

COMBINED METALS REDUCTION CO.

IBLA 2003-332

Decided September 7, 2006

Appeal from a decision of the Kingman (Arizona) Field Office, Bureau of Land Management, issuing a cessation order under 43 CFR Subpart 3715.

Affirmed in part, affirmed in part as modified, and vacated in part and remanded.

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

All existing uses and occupancies under the mining laws were required to comply with Departmental regulations at 43 CFR Subpart 3715 implementing the Surface Resources Act, 30 U.S.C. § 612(a) (2000), by Aug. 18, 1997, after which they became subject to enforcement action.

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

A party will be deemed not to have received constructive notice under 43 CFR 1810.2(b) of a notice of noncompliance (NON) issued by BLM under 43 CFR 3715.7-1(c) where the NON was mailed to the party but not received by him, the record does not establish that it was mailed to his last address of record, and the circumstances of the non-delivery are not clear from the record. In the absence of service of the NON, the purpose of providing notice to the claimant of how it is failing or has failed to comply with 43 CFR Subpart 3715 was

thwarted, and the matter must proceed as though no NON was issued.

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

Under 43 CFR 3715.7(b)(1), to the extent that a use or occupancy is not reasonably incident to prospecting, mining, or processing operations, BLM may order a temporary or permanent cessation of all or any part thereof if all or part of the use or occupancy is not reasonably incident but does not endanger health, safety, or the environment. A cessation order citing use or occupancy that is not reasonably incident, but does not endanger health, safety, or the environment, is properly issued even though it was not preceded by a cognizable notice of noncompliance.

4. Mining Claims: Surface Uses--Surface Resources Act: Occupancy--Words and Phrases

Reasonably incident. Under 43 CFR 3715.2, occupancy of a mining claim for more than 14 days in any 90-day period is not an authorized use or occupancy if the mining operations used to justify the use or occupancy are not “reasonably incident” to mining or mining-related activity. “Reasonably incident” is defined at 43 CFR 3715.0-5 as those actions involving the “statutory standard” of “prospecting, mining, or processing operations and uses reasonably incident thereto” and “includes those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit, using methods, structures, and equipment appropriate to the geological terrain, mineral deposit, and stage of development and reasonably related activities.”

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

The burden of proving that activities on a mining claim are reasonably incident to mining or mining-related

activity is on the claimant. The extent of permissible occupancy is directly related to the extent of mining-related activity conducted on the claim; the structures and equipment maintained on site must be related to and commensurate with the operations. The relevant period of time for determining the level of activity on mining claims is the time immediately prior to BLM's issuance of a cessation order. Where the record shows that, for a period of some 3 years immediately prior to the issuance of the CO, an occupant was merely "mothballing" its equipment, while actually dismantling much of its mining infrastructure, and that the actions taken were defensive and preservational and not related to the development of the mineral resources of the claims, the occupancy is not "reasonably incident" under the regulations.

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

Where an occupancy does not meet the conditions of 43 CFR 3715.2(a) and 3715.5(a) (both requiring that such occupancy be "reasonably incident") maintaining structures and equipment for such occupancy is prohibited under 43 CFR 3715.6(a) and (j), and a cessation order directing the immediate removal of structures and equipment from the claims is properly issued under 43 CFR 3715.7-1(b)(i).

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

The promulgation of 43 CFR Subpart 3715 superseded any previous authorizations for occupancy. In the absence of a new authorization under 43 CFR Subpart 3715, any prior authorization of occupancy is irrelevant.

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

As long as mining claims remain valid, the claimant retains the right to re-enter its claims for mining, exploration, and/or milling operations, subject to the

limitations imposed by 43 CFR Subpart 3809 and 3715. To the extent that a validly-issued cessation order purports to permanently bar an operator from re-entering a valid mining claim to conduct mining and/or milling operations, it will be modified to clarify that occupancy is barred only until BLM approves a new occupancy.

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

A cessation order issued by BLM pursuant to 43 CFR Subpart 3715 is properly vacated as unsupported where the record does not show, and BLM has not ruled in the first instance, that reclamation is in order under relevant provisions of 43 CFR Subpart 3809.

10. Appeals: Generally--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

As a BLM decision concerning permissibility of occupancy of a mining claim is not a decision determining whether the claim is invalid due to lack of a discovery under the Mining Law of 1872, the mining claimant is not entitled to a pre-decisional fact-finding hearing before an administrative law judge. The claimant's due process rights are fully protected by its right to appeal such decision to the Interior Board of Land Appeals.

APPEARANCES: Jerry L. Haggard, Esq., Phoenix, 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 ADMINISTRATIVE JUDGE HUGHES

Combined Metals Reduction Company (CMRC) appeals the June 16, 2003, cessation order (CO) issued by the Kingman (Arizona) Field Office, Bureau of Land Management (BLM), instructing it to terminate all operations on the Mohave Mine Project, located in Secs. 16, 20, 21, 27-29, and 32-34, T. 25 N., R. 21 W., Gila and

Salt River Meridian, Mohave County, Arizona, and begin reclamation of the site.^{1/} BLM's CO cited 11 violations of 43 CFR Subpart 3715, relying on evidence gathered during multiple on-site inspections and communications with State and Federal regulatory authorities.

CMRC filed a Notice of Appeal and Petition for Stay on July 23, 2003, disputing BLM's characterization of the state of the project and arguing that it should be permitted to continue operations. By Order dated August 29, 2003, we stayed the effect of BLM's CO during the pendency of the appeal.

The background of the matter is that, on July 23, 1989, BLM approved CMRC's mining plan of operations (MPO 89-K-08) to carry out exploration, mining, and mineral processing on CMRC's unpatented mining claims in Mohave County, Arizona. That project is collectively referred to as the Mohave Project.^{2/}

The MPO as issued contained a stipulation expressly stating that "[t]he mine area should not be used for any purpose other than mining," and that "[a] mine workers' residence or recreation area is not allowed." However, the Kingman Area Manager notified CMRC by letter dated August 16, 1989, that "[t]he mine worker's residence not allowed in Stipulation No. 4 is not meant to prohibit a residence for a watchman or caretaker on the mine site."

It is difficult to judge from the present record how much development activity occurred on the Mohave Project site during the first years following approval of the MPO. The record refers to activities, some of which related only to patented lands.

