JASON S. DAY

171 IBLA 53 Decided January 25, 2007

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Appeal from a decision of the Manager, Lower Sonoran Field Office, Phoenix District, Bureau of Land Management, rejecting and denying a Land Use Application and Permit seeking residential occupancy of land within the Winter Gold lode mining claim. AZA-33651.

Affirmed as modified; petition for stay denied as moot.

1. Federal Land Policy and Management Act of 1976: Permits--Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Surface Uses

   BLM, acting on behalf of the Secretary of the Interior, has discretionary authority, in accordance with 43 CFR 2920.1-1, to authorize any use of public land not specifically authorized under other laws or regulations and not specifically forbidden by law. Residential occupancy of a mining claim is specifically authorized under 43 CFR Subpart 3715, when certain conditions are met. When a mining claimant fails to comply with those conditions, the claimant may not, as an alternative, receive authorization for residential occupancy of the claim under 43 CFR Part 2920.

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 August 11, 2006, decision of the Manager, Lower Sonoran Field Office, Phoenix

District, Bureau of Land Management (BLM), rejecting and denying his July 17, 2006, "Land Use Application and Permit," serialized as AZA-33651. BLM has responded, opposing a stay.

Day is the owner of the Winter Gold lode mining claim, AMC-62597, situated in the SW¼SE¼ sec. 2, T. 1 N., R. 8 E., Gila and Salt River Meridian, Pinal County, Arizona. Day has maintained a residence on that claim since at least 1994. On February 14, 2006, this Board issued a decision in Jason S. Day, 167 IBLA 395 (2006), affirming a BLM decision issued pursuant to the regulations regulating use and occupancy of mining claims (43 CFR Subpart 3715), requiring Day immediately to cease all use and occupancy of that claim and to remove all residential structures and other personal property, based on the conclusion that Day's occupancy was not reasonably incident to the prospecting, mining, or processing of minerals. [1/]

BLM states that, since issuance of the Board's decision, it "has attempted to work cooperatively with Mr. Day * * * while he has attempted to clean and vacate the subject land." (Response, Ex. C (Declaration of James V. Andersen, Lead Realty Specialist, Phoenix District Office, BLM, dated Oct. 6, 2006) at 2, ¶7.) According to Andersen, BLM officials met with Day and his attorney on May 12, 2006, at which time Day and his attorney proposed a "'life estate lease'" for Day so that he could continue to reside on the claim. Id. at ¶8. BLM states that they were told that authorization for such a use is "discretionary and that residential occupancy was not consistent with BLM policy, applicable land use plans, and was therefore not permitted." Id.

Thereafter, in an attempt to regularize his occupancy, Day filed his application, pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2000), and its implementing regulations, 43 CFR Part 2920, seeking a permit for residential occupancy of 0.81 acres of public land within the boundaries of the Winter Gold lode mining claim. [2/] Day stated that

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[1/] The history of Day's occupancy of that claim is detailed in the Board's decision. The Board did not adjudicate the validity of the mining claim in that decision.

[2/] The regulations in 43 CFR Part 2920 contemplate a specific process for public-initiated land use proposals. While the May 12, 2006, meeting for discussion and evaluation of Day's proposal is envisioned in 43 CFR 2920.2-1, the regulations provide that for any authorization, other than a minimum impact permit, an application may be filed "only after publication of a notice of realty action." 43 CFR 2920.5-1(a); see 43 CFR 2920.2-2, 2920.2-3, 2920.2-4, 2920.2-5, and 2920.4. Day's (continued...)

he proposed to use a "[m]iner's cabin, sheds & carport" on that land, and he requested the term of the permit to be a life estate. He also sought access to the land over an existing unimproved road. [3/]

In its August 11, 2006, decision, BLM rejected the application and denied Day's permit request, stating that "[a] review of your application has determined that the proposed use would not be in the public interest and would cause appreciable damage to the public lands, their resources and improvements." [4/] (Decision at 1.) Day has failed to show any error in BLM's decision. Therefore, we affirm BLM's decision. However, we modify the basis for that decision based on our review of the applicable regulations. We also deny the petition for stay as moot.

The lands sought by Day for residential occupancy are within the boundaries of his Winter Gold lode mining claim. Residential occupancy of a mining claim may be authorized by BLM under 43 CFR Subpart 3715, under certain circumstances, including that such occupancy is reasonably incident to prospecting, mining, or processing operations. As noted above, this Board has affirmed a BLM decision directing, in accordance with 43 CFR Subpart 3715, an immediate cessation of all occupancy of that claim as not reasonably incident to prospecting, mining, or processing operations.

[1] The Secretary of the Interior has authority, under section 302(b) of FLPMA, to regulate the use, occupancy, and development of public lands through the issuance of permits, leases, and easements. BLM, acting on behalf of the Secretary, has discretionary authority to authorize "[a]ny use not specifically authorized under

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[2/] (...continued)
residential occupancy request clearly could not be viewed as a proposal for minimum use, given the extent of his occupancy. See 167 IBLA at 396.

[3/] The Board's decision in Jason S. Day, 167 IBLA at 396, contains a partial list of residential structures, equipment, and materials found on the claim by BLM during inspections from 2000 to 2005. Day asserts that, if BLM approved his request, he would continue to clean up the claim.

[4/] Andersen states that he recommended denial of Day's permit application to the Field Manager because approval would conflict with the Board's February 2006 determination, that occupancy "provides no public benefit and would continue to cause appreciable damage to the public lands." (Response, Ex. C at 3, ¶9.) He added that "residential occupancy was not consistent with BLM policy, applicable land use plans, and was therefore not permitted." Id.

other laws or regulations and not specifically forbidden by law[.]" 43 CFR 2920.1-1; see Organized Sportsmen of Lassen County, 124 IBLA 325, 329 (1992), and cases cited.

In ALANCO Environmental Resources Corp., 145 IBLA 289, 296-97 (1998), this Board concluded that "43 C.F.R. Part 2920 was intended to serve as a distinct means of authorizing activity that is not subject, under any circumstances, to authorization under another law or regulation, and not to serve as an independent alternate source of authority when authorization pursuant to other law or regulation has not in fact been obtained." Residential occupancy of a mining claim is "specifically authorized under other laws or regulations," when a claimant meets certain conditions in 43 CFR Subpart 3715. When a claimant fails to meet those conditions, such occupancy may not be authorized under 43 CFR Part 2920. Day's residential occupancy failed to meet the conditions of 43 CFR Subpart 3715. The regulations in 43 CFR Part 2920 do not afford an alternative basis for authorizing that occupancy of the claim or any part of it.

Even if Day had relinquished his mining claim prior to seeking authorization for a life estate in the lands in question, the result would be no different. BLM clearly has the discretionary authority to deny a proposed land use. Organized Sportsmen of Lassen County, 124 IBLA at 329, and cases cited. As we have stated on numerous occasions, a BLM decision must be supported by a rational basis, as reflected in its decision, as well as the administrative record accompanying the decision. Wyoming Outdoor Council, 160 IBLA 387, 398 (2004), and cases cited. However, "[w]e have also, as a matter of practice, allowed parties to supplement the record on appeal." Id. While BLM's decision in this case is strictly conclusory, the record as a whole, viewed in light of our decision in 167 IBLA 395 and, as supplemented on appeal by the Andersen Declaration, provides a rational basis for declining to authorize Day's requested occupancy, even if it were not within the boundaries of an existing mining claim.

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 as modified. Day's petition for a stay is denied as moot.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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H. Barry Holt
Chief Administrative Judge