occupancy of mining claims on public lands. Wineland has also appealed a March 8, 2004, BLM decision declaring his Notice of Operations N-71921 to have expired effective February 13, 2004. The basis for this decision was that Wineland had not responded to a letter requesting a revised estimate of reclamation costs needed to determine the amount of the financial guarantee for reclamation required by 43 CFR Subpart 3809. For reasons explained below, we affirm both decisions.

The four mining claims are the Cabell (NMC 827069), the Carolyn (NMC 827070), the San Mateo (NMC 827073), and the Virginian (NMC 827074). They are situated near Searchlight, Nevada, mostly encompassing land in secs. 25 and 26, T. 28 S., R. 63 E., and secs. 30 and 31, T. 28 S., R. 64 E., Mount Diablo Meridian. The record shows, however, that they are relocations of claims first located 80 years earlier. The Cabell, Carolyn, San Mateo, and Virginian claims were first located on July 2, 1921, and assigned serial numbers NMC 50506, NMC 50507, NMC 50510, and NMC 50511, respectively, when recorded with BLM. A letter from Wineland dated September 24, 1996, suggests the claims were forfeited for failure to pay the maintenance fee or qualify for a waiver by August 31, as required by 30 U.S.C. § 28f (2000). The claims were relocated on September 16, 1996, and assigned serial numbers NMC 750919, NMC 750920, NMC 750923, and NMC 750924, but were also “closed.” Wineland located the claims once again on October 17, 2001.^{1/}

In his Statement of Reasons (SOR), Wineland states that his grandparents purchased the claims in the late 1940s and the purchase included a bunkhouse built in the early 1900s and some “antique mining equipment.” His grandparents added 800 square feet to the original bunkhouse, and added a water tank, windmill system, storage barn, and generator shed. According to a letter from Wineland to BLM dated July 17, 2003, Wineland’s parents inherited the claim from his grandparents and he took them over in the early 1980s. In that letter, he states that from 1980 to 1981, he mined the claims for 9 months and received \$23,000 from ASARCO Corporation.

^{1/} If prior claims have been abandoned for failure to file the affidavit of assessment work required by 43 U.S.C. § 1744 (2000), or forfeited for failure to comply with the maintenance fee or waiver requirements of 30 U.S.C. § 28f (2000), the claims are to the former claimant “as though he had never owned or occupied [them]. * * * Rights acquired under a relocation of an abandoned claim, whether by a former claimant or another, will not relate back to the date of location of the original claim, but only to the date of the relocation.” U. A. Small, 108 IBLA 102, 107 (1989); Florian L. Glineski, 87 IBLA 266, 268-69 (1985) (quoting 2 Rocky Mountain Mineral Law Institute, American Law of Mining, 8.6 (1983 1st ed.)).

After an October 29, 1991, inspection, BLM sent a letter dated November 6, 1991, notifying Wineland that he was not in compliance with regulations at 43 CFR Part 3809 pertaining to surface management of mining claims and that he must submit a notice or plan of operations. After exchanges of correspondence, Wineland submitted a Notice of Operations on April 24, 1992, that described “a contact zone of andesite rock and monzonite rock [that] is generally exposed along the surface in an approximate East-West direction” on the San Mateo, Cabell and Oakland claims between the bunkhouse and water tanks.^{2/} Wineland stated that operations were currently taking place and would continue for the next decade to expose the mineralized area and to upgrade the water well. By letter dated May 7, 1992, BLM found that Wineland had submitted the required information, serialized the Notice as N-71921, and advised Wineland to avoid disturbing historic features.

On October 27, 1992, BLM conducted a field inspection to determine whether significant cultural resources occur on or near the claims. In a letter dated January 11, 1993, BLM stated:

The stamp mill, associated structures and artifacts, including an area that extends south from the mill to a nearby hill with a windl[a]ss, is considered an historic mining complex. Historic archaeological sites are areas or buildings where human events occurred 50 years or more in the past, such as mining camps or railroad construction sites.

The letter stated that these areas were cultural resources protected by “numerous laws.” The letter further stated that BLM’s inspection “was merely a reconnaissance evaluation and the mining complex had not been recorded according to standards established by the Advisory Council on Historic Preservation. Prior to any authorized disturbance it would be necessary to comply with the recordation procedures * * *.”