^{1/} On Mar. 31, 2006, Cottonwood Gold Company (Cottonwood) informed this Board that it had assumed CMRC's interest in the Mohave Mine property pursuant to a Deed In Lieu of Foreclosure dated June 30, 2004, presumably as an adjunct to the bankruptcy action styled Combined Metals Reduction Co., Case No. BK-N-02-53359-GWZ (U.S. Bankruptcy Court, District of Nevada). We construe this information as a motion to substitute Cottonwood as the appellant in this case and grant the motion. For convenience, we preserve the style of the appeal as originally docketed.

Our action should not be construed as a determination that Cottonwood has complied with relevant regulatory requirements concerning financial guarantees upon transfer of operations (see 43 CFR 3809.593) or other relevant regulatory requirements.

^{2/} The record shows that CMRC also had other operations in the same area, apparently on privately owned lands, including the Golden Door, Klondyke, Jim and Jerry, and Scout Mines located in secs. 20, 21, 28, 29, and 33, T. 25 N., R. 21 W., Gila and Salt River Meridian, Mohave County, Arizona, and predating the 1989 MPO. (Memorandum dated June 13, 1989, at 1; Memorandum dated June 1, 1989, at 1.)

In December 1989, CMRC notified BLM of “the 1990 proposed drilling locations which fall under” MPO 89-K-08, where it would be doing “development drilling of the known ore zones” to “help to increase” its “ore reserves for the soon to start mining operations.” Additionally, CMRC alluded to submitting a notice of intent to BLM for “proposed exploration drilling of the Jaime and Dixie Trend,” which areas were not covered under its MPO. The record contains illegible photocopies of photographs of activity, apparently from March 1990, suggesting that CMRC did development drilling, although it cannot be determined from them where this activity occurred.

On March 20, 1990, CMRC notified BLM of exploratory activities at the Hackberry Mine, confined to 12 patented claims in the general area of the Mohave Project. That work involved reopening an old vertical shaft on the Sunshine No. 2 patented claim and rehabilitation of the workings. CMRC indicated that it was “in the process of building roads for drill sites on this and the adjacent Sunshine patented claim,” but that “[w]ork on the unpatented claims [was] not anticipated in the near future.” In a separate letter dated March 18, 1990, and filed with BLM on March 20, 1990, CMRC notified BLM of the presence of some 7 trailers in a mining camp at CMRC’s Klondyke property.^{3/}

On July 9, 1990, CMRC wrote the Arizona Department of Environmental Quality (ADEQ) indicating that it had “begun construction” on the Mohave Project permit, but that it was modifying specifications for leach pad design, solution ponds, and water wells. ADEQ responded that the proposed revision was being considered as a major modification to the facility but, urging an alternative that would constitute a minor modification, allowed the project to proceed. By letter dated August 15, 1990, CMRC indicated that it would comply with ADEQ’s suggestion. It is unclear how much construction was accomplished or whether it was on the unpatented mining claims covered by the MPO or on other patented lands.

By letter dated March 13, 1992, CMRC notified BLM that it was “approaching the construction start-up of the Mohave Project,” strongly suggesting that little had been accomplished up to that date. That is confirmed by a memorandum to the file dated August 14, 1992, stating that the owner of a “large claim group being leased by [CMRC and] operating under MPO AZA-26288 (89-K-08)” had indicated that there

^{3/} Oddly, in its Answer, BLM employee Ralph Costa asserts that he had “carefully reviewed BLM casefile AZA-26288 and [could] state with certainty there is no evidence the document was received by BLM or processed by BLM in any way.” (Declaration of Ralph Costa (Costa Declaration) dated Aug. 14, 2003, filed as Ex. X to BLM Answer, at 12.) The case record forwarded by BLM contains a photocopy of the letter ostensibly stamped as “Received” on “Mar 20 1990” by BLM. We agree that there is no evidence that BLM responded to that letter.

had been a “lack of commercial development.” CMRC has submitted what appears to be an MPO amendment apparently submitted to BLM in March 1992. (Appellant’s Reply and Report to the Board, Ex. E.) The first BLM compliance inspection report appears in the record dated August 21, 1992, stating: “Project appears to be in early stages. No leach pads or ponds constructed. Work to date consists of drilling and access roads, and minor excavation at Jim and Jerry Pit.” Little activity (apart from drilling) was reported throughout the area; to the contrary, the area was described, even at that early date, as “overgrown.” The reports notes some 26 trailers, bulldozers, and other machines in the area.

On September 3, 1993, the Kingman Area Manager, BLM, wrote CMRC, referring to an August 12, 1993, compliance check of its “existing gold mine site.” That letter noted that the “amount of existing disturbance has not changed appreciably, because there has been no significant activity in the past three years, since conducting exploration in 1989 and 1990.” BLM stated that, “[i]f you have no immediate plans for this area[,] i.e., plans to begin mining this year, we request that you remove your mobile buildings and equipment and reclaim the area.” CMRC responded promptly, indicating that it had “just hired a new project manager for the Mohave Mine, and expect[ed] production financing to be in place by mid 1994.” (Letter from CMRC to BLM, filed Sept. 13, 1993.)

CMRC apparently constructed leach pads for the Mohave Project in 1994. It sought approval in December 1993 from the ADEQ for an amendment to its State groundwater quality protection permit/aquifer protection permit. It held discussions with BLM regarding proposed changes and construction of a guzzler for the protection of wildlife in the area, which had been established as a condition to starting production. On April 22, 1994, BLM wrote to CMRC, noting those developments and cautioning that the original \$25,000 reclamation bond might be “adjusted upward,” and that a cash bond would have to be submitted in lieu of the certificate of deposit it had filed with BLM. On July 7, 1994, the Phoenix (Arizona) District Manager, BLM, notified the Arizona Department of Water Resources (ADWR) that BLM had authorized CMRC to apply for notices of intent to drill four water wells for mining and leaching purposes. ADWR responded on July 14, 1994, returning copies of the notices to BLM as evidence of compliance with State drilling requirements. In August 1994, BLM brought to CMRC’s attention the concerns of the Arizona Game and Fish Department (AGFD) about impacts to a substantial bat population in the area. Construction of the animal watering facility or facilities progressed, as shown by correspondence among BLM, AGFD, and CMRC in August 1994. Photocopied photographs in the record from December 1994 ostensibly of the mine area show no mining activity, but only roads and some vehicles or structures. Photocopies of photographs dated April 1995 appear to show a lined leach pad in the

Klondyke and Golden Door area. Also, more exploration drill roads are depicted in the area.

