



KARL F. REITH

172 IBLA 351

Decided September 28, 2007



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

KARL F. REITH

IBLA 2006-194

Decided September 28, 2007

Appeal from a decision of the Baker (Oregon) Field Office, Bureau of Land Management, constituting a determination of nonconcurrency with a request for occupancy of a mining claim. ORMC 159700.

Affirmed in part; set aside and remanded in part.

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

Occupancy of the public lands under the mining laws within the meaning of the regulations at 43 C.F.R. Subpart 3715 includes the construction, presence, or maintenance of temporary or permanent structures, including buildings and the storage of equipment or supplies. BLM properly makes a determination of nonconcurrency with a request for occupancy of a mining claim when the claimant has failed to demonstrate by a preponderance of the evidence that the activity on the claim is reasonably incident to prospecting, mining, or processing operations, and is commensurate with the level of occupancy requested.

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

When BLM issues a decision enforcing the use and occupancy requirements of 43 C.F.R. Subpart 3715, it must ensure, as an initial matter, that the decision is supported by a reasoned analysis of the facts in the record. Thereafter, a party challenging a BLM decision that is based on a finding that a claimant's use or occupancy of a mining claim is not reasonably incident to prospecting, mining, or processing operations bears the burden of proving, by a preponderance of the evidence, that the challenged decision is in error and that the use or occupancy is, in fact, in compliance with section 4(a) of the Multiple Use Mining Act of 1955 and 43 C.F.R. §§ 3715.2 and 3715.2-1. When a decision does not include a reasoned analysis of a

determination regarding a claimant's request to occupy the mining claim by storing equipment and other property the decision will be set aside and remanded to BLM.

APPEARANCES: Karl F. Reith, Auburn, Indiana, *pro se*; Nancy K. Lull, Resource Manager, Baker Resource Area, Baker Field Office, Bureau of Land Management, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Karl F. Reith appeals from the March 16, 2006, decision, styled "Determination of Non-Concurrence," of the Baker Field Office, Bureau of Land Management (BLM), declining to authorize the proposed use and residential occupancy of the cabin and outhouse located on the Reloader #2 (ORMC 159700) placer mining claim (claim), because "the use and occupancy is not in compliance with 43 CFR 3715 Use and Occupancy Under the Mining Laws Regulations."¹ Decision at 2. The mining claim is located in sec. 8, T. 12 S., R. 42 E., Willamette Meridian, in Baker County, Oregon. On October 19, 2005, claimants filed both a Request for Occupancy under the regulations at 43 C.F.R. § 3715.3-2 and Mining Notice OR 62880 (Notice), in which they proposed exploration, testing, and mining of gold-bearing gravels on the claim.²

Finding that appellant has failed to carry the required burden of demonstrating error in BLM's decision, as explained below, we affirm BLM's decision to the extent it found the residential occupancy proposed for Phases I and II of the mining operation not reasonably incident to prospecting, mining, or processing operations. We set aside in part and remand the case to BLM to address the issue of whether appellant is authorized to occupy the claim for purposes of storage.

Background

The claimants located the claim on April 10, 2005. The 60-acre mining claim was the fourth that they had located on the subject lands since January 5, 1995.³ A

¹ Karl Reith (Reith or appellant) and Erin Reith and Gloria Carlile (Carlile) are the mining claimants of record, and Carlile and Reith are the operators of the claim.

² The Decision incorrectly identifies the year that the Notice was received as 2006.

³ An order we issued Aug. 25, 2005, in connection with IBLA 2005-196, sets forth this and other background information pertinent to the case at hand. In that earlier appeal, Reith challenged BLM's May 17, 2005, "Determination of Non-Concurrence," which detailed how appellant's use and occupancy of the forfeited mining claim

(continued...)

cabin and outhouse located on the claim were used in conjunction with activities at the same location under the previous Notice (OR 53063), but occupancy was never authorized by BLM.⁴ Decision at 2.

The record and attachments to BLM's Answer in this appeal include extensively documented inspections since 2001. Photographs and field inspection records of the land encompassing the claim reveal old machinery and other equipment, structures with cans and other materials, a wooden sign on a wall reading "Carlile Flats," clay pigeons and launches for skeet shooting, targets, rock polishing equipment, adits used to store food, deer and elk antlers and equipment to hang and butcher game, and some apparently operable, mining-related equipment. Answer, Attachments 2 and 3. Site inspection reports comparing photographs over the years indicate that "there is little to no evidence of mining since 2001." Answer, Attachment 3, "Carlile Occupancy OR 53437 Notice OR 53063 Photographs 4/7/05 Taken by Tom Averett." A report of April 7, 2005, discusses a conversation record between BLM employee Kata Bulinski and Dale Carlile dated January 14, 2002, in which "Carlile stated that he and his wife may go up and dig around at the claim occasionally but that he was thinking of letting his Notice of Operations lapse because he had a heart attack in Summer 2001. Kata discussed 'occupancy' and 'reasonably incident' with Carlile. Dale Carlile is now deceased. (Jan. 2004)." Answer, Attachment 3, "Lawnnet 05-380-00013." A report of a BLM inspection on October 25, 2005, after the claimants filed the new Notice and Request for Occupancy indicates that "clutter has been cleared away from sight," the backhoe attachment that goes on the back of the cat is in the original location, the small bulldozer is parked on the access road to the cabin, and the backhoe that was at the base of the hill are now located on the west side. It further notes that "some effort was made in cleaning up site. . . . Materials were burned and are now covered with layer of dirt. No one on

³ (...continued)

known as the Reloader #1B, situated in the same location as here, failed to meet the requirements of 43 C.F.R. Subpart 3715. BLM issued the May 17, 2005, decision after declaring the mining claim forfeited by operation of law (for failure to file a notice of intention to hold the claim) by decision dated Mar. 29, 2005, and after posting the cabin and outhouse as government property on Apr. 7, 2005. The Board set aside BLM's May 17, 2005, decision and remanded the case to BLM, noting that BLM posted the structures as government property before the appeal period for the Mar. 29, 2005, decision had expired, and that on Apr. 10, 2005, Reith had located a new claim, the Reloader #2 (ORMC 159700). Order dated Aug. 25, 2005.