The site was inspected several times in the following years, and although some changes in the site were reported, BLM never found evidence of mining activity. A June 25, 2002, inspection report identified a house, a smaller building, water tanks, private signs on the house and fence, a “dummy locked” gate on the road to the site, and a large pit. The report stated that the house was visited frequently. Photographs showed the structures and equipment as well as an open pit, an unsecured mine entrance, and a concrete pad with a stockpile with vegetation growing on it.

On September 23, 2002, BLM issued a letter advising Wineland that the surface management regulations at 43 CFR Part 3809 had been revised effective January 20, 2001, that reclamation bonds were now required, and that after January 20, 2003, notices of operation that were not bonded would expire. The

^{2/} The Oakland claim is not at issue in this appeal.

letter required Wineland to submit a reclamation cost estimate and to reclaim existing disturbance. By letter dated January 15, 2003, Wineland submitted his estimate for reclamation costs.

By letter dated May 29, 2003, BLM notified Wineland that a surface use evaluation would be conducted to determine compliance with BLM's surface use regulations in 43 CFR Subpart 3715. A BLM inspector met with Wineland on July 2, and his report found:

There is little in the way of mining equipment on the site. He has a small jig table and crusher stored in the shed. A shovel and some other hand tools are also there. Stockpiled materials, which he claims is ore, have vegetation growing on them. Wineland said that he came out on the site every six to eight weeks to do work. He stated that he felt there was a commercial body of ore on the site, but that he did not have the necessary funds to bring it into production. He is processing about \$1,500 - 2,000 a year. There is a bunkhouse on site that Wineland uses. An old cabin, dating from the 1950's is not habitable. A small shed is used to store a number of items. Water is drawn by submersible pump from an old mineshaft with a concrete housing over it. The site is neat and fairly clean.

On July 8, 2003, BLM sent Wineland a summary of remarks made during the inspection which he clarified in a letter dated July 17. In his letter, Wineland provided information about the history of the claims and the buildings on them. As to mining activity, Wineland stated that in addition to assessment work, he has attempted "to regularly process gold and silver ore into concentrates using ore which was recently mined or ore from stockpile" and that these concentrates have been sold. He asserted that a stockpile of approximately 100 tons of ore of commercial value remains on the site. He referred to the period in 1980-81 when he occupied the claims for approximately 9 months and sold approximately \$23,000, and mentioned a 1917 publication as showing a history of production from the claims.

After additional inspections on July 18 and August 29, BLM prepared a Mineral Report dated September 30, 2003, for a surface use determination. The Report identified a storage building, bunkhouse, and water storage tanks on the San Mateo claim, an incomplete and uninhabitable cabin from the 1950s on the Carolyn claim, a gate across the access road on the Virginian claim, and a covered mine shaft used for storing water on the Cabell claim. The Mineral Report identified equipment, parts, and other items on the site, and set forth the following conclusions:

- 1) No milling or mining operations are taking place that would require the level of occupancy which is taking place.

- 2) Activities on the site do not constitute substantially regular work.
- 3) Activities and equipment on the site cannot be reasonably calculated to lead to the extraction and beneficiation of minerals. Mining equipment located on the claims is along the lines of what would be used in hobby mining.
- 4) Operations do not involve observable on-the-ground activities that the BLM may verify under [43 CFR] 3715.7.
- 5) The primary use of the claims is for non-mining related occupancy. There is no equipment present that could be reasonably incident to a theoretical operation. All other equipment, machinery and personal property are inappropriate for the purposes to which the claims are actually put, and could not be adapted for actual mineral production or mining operations.
- 6) Since no valuable minerals are exposed, the present occupancy is beyond that needed to protect exposed, concentrated or otherwise accessible valuable minerals from theft or loss.
- 7) The occupancy is not needed to protect from theft or loss appropriate, operable equipment, which is regularly used, is not readily portable and cannot be protected by means other than occupancy. The equipment on site that is mining related is readily portable and could be removed between operating periods.
- 8) The occupancy is not needed to protect the public from appropriate operable equipment, which is regularly used, is not readily portable, and if left unattended, creates a hazard to public safety.
- 9) The occupancy is not needed to protect the public from surface uses, workings or improvements, which if left unattended, create a hazard to public safety. The workings can be secured (as some already have [been]) to prevent a hazard to the public safety.
- 10) The site is not located in an area so isolated or lacking in physical access as to require the mining claimant, operator or workers to remain on site in order to work a full shift of a usual and customary length. The site is within an hour[']s travel distance of Las Vegas, Nevada, and 10 minutes['] travel distance from Searchlight, Nevada.