In June 1995, CMRC proposed modifications respecting its "Mohave properties," expressly referring to the Golden Door Extension 252 and Golden Door Extension 254 claims (AMC-93812 and -14) in Section 9, T. 25 N., R. 21 W. That proposal is significant, because it included establishing a mining camp, with a mobile change house and five mobile camper hookups, as well as a septic system. CMRC also proposed road improvements and construction. The record contains nothing approving such modifications, but it is clear that several trailers were set up on the site at some point. BLM's compliance inspection report dated May 9, 1994, indicates that the cost of the guzzler was still being determined. It is noteworthy that the inspector stated that he "suggested they move the existing camp site up to the new mine operations area next to the pa[ds] to cut down the disturbed surface area."

A BLM field inspection report from February 1996 reflects that the operation was "active" with a "pre-start gold mine." At least five large pieces of equipment (trucks and front end loaders) were noted on site, as was a large 600' by 300' leach pad (lined). The report stated that occupancy was authorized.

The record reflects that further activity occurred in March 1996. A photocopied photograph from April 1996 appears to show a pad and several mobile buildings. Anonymous letters to ADEQ received by BLM in May 1996 reflect that there was equipment on the site and that some ore had been crushed. That some activity was underway at that time is reflected in a May 20, 1996, letter from BLM to CMRC, noting problems at the site with burial of trash; leakage from drums, tanks, and vehicles; and spillage from generators, valves, and pipes. In June 1996, activity in the area sparked a letter from the Corps of Engineers, U.S. Department of the Army, requesting CMRC to cease all activities in waters of the United States, citing the discharge of dredge and/or fill material into unnamed washes in the area of the Mohave (Klondyke) gold mine. Such activity is also reflected in a November 1996 letter from ADEQ to CMRC, stating that the engineering determinations in CMRC's aquifer protection permit application were not acceptable. The letter contained comments citing numerous technical problems concerning pond and heap leach pad capabilities.

The activity on the claims seems to have been short lived and appears to have ended no later than 1998. By February 1999, ADEQ wrote CMRC to advise that its application for an aquifer protection permit had "lapsed due to lack of response from" CMRC and that it was vacating CMRC's groundwater quality protection permit, under which operations had originally been permitted. Photocopies of photographs of the area taken in June 1999 show a conveyor set up and some machinery and mobile

buildings and appear to show some stockpiled material. There is also a photograph of stored equipment at the site as well as a living/office area. The site is described in several photos as “inactive.”

On July 22, 1999, BLM addressed the following letter to Larry T. Atkinson, President, CMRC, at an address in New York City:

You are in non-compliance with your mining plan as approved in July 23, 1989, and with the requirements of mining claim occupancy as set forth in 43 CFR 3715. You were last contacted September 1, 1993, and requested to reclaim your mine, since there had been no mining activity in the past four years. Since 1993, there has been sporadic periods of exploration and construction of a large crushing facility with an accompanying portable conveyor system and a large heap-leach pad. In addition there are about five trailers of different size and repair parked on site. This activity has occurred mainly between 1994 and 1997.

Art Smith, Geologist, Kingman Field Office, inspected the property December 2, 1994, along with Bob Hall of the Kingman Office and there was no exploration or mining activity occurring at that time. Mr. Smith inspected your operation on June 16, 1999, and again on July 15, 1999 with other BLM staff. At both times there was no indication of any activity at the mine location or on the surrounding claims. The gate was locked to the site and there were indications that a watchman lived on site. From the vantage point of the locked gate, the site appeared to be abandoned.

You are required to revise your mining plan and comply with the requirements at 43 CFR 3715 by October 1, 1999. The mining plan needs to reflect the current status of your operation which appears to be inactive, if not abandoned. I have enclosed a copy of the requirements for complying with the permitting regulations at 43 CFR 3715. If you do not plan to mine this area, you are required to notify the Kingman BLM Office and immediately begin to remove all equipment including trailers and then reclaim the area under our direction.

Failure to comply with these requirements will activate a decision on non-compliance and cessation order from the Field Manager, Kingman BLM Office.

In its Answer, BLM asserts that the New York address was CMRC's address of record at the time, but acknowledges that CMRC did not receive the letter and that it was instead returned undelivered to BLM. BLM has provided a copy of the 1999 NON bearing a notation by A. R. Smith, presumably Art Smith, the geologist in BLM's Kingman Resource Area, dated November 7, 2001, indicating that the "letter was returned[,] Attempted--Not Known." (Answer at 28 and Ex. V.) Although the letter states that it was sent certified mail with a return receipt requested, it does not include a certified mail tracking number, and the record does not contain any envelope or receipt. In 1984, CMRC's letterhead listed the New York address, an address in Nevada, and an address in Colorado. That letterhead was used at least until April 1994. The record contains correspondence addressed to CMRC from BLM and other State and Federal government agencies at at least five different addresses in Arizona, Colorado, and Nevada, but it also includes earlier correspondence sent by BLM to the New York address in 1993.^{4/} Consistent with what the record shows, in his affidavit, Ralph Costa, an engineer in BLM's Arizona State Office, explains that the address of record is in Tonopah, Nevada, and he acknowledges error in asserting that the address of record was the New York address. Costa further notes the different addresses used by CMRC over the years, states that BLM had customarily replied to the return address from the last letter received, and avers that in "approximately 1999" BLM officials "lost contact" with CMRC and tried to use the New York address, which appeared on the cover memorandum for the original mine plan filed in 1989. (BLM Motion for Summary Judgment and Response to CMRC's filing dated Sept. 15, 2003, Ex. B ¶ 17 at 17.) That memorandum is not in the record before us.