⁴ Attached to BLM's Answer in this appeal is a copy of expired Notice OR 53063, filed Aug. 13, 1996, describing a similar operation as that proposed in the current Notice, but with less detail. It also states that "a small cabin and storage building are located on the east side of the claim on a high bar." Answer, Attachment Ib.

site. The work appears to have been done quite recently, perhaps over the weekend of October 22-23, 2005.” *Id.*

The Notice at issue states that “fine gold is present in the stream channel, dry channels, and alluvial fans,” that exploration has taken place in the stream, and that the claim was mined historically and recently “by constructing adits underground into [] tightly consolidated gravel layers.” Notice at 1.⁵ The Notice reports that “[t]here are 3 short adits excavated into the highbar placer gravels. Two were there when we bought the claim, one short adit was dug with hand tools.” Notice Form at 5. The claimants intend to sample highbar gravels and test holes and trenches near Cave Creek. *Id.* at 3. “This exploration is planned to take place in a logical and sequential manner” (Notice at 1) in three phases “that may be completed in 2-3 years.” Notice Form at 5; *see also* Notice at 1. A fourth phase involving mining “will be covered in a mining plan of operation” for the claim “[i]f values prove as expected.” Notice at 1. “We plan to work full time mining, and plan to stay on site. Mining can take place late into the year due to the low elevation and warm winter temperatures.” *Id.* Operations are expected to be inactive from December through February. Notice Form at 4. In order to minimize the cost, Reith requested that their reclamation bond initially cover only Phases I and II.

Phase I involves removing “any machinery, parts, tires, pipes, and miscellaneous materials and equipment,” enlarging the water source pond, constructing two settling ponds, and reinforcing the existing ford or another crossing at Cave Creek. Notice at 2.⁶ Phase II involves exploring the highbar in two 50-foot segments, by removing “approximately 200 cubic yards of overburden that will be stockpiled up on the bench and at the toe of the slope, away from the 50 foot segment to be explored.” *Id.* The Notice describes “a thin soil layer and about 4’-10’ of substrate above the gravel layer” and explains that

. . . The highbar will be worked in 50 foot long segments, approximately 12 feet back into the hill. Mining activity will take place through the areas of the existing adits, where pay gravel is gone. The

⁵ The Notice filed includes (in addition to four maps) a six-page form, entitled “43 CFR 3809 Notice-Level Operations,” and four pages of narrative text describing the proposed activities. To distinguish similar page numbers in the two documents comprising the Notice, the former is referred to herein as “Notice Form,” and the latter as “Notice.”

⁶ The Notice states that “[t]he existing ford will be used to cross Cave Creek, or a new crossing will be established to protect the small boggy area. Junipers will be cut and laid in the stream lengthwise at the crossing to protect the riparian areas along the stream and to protect the stream bottom.” *Id.* at 2.

available pay gravel will be loaded into a chute that ends near the wash plant. Approximately 5-10 cubic yards per day will be mined with the cat, pushed to the bench where the cabin sits, then loaded into the chute using the backhoe. . . [which reaches] from the highbar down to the wash plant, where the material will be processed.

. . . Once this is accomplished, the second 50'X12' area will be opened up.

Id. at 2-3. Sometime late in Phase II, after reclaiming the sample highbar sites, the Notice proposes bringing an excavator into the north end of the claim, across the stream at the rock ford near a limestone outcrop, and using it “to stockpile topsoil, [and] then to excavate one 30 foot trench into the hillside near the limestone outcrop.” *Id.* at 3.

The trench will be up to 20 feet deep and 10 feet wide at the surface, narrowing to a bucket width at the bottom. If this trench intercepts the gravel layer, samples will be taken to ascertain values. These samples will be run at the processing site. If values are not present, reclamation will consist of refilling the trench with rock and substrate and replacing topsoil to approximate normal land contours. If paygravel is intercepted, BLM will be notified and a second trench the same size may be excavated.

Id.

The Notice indicates that BLM will be notified before the start of Phase III, which involves backhoe exploration of about 20 cubic yards of dry stream channel daily in 20-foot segments. *Id.* at 3-4.

In the Request for Occupancy at issue, in which Reith reports that since the death of his partner, Dale Carlile, 2 years ago, “little mining has taken place on the claim, and we have not been using the cabin.” Request for Occupancy at 1. Also, the rock saw, old tractor, grain elevator, old pump, and other items “not incident to the current mining operation, have been removed, or will be removed this fall.” *Id.* at 2. Already, the Request asserts, “[t]he entire area has been cleaned of trash, plastic buckets, tarps, tires, old pipe and other miscellaneous materials not incident to the mining operation.” *Id.*⁷

⁷ The report from a BLM inspection confirms this assertion, stating that very recently “[s]ome effort was made in cleaning up site.” Inspection Checklist, BLM Baker Resource Area Short Form, dated Oct. 25, 2005.

The use of the cabin, outhouse and shed, the Request states, is reasonably incident to the planned mining activities on the Reloader #2 mining claim and is not planned for recreational purposes. The structures and their proposed uses associated with the new Notice are described as follows:

The cabin is actually, two buildings connected by an enclosed porch There is a chemical toilet inside a separate building just to the north of the cabin. The structure does not have a foundation and is built on skids. It is approximately 16' X 40'.

