

TERRY HANKINS

IBLA 2001-22

Decided July 22, 2004

Appeal from decision of the Little Snake (Colorado) Field Office, Bureau of Land Management, issuing a notice of noncompliance under 43 CFR Subpart 3715. CO-016-87-3; CMC-250348.

Affirmed in part as modified, reversed in part, and remanded with instructions.

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

The regulations governing use and occupancy of unpatented mining claims, 43 CFR Subpart 3715, apply to a use or occupancy that was in existence when the regulations were published. All existing uses and occupancies had to meet the applicable requirements of that subpart by August 18, 1997.

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

Departmental regulation 43 CFR 3715.0-5 defines "occupancy" of public lands covered by mining claims as "full or part-time residence on the public lands," including "the construction, presence, or maintenance of temporary or permanent structures." However, under that definition, "residence or structures" include uses not commonly associated with residential occupancy, *viz.*, "barriers to access, fences, * * * buildings, and storage of equipment or supplies." As a result, structures used for purposes other than residential use are governed by

43 CFR Subpart 3715, specifically including buildings and storage of equipment or supplies.

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

Under 43 CFR 3715.2, in order to occupy the public lands under the mining laws for more than 14 calendar days in any 90-day period, a claimant must be involved in certain activities that (a) are reasonably incident; (b) constitute substantially regular work; (c) are reasonably calculated to lead to the extraction and beneficiation of minerals; (d) involve observable on-the-ground activity that BLM may verify under 43 CFR 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. All five of those requirements must be met for occupancy to be permissible, in addition to other relevant requirements.

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

The regulation at 43 CFR 3715.2-1 establishes a requirement separate from and additional to those at 43 CFR 3715.2. Under 43 CFR 3715.2-1, occupancy of a mining claim is permissible if it involves 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; (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 being ordinarily 8 hours and not including travel

time to the site from a community or area in which housing may be obtained. Occupancy of a mining claim by using it as a residence is not authorized where the claim is located near two towns, minerals and equipment on the claim can be protected by removing them from the claim or by storing them in buildings on the claim, and the claim does not contain equipment or works that are hazardous to the public or that cannot be stored in buildings on the claim. At the same time, the need to use a mining claim for protective storage of equipment and samples, satisfies one or more of those requirements, justifying maintenance of non-residential structures on the claim, if other relevant requirements are met.

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

BLM may not, in the context of issuing a notice of noncompliance under 43 CFR 3715.7-1(c) citing a claimant for unauthorized occupancy of a mining claimant, order immediate cessation of occupancy and the complete reclamation of the mining claim. In such a NON, BLM is required to (1) describe how the claimant's use is not in compliance with the regulations, (2) describe the actions that must be taken in order to correct the noncompliance, (3) set a date not to exceed 30 days from the issuance of the NON by which corrective action is to commence, and (4) establish the time frame by which corrective action is to be completed. BLM may issue a Cessation Order under 43 CFR 3715.7-1(b)(ii) only when corrective action by the mining claimant is not completed within the time specified in the NON. Where a NON effectively required immediate cessation of occupancy and reclamation of the mine site, it will be amended on appeal, as it was premature for BLM to take such action.

APPEARANCES: Terry Hankins, pro se; Jennifer Rigg, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Terry Hankins has appealed from the September 26, 2000, Notice of Noncompliance (NON) issued under 43 CFR Subpart 3715 by the Little Snake (Colorado) Field Office, Bureau of Land Management (BLM), for unauthorized use and occupancy of Federally-owned lands. Hankins appears on his own behalf and on behalf of the Timberlake Creek Placer Mining Association "D," apparently the co-locators of the Ace #7 placer mining claim (CMC-250348).

At issue is Hankins' occupancy of Federally-owned lands in sec. 8, T. 11 N., R. 91 W., 6th Principal Meridian, in Moffat, Colorado, covered by the Ace #7 claim. The occupancy in question commenced in 1987 and continued at least until the issuance of the NON. The record shows that Hankins' residence (a trailer) is situated in the far northeast corner of sec. 8, near the corner common to secs. 4, 5, 8, and 9, on a tract of about 1.2 acres. Hankins refers to this area as "Site A."

The record indicates that the larger area in which Hankins' residence is located was previously mined in the early 20th century, with a "major ditch, hillside sluices, valley bottom ponds * * * , and large dredge ponds." (Letter to File dated Sept. 13, 2000, reporting conversation with Terry Hankins on Sept. 12, 2000.) Hankins engaged in mining activities in the area to varying degrees in the years preceding the issuance of BLM's NON. Thus, the record shows that, on June 10, 1987, he filed with BLM a Notice of Intent to conduct prospecting operations (NOI) at the "Mitch Chesney Lease Pit No. 1." The underlying claim at that time appears to have been the FHC 253 placer claim (CMC-181374) in the E $\frac{1}{2}$ NE $\frac{1}{4}$ of section 8, which was apparently located by other parties and apparently quitclaimed or leased to Hankins, among others, by Mitch Chesney. An inspection by BLM on August 7, 1987, revealed that Hankins was "running material" from the site that was apparently taken from the "top 4+ feet of sand material" in approximately one-half acre. Another inspection on September 17, 1987, indicated that his operations were continuing. Although the record does not specify the area where these activities were undertaken, there is little doubt that Hankins, and others, were engaged in mining in the E $\frac{1}{2}$ NE $\frac{1}{4}$ of section 8.