BLM's case record contains numerous inspection reports prepared by BLM and State inspectors after 1999, all showing that there was no activity on the site. For example, a State inspection form indicates that, on November 15, 2000, an inspector "visited the mine site and found it to be completely deserted. The equipment was still there that I remember when Jerry Cross and I inspected the place in 1996 except for the gen set. I looked in the office trailer and saw three calendars on the wall dated June 1998." Another State inspector stated that he made "contact with Mr. Atkinson who is a Director for" CMRC, who said that "a watchman is manning the mine site, a Mr. Hobbs." The inspector stated that "[t]his is not [consistent] with any of our visits but Atkinson insist[s] Mr. Hobbs does watch the property."^{5/} On April 16, 2001, State inspectors reported that "[n]o persons were present" at the "office circle (about 6 trailers)," and that there was one "truck belonging to R. Hobbs" and six abandoned

^{4/} The Sept. 3, 1993, letter from BLM to CMRC requesting that it leave the area due to lack of significant activity was mailed to the New York City address, but a copy was provided to CMRC's mine manager in Tonopah, Nevada.

^{5/} Those inspections were made in connection with the State's investigation of whether there was a large amount of explosive stored on the site.

trailers. In July 2002, BLM inspectors found two front-end loaders, a road grader, a crane truck, two 50-ton haul trucks, a forklift, a tracked blast-hole drill rig, and “assorted support vehicles,” as well as ore conveyors and an ore spreader. It was reported that “this mine and mill-site are complete, but have never been put to work.”

In late July 2002, CMRC’s Atkinson stated in a telephone conversation with BLM personnel that he had hired a man to perform maintenance on equipment recently, although he admitted that no exploration or development work had been conducted. He explained that he had not received the necessary funding to begin production.

In June 2003, BLM inspectors visited the site for the last time before issuing the CO involved in the present appeal. Facilities at the site showed no sign of recent use and had suffered damage from the elements. In particular, the heap leach pad liners had blown off the pad, exposing the sub-liners. Electrical service and plumbing were not connected to the cyanidation plant, and equipment was in general disrepair. The BLM report states:

A compliance inspection of this site was made by R. Costa and P. Misiaszek on June 12, 2003. The infrastructure on-site continues to deteriorate. No signs of ongoing exploration or development were observed. No company personnel were present, but the half-dozen chow dogs were still fenced in a yard with sufficient food and water. The heap-leach pad liner had been blown off its bed in several locations. Further damage to the heap-leach pads had occurred since the last inspection on July 24, 2002. Structural steel had been placed in a pile on the ready line recently, as if someone were preparing to salvage scrap steel. Ancillary equipment, such as haul trucks and utility vehicles, remain in disrepair and appear inoperable.

The components of the mineral processing plants (crusher, mills, conveyors, gen-sets, cyanidation plat, and refinery) are on-site, but most are disconnected from the mineral process circuit. Plumbing and electrical lines are missing or disconnected. The main gate remains locked. No signs of vandalism were observed. Some chemicals remain in the assay lab/refinery area’s conex storage box. Activated carbon is stored in several dozen cardboard barrels, which are disintegrating.

On July 23, 2003, BLM issued its CO, which required CMRC to immediately and permanently cease all operations and begin full reclamation of the site, citing the following violations of 43 CFR Subpart 3715: CMRC’s occupancy is not reasonably incident (43 CFR 3715.2(a) and 3715.5(a)); CMRC’s activities do not constitute

regular work (43 CFR 3715.2(b)); CMRC's activities are not reasonably calculated to lead to the extraction and beneficiation of minerals (43 CFR 3715.2(c)); CMRC's activities do not involve on-the-ground activity observable by BLM (43 CFR 3715.2(d)); BLM has not issued a concurrence for occupancy (43 CFR 3715.3-6); CMRC's uses and occupancy do not conform to applicable federal and state environmental laws and the necessary permits are not in place (43 CFR 3715.5(b); 3715.5(c)); CMRC has used structures for occupancy without meeting the conditions of occupancy (43 CFR 3715.6(b)); and CMRC has placed or maintained enclosures and gates without BLM's concurrence (43 CFR 3715.6(g)).

A reclamation estimate prepared by a private contractor in July 2003 just after the issuance of the CO indicates that the mine site was inactive, with substantial equipment on the site. The following improvements were in place at the site:

[A]ccess, exploration and haul roads; two open pits, drill pads, camp sites, a shop and equipment maintenance facility, a crushing/screening plant, a conveying/stacking system, leach pads and ponds, a gold recovery plant, assay facilities, water wells and distribution system, electrical power generation and distribution system, monitor wells, storage facilities and fencing[.]

as well as five vehicles (three pick-up trucks and two tank trucks). (Mohave Mine Site Reclamation Estimate (Reclamation Estimate) dated July 21, 2003, prepared by Mining & Environmental Consultants, Inc., filed with BLM's Answer, Ex. A, at 1, 4.) Most of the facilities appeared to be "in good condition with no evidence of vandalism," allowing them to be salvaged at no cost. (Reclamation Estimate at 2; *id.*, Facilities & Equipment List at 1-2.) Culverts had been removed from the haul road, rendering it unusable. (Reclamation Estimate at 2.) The Reclamation Estimate indicates that "[p]erhaps 19,000 cubic yards of rock is piled near the crushing plant and a few tons may have been run through the crushing circuit, but no rock was placed on the leach pads" (*id.* at 1) and that "no significant work appears to have been done on the claims since 1996." *Id.*

Following receipt of the CO, CMRC's Atkinson wrote BLM, explaining the recent history of operations at the mine site:

Mining was suspended at Mohave in late 1995 for economic reasons after having begun only shortly before. However, a great deal of waste rock had been removed and approximately 18,000 tons of ore is stockpiled at the crusher and another 18,500 tons is broken in the pit, awaiting stockpile space at the crusher. It is true that no mining has been conducted since October 1995, but at no time has the property or

anything on it been abandoned. Despite pressure to begin small scale production, Jack Hamm and I have been unwilling to operate Mohave or any other mine on less than a fully professional and adequately financed basis.

(Letter from Atkinson to BLM filed June 26, 2003, at 1.) He further explained:

Although there has been no mining at Mohave since late 1995, there certainly has been mining related activity. Three of us including the project geologist have regularly worked at refining the Mohave operating plan and projections. Last year we began modification of the radial stacker to eliminate most of the hydraulic components in favor of electric motors and controls that do not leak oil. Also, our vendor has recently completed a six generator spill containment skid to eliminate contaminated soil behind the Mohave power house, and a free-standing lime silo required for [pH] control. A higher capacity rectifier and plating tank have been purchased, and a 330 feet conveyor for installation between the screen tower and the leach pad is nearly complete. The list is long, but these are representative samples.