. . . .

A covered shed attached to the south side of the structure is used for storage of hand tools, small equipment associated with both the mining operation and with the occupancy, and a woodshed is located on the south end of the structure. 5 gallon buckets of black sand concentrates, and small gold recovery equipment are stored in and around the structure.

The structure is used to prepare meals, as a first aid station, and as sleeping quarters. It is also used to separate gold from black sands, perform small lab tests in the evenings and during inclement weather, and as a place to store small equipment and supplies. . . .

. . . .

. . . Although occupancy will not take place during the winter months, the cabin is still necessary to store mining equipment and supplies for the ne[x]t season.

Id. at 1-3.

Elaborating on the plan to leave equipment on or near the property, the Request for Occupancy adds:

Some equipment must remain on the claim over the winter, such as the shaker, wash plant, and sluices. It is time consuming to set up a wash plant, and once set up, it is reasonable to leave it set up. Removal of the processing equipment will be included in our bond. However, the cat and backhoe are mobile, and in order to decrease the cost of the bond, these will be moved onto private land during the winter months.

Id. at 3.

Remoteness of the site and difficult road and ford conditions are cited as additional justifications for occupancy:

. . . Occupancy on site allows us to mine in the spring when driving in and out is impossible due to the Burnt River flooding, and . . . in the summer during the irrigation season when high flows make the ford impassable. Only small amounts of materials and supplies can be taken across on the cable tram, and in order for us to mine in the spring, we must have equipment and materials already on site.

. . . .

The site is remote, being over an hour's drive from Durkee. When the river is high, the ford cannot be crossed with vehicles, and we have a cable tram at the ford to allow us to get across. This is a slow, tedious process, especially with supplies. We leave a vehicle on the south side of the river during this period, to drive the 1-1/2 mile of native surface road that runs through private land to the claim, however, when the Cave Creek road is wet, it is almost impassable. Driving the road during this period can be dangerous, and because of the proximity to the creek, both the road and the creek can be adversely impacted with rutting and soil movement. It would not be possible to work full time at the claim, and commute, and my intent is to mine full time.

Id.

In addition, the Request asserts that occupancy is necessary in order to secure exposed and stored minerals and to protect the public:

Occupancy on site during active mining periods will not only help to protect the equipment from vandalism, but will also protect public safety. People think the road continues up Cave Creek, and we have had to pull vehicles out of the creek on more than one occasion. Also, an active mining site is simply not a safe area for the public, because of operating machinery, open adits, crumbling rock faces, settling ponds and open excavations. The area will be maintained in as safe a condition as an industrial site can be maintained, however the public will not be allowed to walk around unsupervised when equipment is operating, nor will prospecting on site be allowed.

Occupancy on site will help protect the gold exposed in the gravel bars, and the concentrated gold in my sluice boxes from theft.

Also, the valuable mineral concentrates stored in 5 gallon buckets will be protected from theft.

*Id.*⁸

According to the Request for Occupancy, Reith's work schedule "when on site is normally 8 hour shifts per day and five days or more per week. Other workers on site may have a more sporadic work schedule." *Id.* at 2.

On December 9, 2005, BLM acknowledged receipt of the Request for Occupancy, and notified the operators that BLM would process the information and issue a written determination of concurrence or non-concurrence pursuant to the regulations at 43 C.F.R. § 3715.3-3. However, "[d]ue to the numerous use and occupancy cases, it is unknown at this time when you will receive BLM[']s determination." Letter dated Dec. 9, 2005, from Penelope Dunn Woods, Field Manager, Baker Resource Area, to Reith and Carlile. On January 18, 2006, the Board received Reith's appeal of this notification, which charged BLM with violating the requirement at 43 C.F.R. § 3715.3-3 that BLM will review requests for occupancy within 30 business days of receipt, unless it concludes that the determination cannot be made within the time allowed by the regulation. In its Answer, BLM stated that, because the Baker Field Office had 13 pending requests for use and occupancy, it was not possible to prepare written determinations for all of them within the regulatory timeframe, but that BLM would review Reith's request and make a written determination on or before March 20, 2006. On May 31, 2006, the Board dismissed the appeal as premature, holding that there was no final written decision and that the Board could not elicit a final decision from BLM, as requested by Reith, because the Board has no jurisdiction to supervise employees of BLM. Order, dated May 31, 2006 (IBLA 2006-102).

On January 27, 2006, BLM notified the operators that BLM had reviewed the Notice and additional information received, including information from a field visit with Carlile and Jan Alexander on November 18, 2005, and determined that the Notice, with attached stipulations, was complete pursuant to 43 C.F.R. § 3809.311(b). On the same day, BLM issued a decision finding sufficient the claimants' revised reclamation cost estimate for the reclamation work required for Phases I and II of the Notice, and requesting payment of the financial guarantee in the amount of \$2,113. Phase III was explicitly not authorized or covered by the reclamation cost estimate.

