

DAVID E. PIERCE

IBLA 2000-4

Decided September 29, 2000

Appeal from a decision and notice of noncompliance issued by the Las Vegas Field Office, Bureau of Land Management, requiring the removal of certain items from mining claims for failure to comply with use and occupancy regulations at 43 C.F.R. Subpart 3715. N54-89-002N.

Affirmed in part; set aside in part.

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

Section 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (1994), bars use of an unpatented mining claim for any purpose other than prospecting, mining, or processing operations and uses "reasonably incident thereto." Residential occupancy may be reasonably incident to mining during the conduct of operations where the claims are located in an area so remote as to require the claimant to remain on site in order to work a full shift. Residential occupancy may also be allowed to provide security for equipment and material at times when operations are ongoing. These needs are obviated, however, and residential occupancy may not be reasonably incident where the claimant's family owns fee lands adjacent to the claims in question, on which the claimant is mining, where he could reside and store equipment to protect it from theft.

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

Storage on unpatented mining claims of an excessive amount of equipment for a mining operation which is in an exploratory or prospecting stage of development is not reasonably incidental to mining.

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

While 43 C.F.R. § 3715.6(g) prohibits placing gates on mining claims to exclude the general public, a notice of noncompliance cannot be sustained to the extent that it is premised on a locked cable blocking access to mining claims where it is unclear whether the cable is located on public land.

APPEARANCES: David E. Pierce, pro se; Mark R. Chatterton, Assistant Field Manager, Las Vegas Field Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

David E. Pierce has appealed a decision and notice of noncompliance issued by the Las Vegas Field Office, Bureau of Land Management (BLM), dated August 31, 1999, advising him that the activities taking place on the Gingerlode 2 (NMC 377978), Fat Chucker #3 (NMC 415003), Fat Chucker #4 (NMC 511035), Fat Chucker #5 (NMC 511036), Fat Chucker #6 (NMC 511037), and the Chipmunk #2 (NMC 608597) lode claims were found to be not reasonably incident to prospecting, mining, or processing operations within the meaning of the Surface Resources Act of July 23, 1955 (the Act), 30 U.S.C. § 612(a) (1994), 43 C.F.R. § 3712.1, and 43 C.F.R. § 3715, and ordering him to remove certain items from the claims under the authority of 43 C.F.R. § 3715.7-1(c).

Pierce has also petitioned to stay the effect of BLM's decision pending consideration of the appeal. Our review of the record to determine whether a stay should be granted resulted in our consideration of issues going to the merits of this appeal; thus, in the interest of judicial economy we have proceeded to decide this appeal.

The case file shows that Gingerlode 2 was located on September 21, 1986, and that Pierce is claimant. The Fat Chucker #3 and Fat Chucker #4 were located on May 1, 1987, and July 17, 1988, and the claimant is Jane Carlisle. The Fat Chucker #5 and Fat Chucker #6 were located on July 17, 1988, and the claimant is Pierce. The Chipmunk #2 was located on August 18, 1990, and the claimant is Pierce. (MINERAL REPORT Surface Use Determination For The Gingerlode 2, Fat Chucker #3, Fat Chucker #4, Fat Chucker #5, Fat Chucker #6, and Chipmunk #2 Lode Claims, completed August 26, 1999 (Report) at 6.)

The claims in question are situated in secs. 22, 23, 26, and 27, T. 28 S., R. 61 E., Mount Diablo Meridian, Clark County, Nevada.

A Notice to carry out surface disturbing activities on a group of claims which included the Gingerlode 2 claim was submitted to BLM May 21, 1987, pursuant to the surface management regulations at 43 C.F.R. Subpart 3809. The Notice, N56-87-032N, listed Pierce as the operator

and proposed to do road work to provide access to the claims. See Report at 7; BLM Decision dated August 31, 1999 (Decision) at 1.