On June 15, 1987, Hankins wrote the Colorado Mined Land Reclamation Division (CMLRD), State of Colorado, requesting its approval to "continue to use the site for living quarters while prospecting," asserting his belief, "based on the phone calls with" a BLM employee and a CMLRD employee, that "such domestic use on a temporary basis is acceptable." On June 22, 1987, BLM informed Hankins that his NOI was complete and set out requirements to prevent unnecessary degradation to affected lands and resources; at the same time, BLM assigned serial number CO-016-87-3 to its administration of his occupancy of the claim. (Letter to Hankins dated June 22, 1987, at 1.) On September 22, 1987, Hankins filed an amendment to

his NOI notifying BLM that a “trailer house” would be set up “for a security guard to live in” and that, “associated with it [would] be a 20' x 28' temporary frame storage building to house supplies for future anticipated mining operation as well as current prospecting activity.” By letter dated October 5, 1987, BLM advised Hankins that it had “received and reviewed” his proposal to amend NOI CO-016-N-87-3, and that specified health and safety requirements would apply to prevent unnecessary degradation to the affected lands and resources.

On October 25, 1988, BLM received a letter from Hankins amending his 1987 NOI to include an additional “one acre small scale placer gold prospecting site in the extreme NE corner of Sec. 8 * * * on the FHC 253 claim, where a water supply pond (approx. dam height of 4 feet) will be required.” That appears to refer to the site where Hankins placed his trailer and other buildings. On November 2, 1988, BLM notified him of an additional cultural resource inventory that had to be done and of the need to increase the bond posted with CMLRD, but did not indicate that he could not proceed.

The record contains a report for a May 2, 1991, inspection by CMLRD indicating that Western Placer Company had been mining placer material in the fall of 1990. The report notes that 1.5 acres near Timberlake Creek had been disturbed, in addition to 2.4 acres located near the Western Placer Plant. This area is within the NE¼ of sec. 8 but apparently to the west of the area where Hankins located his trailer and other buildings. Hankins explains that this area was test mined in the fall of 1990 using a “massive” dry land dredge plant (described by him as “weighing about four hundred tons, and standing eighty feet tall”) capable of handling 80 tons per hour, but that testing was discontinued due to “a low gold recovery.” (Supplemental NOI filed July 21, 2000, at 8.)

On June 6, 1991, the Colorado Mined Land Reclamation Board (CMLRB) issued Hankins a notice of possible violation, apparently for mining an area in excess of that permitted by CMLRD. Hankins sent a letter to CMLRB suggesting that any violations were the result of the acts of other parties, presumably Western Placer. However, Hankins also stated in that letter that he personally planned “to continue prospecting activity on this site within two years--but probably not this summer.” (Letter from Hankins to CMLRB dated June 16, 1991, at 2.) It appears that a notice of violation for mining without a permit was issued on June 26, 1991. On December 20, 1991, CMLRB issued Hankins a cease and desist order and order to pay civil penalty ordering him to cease and desist mining operations in that area.

Apart from a letter from Hankins to BLM concerning a dispute about filing of annual assessment documentation for the FHC 253 claim (CMC-181374), among others, the record is silent until September 3, 1996, when Hankins filed an Existing

Occupancy Notification form with BLM pursuant to 43 CFR 3715.4, part of the then newly-promulgated regulations governing residential occupancy of unpatented mining claims. Hankins has subsequently explained that activity up to 1998 on the site “was limited to sampling and equipment repair, modification, building sampling and equipment repair, modification, building construction[,] and the construction of a support framework for [a] planned [processing] plant at Site A,” the area where Hankins’ trailer was situated. (Supplemental NOI at 8.)

On May 4, 1998, the Ace #7 placer mining claim was located for Lots 1, 2, 7, and 8 (the NE¹/₄) sec. 8, T. 11 N., R. 9 W., 6th Principal Meridian, by a group of persons including Terry and Jay Hankins. (Supplemental NOI at 15.) This claim was serialized by BLM as CMC-2503478.

On September 24, 1998, BLM inspected the site. Its 3809 Inspection Form notes that the site was “still in operation” and that the “[o]perator is in process of modifying site and method of recovery.” Photographs show abandoned vehicles and a small trommel, as well as a residence and ore processing facilities on the claim. The report of inspection notes that there was full-time occupation of the site and that the residential occupancy of the site “need[ed] to be authorized,” with such “determination to be completed at another time, next summer.” It also notes that Hankins proposed to submit a plan of operations “this next year.”

In July 1999, a BLM employee delivered a copy of the regulations governing use and occupancy of mining claims to Hankins. Hankins called and wrote BLM on July 8, 1999, to complain about the attitude of that employee. It appears that Hankins was objecting to the employees’ statements regarding Hankins’ possible noncompliance with those regulations.

On July 14, 2000, BLM wrote Hankins to arrange an inspection of the site on July 25, 2000, to determine compliance with 43 CFR Subparts 3715 and 3809. BLM expressly advised that the inspection would involve “a use analysis regarding [Hankins’] occupancy being reasonably incident to mining.” On July 21, 2000, Hankins filed a supplemental NOI “to cover [his p]rospecting and exploration [activity] leading to an active mining operation on the Ace #7 placer claim, CMC 250348.” Hankins stated therein that his “intention is to continue prospecting and exploration activity at the present level of effort.” (Supplemental NOI at 3.) He further stated that “prospecting operation will be limited to 50 tons per day maximum, largely in seasonal bulk sampling mode using the small 18" diameter red

trommel” at “Site A.”^{1/} He asserted that “[f]ront end loader, backhoe, or floating dredge operations are planned, once financing is obtained, at a rate of 1200 tons per day on the Ace #7 Claim.” He noted that “[e]ach acre of the Ace #7 claim contains about 43,000 tons of placer sand material of valuable metal content,” but that “[t]iming of start and completion of operations cannot be definitively stated at this point in the planning process due to uncertainty of market prices and financing and the degree and character of governmental regulation.” He estimated that he had enough placer material for 20 seasons of operation at 200 operation days per year. He stated that “limited activity” was continuing and that “planning was underway to update maps, flowsheets, and recovery methods, focused mainly on rare earth recovery.” He described this activity as “limited to sampling and equipment repair, modification, building construction[,] and the construction of a support framework for the planned plant” near his trailer. *Id.* at 8. He asserted that “[d]ue to remote location and the need to secure equipment and supplies from theft and to prevent mineral trespass, fulltime occupancy of at least some of the 8 owners will continue to be an integral part of either prospecting * * * or under full scale, plan level mining.” *Id.* at 9.^{2/}

BLM inspected Hankins’ mining operation as scheduled on July 25, 2000, and its 3809 Inspection Form notes the presence of exploration, test pit(s), bulk sampling sites, and milling or processing facilities. It also notes the presence of structures or

^{1/} The “red trommel” is situated near his trailer and appears in photographs of subsequent inspections.