On March 14, 2006, 2 days before issuance of the Decision on appeal, BLM

⁸ The document expresses concern for the fair processing of appellant's occupancy request in light of BLM's previous posting of government property signs.

received a three-paragraph letter from Reith, dated March 8, 2006, proposing a modification of the Notice. Reith states that he and Carlile believe it is essential that they conduct additional work underground in the two adits. Anticipating using a “winkie” type drill, Reith states that “we will drill underground to determine how far into the hillside the placer deposit goes.” Amended Notice and Request for Occupancy, dated Mar. 8, 2006. Although “[t]he Notice plan is still to work the highbar from the surface in benches,” the letter states that, since most of the gold that has been taken out has been from drifts on the claim, as long as the operators are still in gravel, they “plan to continue to drift into the hillside and mine underground until the pay gravel runs out.”⁹ *Id.* Reith states that he does not expect this proposed modification to affect the financial guarantee estimate and reclamation bond that is in place, as “[o]ne pass with the cat along the bench located upslope of the two adits, will close the portal entrance.” *Id.*

By letter dated March 27, 2006, the Acting Field Manager, Baker Resource Area requested “clarification” of the proposed modification. “Based on the information submitted, it appears that the existing excavations will be removed as the highbar is worked. Once the highbar is worked, BLM assumes that no drilling will take place. Is this true?” *Id.* Addressing the bond, BLM “concurr[ed] that any increase in your financial guarantee regarding this modification is not warranted.” *Id.*

The Decision

BLM’s Decision, issued March 16, 2006, details the reasons that BLM determined the proposed occupancy fails to meet the requirements of 43 C.F.R. § 3715.2, § 3715.2-1, or § 3715.5. First, BLM states that “[t]he level of activity proposed at your site does not warrant a permanent structure.” Decision at 2. Using information in the Notice, BLM explains that if 10 cubic yards will be processed from the highbar per day for a total of approximately 220 cubic yards, that work will take 22 days to complete. And, if one 30-foot trench is excavated yielding 200 cubic yards (20 cubic feet by 10 cubic feet), at a processing rate of 10 cubic yards per day, BLM reasons, it will take approximately 20 days to process that material. *Id.* In addition, BLM explains that, since Reith requested incremental bonding and Phase III is not included in the financial guarantee, information on Phase III is not relevant to BLM’s

⁹ The request does not identify when the additional proposed work would take place, or during which phase. We assume that the possible additional work described in the request for Notice modification relates to Phase II. As discussed below, we read the Decision to suggest that BLM made a similar assumption.

determination of occupancy. *Id.* at 1-2.¹⁰

Addressing the issue of remoteness, the Decision states, “[o]ne of the operators resides in Durkee, Oregon, which is approximately 12 miles from the site. Given the short commute on a good county road, BLM believes operators could easily commute to the site on a daily basis.” *Id.* at 2.

Finally, referencing seven field inspections conducted during the period of October 2001 to April 2005, in connection with the claimants’ prior expired Notice, OR 53063, BLM states that “the level of work conducted in the past on this claim” has not met the regulatory requirements. Site inspections . . . document that there has been no evidence of exploration or mining activities at your site. Minimal activity with a backhoe was noted during the 7/9/01 site inspection.” *Id.* at 3.

The Appeal

Appellant challenges BLM’s determination, arguing that “we may have the grade and yardage to support a small-scale mining operation,” that he is “a legitimate miner” as is Carlile, that the “operation has an approved reclamation plan and bond, and the cabin has been used in support of the mining operation since Jack Page owned the claims back in the 1970s.” Statement of Reasons (SOR) at 1. Reith argues that “a permanent residence which is reasonably related to mining is permissible”; that the prevention of theft and vandalism justifies occupancy; and further, that even sporadic or minimal mining efforts may justify occupancy. *Id.* at 2.

Reith contends that “BLM has failed to accurately portray the level of activity that will be taking place. BLM appears to believe that all you have to do in a mining operation is mine the gravel and process it, day in and day out. Thus, BLM states that I should be able to mine and process 200 cubic yards in 20 days since I process 10 yards per day.” *Id.* at 3. In reality, Reith asserts, it may take 2 or 3 weeks for him and Carlile to set up the equipment, level the sluices, excavate the settling ponds, install the chute, excavate the water source pond, lay pipeline, and install pumps. *Id.* After this initial start-up period, Reith argues, it will take time to classify the concentrates, maintain the equipment and site (including cleaning ponds and moving stockpiles), and reclaim the site, none of which, according to Reith, BLM considered in its time computations. *Id.* at 4-5. Specifically, Reith claims that “[f]or every 40 hour week in mining, at least 8 of these hours are spent in equipment maintenance and site maintenance, and 4-6 hours are spent in reclamation.” *Id.* at 4.

Reith claims that BLM also underestimated the time necessary to undertake

¹⁰ The Decision indicated that “clarification of this proposed work is required by BLM.” *Id.* at 1.

Phase II by underestimating the amount of pay gravel to be mined. “There is at least double the pay gravel BLM claims is available to be mined, thus this equates to at least 44 days of actual mining and processing,” rather than 22 days, as BLM calculated. *Id.* “There is absolutely no reference [in the Notice] to the gravel being 5 feet thick. The fact is, we can stand up in the existing drifts, and as (Enclosure Picture # 4) shows, the gravel is over 10 feet thick. We are not down to bedrock yet. Using an average thickness of 10 feet gives you 444 cubic yards of pay gravel to process, not 222 cubic yards.” *Id.*

In addition, Reith alleges that BLM erred in failing to consider one of two proposed 30-foot trenches and the operational activities described in Phase III. *Id.* at 2-3, 5. “Two trenches equate to 400 cubic yards, 40 days of processing, plus the additional days needed for equipment maintenance, repairs, site maintenance and reclamation.” *Id.* at 5.

Addressing BLM’s request for clarification, Reith says:

I do not know what else to tell Mr. Davis about this work that we are proposing. Most of the gold Dale and Gloria took out during the years that we have had the claim, and most of the gold that my predecessor, Jack Page, took out, has come from the existing drifts. Once we mine the hillside with the cat and backhoe, as far back into the hill as we can get (overburden limits this phase of the operation) and after we process this material, we intend to conduct additional drifting into the hill, and do some directional drilling to ascertain the extent of the deposit. Again, if Mr. Davis had read our Notice, he would have seen that we do not anticipate mining the deposit out from the surface, we only intend to mine what we can feasibly get to. A 10 foot gravel exposure is visible right now, but we still are not down on bedrock, where the best values are located. . . . We figure there will be another 5-10 years of mining in these drifts. When the gravels run out, we will reclaim the drifts.