On November 4, 1998, a new Notice was submitted to BLM for work to be completed on the Fat Chucker #3 and #4 claims. Pierce was again named operator and the work was to consist of exploration of veins. The new Notice was combined with N-87-032N and assigned a new number, N54-89-002N. On May 17, 1993, an amendment to N54-89-002N was received by BLM which added the Chipmunk #1 through #5 claims and noted that a trailer and camper were located on the Chipmunk #2. On June 23, 1994, an amendment removing the proposed disturbance for the Fat Chucker #3 and #4 was received by BLM. According to the amendment, the disturbance for those claims actually took place on patented lands adjacent to the claims. William Fuller was listed as operator. On December 5, 1994, BLM received notification that Fuller would be constructing and operating a cyanide vat leaching operation on the Gingerlode 2. See Report at 7; Decision at 1.

According to the Report, the site was inspected 13 times from 1990 through 1999. BLM attempted the first inspection on November 5, 1990, but a locked cable blocked access to the site. On May 4, 1992, BLM also found a cable blocking access. The BLM inspector walked onto the site and found trailers, a junk car, batteries, old tires, trash, and some equipment. See Report at 8-9.

An inspection completed on September 28, 1992, found that nothing had changed on the site since the prior inspection. The inspection of January 12, 1993, found that a mobile home had been moved into the area between the gate on the Fat Chucker #6, and the camper top located on the Chipmunk #2, with approximately one third of an acre being cleared for the mobile home. Some hydrocarbon contamination was also found. Consequently, on January 20, 1993, BLM sent a letter to Stanley Pierce, ^{1/} who was listed with David Pierce as operator, notifying him that the site was not being maintained and that total surface disturbance probably exceeded 5 acres. The letter required that either a Plan of Operations be submitted, or reclamation to reduce the acreage be completed and that the site be cleaned up. (Report at 9.)

During the April 27, 1993, inspection, BLM found that some clean-up and reclamation of the site had been completed, and ore was being removed from the deep mine. An inspection on June 16, 1994, found that William Fuller was planning to construct a cyanide vat leach system on the Gingerlode 2, which was not included in the Notice, but no construction of the system had begun at the time of the inspection. (Report at 9.)

^{1/} David Pierce is the son of Stanley Pierce. See BLM letter dated Nov. 24, 1998.

Inspections conducted on November 30, 1994, and December 7, 1994, revealed that the leach system was not under construction. On its September 20, 1995, inspection, BLM found that no one was on site and that no work on the leach system had been completed. (Report at 9.)

The inspection completed on November 17, 1998, found no hunting and no trespassing signs posted at the cable blocking the road, equipment which was not in use, and no signs of recent operations. The mobile home on the Fat Chucker #5 had broken windows. (Report at 9.)

A field examination of the site was completed on January 13, 1999, to determine whether activities reasonably incident to prospecting, mining, or processing operations within the meaning of the Act and regulations were taking place that would warrant occupancy. David Pierce and William Fuller, operators, were present. (Report at 11.)

During the field examination, BLM found a locked cable located on the Fat Chucker #6 blocking access to the claim group. (Report at 11.)

BLM reported a deep mine located on the Gingerlode 2 lode claim with tumbleweeds filling the mine opening. The following equipment and improvements were found on the claim: a head frame/hoist; a small generator providing power for the hoist; an aluminum trailer purportedly used for storage, but empty; a dump truck which purportedly worked; a small pile of "sulphide ore" from the deep mine; and vat leaching equipment and miscellaneous items. BLM reported that none of the vat leaching equipment was set up in a circuit. (Report at 11.)

BLM found a camper top on the Chipmunk #2 lode claim, where according to Pierce and Fuller, they stay when they spend more than a day working on the property. BLM stated that a fiberglass tank, household items, backhoe, portable fuel tank, tractor, and miscellaneous items were also stored on this claim. (Report at 11.)

BLM reported a small exploration site located where the Fat Chucker #3 and #5 lode claims overlap. BLM stated that a wash where the Fat Chucker #4 and #6 lode claims overlap, had been blocked by dirt graded up into a mound. BLM observed a mobile home located on the Fat Chucker #5 lode claim. BLM noted that some of the siding was coming off and the interior had insulation falling out. According to BLM, the mobile home did not have a septic hook-up or power and did not appear to be used for habitation at that point. BLM reported that an inoperable car sat just west of the mobile home. (Report at 11.)

In its Report, BLM also noted that there was a follow up inspection dated March 4, 1999. Photographs included in the BLM's Report provide verification of BLM's findings during the inspections.

