

JIM D. WILLS

REGGIE N. WILLS

IBLA 90-24, 90-118

Decided March 28, 1990

Consolidated appeals from trespass notices issued by the Folsom, California, Area Manager, Bureau of Land Management. CA 21029; CA MC 148792.

Reversed and remanded.

1. Millsites: Generally--Mining Claims: Millsites--Trespass: Generally

Under 30 U.S.C. § 42 (1982), the proprietor of a mining claim may appropriate nonmineral ground as a millsite for mining, milling, or other operations in connection with such claim. Occupancy of a millsite claim for purposes not related to mining operations constitutes a trespass.

2. Administrative Procedure: Generally--Administrative Procedure: Adjudication--Administrative Procedure: Hearings--Contests and Protests: Government Contests--Hearings--Millsites: Generally--Mining Claims: Millsites--Rules of Practice: Government Contests

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

APPEARANCES: Jim D. Wills and Reggie N. Wills, pro sese.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

Jim D. Wills and Reggie N. Wills have appealed from separate trespass notices dated July 7, 1989, issued by the Folsom, California, Area Manager, Bureau of Land Management (BLM), concerning their occupancy of certain land described as the SW $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 5, T. 4 S., R. 18 E., Mt. Diablo Meridian, Mariposa County, California, on which appellants have located millsite claims pursuant to 30 U.S.C. § 42 (1982). CA 21029; CA MC 148792. ^{1/} The notices charge appellants with committing the following acts: "Unauthorized occupancy not reasonably incident to prospecting, mining, or processing operations; violation of county building and sanitation codes, creating a hazard and public nuisance and resulting in unnecessary and undue degradation of public lands."

The trespass notices cite appellants with violations of provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), specifically 43 U.S.C. § 1733(a) and (g) (1982), and the Surface Resources Act of 1955, 30 U.S.C. § 612(a) (1982). Under 43 U.S.C. § 1733(a) (1982), the Secretary is required to issue regulations necessary to implement the provisions of FLPMA. That section provides for criminal penalties for violators of such regulations. Subsection (g) provides: "The use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary or other responsible authority, or contrary to any order issued pursuant to any such regulation, is unlawful and prohibited." The cited subsection of the Surface Resources Act provides: "Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of a patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto."

The trespass notices also cite violations of several Departmental regulations. 43 CFR 3712.1(b) implements 30 U.S.C. § 612(a) (1982), and prohibits locators of mining claims from using the claims for purposes unrelated to mining. 43 CFR 8365.1-4(b) prohibits a person from creating a hazard or nuisance on public land. Departmental regulations published at 43 CFR Subpart 3809 concern surface management of mining, millsite, and tunnel site claims. The trespass notices cite 43 CFR 3809.2-2 which generally provides that all operations shall be conducted to prevent unnecessary or undue degradation of Federal lands, and shall comply with all pertinent Federal and state laws, including but not limited to air quality, water quality, solid wastes, fisheries, wildlife, plant habitat, and cultural and paleontological resources.

^{1/} CA 21029 appears to be the serial number for both trespass notices. CA MC 148792 is the serial number for the Black Power #1 mining claim and is the lead number for the case file containing BLM's records concerning appellants' mining and millsite claims. The Black Power #1 claim is not situated on the land to which BLM's trespass notices were directed. That land includes the Wills Mill (CA MC 178762), the Wills Mill #2 (CA MC 180731), and the Wills Mill #4 (CA MC 182445) millsite claims.