Id. at 3.

Regarding the remoteness of the claim, Reith argues that BLM should have considered the distance of his home in Indiana to the mine and calls the fact that Carlile “lives fairly close to the mine” “irrelevant.” *Id.* “Carlile cannot run the operation by herself,” he states. “I live in Indiana, and when I fly to Oregon each summer, I come to mine. I cannot run the operation by myself either, and Gloria’s work in the operation is essential to its taking place. When Gloria cannot be on site, her son works with me. I am an equipment operator and also a diesel mechanic but it takes two people to mine this property.” *Id.*

Regarding access to the site, Reith disputes BLM's characterization of the access time and the quality of the access road.

. . . The road is only rocked until you reach the ford in the Burnt River that must be crossed to access the 1 1/2 mile native surface road that leads to the mine. The ford in the river is not passable in the spring when the river is flooding (Enclosure # 5), nor is it usable at times during the summer when irrigation releases from Unity Dam increase the flows to the point that the ford cannot be driven. We have gone into the mine, and then when we tried to come back across the ford, the water was too high to cross. In addition, the Cave Creek road is impassable during wet weather.

Id. at 5-6.

Reith accuses BLM of failing to use "reasoned analysis" and argues that in order to mine without use of the cabin, he would have to haul in a trailer in the winter and build a snow shed over it for protection. This, he asserts, would cause more impact than using the existing structure, which is not affixed to the ground, has no foundation, and is built on skids. *Id.* at 6.

Reith challenges BLM's reliance on reports from inspections conducted in 2003, 2004, and 2005, asserting that the operators could not mine in those years because when the now-deceased partner became ill their notice expired and the other claimants did not understand the filing requirements. *Id.* at 7. Reith takes issue with the reports of the site inspections conducted on October 26, 2001, and September 27, 2002, and asserts that he and the other claimants "bulk sampled the dry stream channel material, excavated placer gravels adjacent to Cave Creek," and conducted other exploration work. *Id.* He adds that "[r]easonably incident" means just that. It does not mean "absolutely necessary," and concludes "[i]t appears that BLM's earlier failed attempt to post the cabin may have influenced the present decision to deny occupancy while we are mining." *Id.* at 7-8.¹¹

BLM filed an Answer to the SOR on May 25, 2006, addressing each of the points appellant raised. Referencing the numerous site inspections and photographs, BLM states that "[t]he level of work conducted in the past on this claim under notice OR 53063 also did not meet the requirements for residential occupancy under 43 C.F.R. [Subpart] 3715." Answer at 2. It was not "reasonably incident" and did not constitute "substantially regular work." Answer at 5. They document that "there was no evidence of exploration or mining activities at the site. Minimal activity with

¹¹ Appellant also argues that BLM inaccurately referred to a chemical toilet as an outhouse. *Id.* at 3.

a backhoe was noted during the July 9, 2001 site inspection (Attachment 3).” *Id.* at 2. BLM asserts that “[p]hotographs taken during routine BLM site inspections show much of the site activity to be related to recreating and not incidental to mining,” such as a clay pigeon (skeet) thrower, box of clay pigeons and hobby rock cutting and grinding equipment on the site since 2001, and sport hunting, fishing and winter sporting equipment on site in 2004. *Id.* at 4. “The operator has never been observed working or to even physically be on site during the site visits.” *Id.*

Regarding the processing time, BLM states that “[w]hile BLM is aware that the gravel thickness is variable, the zone that has been historically processed at this site is less than 10 feet thick. BLM used 5 feet (approximate drift height) as an average mining thickness in calculating the process time and amount of material to be moved.” *Id.* BLM explains that it based the time estimate for the Phase II work on the information in the Notice and acknowledged that while “[t]he actual time that the operator will spend on processing is, of course, variable due to vagaries of weather, equipment condition, and operator skills, [t]he BLM made no attempt to factor those variables into the time estimate.” *Id.* at 5.

As in the Decision, BLM asserts that the project site is 12 miles and less than 30 minutes away by good county road from the community of Durkee, Oregon, which has available housing and camping facilities and that one of the operators lives in Durkee. *Id.* And, although flooding may affect passage through the ford at Burnt River (near the mouth of Cave Creek) on some days in the spring, BLM notes that the ford is “normally passable,” and that a hand trolley at the ford “serves as additional access, if necessary. Fording could be done via the hand trolley and would allow for uninterrupted commuting from Durkee and a full work shift at the project site.” *Id.*

The Answer emphasizes that “BLM does not believe that in this particular case, the notice-level operation warrants permanent residential and outhouse structures on-site.” *Id.* Responding to appellant’s description of the cabin, BLM refutes the claim that the structures were ever authorized and notes that “[t]he cabin is considered a permanent structure under the definition of ‘permanent structure’ in 43 C.F.R. § 3715.0-5: ‘[t]he term also includes a structure placed on the ground that lacks foundations, slabs, piers, or poles, and that can only be moved through disassembly into its component parts or by techniques commonly used in house moving.’” *Id.* at 3-4.

Applicable Law

The Mining Law of 1872, *as amended*, permits the location of mining claims encompassing valuable mineral deposits on the public lands of the United States for the purpose of prospecting and extracting valuable minerals. *See generally* 30 U.S.C. §§ 21-47 (2000). In addition, a mining claimant is permitted to occupy certain

public lands for “mining or milling purposes.” 30 U.S.C. § 42 (2000). Congress revisited its requirements for permitted use or occupancy of the public lands under the Mining Law in section 4(a) of the Multiple Use Mining Act of 1955 (also known as the Surface Resources Act of 1955), 30 U.S.C. § 612(a) (2000). Therein, Congress mandated 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.” 30 U.S.C. § 612(a) (2000).