11) Having equipment, machinery and other personal property on site that is not related to mining or inappropriate for the purposes to which the claims are actually put, and could not be adapted for actual mineral production or mining operations causes[] unnecessary and undue degradation of the public lands and resources.

(Mineral Report at 3-4.)

On November 7, 2003, BLM issued its NON from which the first of these appeals is taken. The NON set forth the above conclusions from the Mineral Report and required Wineland to remove the gate, garage/shop, bunkhouse, cabin and other personal items, equipment and trash. The NON identified historic items which should be left undisturbed, and required Wineland to meet with a BLM archaeologist to review removal plans and ensure archaeological protection. The NON required Wineland to begin work within 30 days and to finish within 90 days.

The NON was received by Wineland on November 22, 2003. He filed a timely Notice of Appeal and petition for stay on December 19. BLM filed a stipulation to stay the NON, and the Board granted the stay by order dated January 5, 2004.

On November 26, 2003, BLM issued a decision acknowledging receipt of Wineland's January 15, 2003, notice of intent to extend Notice N-71921. BLM stated that a reclamation bond or financial guarantee must be posted to extend a notice, citing 43 CFR 3809.503, but that a bond cannot be posted unless the estimate of costs is acceptable. BLM found that Wineland's cost estimate was deficient for failure to include the costs of removal of certain structures and regrading the roads and the site. Wineland was required to submit a revised cost estimate within 30 days; otherwise, the Notice of Operations would expire.

In a letter dated January 9, 2004, BLM extended the period for submitting a response to the November 26 notice until 30 days after receipt. Wineland received this letter on January 14, but did not respond to it. BLM then issued its March 8, 2004, decision declaring Notice N-71921 to have expired effective February 13.

In his Notice of Appeal, Wineland's principal assertion is not that BLM's decision is in error, but rather that the financial consequences of the mining claims are a liability he could not have anticipated given the Department's effective acquiescence in his family's use of the mining claims since the 1940s. He asserts that he waited a good part of his life to take over or inherit the property on the mining claims from his forefathers, only to discover that he must reclaim what they left behind. Wineland considers his occupancies "to be 'cultural resources' with historical value, and 'protected' under federal law[.]" (Notice of Appeal at 2.) He proposed a compromise withdrawal of BLM's decision and holding his bonding evaluation in

abeyance while he carried out specified reclamation activities including removal of certain structures (the bunkhouse would remain) and debris on the claims. On completion of his proposed work, Wineland would post a reclamation bond for uncompleted work and his Notice of Operations would be renewed, after which he would have a 2-year period to increase mining operations, the absence of which would result in reissuance of BLM's decision.

On March 16, 2004, counsel for Wineland submitted a draft agreement intended to resolve the issues raised in both BLM decisions.^{3/} On March 23, BLM proposed an alternative agreement. The Board had granted Wineland extensions of time to file his SOR, up to May 16, 2005. Wineland utilized this time to comply in part with BLM's notice by removing some structures and items from the claims. BLM again inspected the claim on December 14, 2004, and found that the gate was locked but that a number of items had been removed, including the partial cabin on the Carolyn claim, two of the water tanks (with only the bases remaining), the old shower house, and some smaller items. The inspection report noted that Wineland had contracted with a geologist to review the property.

In letters to BLM in early 2005, Wineland sought to meet with BLM to resolve concerns about the extent of reclamation, bonding, "and the extent of operations which you feel are required to keep the remaining two buildings." Wineland stressed that immediate compliance with BLM's notice would result in unjust hardship and proposed a settlement by which the NON would be withdrawn and Wineland would submit a notice or plan of operations for work over a 2- or 3-year period. These letters generated no response from BLM and Wineland filed his SOR.