Based upon the inspection of January 13, 1999, the follow-up inspection of March 4, 1999, and the prior inspections, 2/ the mineral examiners concluded that, based on their professional opinions, activities on the site did not meet the requirements of 43 C.F.R. §§ 3715.2, 3715.2-1, or 3715.5. The conclusions in the Report read as follows:

- 1) There are no milling or mining operations taking place that would require the level of occupancy which is taking place.
- 2) Activities on the site do not constitute substantially regular work. No ore has been pulled from the deep mine in 2 years. Other than sporadic sampling of surface areas and storage of equipment the site is only used for occupancy.
- 3) There are no activities and equipment on the site that can be reasonably calculated to lead to the extraction and beneficiation of minerals.
- 4) Operations do not involve observable on-the-ground activities that BLM may verify under Sec. 3715.7.
- 5) There is no appropriate equipment that is presently operable on the site.
- 6) The present occupancy is beyond that needed to protect exposed, concentrated or otherwise accessible valuable minerals from theft or loss. The specific site of exploration could be fenced off to prevent any removal of materials.
- 7) The occupancy is not needed to protect from theft or loss appropriate, operable equipment which is regularly used, is not readily portable and cannot be protected by means other than occupancy.
- 8) The occupancy is not needed to protect the public from appropriate, operable equipment which is regularly used, is not readily portable, and if left unattended, creates a hazard to public safety.

2/ BLM summarized 11 of the 13 inspections of the site in its Surface Use Determination Report. The Mar. 27, 1997, compliance inspection and the Mar. 4, 1999, follow-up inspection were not summarized in the Report. In the compliance inspection report dated Mar. 27, 1997, BLM again noted the mobile home and camper. There is no Mar. 4, 1999, compliance inspection report included in the case file. Also, we note that the case file contains a compliance inspection report dated Dec. 8, 1998, which is not mentioned in the Surface Use Determination Report. In that report, BLM stated that the no hunting and no trespassing signs had not been removed.

9) The occupancy is not needed to protect the public from surface uses, workings, or improvements which, if left unattended, create a hazard to public safety. The surface uses taking place actually create a hazard to public safety. There are old mine workings present but they can be secured by fencing and signs at their point of occurrence.

10) The site is not located in an area so isolated or lacking in physical access as to require the mining claimant, operator or workers to remain on site in order to work a full shift of a usual and customary length. The site is approximately 1.5 hours from Las Vegas, Nevada. Searchlight and Prim, Nevada are within a half hour of the site. In addition, private lands owned by Bill Fuller and the Pierce's [3/] is adjacent to the public lands where the claims occur. There is no continuous activity taking place on the claims that would warrant occupancy of the site.

(Report at 3-4.)

In accordance with the Recommendations contained in the Report, BLM in its August 31, 1999, decision issued a notice of noncompliance based on the January 13, 1999, field examination of the site and the 10 conclusions listed in the Report. BLM stated that the activities taking place on these claims were found not to be reasonably incident to prospecting, mining, or processing operations within the meaning of 30 U.S.C. § 612(a), 43 C.F.R. § 3712.1, and 43 C.F.R. § 3715. Under the authority of 43 C.F.R. § 3715.7-1(c), BLM ordered Pierce to remove the locked cable blocking the road leading to the claims, the single-wide mobile home, camper shell, and storage trailer. BLM ordered Pierce to reopen washes leading into the site that have been blocked with dirt from the wash bottom, and to remove the equipment and all personal items stored on the claims. BLM stated that the work must be completed within 30 days of receipt of this order unless he filed an appeal with the Board.

In his statement of reasons (SOR), Pierce responds to the 10 conclusions set forth in BLM's decision.

(1) Pierce asserts that there is equipment in place to remove ore from the sulfide zones on the Gingerlode, and a permit to mill ore on the premises.