In 1970, the Department adopted regulations to implement the Surface Resources Act at 43 C.F.R. Subpart 3712, and in 1996, the Department adopted additional rules at 43 C.F.R. Subpart 3715 to implement the Act and to address the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. See 61 Fed. Reg. 37115, 37116 (July 16, 1996). Subpart 3715 provides mining claimants guidance in determining which uses or occupancies are “reasonably incident” within the meaning of 30 U.S.C. § 612(a) (2000).

[1] An “occupancy” of public lands under the mining laws, governed by 43 C.F.R. Subpart 3715, includes “full or part-time residence on the public lands” and also “the construction, presence, or maintenance of temporary or permanent structures,” including “buildings, and storage of equipment or supplies.” 43 C.F.R. § 3715.0-5; see *Cynthia Balser*, 170 IBLA 269, 275 (2006); *Pilot Plant, Inc.*, 168 IBLA 201, 214 (2006); *Terry Hankins*, 162 IBLA 198, 213 (2004). To justify an occupancy, including the placement of buildings and personal property on a mining claim or mill site, for more than 14 calendar days in any 90-day period, a claimant must show that its activities: (a) are reasonably incident to mining;¹² (b) constitute substantially regular work; (c) are reasonably calculated to lead to the extraction and beneficiation of minerals; (d) are observable on-the-ground activity verifiable by BLM; and (e) use appropriate and operable equipment. 43 C.F.R. § 3715.2. All five of those requirements must be met for occupancy to be permissible. Occupancy must also meet one of several standards set forth in 43 C.F.R. § 3715.2-1, including “[b]eing 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

¹² The term “reasonably incident” derives from the statutory standard found at 30 U.S.C. § 612 (2000): “prospecting, mining, or processing operations and uses reasonably incident thereto.” 43 C.F.R. § 3715.0-5. “It 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.” *Id.*

of usual and customary length.” 43 C.F.R. § 3715.2-1(e).¹³ *Pilot Plant, Inc.*, 168 IBLA at 215; *Jason S. Day*, 167 IBLA 395, 399 (2006); *Precious Metals Recovery, Inc.*, 163 IBLA 332, 333 (2004).

An occupancy proposed by a mining claimant must be reasonably related to actual activities on the claims involving prospecting, mining, or processing operations, and the extent of any permissible occupancy must directly relate to the magnitude of the mining and related activities conducted on the claim. *Cynthia Balsler*, 170 IBLA at 276, citing *Combined Metals Reduction Co.*, 170 IBLA 56, 74 (2006); *Pilot Plant, Inc.*, 168 IBLA at 217; *Dan Solecki*, 162 IBLA 178, 180 (2004); *Karen V. Clausen*, 161 IBLA 168, 177 (2004). Therefore, the structures and equipment maintained on a claim must be related to and commensurate with the operations. *Pilot Plant, Inc.*, 168 IBLA at 215; *Las Vegas Mining Facility*, 166 IBLA 306, 314 (2005); *Karen V. Clausen*, 161 IBLA at 178. “This is consistent with the requirements that occupancy must constitute substantially regular work (43 C.F.R. § 3715.2(b)), that it be reasonably calculated to lead to the beneficiation of minerals (43 C.F.R. § 3715.2(c)), and that it involve observable on-the-ground activity that BLM may verify under 43 C.F.R. §§ 3715.2(d) and 3715.7 (43 C.F.R. § 3715.2(d)).” *Las Vegas Mining Facility*, 166 IBLA at 314.

In addition to being reasonably incident, an occupancy must also prevent or avoid unnecessary or undue degradation of the public lands and resources. 43 C.F.R. § 3715.5(a). “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.” *Cynthia Balsler*, 170 IBLA at 273-74, citing 61 Fed. Reg. at 37117-18; 43 C.F.R. § 3715.0-5; 43 U.S.C. § 1732(b) (2000); *Combined Metals Reduction Co.*, 170 IBLA at 72; *Pilot Plant, Inc.*, 168 IBLA at 214, and cases cited.

The regulations address occupancies in existence at the time of initial promulgation of the Subpart 3715 regulations on August 16, 1996, and require those occupancies to meet the regulatory requirement by August 18, 1997, and thereafter to remain in compliance. 43 C.F.R. § 3715.4(a); *Combined Metals Reduction Co.*,

¹³ The regulation specifies that “[a] full shift is ordinarily 8 hours and does not include travel time to the site from a community or area in which housing may be obtained.” 43 C.F.R. § 3715.2-1(e). The other elements set forth in 43 C.F.R. § 3715.2-1 at (a) through (d) are: (a) protecting exposed, concentrated or otherwise accessible minerals from loss or theft; (b) protecting appropriate, regularly used, and not readily portable operable equipment from theft or loss; (c) protecting the public from such equipment which, if unattended, creates a hazard to public safety; and (d) protecting the public from surface uses, workings, or improvements which, if unattended, create a hazard to public safety.

170 IBLA at 72, citing *Terry Hankins*, 162 IBLA at 212-13; *Jason S. Day*, 167 IBLA at 400, citing *Leadville Corp.*, 166 IBLA 249, 254 (2005); *Karen V. Clausen*, 161 IBLA at 178.

Under the Subpart 3715 regulations, a claimant must not begin occupancy (43 C.F.R. §§ 3715.3-1, 3715.3-6) until it has consulted with BLM (43 C.F.R. § 3715.3), provided detailed information about the proposed occupancy (43 C.F.R. § 3715.3-2), and received a written determination of concurrence or nonconcurrence that “the proposed occupancy or use will conform to the provisions of §§ 3715.2, 3715.2-1, and 3715.5.” *Rivers Edge Trust*, 166 IBLA 297, 303 (2005).