The trespass notice form contains three boxes for the official issuing the notice to select what action is required. The box marked on appellants' notices indicates: "Violations, if continuing, must stop immediately." (Emphasis in original.) The other alternatives require a person charged with a trespass to cease the trespass operation within a certain number of days from receipt of the notice or to submit evidence or information which tends to show that the person charged is not a trespasser as alleged. ^{2/}

[1] Appellants deny the allegations in the trespass notices, pointing out that the same violations were cited in notices of noncompliance that were the subject of their previous appeal to this Board, IBLA 89-83, which was consolidated with the appeals of Pierre J. Ott, IBLA 89-82, and Robert A. Berg, IBLA 89-84. Appellants assert that their millsite claims are used in connection with various nearby placer and lode mining claims. Under 30 U.S.C. § 42 (1982), the proprietor of a mining claim may appropriate nonmineral land for mining, milling, or other operations in connection with such claim. However, because occupancy of a mining claim for purposes not related to mining operations constitutes a trespass, United States v. Nogueira, 403 F.2d 816 (9th Cir. 1968); United States v. Rizzinelli, 182 F. 675 (D. Idaho 1910); Teller v. United States, 113 F. 273 (8th Cir. 1901), it also follows that occupancy of a millsite claim for purposes not related to mining operations constitutes a trespass.

BLM's notices of noncompliance that were the subject of appellants' prior appeal alleged, inter alia, violations of state building and sanitation codes. By order dated April 27, 1989, the Board limited the scope of that appeal to the question of the correctness of the finding that violations of state law resulted in unnecessary and undue degradation of public lands by appellants. The Board specifically required BLM to address seven issues stated in that order. BLM declined to provide the legal analysis required to support its efforts to enforce the provisions of state law allegedly violated. Instead, in response to our order, counsel for BLM expressed his appreciation for "the Board's considered analysis set forth in its Order" and stated his belief that "the Board correctly determined that BLM's remedies for occupation within a wild and scenic river corridor, without authorization via an approved plan of operations, is more properly redressed in the District Court pursuant to the theory set forth in United States v. Doremus, 658 F. Supp. 752 (D. Idaho 1987)." He requested that we set aside BLM's decisions and remand the matter for further action within the Federal judicial system. This request was granted by order styled Pierre J. Ott, IBLA 89-82, May 24, 1989. Nevertheless, BLM issued the trespass notices that are the subject of the instant appeals on July 7.

^{2/} A question is presented whether BLM's trespass notices constitute "decisions" which are appealable to this Board under 43 CFR 4.410. The notices in this case did not allow the Wills the opportunity to present evidence to BLM to show they were not trespassing. Had the notices provided that opportunity, arguably they would have been interlocutory. See e.g. BLM Realty Trespass Abatement Handbook H-9232-1, V-6. Moreover, BLM has not argued that the notices are interlocutory. Under the circumstances of these cases, we consider the notices to be appealable.

Citing this prior history, appellants ask that we not set aside and remand this case; they want a decision and have requested a hearing. Citing the fact that the trespass charges include matters previously raised in their prior appeals, appellants state that "it appears that Deane Swickard, Folsom Resource Area Manager has successfully avoided the appeals process" (Statement of Reasons at 1). Appellants are incorrect that the Area Manager avoided the appeals process; however, by issuing the trespass notices, BLM in essence has simply reissued the charges to which our April 27, 1989, order was directed without making any attempt to provide this Board with the analysis we previously required so that we might give those charges further consideration. ^{3/}

[2] Appellants' request for a hearing has merit. In our April 27 order, we noted the similarity between the matter involved in these appeals and the case of Bruce W. Crawford, 86 IBLA 350, 92 I.D. 208 (1985). In that decision, we stated:

We find no difficulty in concluding that, to the extent to which BLM's actions may be predicated on the statutory limitation that allowable surface uses of unpatented mining claims are only those reasonably incident to mining, a decision ordering the cessation or limitation of occupancy in the instant case may only be entered after notice and an opportunity for hearing.

86 IBLA at 376, 92 I.D. at 222. We concluded that if "BLM desires to challenge appellants' occupancy as not reasonably related to their mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it shall bring a contest alleging such grounds." 86 IBLA at 402, 92 I.D. at 236-37.