^{2/} Hankins also indicated that “the property to be mined is planned to be patented,” and that a “public Notice of Intent to Patent was posted on the property” in May 1993. We are not aware that an application for patent has been filed with BLM.

In his Supplemental NOI, Hankins also proposed bifurcating the mining into two sites, one near his storage building and trailer (Site A) and another in the area substantially to the west previously used by Western Placer as the “Mitch Chesney Pit No. 1” (Site B). That request was denied by BLM in an Aug. 22, 2000, letter, in which BLM ruled that Hankins, as Western Placer’s representative, was responsible for reclaiming Site B, indicating that the disturbed area for which Hankins was responsible comprised 2.9 acres in total.

On Aug. 10, 2000, the Colorado Division of Minerals and Geology (CDMG) had inspected the “Mitch Chesney Lease” area (Site B), reporting a disturbance of approximately 2.9 acres. CDMG noted that Hankins had been issued a Notice of Intent (presumably under State law) to conduct prospecting activities for less than one acre and had made a financial warranty of only \$100. CDMG also noted a possible violation of governing State law for failure to file a proper NOI. It requested that Hankins submit a revised State NOI for a total of at least 2.9 acres and post a replacement warranty of \$4,800 for reclamation.

buildings affixed to the land and sanitary facilities, as well as full-time occupation of the site, and that the type of mining equipment present is in compliance with the NOI. Under “general inspection observations and comments,” the form states:

No appreciable change in operation since brief visits in July of 1999 and summer of 1998 visits. No appreciable mining activity present. Two very small, very shallow cuts are the only evidence of mining. * * * No evidence of 10+ years of mining excavation activities were identified. * * * This operation is in compliance with disturbed acreage restrictions, that being below the 5 acre limitation. But given the lack of diligent active mining activity and no evidence of past excavations, this site’s surface disturbance and the associated equipment storage presents concerns regarding undue and unnecessary degradation of the public lands. Also of concern is the use and occupancy being reasonably incident to active, regular mining activity. The operator, Mr. Hankins has stated several times that the equipment he has installed and uses is too small and inadequate to run the volumes of ore needed to make this operation feasible and profitable. The scale and design does not recover enough gold and other concentrates to allow for continuous, regular operations. They are seeking financial assistance, but the likelihood of this seems dubious at best. The operation shows no evidence of use, the ponds are all dry and there are no areas being excavated, no significant ore stockpiled, no production. This is not an active mining operation, but more of a very very small scale limited exploration project with an abundant amount of stored equipment and sundry supplies and materials.

In addition to its written description of the claim, BLM provided 36 photographs comprehensively documenting various features of the site, taken during the inspection. Those photographs confirm the absence of any substantial recent workings or stockpiles of ore. They show little evidence of use for mining purposes, demonstrating that the only evidence of ongoing mining consisted of two small trenches; a single, small trommel and sluice; and a small shaker table.

On August 10, 2000, CDMG conducted an inspection both of the area to the west within and adjacent to Timberlake Creek (1.2 acres)^{3/} and an area described as “east of the creek” (1.7 acres). It appears that the latter reference was to the trailer area (Site A) because CDMG noted the presence there of “various disturbances” including “recycle ponds, holding pond, van/trailer, scrap yard, test pits, topsoil

^{3/} It is not immediately clear why the disturbed area surrounding the creek was estimated at 1.2 acres when it had previously estimated in 1991 at 3.9 acres.

stockpile, living quarters (trailer), trommel, sluice, sluice tailings pond, shed, shop, and metal frame.” (CDMG Report of Aug. 10, 2000, Inspection at 2.) Many of those disturbances are situated in the trailer area. CDMG stated that it had calculated a total reclamation cost of \$4,800 for the entire area of prospecting-related disturbance in the area, totaling 2.9 acres. It requested that Hankins post appropriate surety. On August 22, 2000, BLM notified Hankins that he was not in violation of the five-acre limit provided by 43 CFR 3809.1-3.

On September 8, 2000, BLM gave Hankins notice that it would conduct another compliance inspection on September 12, 2000. Hankins prepared a “required agenda” for that inspection, which is relevant in that it describes activities that he was engaged in that he believes are “reasonably incident activity,” that is, activity which would justify occupancy of his mining claim under 43 CFR Subpart 3750.^{4/} BLM conducted the followup inspection as scheduled on September 12, 2000. The 3809 Inspection Form reports that there was “[n]o appreciable change in operation since compliance inspection visit in July of 2000”; that “[n]o appreciable mining activity [was] present”; and that “[t]wo very small, very shallow cuts are still the only evidence of mining.” The BLM inspector also prepared a letter to the file that quotes Hankins’ statements during the inspection, stating as follows concerning mining issues:

Several of the old dry ponds have been slightly modified with recent PVC pipe overflows, and drainage improvements “for future use” when [Hankins] gets enough involvement by investors to expand “the scale.” * * * .^{5/1} He showed us his working trommel and screens (approx. 8' x 3' drum), with a recent (still wet) batch of sandy sample in it. He demonstrated that this ran by briefly turning it on, and pointed out his water tank, and water lines, that were said to be recent improvements.