Analysis

[2] When BLM issues a decision enforcing the use and occupancy requirements of 43 C.F.R. Subpart 3715, it must ensure, as an initial matter, that the decision is supported by a reasoned analysis of the facts in the record. *L. Joei Netolicky*, 167 IBLA 193, 197 (2005); *Precious Metals Recovery, Inc.*, 163 IBLA at 339; *Thomas E. Swenson*, 156 IBLA 299, 310 (2002), citing *David J. Flaker*, 147 IBLA 161, 164 (1999). Thereafter, a party challenging a BLM decision that is based on a finding that a claimant’s use or occupancy of a mining claim is not reasonably incident to prospecting, mining, or processing operations bears the burden of proving, by a preponderance of the evidence, that the challenged decision is in error and that the use or occupancy is, in fact, in compliance with section 4(a) of the Multiple Use Mining Act of 1955 and justified under the standards of 43 C.F.R. §§ 3715.2 and 3715.2-1. 61 Fed. Reg. 37123 (July 16, 1996); *Jason S. Day*, 167 IBLA at 400, *Leadville Corp.*, 166 IBLA at 255; *Larry Amos*, 163 IBLA 181, 190 (2004); *Dan Solecki*, 162 IBLA at 191-92; *Thomas E. Swenson*, 156 IBLA at 310.

The extensive record of BLM’s photographs and inspections of the claim under the expired notice reveals a dearth of verifiable on-the-ground mining activity in the preceding 4 years. Reith, however, takes issue with BLM’s reliance on reports of inspections in 2001 and 2002, arguing that Dale and Gloria Carlile and he had bulk sampled the dry stream channel material, excavated placer gravels adjacent to Cave Creek, and conducted exploration on other areas of the claim during that period. SOR at 7.¹⁴ Reith considers BLM’s reliance on inspection reports from 2003 to April 2005 “unfair,” explaining that after Dale Carlile became ill, Reith and Gloria Carlile “did not understand the filing procedures” and, as “the paperwork did not get done,” the previous notice expired. *Id.*

¹⁴ A photograph attached to the SOR shows a portion of a hillside covered with topsoil.

We have looked for evidence of mining that meets the regulatory standards in 43 C.F.R. Subpart 3715 in other contexts. When BLM issued a notice of noncompliance (NON), we considered the level of activity in the 24 months preceding issuance of the NON. *Terry Hankins*, 162 IBLA at 216. When the decision on appeal was issuance of a cessation order (CO), we held that the relevant period of time for determining the adequacy of the level of activity on mining claims is “the time immediately prior to BLM’s issuance of the CO.” *Combined Metals Reduction Co.*, 170 IBLA at 74; *see also Jason S. Day*, 167 IBLA at 401.

In *Jason S. Day*, BLM found appellant’s (along with his wife’s and children’s) long-term use and occupancy of a gold lode mining claim not reasonably incident to the prospecting, mining, or processing of minerals, and ordered immediate cessation of all operations and occupancies in accordance with an established schedule. Day had never presented BLM with any observable or tangible evidence of gold produced at the claim. He made no allegation of having conducted any mining activities on the claim, but asserted, on appeal, that he was planning to extract “newly discovered gold” from underground waters on the claim, an assertion that was undercut by evidence offered by a BLM geologist. *Jason S. Day*, 167 IBLA at 398, 400. The record showed that Day had “done little to clean up the property” and inspections since Day had become a claimant, many years after his residency on the site began, “document[ed] a substantial and increasing occupancy with ever more non-mining related items on site or with some things simply moved around the claim.” *Id.* at 401. In affirming BLM’s decision, we held that

[a]ppellant appears to labor under the mistaken impression that, even though he is not engaged in any active mining operations or mine-related activity, he is justified in maintaining structures and otherwise occupying the claim, so long as the claim may, in the future, be used in mining. However, the fact that appellant is not engaged in active mining operations or mine-related activity means that he *cannot* occupy the claim. The possibility that mining or milling might commence sometime in the future does not justify current occupancy of a mining claim or mill site.

Id. at 401, citing *Las Vegas Mining Facility, Inc.*, 166 IBLA at 313.

Here, we are not unsympathetic to Reith’s justification for the absence of mining activity on the claim in the most recent years. It does not, however, and indeed cannot, dissuade us from giving deference to BLM’s reliance on the claimant’s prior level of mining activity. BLM is correct in looking for “observable on-the-ground activity that BLM may verify under § 3715.7.” 43 C.F.R. § 3715.2(d). “Without observable evidence of mining activity commensurate with the need for a cabin, such occupancy is not justifiable.” *Karen V. Clausen*, 161 IBLA at 177,

citing *Patrick Breslin*, 159 IBLA 162, 166 (2003), and *Jay H. Friel*, 159 IBLA 150, 159 (2004). Nevertheless, we acknowledge the level of detail in the new Notice and Request for Occupancy, the claimants' recent, verified efforts to clean and ready the site, the apparent operability of the equipment,¹⁵ and the evidence of a very minimal level of mining-related activity prior to Dale Carlile's illness, which together provide some evidence of the claimants' good faith intent to use and occupy the claim under the new Notice in accordance with 43 C.F.R. § 3715.2.

It is clear that "to be permissible, the occupancy must meet all five of the requirements contained in 43 C.F.R. § 3715.2." *Cynthia Balsler*, 170 IBLA at 275; *Jason S. Day*, 167 IBLA at 399. BLM has determined that Reith's proposed residential occupancy under a Notice very similar to the prior notice to which the inspections relate is not commensurate with the level of mining activity observed in the past or proposed in the Notice. In light of the extensive record documenting both a paucity of mining-related activities and a significant amount of nonmining-related property and activities on the claim since 2001, we agree and conclude that BLM's consideration of past activities on this claim was reasonable, under the circumstances.