(2) According to Pierce, there is no point in removing the ore from the test mine sulfide zone until the most viable process has been developed. The last time work was done in the test mine was in July 1999 by Clyde Smith. Pierce refers to assays of samples from the Gingerlode which he attached to his SOR. Pierce explains that the alleged sporadic sampling

3/ In its Report, BLM states that David Pierce's mother owns the patented ground adjacent to the unpatented claims. See Report at 12.

is done on the oxide zones to map and locate the rich sulfide zones below. Pierce claims that this preliminary work must be completed before an extensive drilling program can take place. As for the heavy equipment and other machinery, Pierce asserts that it is kept on the site to be used as needed, because it is too time consuming to move it from one property to another.

(3) Pierce explains use of the equipment and improvements as follows:

The camper is used to store a small generator, pumps, supplies and a place to cook and sleep. The single wide trailer is to act as a bunkhouse for Fuller's crew and is currently holding approximately 600 flood lights for the underground digs. The D-9 Caterpillar dozer, D-8 R Caterpillar dozer, 980 Caterpillar loader, Gallion grader, 830 Case tractor, core drill, air track drill, compressors, generators, SCB backhoe, welding truck and milling and processing equipment are there for the location, development, extraction and beneficiation of minerals.

(4) Pierce said he would be "more than happy" to show BLM around the site to observe on-the-ground activity.

(5) Pierce states that every piece of heavy equipment is running except the 830 Case, and he guesses that a rat may have destroyed the radiator hose which he is having difficulty replacing.

(6) and (7) Pierce explains that even with the gates in place on the perimeter of the properties and locked doors on some of the digs, ore is still being stolen. Pierce claims that a fence around the ore or digs, as suggested by BLM, would allow vandals closer easier access. Pierce applies the same reasoning to theft and vandalism of equipment.

(8) and (9) Pierce contends that the gates help protect the public and the miners from each other by keeping a safe distance between them. According to Pierce, people and vehicles have narrowly escaped injury from heavy equipment and blasting. Pierce asserts that gates also help protect the public from the inherent risks from mining such as holes, cuts, shafts, and tunnels.

(10) Pierce states that he works from sunrise to sundown. His primary residence is in Las Vegas which entails a 3-hour round trip commute to and from the site. Pierce explains that the location of the mobile home and camper serve as storage facilities, sleeping accommodations, and also security, by creating the impression that someone is living there full time. Pierce asserts that the adjacent private lands are part of the mining operation and are also being developed. (SOR at 2-3.)

In its answer, BLM addresses each of Pierce's itemized responses and provides further explanation and rationale to support its conclusions and to rebut Pierce's SOR. Thus, BLM points out that there may be equipment

on the site that can be used for mining, but it is not being used for that purpose. BLM notes that during the January 13, 1999, inspection, Pierce stated that it had been 2 years since ore was removed from the deep mine. BLM points out that none of the processing equipment is set up in a working circuit. BLM refers to Pierce's statement that a proper method has not yet been developed to process the ore and reasons that Pierce has therefore admitted that the current level of occupancy is beyond that required for the level of mining activity taking place. BLM reiterates that the equipment could be stored on the patented properties adjacent to the claims in issue where it would be accessible when needed and could be more appropriately secured. (Answer at 2.)

BLM asserts that Pierce himself stated on January 13, 1999, that most of the work he has been doing is on the adjacent patented lands. BLM points out that photographs of the single-wide trailer show that it is not being maintained. BLM explains that Fuller does not have a crew that needs housing so the trailer is not needed. BLM states that some of the equipment mentioned by Pierce was not on the public lands during the January 13, 1999, inspection. BLM states that the work on the unpatented claims has been limited to sporadic sampling that may lead to further development of the property. (Answer at 3.)

BLM refers to Pierce's statement that he would have been more than happy to show BLM around the property so they could see observable on-the-ground activity. BLM responds that the purpose of the January 13, 1999, inspection was explained to Pierce and he was given the opportunity to point out whatever he felt was relevant to justify the occupancy of the site. (Answer at 3.)

BLM refers to the Report which describes the equipment and other items stored on the claims at the time of the inspection. BLM points out that most of the heavy equipment that Pierce mentions was on Fuller's patented lands during the inspection. BLM notes that there was no milling or processing equipment set up in a circuit that could process ore. (Answer at 3.)