^{4/} Hankins included affidavits attesting to the mineral character and value of the material on the claim and attesting to the extent and nature of mining improvements made in the area. He also either included with that document or filed at about the same time a chronological listing of activities on the claim from Apr. 20, 1998, through Sept. 10, 2000, apparently to show that he was engaged in mining or mining-related activities.

^{5/} The inspector also stated that Hankins “explained the area had high values in the rare earth metals, as well as fine gold, to a value of ‘\$4100/ton.’” Hankins notes on appeal that this amount was “the value per table ton of concentrate,” not per ton of mined material. (List of Intentional Lies filed Feb. 23, 2001, at 4.)

He stated that his 1988 [sic^{6/}] and 2000 improvements were a newly dug pit (size is closer to a small sample cut), a replaced drain pipe, and stockpiled firewood for heating the mining buildings and a newly repaired larger Trommel “for future use.” He finally showed us around the mine buildings, only one of which had working mining equipment in it, and had a propane heater. This consisted of a couple of shake tables, one motorized, but with no effective wash system, and one un-motorized, with sample on it. He turned the water on this one, and showed us the function of it. About 20 lbs. of concentrates were in pans on this table. No other milling or placer equipment was seen to be functional, and no sizable concentrates, heavies, or recent mining areas were noted.

* * * * *

I saw no evidence of any recent mining of any size on the claim. It looked as if all their concentrates and their very limited to non-existent waste rock pile are the result of a day or two of sample-sized placer digging and milling. Several days labor probably went into fitting a few PVC and other pipes to pits and apparatus, welding and wiring up a trommel and a shaker table.

This claim has considerabl[y] more evidence of mining and mining related work and equipment from previous decades and other claimants, than can be attributed to recent years from the present claimants. More recent work, facilities and improvements exist on the claims in the habitation and occupancy of the claim than in mining on the claim. It appears that the Hankins are doing essentially the minimum to fulfill the \$100 per year work per claim requirements of the mining law, and the small miner’s annual fee exemption. They are clearly not doing “substantially regular work” toward mining as required by the occupancy [(43 CFR 3715.2(b)] requirement.

(Letter to file dated Sept. 13, 2000, at 1-2.) The report also indicates that the BLM employee also talked Jay Hankins, asserting that he “largely contradicted his father (Terry) in values and the claimants[’] plans to not get further investors in this claim.”

Finally, the report sets out evidence concerning the proximity of the claim to nearby towns that is relevant to determining its remoteness under 43 CFR 3715.2-1(e):

^{6/} This should probably be “1999.”

After resetting the odometer, we drove the approx 50 yds from the gate on the dirt road east to CO Hwy 13, then north, and found the distance to Baggs, Wyo to be 7.5 miles. We then turned south to Craig Colorado, past the mining claim on Hwy 13. Resetting the odometer on Hwy 13, approx 1/4 mile from the claim[’s] NE corner, it was 31.5 miles to the Craig town limits sign.

Id. at 2.

On September 26, 2000, BLM issued its NON, holding that Hankins’ “present activities do not justify use and occupancy of the public lands.” (NON at 1.) BLM noted that, on inspections of his site on July 25 and September 12, 2000, “no appreciable mining activity was documented” and held “no evidence of significant recent mining or processing exists on the claim.” Id. BLM also held that, although “there has been and continues to be ancillary work done on [Hankins’] project, this work does not involve any significant regular extraction and processing of mineral bearing earth minerals” and, accordingly, did not constitute “mining” within the meaning of 43 CFR 3715.0-5. Id.

BLM noted in the NON that qualifying activities required to authorize use and occupancy are defined by 43 CFR 3715.2 and that such activities “must be reasonably incident to mining or milling operations,” that is, “[t]here must be evidence of substantially regular work leading to a reasonable calculated probability of extraction and beneficiation of minerals using appropriate equipment.” Id. at 1. Citing Hankins’ statements (presumably as documented during site inspections) and his “affidavit of regular work filed with Carbon County, Wyoming (pages 9-13) on September 12, 2000,” BLM concluded that “no regular mining or milling activity is occurring due to the fact that valuable minerals cannot be recovered with a reasonable hope of profit using the small scale equipment involved.” Id. at 1. BLM also noted that its “site inspections revealed no appreciable excavations as would be evident if mining had occurred” during Hankins’ 10-year use and occupancy of the Ace #7 claim and that “there seems to be very little likelihood that investor funding is forthcoming to permit construction and installation of” processing equipment adequate “to recover valuable and marketable minerals, if present.” Id. at 1-2.

BLM concluded that Hankins’ use and occupancy of the public lands were not permissible under 43 CFR 3715 because he was not engaged in activities that were “reasonably incidental to mining or milling operations,” and because BLM had found no “evidence of substantially regular work leading to a reasonable calculated probability of extraction and beneficiation of minerals using appropriate equipment” on inspections of his mining claim. (NON at 1.) The NON summarized some of BLM’s findings during its site visits of the claims:

As with previous site visits in 1998 and 1999, no appreciable mining activity was documented as having occurred [during inspections conducted in July and September 2000], and no evidence of significant recent mining or processing exists on the claim. * * * While we acknowledge that there has been and continues to be ancillary work done on the project, this work does not involve any significant regular extraction and processing of mineral bearing earth materials. * * * The documented site inspections revealed no appreciable excavations as would be evident if mining had occurred in greater than 10 years of use and occupancy of [Hankins'] Ace #7 placer mining claim ([CMC 250348]). There is no indication of an active on-going operation * * * .

Id. BLM concluded that Hankins' activities did not justify the use and occupancy of the public lands or his residence on the claim. Citing 43 CFR 3715.2, BLM found that Hankins' mining claim showed "no evidence of past or present reasonably incident mining activities" that would "justify continued use and occupancy" of the site. (NON at 2.)