In his SOR, Wineland repeats his concerns regarding the financial liability the claims have created for him, based on his family's history. Acknowledging that the laws and regulations currently in effect authorize BLM's decisions, Wineland believes BLM nonetheless should take into consideration the circumstances of a small miner in order to conclude that his activities on the claims constitute substantially regular work and that his equipment is suitable for the beneficiation of minerals. (SOR at 3-4.) He faults BLM for being inflexible in failing to negotiate a settlement. (SOR at 4-5.) He complains that "potential historical structures were dismissed due to their 'use or modification' [and] were ordered to be removed without a formal written determination from the BLM archaeologist." (SOR at 5 (emphasis in original).) He describes his efforts to obtain a surety bond for reclamation for his Notice, and asserts

^{3/} We note that on Mar. 8, 2004, BLM received a letter from Wineland concerning an agreement proposing the completion of certain cleanup and reclamation as well as a specified amount of mining work to satisfy occupancy issues. The letter expressed Wineland's understanding that "the recalculated cost for a bond estimate would be part of this agreement; not precede it."

that BLM “is ordering something that is not available.” (SOR at 6.) He asserts that BLM has not acted in good faith in attempting to reach an agreement that would provide a plan to bring the claims into compliance over a period of years and particularly objects to the issuance of BLM’s March 8, 2004, decision declaring his Notice of Operations to have expired while negotiations were taking place. He requests that BLM’s NON be overturned or that it be stayed for another 2 or 3 years and that the Notice of Operations be reinstated. (SOR at 7.)

[1] Because operations that would justify an occupancy under Subpart 3715 cannot be conducted under an expired notice, see 43 CFR 3809.300(d), we turn first to BLM’s March 8, 2004, decision declaring his Notice of Operations to have expired before we address the November 7, 2003, NON. Although the costs of reclamation and the amount of any bond required in the future may depend upon the extent of Wineland’s operations and occupancy that BLM allows in the future, this circumstance does not relieve Wineland of his present obligation to provide a bond or other financial guarantee to cover reclamation of areas on the claims that are presently disturbed.

Congress has imposed upon the Secretary of the Interior a responsibility to prevent unnecessary or undue degradation of the public lands, by regulation or otherwise. See 43 U.S.C. §§ 1732(b), 1740 (2000). Under rules enacted in 1980, 45 FR 78902, 78909 (Nov. 26, 1980), for mining operations that cause less than 5 acres of disturbance during the calendar year, but amount to more than casual use of the surface, a notice of intent to mine is required at least 15 days in advance of mining activity. 43 CFR 3809.1-3 (1990). The Department amended the 3809 regulations effective January 2001, 65 FR 69998 (Nov. 21, 2000). When BLM amended these regulations, it provided that an operator such as Wineland, who had filed a Notice before January 20, 2001, may conduct operations for 2 years under the existing notice under the regulations previously in effect. 43 CFR 3809.300(a). Under 43 CFR 3809.503(a), an operator whose notice was on file with BLM on January 20, 2001, was not required to file a financial guarantee or bond unless he modified or extended the notice under 43 CFR 3809.333. After two years, however, the operator may extend the notice under 43 CFR 3809.333, but “must notify BLM in writing on or before the expiration date and meet the financial guarantee requirements of § 3809.503.” 43 CFR 3809.333 (emphasis added). See 43 CFR 3809.552 (financial guarantee “must cover the estimated cost as if BLM were to contract with a third party to reclaim your operations * * *”).

The regulations provide no support for Wineland’s belief that no bond was required. Nor do Wineland’s difficulties in obtaining a bond provide a basis for BLM to extend his Notice of Operations in the absence of a financial guarantee. While we may sympathize with Wineland’s difficulties, the Board has stated: “[U]nder the new regulations, the authorized officer would have absolutely no authority to waive the

requirement that Wineland submit an individual financial guarantee, *i.e.*, a bond.” Nevada Mineral Processing, 157 IBLA 223, 228 (2002). Accordingly, BLM’s decision that Wineland’s Notice of Operations expired must be affirmed.

We turn now to Wineland’s appeal from the November 7, 2003, NON for failure to comply with the regulations in 43 CFR Subpart 3715 concerning occupancy of mining claims. 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.” Effective August 16, 1996, the Department adopted 43 CFR Subpart 3715 to implement those statutory provisions and to address the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. See 61 FR 37115, 37116 (July 16, 1996). The regulations set forth restrictions on the use and occupancy of public lands open to the operation of the mining laws, limiting such use and occupancy to those involving prospecting or exploration, mining, or processing operations and uses reasonably incidental 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. Karen V. Clausen, 161 IBLA 168, 175-78 (2004); Jay H. Friel, 159 IBLA 150, 156-57 (2003); Bradshaw Industries, 152 IBLA 65, 67 (2000). Additionally, the regulations clarify that unauthorized uses and occupancies on public lands are illegal uses that constitute unnecessary or undue degradation of public lands. 61 FR at 37117-18; David J. Timberlin, 158 IBLA 144, 151 (2003).^{4/}