Responding to Pierce's concerns about vandalism and theft, BLM states that removing unneeded equipment and personal goods from public lands would be a better option for protection than closing off large areas of public lands to other legitimate users. BLM points out that extra steps could be taken for protecting these items if they were on the private lands controlled by the operators. Similarly, BLM believes that Pierce should take other measures for the protection of ore, rather than closing the land to legitimate users. (Answer at 4.)

Pierce contends that the gates help protect the public from the mining equipment and blasting. BLM asserts that proper marking and signing of the area, removal of unnecessary equipment, and care on the part of the operator in carrying out mining activities would do more to prevent accidents from occurring than blocking public access. BLM notes that there

was no recent evidence of blasting on the claims inspected. BLM recommends that shafts, tunnels, and other mining disturbances should be signed, fenced, or reclaimed if not used to protect the public. (Answer at 4.)

BLM asserts that there is no need for Pierce to stay on the site. BLM refers to Pierce's statement made at the January 13, 1999, inspection, that he can stay at a casino at Prim, Nevada for a reasonable price. BLM adds that he could also occupy the private lands. BLM contends that occupancy is not necessary for security because equipment could be better protected on private lands controlled by the operators. (Answer at 4.)

On October 15, 1999, Pierce filed a response to BLM's answer in which he reiterates arguments presented in his SOR. He elaborates on the use of the mobile home, storage trailer, and camper shell. As to the dirt pushed up in a wash, he explains that the purpose is to catch water to use for mining purposes. Pierce refers to a statement in BLM's response that the D-9 Caterpillar was destroyed on patented ground. Pierce states it was ruined by a vandal pouring sand down the smoke stack and into the oil well while located on unpatented land. Pierce asserts that in order for a vandal to reach the cable blocking the road, it was necessary to pass over patented ground. (Response at 2.)

Pierce argues that BLM has exceeded its authority by suggesting that he move equipment and improvements onto "a non-owner and a non-operator's private property" because the owner of the patented land is related to him. (Response at 3.)

[1] Section 4(a) of the Act, 30 U.S.C. § 612(a) (1994), provides that claims located under the mining laws of the United States "shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." In addition, 30 U.S.C. § 625 (1994) provides that all mining claims and millsites located on public lands "shall be used only for the purposes specified in section 621 of this title and no facility or activity shall be erected or conducted thereon for other purposes."

Effective August 16, 1996, BLM adopted 43 C.F.R. Subpart 3715, which implements those statutory provisions by addressing the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. See 61 Fed. Reg. 37115, 37117 (July 16, 1996). These regulations set forth restrictions on the use and occupancy of public lands administered by BLM open to the operation of the mining laws, limiting such use and occupancy to those involving prospecting or exploration, mining, or processing operations, and reasonably incidental uses. They also establish procedures for beginning occupancy, standards for reasonably incidental use or occupancy, prohibited acts, and procedures for inspection and enforcement, and for managing existing uses and occupancies. 61 Fed. Reg. 37116 (July 16, 1996). Additionally, the regulations clarify 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. 61 Fed. Reg. 37117-18 (July 16, 1996); see 43 U.S.C. § 1732(b) (1994). ^{4/}

In its notice of noncompliance, BLM stated that the activities taking place on the claims were in violation of 43 C.F.R. § 3712.1 and 43 C.F.R. § 3715. Departmental regulation 43 C.F.R. § 3712.1 deals with restrictions on use of unpatented mining claims and quotes section 4 of the Act. Under 43 C.F.R. Subpart 3715, Use and Occupancy Under the Mining Laws, we will focus on 43 C.F.R. §§ 3715.2, 3715.2-1, and 3715.5, the regulations cited in the conclusions section of the Report which was adopted by BLM in its decision.

Departmental regulation 43 C.F.R. § 3715.2 provides that in order to occupy public lands for more than 14 days in a 90-day period, the activities that are the reason for the occupancy must:

- (a) Be reasonably incident;
- (b) Constitute substantially regular work;
- (c) Be reasonably calculated to lead to the extraction and beneficiation of minerals;
- (d) Involve observable on-the-ground activity that BLM may verify under § 3715.7; and
- (e) Use appropriate equipment that is presently operable, subject to the need for reasonable assembly, maintenance, repair or fabrication of replacement parts.