Accordingly, Hankins was ordered "to begin full reclamation activities within 30 days of receipt of" the NON, to "include removal of the living quarter[s] trailer, all out buildings, equipment, materials, supplies, septic systems, and miscellaneous debris and trash." BLM also directed that the "surface will be re-contoured to pre-existing topographic conditions"; that "the area [will be] top soiled where applicable and available"; and that "the site [will be] seeded with a BLM approved seed mixture." Id. BLM allowed 60 days from date of receipt of the NON to complete this work.

Hankins filed a timely appeal of the NON, along with a petition for stay of the decision, on October 25, 2000. His petition for stay was granted by this Board on January 4, 2001. Hankins argues in his NA that BLM erred in concluding that he was not conducting an active mining operation at the Ace #7 placer mining claim:

The central fact is that the Ace #7 claim is valid, and that present and all prior uses and occupancy is appropriate, previously approved, and reasonably incident to exploration, sampling, mining, process development, equipment fabrication, and the security needs of this particular operation. Occupancy has been registered on the required form for four years and was not previously questioned, until

[BLM inspector] Ernst came along.^[7/] Contrary to what his inspection report says and what the [NON] repeated word for word, the sampling indicates favorable economic potential, and [the claim] has been diligently and continuously developed, consistent with our economic capabilities. The Ace #7 claim is properly monumented, with all notices posted, with appropriate identifying signs, currently maintained, and with all bookwork current through August, 2001. The claim has a solid, multiple mineral discovery. * * * Present planning and testing indicates that [multiple] mineral products can be recovered and marketed at a profit. Innovations and [improvements] in both recovery and markets [have occurred] during the last decade, leading to a more broadly-based range of producible products than existed before 1990, even while the market price of gold has declined.

(NA at 1 (emphasis and references to exhibits deleted).) In support of his NA, he submits documentation that, for the most part, appears in BLM's case record. He has marked copies of BLM's inspection reports with comments generally challenging the accuracy of statements made therein. Hankins also cites United States v. Shumway, 199 F.3d 1093 (9th Cir. 1999).^{8/}

Hankins also alleges that the location of the Ace #7 placer mining claim is sufficiently remote so as to warrant its continued occupancy by claimants, and that occupancy is also necessary to prevent the theft or vandalism of exposed minerals and mining equipment. Hankins also makes general allegations that BLM's NON exceeded its scope of authority and that BLM does not have the authority to order reclamation of the surface. Hankins claims that, as owner of a valid mining claim, he has an interest in real property which precludes BLM from ordering him to shut down

^{7/} Ernst was an inspector for the Sept. 24, 1998, inspections. He also delivered the copy of the regulations to Hankins in July 1999, apparently commenting on Hankins' compliance. Ernst's findings have been twice fully corroborated by other BLM inspectors.

^{8/} Hankins also refers to a civil lawsuit for damages against BLM employees; asserts that BLM employees knowingly and willingly concealed material facts; and demands that three BLM employees be terminated from Federal employment. Those issues are not addressed herein as they are not with this Board's authority.

The record reveals that a judicial action, apparently instituted by Hankins for damages against BLM employees (see Letter from Hankins filed July 20, 2001, at 1) was dismissed with prejudice by the United States District Court of the District of Colorado. Terry Hankins v. John E. Husband, et al., Civ. No. 00-D-2066 (Order entered Mar. 30, 2001.) We are unaware of any other appeals or decisions concerning that action.

operations on, remove equipment from, or reclaim the surface of his claim site. Finally, Hankins claims that BLM gave him written permission to place a trailer home on the site in 1987 and again in 1988, so that BLM is now precluded from ordering its removal.

Hankins has filed affidavits of third parties attesting to the value of the mining claim held by the Timberlake Creek Placer Mining Association “D,” the regular work that Hankins and his associates have performed on the site since 1987, and the substantial improvements they have made to the site. Hankins submitted photocopies of pictures showing various areas of the mining claim, as well as some of the mining equipment he maintains on the site. In addition, Hankins filed a daily description of his activities performed at the claim site, which he characterizes as being in support of his mining operation, both before and after the issuance of the NON.

BLM filed its answer to the SOR on March 5, 2001, citing the findings it made during the site inspections of the mining claim and asserting that issuance of the NON was appropriate. BLM argues that Hankins has not satisfied the minimum requirements for use or occupancy of a mining claim found at 43 CFR 3715.2 or any of the additional requirements imposed by 43 CFR 3715.2-1.

BLM maintains its position that Hankins had not been engaging in actions that are “reasonably incident” (within the meaning of the regulations) to prospecting, mining, or processing of ore to such an extent as would warrant his occupancy of the public lands. BLM notes that, for 13 years, Hankins has engaged in little more than limited prospecting. BLM asserts that this is insufficient to justify occupancy of the public lands and that the lack of readily observable mining activity demonstrates that Hankins has not engaged in activities that are “reasonably incident” to mining.

BLM also argues that Hankins’ activities to maintain his mining claim do not constitute “substantially regular work” within the meaning of the regulations necessary to justify his occupancy of the mining claim. Specifically, it argues that the small-scale sampling and assessment work that Hankins performs does not constitute the level of “substantially regular work” necessary to support his current level of use and occupancy.

Hankins responded to the answer on March 10, 2001, reiterating that BLM overstepped its authority when it promulgated the mining claim occupancy regulations at 43 CFR Subpart 3715 and that his use and occupancy of the public lands was and continues to be reasonably incident to mining, or is otherwise valid under the mining laws and customs of the United States. Hankins provided several affidavits of assessment work done on his claim, as well as additional pictures and

excerpts from his records documenting the mining activity Hankins and his associates had undertaken on the claim in the last several years. Hankins also filed an additional letter with this Board on July 14, 2001, again asserting that BLM's issuance of the NON violated the established mining laws and customs of the United States, and providing additional excerpts from his records documenting the mining activity he and his associates had performed on the Ace #7 placer mining claim since the beginning of September 2000, as well as copies of photographs showing various persons engaged in excavating placer soil and operating his mining equipment.