* * * * *

The Mohave watchman does have a trailer on the property in which he stays two to three nights per week on an irregular schedule. Without the continued presence of his dogs, and his irregular presence, [CMRC's] facilities and personal property would be destroyed or stolen within days, as occurred during 1994 and again in 1995. The watchman lives with his wife a few miles from the mine; he does not live at Mohave, although your 8-16-89 letter * * * would suggest that the watchman may remain on the property when necessary.

Id. at 2.

The record also contains three affidavits by CMRC president Atkinson. Atkinson's statements together present a credible, consistent picture of the situation at the Mohave Mine in the time preceding the issuance of the CO in question in this appeal. In the affidavit dated July 16, 2003 (filed as Ex. G to Notice of Appeal and Petition for Stay), he highlights the extensive amount of serviceable equipment that was at the site in June 2003, amply corroborating the presence of the equipment identified in BLM's Reclamation Cost Estimate. The affidavit also sets out operating projections for the first 3 years of hypothetical, future Mohave mine production.

In Atkinson's second affidavit, dated September 15, 2003 (filed as Ex. A to Appellant's Request for Assignment to Administrative Law Judge (Atkinson Affidavit 2)), he notes that a salaried construction manager, George A. Leech, had been continuously employed for the Mohave Mine since January 1996, and that, from late 1995 until July 2002, he had "divided his time between routine electrical and mechanical work at the Mohave Mine and the design and refinement of Mohave power generation and distribution issues." (Atkinson Affidavit 2 at 1.) Atkinson concedes that, after 1998, "an increasing portion of [Leech's] duties were performed at his home and shop in Kingman, Arizona." *Id.* at 1-2. He also admits that, in May 2003, just before the issuance of the CO, Leech "took on a short-term project to avoid the Arizona heat until materials were available to complete an auxiliary generator and the radial stacker modification for Mohave." *Id.* at 2-3. Thus, Atkinson confirms a continuous decline in the amount of worker time spent on the Mohave project, representing that 1,860 worker-days were spent on- and off-site in 1997, but that, toward the beginning of 2003, only 350 worker-days were spent on- or off-site until May 2003 (*id.* at 2), at which time Leech's contribution of worker time ended indefinitely, thus substantially eliminating the amount of worker time spent at the site.

Much of Atkinson Affidavit 2 concerns activities at the Mohave Mine in 1999. In 1999, additional electrical equipment was delivered, but the coolant was drained from some other equipment engines on the mine site and preservative oil was added to prepare for a long period of inactivity. (Atkinson Affidavit 2 at 5.) In 2000, a new generator was installed on the property, and electrical surveys and road maintenance were performed, but the rest of the activity on-site was repair and salvage work: Repairing wind damage to a trailer, removing salvageable batteries from equipment, removing a trailer from the property, and repairing certain engines. *Id.* at 5-6. In 2001, CMRC took delivery of electrical equipment, removed another trailer, finalized maps for an aquifer protection permit application for the Arizona Department of Environmental Quality, and installed an underground air and electrical system. *Id.* at 6-7. In 2002, additional equipment was delivered, preparations were made to install electric motors in place of hydraulics, and a back-hoe was returned to the vendor for maintenance. *Id.* at 7. After July 2002, little activity of any kind was reported. In May 2003, on-site work stopped completely pending the receipt of supplies. *Id.* at 2-3. From the fourth quarter of 1999 forward, the affidavit confirms that activities at the mine were largely limited to removing and mothballing

equipment and attempting to minimize and repair damage to buildings and roads that were not being used. ^{6/}

In a third affidavit dated March 28, 2006, Atkinson stated that “[m]ining began in September 1995 but was suspended the following month pending completion of process facilities and management’s decision to secure additional working capital before introducing process reagents onto the” Mohave Mine claims. (Affidavit of Atkinson dated Mar. 28, 2006, attached as Ex. I to Appellant’s Reply and Report to the Board, at 1.) However,

[m]any thousands of tons of overburden were removed from the Klondyke pit area during the third quarter of 1995 and approximately 18,000 tons of ore from the first bench was mined and transported to the crusher stockpile. During the fourth quarter of 1995, an additional 22,500 tons of ore and waste was broken in place awaiting transport to the crusher stockpile and waste areas.”

Id. at 3. No reference is made to any further activities, thus confirming that there were no prospecting, exploration, definition, development, mining, processing, or beneficiation operations after the fourth quarter of 1995, because of lack of funding.

The record also contains the Second Amended Disclosure Statement proposed by CMRC and Tesoro Gold Company, dated August 11, 2003 (Disclosure Statement) (filed Oct. 20, 2003, as Ex. C to Respondent’s Motion for Summary Judgment, etc.), a comprehensive history of the Mohave Project prepared by CMRC for use by the Court in bankruptcy proceedings, referenced above. The Disclosure Statement admits that the Mohave Project is not “currently being mined” and that “[o]perations of [CMRC] have been maintained at a minimum for some time as [CMRC] has been without revenue since 1995 and has relied on loans from third parties to preserve and retain its assets.” Id. at 7. It also reveals that, owing to failures to meet development deadlines imposed by financing arrangements, “by year-end 1995,” CMRC was “essentially disassembled,” most knowledgeable employees had been dismissed, and work on the Mohave Project had stopped. Id. at 10. CMRC representatives concede that, since that time, no ore has been moved, even though the Mohave Mine is

^{6/} Atkinson refers to some engineering for planning activities, including “the task of revising the synchronization and load sharing circuits attendant to the large four generators to comprise the Mohave Mine’s primary power system.” There is no evidence that such system was ever put in place on the site. Other such planning activities included “ground conductance tests with a view to improving the quality of the power system earth ground,” “revising completion plans,” completing maps and drawings for a permit application, and designing fuel tanks. Id. at 5-6.

purportedly “ready for gold production” (*id.* at 8) and “[m]ine planning, process development and construction of process facilities have been very nearly complete at Mohave since 1996.” *Id.* at 40.