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; James R. McColl, 159 IBLA 167, 178 (2003). The regulations define “reasonably incident” as those actions involving the “statutory standard” of “prospecting, mining, or processing operations and uses reasonably incident thereto.” 43 CFR 3715.0-5, citing 30 U.S.C. § 612 (2000).^{5/} The term “includes those actions or expenditures of labor and

^{4/} As noted above, the Secretary is mandated by law to take any action necessary to prevent unnecessary or undue degradation of the public lands. See 43 U.S.C. § 1732(b) (2000); see also David J. Timberlin, 158 IBLA at 151; Firestone Mining Industries, Inc., 150 IBLA 104, 109 (1999).

^{5/} In addition, 30 U.S.C. § 625 (2000) provides that all mining claims and millsites
(continued...)

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.” Id.; Patrick Breslin, 159 IBLA 162, 166 (2003). The burden of proving that activities on a mining claim are reasonably incident to mining is on the claimant. Thomas E. Swenson, 156 IBLA 299, 310 (2002); David J. Flaker, 147 IBLA 161, 164 (1999). The extent of permissible occupancy is directly related to the extent of mining activity conducted on the claim; the structures and equipment maintained on site must be related to and commensurate with the operations. Karen V. Clausen, 161 IBLA at 177; John B. Nelson, 158 IBLA 370, 379 (2003); David E. Pierce, 153 IBLA 348, 358 (2000); Bradshaw Industries, 152 IBLA at 63.

We agree with BLM that Wineland has failed to meet his burden of proof that his occupancy is in compliance with 43 CFR 3715.2, particularly in view of repeated inspections that detected no evidence of mining activity and the minimal mining activity that Wineland himself asserts has occurred over the years. Recognizing Wineland’s argument that BLM has required removal of “potential historical structures” without written approval of an archaeologist, we note that the NON itself requires appellant to consult with a BLM archaeologist to review removal plans. Appellant’s concerns will be addressed at that time.^{6/}

We also recognize Wineland’s dismay over the fact that a property interest he acquired from his family has become such a liability to him. He attributes that result to BLM’s inflexibility in imposing what are, to him, new legal requirements rather than exercising discretionary authority to allow his family to use the land as did his grandparents. Wineland is correct in that the regulations implemented in 1996 are more strict than any in place to implement the Surface Resources Act prior to that time. He is wrong to presume that the Department’s lesser enforcement in the past and even acquiescence in occupancies allow BLM discretion to allow occupancies for activities not reasonably incident to mining. As we noted in Bruce W. Crawford,

^{5/} (...continued)

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.” See James R. McColl, 159 IBLA at 177.

^{6/} Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2000), requires that the head of any Federal agency having authority to license any undertaking take into account the effect of the undertaking on any property eligible for inclusion on the National Register of Historic Places. See 36 CFR 60.4 (treatment of “reconstructed historic buildings”).

86 IBLA 350, 358-75, 92 I.D. 208, 212-21 (1985), the provisions of the Surface Resources Act, “far from altering the surface rights obtained by the location of a mining claim were, in fact, simply declaratory of the law as it existed prior to 1955.” 86 IBLA at 364, 92 I.D. at 216 (emphasis in original). “Thus, the term ‘reasonably incident’ may be considered as subsuming that pre-existing case law.” United States v. Peterson, 125 IBLA 72, 78 (1993). In Terry Hankins, 162 IBLA 198, 218 (2004), we noted that “Hankins’ characterization of the mining laws and customs of the United States seems to be more the product of myth and folklore than reality.” Explaining the purpose of the Surface Resources Act to ensure that “exclusive possession and use of a claim site by a mining claimant was recognized by the United States only so long as it was incident to prospecting and mining,” we noted that Hankins could not maintain unauthorized occupancy based upon his belief that mining claims provided opportunities to reside on the public lands. Id., citing United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1281, 1285 (9th Cir. 1980). The same is true in this case, whatever occupancies occurred on these claims in the past based on different circumstances and uses.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 7, 2003 NON and the March 8, 2004, BLM decision declaring his Notice of Operations N-71921 to have expired are affirmed.

Lisa Hemmer
Administrative Judge

I concur:

James F. Roberts
Administrative Judge