[1] The regulations at 43 CFR Subpart 3715

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 FR 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 FR 37117-18 (July 16, 1996); See 43 U.S.C. § 1732(b) (2000).^[2/]

Wilbur L. Hulse, 153 IBLA 362, 367 (2000). BLM adopted 43 CFR Subpart 3715 in 1996, implementing, inter alia, the statutory provisions of the Surface Resources Act of 1955, 30 U.S.C. § 612(a) (2000), to address the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. See 61 FR 37115, 37117 (July 16, 1996).

Despite Hankins' assertions to the contrary, the regulations cited by BLM in its NON do govern his occupancy, even though it originated prior to their promulgation in 1996:

^{2/} 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 CFR Part 3800. 61 FR 37118 (July 16, 1996).

[T]he regulations themselves made clear that they apply to a use or occupancy that was in existence when the regulations were published, and gave mining claimants with preexisting uses and occupancies a year to come into compliance with the regulations. “By August 18, 1997, all existing uses and occupancies must meet the applicable requirements of this subpart.” 43 C.F.R. § 3715.4(a).

Bradshaw Industries, 152 IBLA 57, 61-62 (2000). Furthermore, to the extent Hankins argues that the regulations cited above were improperly promulgated or are otherwise contrary to law, this Board is without jurisdiction to entertain such claims. The Board is required to follow duly-promulgated regulations of the Department. See Vitarelli v. Seaton, 359 U.S. 535 (1959); Accardi v. Shaughnessy, 347 U.S. 260 (1954); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); Arthur Farthing, 136 IBLA 70, 74 (1996).

[2] Departmental regulation 43 CFR 3715.0-5 defines “occupancy” of public lands covered by mining claims as “full or part-time residence on the public lands,” including “the construction, presence, or maintenance of temporary or permanent structures.” However, under that definition, “residence or structures” include uses not commonly associated with residential occupancy, *viz.*, “barriers to access, fences, * * * buildings, and storage of equipment or supplies.”^{10/} As a result, both residences and structures used for purposes other than residential use (specifically including buildings and storage of equipment or supplies) are governed by 43 CFR Subpart 3715. Both types of occupancy are involved in the present dispute.

[3] Under 43 CFR 3715.2, in order to justify occupancy of the public lands (that is, either maintaining a residence or structures) 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 43 CFR 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. In order to comply with 43 CFR 3715.2, all five of those requirements must be met for occupancy to be permissible.

[4] It is also necessary to consider whether any one of the characteristics enumerated at 43 CFR 3715.2-1 apply. That provision establishes a requirement

^{10/} The regulations also include “trailers,” which may or may not be used for residential occupancy.

separate from and additional to those at 43 CFR 3715.2. Thus, under 43 CFR 3715.2-1, occupancy of the public lands is permissible if it involves 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; (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 being ordinarily 8 hours and not including travel time to the site from a community or area in which housing may be obtained.

In determining Hankins' compliance with 43 CFR 3715.2-1, we find that two different results appertain to his use of the site as a residence on the one hand, and to his use of the site for buildings and other structures use for storage of mining equipment and ore on the other. We have reviewed the record and concluded that, as of the issuance of the NON, Hankins' maintenance of a residence on the claim did not meet any of the requirements of 43 CFR 3715.2-1. Hankins bears the burden of proving that his occupancy was in compliance with 43 CFR Subpart 3715. Thomas E. Swenson, 156 IBLA 299, 310 (2002). Specifically, there was no exposed mineral deposit that had to be guarded, as the mineral being mined was widely disseminated placer material found throughout the claim; nor was there any concentrated valuable minerals that could not be protected from theft or loss by locking them away in storage sheds on the claim premises. 43 CFR 3715.2-1(a). There was no equipment that could not be protected from theft or loss by being locked away in sheds on the claim premises. 43 CFR 3715.2-1(b). There was no public safety hazard from equipment that could not be prevented by locking the equipment away in storage sheds on the claim premises. 43 CFR 3715.2-1(c). There was, in view of the very limited amount of development of material from the claim, no public safety hazard from any surface uses, workings, or improvements. 43 CFR 3715.2-1(d). Finally, the claim is not located in area so isolated as to require someone to remain on site. 43 CFR 3715.2-1(e).

Although Hankins asserts that the remoteness of his mining claim justifies his residential occupancy of the site, under 43 CFR 3715.2-1(e), residential occupancy of a mining claim is permitted only for claims that are

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.

In its answer, BLM correctly points out that the claim is located only 7.5 miles from Baggs, Wyoming, and 31.5 miles from Craig, Colorado. (Answer at 17.) Given the distance from the Ace #7 placer mining claim to these two towns and the admitted availability of housing there, we cannot find that Hankins' claim is so remote in location so as to require workers to remain on the site in order to work a full 8-hour shift, even when commuting time is accounted for.

Hankins also argues that his residential occupancy of the mining claim is necessary to protect his mining equipment and supplies from theft and vandalism. (SOR at 1.) As noted above, the regulation at 43 CFR 3715.2-1(b) allows for residential occupancy of a mining claim when, in addition to satisfying the requirements of 43 CFR 3715.2, the claimant can show that occupancy is necessary 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." However, Hankins failed to show that his equipment and supplies cannot be protected by means other than residential occupancy. See Thomas E. Swenson, 156 IBLA at 310. To the contrary, Hankins may store his equipment in secure storage sheds already present on his claim. To the extent that BLM's NON found maintenance of the residence on the claim to be noncompliance, it is affirmed.