Under 43 C.F.R. § 3715.2-1, occupancy must also involve one or more of the following:

- (a) Protecting exposed, concentrated or otherwise accessible valuable minerals from theft or loss;
- (b) Protecting from theft or loss appropriate, operable equipment which is regularly used, is not readily portable, and cannot be protected by means other than occupancy;

^{4/} The preamble explains that the unnecessary or undue degradation controlled by these rules includes uses not authorized by law, specifically those activities which are not reasonably incident and are not authorized under any other applicable law or regulation, while uses that are reasonably incident and do not involve occupancy are governed by the surface management requirements of 43 C.F.R. Part 3800. 61 Fed. Reg. 37118 (July 16, 1996).

(c) Protecting the public from appropriate, operable equipment which is regularly used, is not readily portable, and if left unattended, creates a hazard to public safety;

(d) Protecting the public from surface uses, workings, or improvements which, if left unattended, create a hazard to public safety; or

(e) Being located in an area so isolated or lacking in physical access as to require the mining claimant, operator, or workers to remain on site in order to work a full shift of a usual and customary length. 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.

Departmental regulation 43 C.F.R. § 3715.5(a) provides that use and occupancy must be reasonably incident and prevent or avoid "unnecessary or undue degradation" of public lands and resources. Under 43 C.F.R. § 3715.5(b) and (c), all uses and occupancies must conform to all applicable Federal and state environmental standards and all required permits and authorizations must have been obtained before commencing activities. 43 C.F.R. § 3715.5(d) and (e) state that any temporary structure placed on public lands during prospecting or exploration will be allowed only for the duration of the activities, absent written approval from BLM, and such temporary structure must conform with the applicable state or local codes and occupational safety and health and mine safety standards.

The regulations define "reasonably incident" as being a shortened version of the statutory standard "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 * * *." 43 C.F.R. § 3715.0-5. See Brawshaw Industries, 152 IBLA 57, 63 (2000).

We agree with BLM that the level of mining activity on these claims does not warrant the level of occupancy that exists. Pierce admitted that it had been 2 years since ore was removed from the deep mine, and did not point out any on-going mining activity to BLM during the inspections. Although actual mining is not necessary to be in compliance with the Act and regulations, occupancy must be reasonably incident to mining. See United States v. Doherty, 125 IBLA 296, 299-300 (1993). The equipment and materials present at this site are not justified due to the lack of mining activity.

Regarding residential occupancy of the site, Pierce argues that occupancy of the site is justified because his primary residence is in Las Vegas which entails a 3-hour round trip commute to and from the site. The Board addressed the issue of residential occupancy in United States v. Peterson, 125 IBLA 72, 79 (1993). In that case, Peterson argued that it

was necessary for him to reside on the claim in order to maximize his operating hours on the claim. The Board found that reason did not support residence on the claim under the facts in that case because the claimant owned fee lands contiguous to the claim in issue. The Board explained that residence on the patented lands would be as convenient as residence on the claim in question and would provide him the same opportunity to work odd hours on the claim. A similar situation exists in the case before us. Pierce could reside on the adjacent patented claims. The camper top which he and Fuller use when they spend more than a day on the site could be moved to the private property. The single-wide trailer, which Pierce claims will act as a bunkhouse for Fuller's crew, could also be moved to the private property to be used for sleeping accommodations for a work crew when a work crew becomes necessary. Nor is a mobile home justified on the site because Pierce could reside elsewhere. Moreover, as Pierce points out, inexpensive rooms are available in nearby Prim. As in Peterson, we find that residential occupancy on this site is not reasonably incident to a mining operation.

Pierce argues that he does not own the patented lands and that BLM is exceeding its authority in suggesting that he move improvements and equipment to those lands. We find this argument to be without merit. Pierce stated that the patented lands are part of the same operation as the claims in question and are being developed as well. (SOR at 3.) Also, as BLM points out, most of the heavy equipment listed by Pierce in his SOR was on patented lands at the time of the January 13, 1999, inspection. (Answer at 3.)

The regulations also permit residential occupancy when it is needed to protect equipment from theft. However, Pierce has not shown that equipment cannot be protected by means other than occupancy as required by 43 C.F.R. § 3715.2-1(b). We find that the equipment could be protected by moving it to the patented claims. Nor has Pierce shown that occupancy is necessary to protect the public from equipment which is regularly used, is not readily portable, and if left unattended, creates a hazard to public safety. See 43 C.F.R. § 3715.2-1(b). Inspections of the site did not reveal any on-going mining operations which would present a dangerous situation for the public. Also, as BLM points out, the old mine workings on the site could be secured by fencing and warning signs.

[2] Regarding aspects of occupancy other than residence on the site, Pierce has made no showing that the items stored on the claims are reasonably incident to mining. During the January 13, 1999, inspection, BLM reported a deep mine located on the Gingerlode 2 lode claim with tumbleweeds filling the mine opening. BLM did not find any evidence of observable on-the-ground activity on this claim as required by 43 C.F.R. § 3715.2(d). See Firestone Mining Industries, Inc., 150 IBLA 104, 109-110 (1999). Also, none of the vat leaching equipment was set up in a circuit. Under 43 C.F.R. § 3715.2(e), equipment must be "presently operable, subject to the need for reasonable assembly, maintenance, repair or fabrication of replacement parts."

In his SOR, Pierce lists his equipment and explains that it is on the site for the "location, development, extraction and beneficiation of minerals." (SOR at 3.) He points out that he has acquired a permit to mill ore, obtained samples from the Gingerlode and had them assayed. Although the activities described by Pierce are related to mining, they do not justify the excessive amount of equipment on the site. Brawshaw Industries, 152 IBLA at 63. Pierce describes his activities as "preliminary work," and explains that the equipment is there "to be used as needed." (SOR at 2.) However, Pierce has not shown that he is currently engaged in an active mining or milling operation that would warrant the amount of equipment and improvements on the site. Pierce's operation is in an exploration or prospecting stage of development which does not require the equipment that is stored on the site. Therefore, we find that the equipment present on the site is not reasonably incident to mining in this case as required by 43 C.F.R. § 3715.2(a), and constitutes unnecessary and undue degradation of the public lands which must be avoided or prevented under 43 C.F.R. § 3715.5(a).

[3] During the field examination of the site on January 13, 1999, BLM found that "[a] locked cable located on the Fat Chucker #6 blocks access to the claim group." (Report at 11.) 43 C.F.R. § 3715.6(g) prohibits placing gates to exclude the general public without BLM's concurrence. However, it is unclear from the information in the case file that the locked cable was on public land. In the compliance inspection report dated November 5, 1990, the inspector stated that a locked cable was blocking the access road and that it "may or may not be on patented property." He recommended that BLM return to the site to determine whether the gate was on patented land. In subsequent inspection reports dated November 17, 1998, and December 8, 1998, the inspector stated that the gate was on public land. In a letter dated January 5, 1999, Stanley Pierce stated that "there is a non-public road leading across the Nippeno patent where there is a cable across the private road which leads into the unpatented claims." Although BLM stated that the locked cable was on public land, there is no explanation in the case file to document the basis for resolution of this issue after it was raised in the compliance inspection report dated November 5, 1990. Also, we note that BLM dispute's Stanley Pierce's assertion in his January 5, 1999, letter that the locked cable at issue is on private land. Therefore, we set aside the notice of noncompliance to the extent that it was premised on the fact that there was a locked cable on public land blocking access and remand that issue to BLM for further determination.

We find that, in accordance with 43 C.F.R. § 3715.7-1(c), BLM properly ordered Pierce to remove the single-wide mobile home, camper shell, and storage trailer. Also, BLM properly ordered Pierce to reopen washes leading into the site that have been blocked with dirt from the wash bottom, and to remove the equipment and all personal items stored on the claims. Appellant will have 30 days from receipt of the Board's decision to comply with BLM's decision and notice of noncompliance. Should BLM determine on remand that the locked cable is in fact on public land, then it should be removed as directed by BLM in compliance with 43 C.F.R. § 3715.6(g).

Having decided the appeal on its merits, the petition for stay is deemed as moot.

Therefore, 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 and notice of noncompliance appealed from are affirmed in part, and set aside and remanded in part.

Gail M. Frazier
Administrative Judge

I concur:

James P. Terry
Administrative Judge