In our April 27, 1989, order, we asked the following questions:

6. What due process and procedural rights are available to individuals where, as here, they deny the existence of a

^{3/} One of the problems raised in our Apr. 27, 1989, order was the lack of specificity in BLM's notices of noncompliance as they related to the alleged building and sanitation code violations. That failure has been replicated in the trespass notices. To the extent that BLM's notices charge appellants with "violation of county building and sanitation codes," they fail to specify what county building and sanitation codes are being violated. The notices also fail to specify what remedial action is required in order to bring appellants' operations into compliance. This Board reviews a variety of cases in which agencies of this Department charge citizens with violations of various laws, and this Board will not sustain the issuance of such a notice if the notice lacks the requisite degree of specificity. *E.g., Office of Surface Mining Reclamation & Enforcement v. Ewell L. Spradlin Coal Co.*, 93 IBLA 386 (1986). Thus, the county code charges in BLM's trespass notices are subject to reversal for this reason alone. While the case records disclose a number of county building and sanitation code problems that may have arisen with appellants' use and occupancy of these sites, the trespass notices provide no clue concerning which problems are encompassed by the notices.

violation? Is a hearing required under the analysis employed in Bruce N. Crawford, supra? If not, why not? Is a hearing required under 43 CFR 4.415? If not, why not?

As we have indicated, BLM provided no response to those questions. They are, however, again relevant, given the filing of the appeals to the issuance of the trespass notices. BLM has not filed an answer to appellants' statement of reasons in which they dispute the charges set forth in the trespass notices. We conclude that the analysis set forth in the Crawford case is applicable in these appeals. Accordingly, we must reverse the trespass notices in their entirety because they are insufficient to initiate the proceedings which our decision in Crawford indicated were necessary in a situation such as that presented by these trespass notices.

In reversing the notices under appeal, we are not ordering BLM to initiate a contest, although we hold that BLM is required to do so if BLM desires to make an administrative challenge to appellants' occupancy for the reasons stated in the trespass notices. Although ordering BLM to initiate a contest would accommodate appellants' request for a hearing, there are several reasons why such disposition is not appropriate here. Our reversal fully disposes of the notices appealed. Although appellants may have other concerns they wish us to consider, they are not within the scope of these proceedings. Furthermore, appellants have indicated that they are not prepared to participate in a contest proceeding. We note that under 43 CFR 4.450-6, appellants would be required to file an answer to the complaint within 30 days, but in their request for a hearing, appellants allege that all of the records they require in order to establish the legitimacy of their occupancy for mining purposes are not available to them because they have been seized pursuant to a search warrant captioned United States of America v. Premises located at SW¼, SE¼ [sic] of Section 5, T4S, R18E, consisting of two trailers and one camper, all of which is known as the residence of Jim D. Wills and Reggie N. Wills, Docket No. __ (E.D. Cal. Oct. 17, 1989). ^{4/} Thus, we do not believe BLM should be directed to issue a contest complaint and issuance may serve no useful purpose if, in fact, appellants do not have control of relevant records. ^{5/} Appellants are advised, however, that nothing in our decision precludes BLM from initiating a proceeding in a Federal district court. ^{6/}

^{4/} Appellants should be aware that this Board has no jurisdiction over actions taken by United States Marshals pursuant to a subpoena issued by a Federal district court.

^{5/} BLM is advised that any contest complaint issued on the basis of failure to comply with state and local building codes will be subject to summary dismissal if BLM fails to specify the particular violations involved. See note 3, supra. BLM is further advised that to the extent that the complaint would involve issues raised in our order dated April 27, 1989, the complaint should not be filed until BLM is prepared to respond to those issues.

^{6/} The record contains no indication that any proceeding has been initiated against appellants in a Federal district court, although the search warrant may have been sought in anticipation of the initiation of such a proceeding. Inasmuch as supervision of litigation to which the Department

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed and the cases remanded.

James L. Byrnes
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

fn. 6 (continued)

of the Interior is a party falls within the purview of the Solicitor who exercises the Secretary's authority with respect to "[a]ll the legal work of the Department," 209 DM 3.1.A., this Board has no authority to direct action to be taken in judicial litigation to which the agency is a party.