Hankins asserts that that "staying at the mine site is essentially an economic decision well within the venue of the mine owner to make and well beyond the authority of the BLM to even comment upon." We disagree. The Surface Resources Act and the promulgation of the mining claim occupancy regulations brought the question of the propriety of residing on a mine site squarely within BLM's administrative authority. Although Hankins no doubt feels that his residential occupancy of the mining site is "necessary as an economy measure [because] it reduces the cost of operations" (Hankins' "Legal Analysis of BLM Lies" dated Feb. 12, 2001, at 2, 9), neither the Mining Law of 1872, the Surface Resources Act of 1955, nor 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.

Implicit in our finding that Hankins has not met any of the criteria in 43 CFR 3715.2-1 for maintaining a residence on his claim is a finding that he has met several of those criteria for maintaining storage buildings there. As discussed below, we have determined that Hankins' use of the claim, short of living on it, also meets the

five independent criteria of 43 CFR 3715.2. Accordingly, to the extent that BLM's NON found activity on the claim other than maintaining a residence to be in noncompliance, it is reversed.

The photographs and statements provided by BLM in its various inspections of the site demonstrate that mining operations on the claim were limited to mining and processing of small placer material samples no more than several times a year. Hankins attempts to rebut this finding in his responses to BLM's filings in this matter, providing us with sworn affidavits, photos, and personal records demonstrating the work he and his associates had performed on the site prior to the issuance of NON. That evidence actually confirms that only small amounts of placer material were being mined/processed from sample pits during this period, with most work on the claim being spent on maintaining and improving claim monumentation, ore processing equipment, and water impoundments and delivery. It is clear that, immediately prior to the time of the NON, Hankins was occasionally mining and processing small samples of placer materials so that their mineral content could be assayed.

Hankins points to more extensive activities that occurred in the area as late as 1990. It is enough to note that activities in 1990 do not nothing to show that there was ongoing mining underway when BLM issued the NON here. In material filed on appeal, he claims "mining excavation tonnages" of 1,000 tons in 1997 and 1998. (Hankins' Response to BLM's Answer filed Mar. 16, 2001, Exh. AA.) However, those tonnages appear to refer, not to placer material mined from the claim, but to earth excavated during "pond repair" and to tailings removed from a pile, as well as processing of materials mined from claims other than the Ace #7 claim. *Id.* This is consistent with the fact that, from 1998 to 2000, BLM inspectors found no evidence that such an amount of placer material was being mined and/or processed at the claim site. In any event, Hankins shows that only a total of 255 tons was reported as mined in both 1999 and 2000, most immediately prior to the issuance of the NOV.

That level of activity, we hold, coming as it did in the 2 years prior to BLM's issuance of the NON here, met the requirements of 43 CFR 3715.2, but only barely. The definition of "reasonably incident" in 43 CFR 3715.2(b) is broad enough to encompass the work that the record demonstrates was ongoing at the time of the issuance of the NON, in that Hankins was engaged in prospecting and exploration, albeit at a very minimal level. Similarly, the work can be considered "substantially regular work," as defined in that regulation, as it is associated with the search for and development of mineral deposits and the processing of ores and includes assembly or maintenance of equipment and work on physical improvements incident to mining activities. Again, the work was minimally compliant with those provisions. We can see that Hankins' work was reasonably calculated to lead to extraction and

beneficiation of materials. Why else would Hankins have constructed processing equipment at his claim? It also included observable, verifiable activity, although of a limited scope. Finally, the equipment at Hankins' claim was presently operable.

As we found in United States v. Doherty, 125 IBLA 296, 300 (1993), even though a claimant's "mining efforts may be sporadic or minimal, they [may still be] mining-directed nonetheless," and the use and occupancy of a claim in such circumstances (short of maintaining a residence on the claim) is permissible to the extent it relates "entirely to mining activity." In these circumstances, BLM improperly determined in its NON that occupancy in the form of the maintenance of structures and equipment related to mining were in noncompliance.

Hankins argues in essence that BLM should be estopped from ordering the removal of his living quarters, based on its 1987 approval of his amended mining claim notice, which authorized him to place a trailer house on the claim for a security guard to live in. See Letter from Roy S. Jackson, BLM Area Manager, dated Oct. 5, 1987. There is no indication that BLM's authorization to place the trailer home on Hankins' claim was intended to forever bind the United States. See Wilbur L. Hulse, 153 IBLA at 369. Nor could such permission have been granted informally without the issuance of a formal decision issuing such authorization.

Further, the record indicates that Hankins was aware of the temporary nature of BLM's authorization to place the trailer home on the Ace #7 placer mining claim. In his letter to Jim McCartle of CMLRD, Hankins wrote "my understanding is that domestic use of the site will not require the filing of any mining plan or bond on the area, and based on the phone calls today with Steve Bennett of BLM and yourself, such domestic use on a temporary basis is acceptable." (Letter dated June 15, 1987, from Hankins to Colorado Mined Land Reclamation Division (emphasis added)). However, at that time, Hankins stated that such temporary use would be for a security guard for operations that never came to pass. In our view, circumstances have changed dramatically at the claim since the years immediately following initiation of occupancy of the claim, when substantial placer mining dredging activity was being planned and actually undertaken in the vicinity of the claim. Accordingly, we find nothing to preclude BLM from determining that maintenance of a trailer as a residence on the claim in 2000 was noncompliance, as being not reasonably incident to a mining operation.

Hankins asserts that his property interest in the Ace #7 mining claim borders on the absolute, and that BLM has no authority to regulate his use and occupancy of the site aside from permitting grazing of the surface estate. Hankins' reliance on the mining laws and customs of the United States in support of the proposition that he enjoys absolute rights under the 1872 Mining Law to occupy the surface and dictate

to BLM the terms by which it may administer his use of the surface is misplaced. Although mining claimants on the public lands do indeed retain an interest in property under the Mining Law of 1872, that interest does not take the form of an unfettered right to reside upon and occupy the public lands. The Mining Law of 1872 does not, on its face, permit the extent of use suggested by Hankins. See 30 U.S.C. § 29 (2000). Even prior to the enactment of the Surface Resources Act of 1955, exclusive possession and use of a claim site by a mining claimant was recognized by the United States only so long as it was incident to prospecting and mining. United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277, 1281, 1285 (9th Cir. 1980).