We agree with BLM that Reith also has failed to demonstrate compliance with any of the factors listed in 43 C.F.R. § 3715.2-1, which, in addition to meeting the requirements of 43 C.F.R. § 3715.2, is necessary in order to justify residential occupancy on the claim. Focusing on § 3715.2-1(e), as does Reith, we find his reliance on the distance between his home in Indiana and the mine misplaced. Appellant misunderstands this remoteness factor. It is not the distance from his home that is dispositive. It is the availability of housing within commuting distance to the claim. We have held that the cost to a claimant of finding housing near the claim is not a factor in a determination of remoteness under this regulation. "[N]either the Mining Law of 1872, the Surface Resources Act of 1955, nor the Departmental regulations countenance residing on a claim to reduce the costs of mining. To the contrary, they provide in effect that a claimant must bear the costs of commuting to and from his mining site where the claim is not so remote as to make commuting to the site impractical." *Terry Hankins*, 162 IBLA at 215. Furthermore, the facts in this case do not present the "obvious compliance with 43 C.F.R. 3715.2-1(e)" that we found in *Dan Solecki*, 162 IBLA at 192. Here, BLM determined that the site is not so remote and the creek not so impassable that Reith meets the standard in 43 C.F.R. § 3715.2-1(e). He has failed to show error in that determination.¹⁶

¹⁵ We note that BLM did not determine otherwise, and reported that the heavy equipment was, at least, mobile.

¹⁶ Reith and BLM refer to the availability of a "cable tram" or "hand trolley" at the
(continued...)

The regulations also allow for occupancy of a mining claim when, in addition to satisfying the requirements of 43 C.F.R. § 3715.2, the claimant can show that occupancy is necessary to protect “from theft or loss appropriate, operable equipment.” 43 C.F.R. § 3715.2-1(b). Reith asserts that residential occupancy is necessary for this reason. The record, however, is replete with photographs taken since 2001 of significant amounts of mining-related equipment and other property left unattended for years. This, we believe, undermines Reith’s contention that he needs to live on the claim to protect that same property. Reith has failed to preponderate on any of the factors in 43 C.F.R. § 3715.2-1 to justify residential occupancy.

As noted above, Reith, in a letter to the Board received June 21, 2006, states that BLM’s Decision was “an effort to remove me from my claim.” We remind appellant, however, as we have reminded others before, “that, despite BLM’s decision denying [the claimants’] occupancy request, they have been free to use their claim, consistent with the Surface Resources Act, provided that their use did not rise to the level designated by 43 C.F.R. Subpart 3715 as ‘occupancy.’” *Donna Friedman, John Csupick*, 165 IBLA 313, 325 (2005).

BLM correctly indicated that, at a later stage in the operation, the claimants may be able to demonstrate compliance with the standards in 43 C.F.R. §§ 3715.2 and 3715.2-1, justifying BLM’s concurrence in a future request for residential occupancy. “Nothing prevents the Appellant from seeking [] BLM’s concurrence on occupancy during [Phases III and IV], but at this time, the Appellant has failed to meet” those requirements. Answer at 4.¹⁷

Finding that appellant has failed to meet the burden of demonstrating error in BLM’s decision to the extent it determined nonconcurrence with the request for residential occupancy, we affirm BLM’s Decision.

We have considered the facts in this case in light of our holding in

¹⁶ (...continued)

ford at Burnt River, near the mouth of Cave Creek. Request for Occupancy at 3; Answer at 5. BLM has stated that the ford is “normally passable,” but that Reith can access the claim using this device on days when fording may be difficult. Answer at 5. Nothing in the record or in Reith’s filings disproves BLM’s assertion.

¹⁷ We note that, although the photographs and inspection report from the Oct. 25, 2005, inspection that BLM conducted after receipt of the Notice and Request for Occupancy clearly reveal the continued presence of equipment, supplies, and structures left on the claim, the Decision does not include any enforcement action under 43 C.F.R. § 3715.7-1.

Terry Hankins, 162 IBLA at 214, where we found that “two different results appertain to Hankins’ use of the site as a residence on the one hand, and to his use of the site for buildings and other structures used for storage of mining equipment and ore on the other.” The Decision did not specifically address Reith’s assertions that “[a]lthough occupancy will not take place during the winter months, the cabin is still necessary to store mining equipment and supplies for the ne[x]t season” and that “[s]ome equipment must remain on the claim over the winter, such as the shaker, wash plant, and sluices. It is time consuming to set up a wash plant, and once set up, it is reasonable to leave it set up.” Request for Occupancy at 1-3.¹⁸ It may be that, because the record evidences only very minimal historical on-the-ground-activity that is reasonably incident to mining on the claim, the Decision was meant to provide a determination of nonconcurrence with the request for occupancy for storage purposes also. If, however, that is the case, we find that the Decision is lacking a reasoned analysis of BLM’s determination with respect to occupancy for storage. Therefore, we set aside the Decision in this respect and remand the case to BLM to address the issue of whether the occupancy that appellant proposes for purposes of storage of equipment related to mining is commensurate with the level of mining activity on the claim, as required by 43 C.F.R. Subpart 3715. See *L. Joie Netolicky*, 167 IBLA at 197; *Terry Hankins*, 162 IBLA at 214.

Any other arguments asserted and not addressed herein were considered and determined to be without merit.

¹⁸ As noted above, the Request for Occupancy proposed removing the cat and backhoe to private land during the winter months since they are mobile, in order to decrease the cost of the bond. *Id.* at 3.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed in part and set aside in part, and the case is remanded to BLM for action consistent with this opinion.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
R. Bryan McDaniel
Administrative Judge