The Disclosure Statement generally describes the status of the Mohave mine site as of the date of issuance of the CO:

The solution ponds and initial production cells of the leach pad have been constructed * * * . Water, power and other components of the infrastructure required for production are in place, including laboratory facilities and a 1.5 megawatt plant. A 350 ton per hour crushing plant, pad loading conveyors, carbon recovery plant, haul trucks, blast hole drill, bulldozer and related equipment required for mining and processing gold ores are owned by [CMRC], subject only to [a] mortgage interest. * * * Mine planning, process development and construction of process facilities have been very nearly complete at Mohave since 1996. The leach pad and ponds have been constructed and lined, although repairs to the liner are required as a result of wind damage. Water wells are drilled and connected, the haul road is completed, ore from the Klondyke pit (one of the three presently developed mine areas on the Mohave mine property) is stockpiled at the crusher and the major items of equipment are in place.

Id.

The reports from the BLM inspections are generally consistent with this history. ²⁷ The written reports and photographs portray an unused facility falling into disrepair. For example, the vehicles stored on-site are described as “in serviceable condition or very close to it” in the July 24, 2002, inspection (Photograph 4), but a year later, photographs show the same vehicles missing tires. (Photograph 10, June 12, 2003.) Comparison of photographs of the mill and conveyor belts shows that in 2002, the unit was intact; by 2003, the belt had been blown off the conveyor. See Photograph 10, July 24, 2002; Photograph 2, June 12, 2003. The leach pads

²⁷ The record contains BLM Compliance Inspection Reports dated Feb. 7, 1996, June 1999, Apr. 16, 2001, July 24, 2002, and June 6, 2003.

show consistent deterioration to the point that they are now inoperable. See Photographs 8 and 9, June 1999; Photographs 3-5, and 9, June 12, 2003. ^{8/}

[1] On July 16, 1996, the Department promulgated regulations implementing the Surface Resources Act, 30 U.S.C. § 612(a) (2000), which are located at 43 CFR Subpart 3715. The regulations provide that “unauthorized uses and occupancies on public lands are illegal uses that ipso facto constitute unnecessary or undue degradation of public lands, which the Secretary of the Interior is mandated by law to take any action necessary to prevent.” Pilot Plant, Inc., 168 IBLA 201, 214 (2006).

All existing uses and occupancies on the public lands were required to come into compliance by August 18, 1997. 43 CFR 3715.4(a); Terry Hankins, 162 IBLA 198, 212-13 (2004). Thus, after August 18, 1997, CMRC had to comply with those regulations or be subject to the enforcement authority vested in BLM. Id. To the extent that CMRC argues that those regulations “were never intended to apply” to its “legitimate bona fide uses of public lands under the mining law at the Mohave Project” (Notice of Appeal and Petition for Stay at 9), that argument is rejected as completely unsupported.

[2] CMRC contends that the CO is invalid because BLM failed to provide a notice of noncompliance (NON) to CMRC prior to issuing the CO. Although on July 22, 1999, BLM did send such NON to CMRC at its address in New York City, BLM acknowledges in a July 2, 2003, memorandum to counsel that the “letter was never received by [CMRC] and was returned to the BLM.” Under 43 CFR 1810.2(b), a document delivered to a party’s last address of record will be deemed to have been

^{8/} Although not relevant to the state of the site in June 2003, in an inspection report dated Apr. 6, 2006, the BLM inspector summarized the more recent status of the Mohave Project as follows:

“In summary, no evidence of any recent operations, repairs or maintenance was observed at the Mohave Project. The mineral processing facility remains largely disconnected and partially assembled. All rubber and plastic materials (tires, etc.) continue to deteriorate and are not serviceable. The vehicles are inoperable. Recent thefts of most of the electrical control cables have made the crusher and conveyor circuits non-functioning. The heap-leach pads, pregnant solution ponds and associated plumbing have been destroyed by exposure to wind, rain and sun. Roads have deteriorated from erosion. The main haul road remains impassable by trenches from removed culverts, and earthen berms erected to discourage further thefts from the property.”

(Compliance Inspection of Combined Metal Reduction Co.’s Mohave Project, dated Apr. 6, 2006 (Ex. B to Response to appellant’s reply to Mar. 9, 2006, Order of the Board) at 2.)

received regardless of whether it was actually received by him. However, the NON was not sent to CMRC's last address of record, so there is no basis for finding that the NON was constructively served on CMRC. In these circumstances, we cannot find that BLM issued an NON within the meaning of 43 CFR 3715.7-1(c), as the fundamental purpose of issuing the NON, providing notice to the claimant of how it is failing or has failed to comply with 43 CFR Subpart 3715, has been thwarted by the failure to complete service on the claimant. Cf. Jerry Grover d.b.a. Kingston Rust, 141 IBLA 321, 323-24 (1997); Jerry D. Grover d.b.a. Kingston Rust, 160 IBLA 234, 246 n.12 (2003).

[3] It remains to be determined whether the June 16, 2003, CO was valid in the absence of the issuance of a cognizable NON. We conclude that it was. Under the express terms of 43 CFR 3715.7(b)(1), BLM may order a temporary or permanent cessation of all or any part of a use or occupancy if all or part of the use or occupancy is not reasonably incident but does not endanger health, safety, or the environment, to the extent that it is not reasonably incident, or under three other circumstances not relevant here. The CO in this case cites use or occupancy that is not reasonably incident but does not endanger health, safety, or the environment. We stated in Skip Myers, 160 IBLA 101, 111-12 (2003), that a CO could be issued under 43 CFR 3715.7(b)(1) without a notice of noncompliance having been issued. See also Terry Hankins, 162 IBLA at 219. Reading 43 CFR 3715.7(b) to require, in all cases, issuance of an NON prior to any CO would effectively eliminate issuance of a CO under 43 CFR 3715.7(b)(1)(i). Failure of the claimant to complete the corrective action required by the NON within the time allowed may then result in the issuance of a CO under 43 CFR 3715.7-1(b)(1)(ii). But, we hold, BLM may also opt to issue a CO first under 43 CFR 3715.7-1(b)(1)(i), when charging the claimant with occupancy that is not reasonably incident and is non-endangering, as discussed above.

BLM finds itself in compliance in this case inadvertently, having attempted and failed to properly serve an NON on CMRC. Nevertheless, the regulations do authorize the issuance of a CO for use or occupancy that is not reasonably incident, where such use or occupancy does not endanger health, safety, or the environment. As that is the present circumstance, we do not reverse BLM's issuance of the CO here. However, we are constrained to bear in mind that the only applicable authority for issuing a CO, 43 CFR 3715.7-1(b)(1)(i), expressly limits issuance of COs to cases where the targeted occupancy "is not reasonably incident" and is not endangering. In these circumstances, the issue before us is therefore limited to whether the record shows that CMRC's use was or was not reasonably incident to mining operations. ^{2/}

^{2/} That excludes many of the grounds cited by BLM, including CMRC's failure to obtain approval from BLM before commencing occupancy.

[4] The “reasonably incident” requirement is set forth in the regulation providing that occupancy of a mining claim for more than 14 days in any 90-day period is not an authorized use if the operations used to justify the occupancy are not “reasonably incident” to mining related activity. 43 CFR 3715.2. ^{10/} 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(a) (2000). ^{11/} The term “includes those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit, using methods, structures, and equipment appropriate to the geological terrain, mineral deposit, and stage of development and reasonably related activities.” 43 CFR 3715.0-5; 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. Pilot Plant, Inc., 168 IBLA at 217; Karen V. Clausen, 161 IBLA 168, 177 (2004); John B. Nelson, 158 IBLA 370, 379 (2003); David E. Pierce, 153 IBLA 348, 358 (2000); Bradshaw Industries, 152 IBLA 57, 63 (2000). The relevant period of time for determining whether the level of activity on mining claims is the time immediately prior to BLM’s issuance of the CO. See, e.g., Terry Hankins, 162 IBLA at 216 (considering level of activity in the 24 months preceding issuance of a NON).

[5] We have scrutinized the record, with particular emphasis on the descriptions by CMRC’s president, and conclude that the definition of “reasonably

^{10/} That is part of a five-part requirement. The other four elements are that the operations do not constitute substantially regular work; are not reasonably calculated to lead to the extraction and beneficiation of minerals; do not involve observable on-the-ground activity verifiable by BLM; and do not use appropriate equipment that is presently operable. Pilot Plant, Inc., 168 IBLA at 215. To be permissible under 43 CFR 3715.2, the occupancy must meet all five of those requirements.

However, we bear in mind that we are reviewing a CO effectively issued under 43 CFR 3715.7-1(b)(1)(i) and that the only relevant issue under that provision is whether the mining operations are “reasonably incident.” Hence, we shall address only the first criterion, failure to comply with which, by itself, renders occupancy impermissible.

^{11/} In addition, 30 U.S.C. § 625 (2000) provides that all mining claims and millsites located on public lands “shall be used only for the purposes specified and no facility or activity shall be erected or conducted thereon for other purposes.” See James R. McColl, 159 IBLA 167, 178 (2003).

incident” in 43 CFR 3715.0-5 is not broad enough to encompass the work that the record demonstrates was ongoing for several years preceding the issuance of the CO. CMRC was not engaged in prospecting, exploration, defining, developing, mining, or beneficiating valuable mineral deposits. Instead, the record shows that, for a period of some 3 years immediately prior to the issuance of the CO, CMRC was merely “mothballing” its equipment, while actually dismantling much of its mining infrastructure, thus moving away from the activities comprising “reasonably incident” occupancy under the regulations. In reaching this conclusion, we discount statements made by CMRC’s president concerning planned action and development. The record reveals that the actions actually taken were defensive and preservational and not related to the development of the mineral resources of the claims, however great those resources may have been.

[6] Where an occupancy does not meet the conditions of 43 CFR 3715.2(a) and 3715.5(a) (both requiring that such occupancy be “reasonably incident”) maintaining structures and equipment for such occupancy is prohibited. See 43 CFR 3715.6(a) and (j). To the extent that it directed the immediate removal of structures and equipment from the claims, the CO was properly issued.

[7] CMRC argues that BLM is bound to allow limited occupancy owing to the approval in 1989 of the MPO, particularly as to allowing the site to be occupied by a watchman. We rejected a similar argument in Terry Hankins, 162 IBLA at 217, ruling that no permanent occupancy rights were created by BLM’s approval of a mining notice authorizing the placement of a trailer house on the claim for a security guard to live in. We clarify that the promulgation of 43 CFR Subpart 3715 superseded any previous authorizations for occupancy. Thus, in the absence of a new authorization under 43 CFR Subpart 3715, occupancy pursuant to any prior authorization is irrelevant.

There are two important issues remaining. Whether BLM has the authority to bar all future occupancy and mining operations by issuing the CO on the basis of an occupancy that is not “reasonably incident”; and the validity of BLM’s order to commence reclamation on the site.

[8] BLM’s CO states:

If, in the future, [CMRC] should desire to establish a residential occupancy or mining operations on public lands, [CMRC] must be engaged in the activities described by 43 CFR 3715.2, file the information required by 43 CFR 3715.3-2, meet the requirements of 43 CFR Subpart 3809[,] and receive written concurrence from the BLM before beginning an operation or occupancy. However, as this is a

permanent [CO, CMRC] is permanently barred by this [CO] from conducting mining and/or milling operations on the public lands encompassed by MPO-89-K-08.

(Emphasis added.) CMRC expressly challenges that conclusion. (Notice of Appeal and Petition for Stay at 8-9.)

We agree with CMRC that BLM, by purporting to permanently bar entry to conduct mining operations on valid mining claims, overreached the scope of its authority under 43 CFR Subpart 3715. The validity of a mining claim and permissibility of occupancy of the claim are separate questions. As long as the claims remain valid, we hold, a claimant retains the right to re-enter its claims for mining and/or milling operations, subject to the limitations imposed by 43 CFR Subpart 3809 and 3715. BLM's CO is accordingly modified to reflect that limitation.

That should not be construed as suggesting that an occupancy that has been found impermissible may continue unabated until the underlying claims are declared invalid. To the contrary, a validly-issued cessation order bars occupancy until BLM approves a new occupancy.

What this means in practice is that the holder of any of the claims at issue herein, or its agent, remains free to apply to BLM for approval to mine and/or occupy those claims, notwithstanding the CO. In sum, the CO is "permanent" only in the sense that it remains in effect unless or until new occupancy is approved by BLM. This is because an entity that is in the business of mining that ceases activities due to economic exigencies may resume operations and re-establish mining or mining-related activities that would allow some level of "occupancy" commensurate with that activity within the broad meaning of that term under 43 CFR Subpart 3715. ^{12/} However, it is clear to us that the first step in so doing must be to comply with

^{12/} We are aware of the fact that it is likely that CMRC will not be pursuing occupancy itself in the future, because it has lost its interest in the underlying mining claims. However, CMRC's successors-in-interest may apply to BLM for approval of occupancy commensurate with any mining or milling operations it plans. Alternatively, depending on the ruling of the bankruptcy Court and its own review on remand, BLM may have to address whether such successor is obligated to reclaim.

43 CFR 3715.3. ^{13/} As operations have previously stopped, it may also be necessary to comply with 43 CFR 3809.424 and other provisions of 43 CFR Subpart 3809.

[9] BLM's CO states: "Upon receipt of this order, under the authorities cited, [CMRC] must immediately and permanently cease all operations and occupancies at the site and begin the full reclamation and remediation of the Mohave Mine and all surface disturbance associated with MPO-89-K-08" (emphasis supplied). BLM ordered that "reclamation must be completed in accordance with" a schedule requiring completion of reclamation within 1 year of the effective date of the CO. CMRC also challenges that portion of the CO.

CMRC argues BLM overreached its authority under 43 CFR Subpart 3715 by ordering reclamation in the context of the CO. We have scrutinized the provisions of 43 CFR Subpart 3715 and find adequate support for an exercise of BLM's authority to order reclamation. Although the authority to order reclamation is primarily derived from 43 CFR Subpart 3809, the regulation providing for the issuance of a CO under 43 CFR Subpart 3715 expressly provides that, in addition to ceasing the use or occupancy, a claimant will be informed of the actions to be taken to correct the non-compliance. 43 CFR 3715.7-1(b)(2)(ii). If an existing use or occupancy is not reasonably incident, BLM can order suspension or cessation of such use or occupancy and reclamation under 43 CFR Subpart 3809. 43 CFR 3715.4-3(a) and (b). Under both subparts, any use or occupancy that is not reasonably incident constitutes unnecessary or undue degradation of the public lands. 43 CFR 3715.0-5 and 3809.5. The purpose of Subpart 3809 is to prevent unnecessary or undue degradation of the public lands by mining operations. Accordingly, the regulations provide that any person "intending to develop mineral resources on the public lands must prevent unnecessary or undue degradation of the land and reclaim disturbed areas." 43 CFR 3809.1(a). Although certain provisions of Subpart 3809 relating to plan content and performance standards do not apply to plans of operation approved prior to January 20, 2001, the remaining provisions do. 43 CFR 3809.400(a).

^{13/} All users must receive BLM's concurrence before beginning occupancy. 43 CFR 3715.3-6. Occupancies pre-dating the adoption of 43 CFR 3715.3-6 were given a 1-year grace period to obtain BLM's concurrence, but after August 18, 1997, all occupancies were required to have BLM's concurrence as a prerequisite to occupancy. 43 CFR 3715.4; Jason S. Day, 167 IBLA 395, 400 (2006).

There is no evidence in the record that CMRC ever sought BLM's concurrence for its occupancy after the change in regulations. A user that fails to notify BLM of an existing occupancy is subject to enforcement actions, including an NON and CO under 43 CFR 3715.4-2 and 3715.7-1(b)(1)(ii).

The CO refers to “prolonged inactivity” as the basis for its conclusion that CMRC’s use and occupancy is not reasonably incident. The regulations in 43 CFR Subpart 3809 address four scenarios where a claimant stops conducting operations, including situations when the period of non-operation causes unnecessary or undue degradation, in which case BLM can order reclamation, or a period of inactivity for 5 consecutive years, in which case BLM will determine whether to direct final reclamation and closure. 43 CFR 3809.424(a). In any event, the obligation to reclaim land disturbed by mining operations continues until satisfied. 43 CFR 3809.424(b).

We cannot determine with certainty what provision BLM is applying: On the one hand, it purports to permanently bar CMRC from any mining or milling activity under the approved mining plan, but on the other acknowledges that CMRC could conduct operations, provided it obtained written concurrence and complied with Subparts 3715 and 3809. (CO at 2.) In light of our holding that, so long as the claims remain valid, BLM cannot bar a claimant from re-entering its claims to conduct mining or mining-related operations, it is appropriate to vacate the portion of the CO requiring CMRC to begin the full reclamation and remediation of the Mohave Mine and all surface disturbance associated with MPO-89-K-08 and remand the matter to BLM so that it can decide in the first instance and fully articulate the nature and basis for the order to reclaim the mine site under Subpart 3809.

[10] Finally, we reject CMRC’s argument that it is entitled to a fact-finding hearing before BLM can restrain its occupancy under 43 CFR Subpart 3715. The right to a pre-decisional fact-finding hearing (see Cameron v. United States, 252 U.S. 450, 460-61 (1920)) before an administrative law judge is limited to Government contests asserting that a mining claim is invalid due to a lack of a discovery of a valuable mineral. It is established that a mining claim can be declared null and void ab initio where located on lands not open to mineral entry without a hearing. Sherman C. Smith, 58 IBLA 188, 190 (1981), and cases cited therein. Likewise, claims can be declared abandoned and void for failure to comply with statutory recordation requirements or be declared forfeited under various rental and maintenance fee acts, without a hearing. Beverly D. Glass, 167 IBLA 388, 390 (2006); Robert C. LeFaivre, 95 IBLA 26, 29 (1986). In any event, as we have held above, a determination of a claimant’s right to occupancy does not amount to a determination of the validity of the underlying claim. In these circumstances, the claimant’s due process rights are protected by its opportunity to appeal BLM’s occupancy decision to the Board. See Philip A. Cramer, 74 IBLA 1, 3 (1983), and cases cited therein.

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 in part, affirmed in part as modified, and vacated in part and remanded. ^{14/}

David L. Hughes
Administrative Judge

I concur:

T. Britt Price
Administrative Judge

^{14/} Chief Judge Holt took no part in the present adjudication.