Section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000), provides that mining 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.” Thus, whatever rights granted to mining claimants by Congress in the 1872 Mining Law have been substantially circumscribed by Congress in the 1955 Act. Hankins’ characterization of the mining laws and customs of the United States seems to be more the product of myth and folklore than reality. ^{11/}

In 1996, the Department adopted 43 CFR Subpart 3715 to implement those statutory provisions and to address the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. 61 FR 37115, 37116 (July 16, 1996). Consistent with the Surface Resources Act, these regulations set forth restrictions on the use and occupancy of public lands open to the operation of the mining laws, limiting activities that will justify an occupancy to those involving prospecting or exploration, mining, or processing operations and uses reasonably incident to such activities. They also establish procedures for beginning occupancy, standards for reasonably incidental activities, prohibited acts, and procedures for inspection and enforcement and for managing existing uses and occupancies. Karen V. Clausen, 161 IBLA 168, 175-76 (2004); Jay H. Friel, 159 IBLA 150, 156-57

^{11/} Hankins’ reliance on United States v. Shumway, 199 F.3d 1093 (9th Cir. 1999), is also misplaced. In that case, the U.S. Court of Appeals for the Ninth Circuit reversed a U.S. Forest Service decision that sought to eject a mining claimant from his claim over disapproval of his operating plan and reclamation bond, holding that the “failure to file an approved operating plan cannot, *ipso facto*, cause a forfeiture of the bona fide claim owner’s equitable title and possessory right.” *Id.* at 1108. Failure to file an operating plan is not the issue here. The court in Shumway tacitly acknowledged the applicability of the regulations governing mining claim occupancy by noting that mining claimants could retain their possessory interest in their mining claim only “so long as [they] complied with mining law and forest service regulations.” United States v. Shumway, 199 F.3d at 1103.

(2003). Unauthorized uses and occupancies on public lands are illegal uses that constitute unnecessary or undue degradation of public lands. 43 CFR 3715.0-5; 61 FR at 37117-18; David J. Timberlin, 158 IBLA 144, 152 (2003). The Department of the Interior has been delegated by Congress the administrative authority to regulate the surface use of mining claims located under the Mining Law of 1872. The regulations promulgated by BLM at 43 CFR Subpart 3715 implement this statute, among others, and provide mining claimants with guidance on what uses or occupancies the agency views as being “reasonably incident thereto.” As far as the current record shows, BLM has acted well within that authority in all of its dealings with Hankins.

[5] Finally, we consider procedural aspects of BLM’s issuance of its NON. BLM issued its NON under 43 CFR 3715.7-1(c), ruling that, as of the date of the NON, all aspects of Hankins’ occupancy were in noncompliance. In such a NON, BLM is required to (1) describe how the claimant’s use is not in compliance with the regulations, (2) describe the actions that must be taken in order to correct the noncompliance, (3) set a date not to exceed 30 days from the issuance of the NON by which corrective action is to commence, and (4) establish the time frame by which corrective action is to be completed. 43 CFR 3715.7-1(c). It is thus apparent that a NON is intended both to provide a claimant with notice of the existence and nature of noncompliance and to allow him an opportunity to correct it.

It is only when the time for completion of corrective action specified in the NON expires without such action having been completed that BLM may order reclamation by issuing a Cessation Order (CO) under 43 CFR 3715.7-1(b)(ii). Since BLM opted to issue a NON under 43 CFR 3715.7-1(c), ^{112/} it had to follow the procedures provided in 43 CFR 3715.7-1 in requiring cessation of Hankins’ use or occupancy and reclamation. See Skip Myers, 160 IBLA 101, 112 (2003).

Accordingly, it was premature as a procedural matter for BLM to order Hankins in its NON to cease all occupancy and reclaim his mining claim. BLM should instead have set a date for Hankins to commence corrective action and a date by which corrective action was to be completed. It failed to do so, and its NON must accordingly be amended. We have concluded herein that BLM properly determined in its NON that Hankins’ maintaining a residence on his claim was noncompliance with the provisions of 43 CFR Subpart 3715. This decision affirms BLM’s NON to the extent that it provided Hankins with notice that maintaining a residence on his claim was, based on the circumstances evident in 2000, noncompliance. BLM’s NON is

^{12/} Instead of a NON, BLM could possibly have issued a CO pursuant to 43 CFR 3715.7-1(b), upon determining that Hankins’ use and occupancy of his mining claim was not reasonably incident to mining. It did not.

modified to the extent that BLM is directed on remand to issue an amended NON that will establish a period of 60 days for Hankins to demonstrate that he has taken corrective action to bring his mining operation into compliance. If he fails to do so, BLM may take appropriate action to require removal of the residence facilities and appropriate reclamation of the site.

As we have concluded that BLM improperly determined in its NON that Hankins' occupancy in the form of maintaining storage facilities were in noncompliance in 2000, no further action is required by Hankins to bring those activities into compliance. However, BLM is free to re-evaluate the situation to determine if an operation without a residence is still in compliance today.

This Board is without jurisdiction to entertain Hankins' further requests that certain BLM employees be dismissed from Federal service for cause, and that patent be issued to Hankins on the Ace #7 placer mining claim.

To the extent not expressly addressed herein, Hankins' arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's notice of noncompliance is affirmed in part as modified and reversed in part, and the matter is remanded to BLM for further action as described above.

David L. Hughes
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge