

MARIETTA CORPORATION
COMSTOCK ORE BUYERS

IBLA 2002-211 and 2002-212

Decided February 10, 2005

Appeal from a decision of the Field Manager, Carson City, Nevada, Field Office, Bureau of Land Management, entitled "Thirty Day Notice of Intent to Remove Property." NV-30-96-003P; NV-30-90-003P; NVN-70052.

Affirmed.

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

An enforcement order issued under 43 CFR 3715.7-1 survives the forfeiture of a mining claim or mill site or the abandonment of such a claim or site that attends the conclusion of the permitted exploration, mining, or milling operation.

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

When a person or entity legally acquires property on a mining claim or mill site through a chain of title, by virtue of contract, agreement, or the exercise or operation of law, and exercises dominion and control over it, the pronouns in the regulations at 43 CFR 3715.5-1 and 3715.5-2 are properly construed to include a subsequent successor-in-interest to the property left on the mining or mill site claim.

APPEARANCES: Lawrence T. Atkinson, Reno, Nevada, for Marietta Corporation; Dennis Nelson, Silver City, Nevada, for Comstock Ore Buyers; Emily Roosevelt, Esq., Office of the Field Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

The Marietta Corporation (Marietta) and Comstock Ore Buyers (Comstock) separately appeal from a January 29, 2002, decision of the Field Manager, Carson City, Nevada, Field Office, Bureau of Land Management (BLM), entitled “Thirty Day Notice of Intent to Remove Property.” The decision notified appellants that BLM would, within 30 days after January 30, 2002, begin removing and disposing of “any and all property” from the Goldhill mill site, NMC-804079, pursuant to 43 CFR 3715.5-2.

On March 15, 2002, BLM submitted a motion to consolidate the two appeals. We grant that motion.

By way of background, the Mining Law of 1872 permits location of valuable mineral deposits on the public lands of the United States. 30 U.S.C. §§ 21-47 (2000). A claimant may also occupy public lands for “mining or milling purposes.” 30 U.S.C. § 42 (2000).^{1/} The requirements for permitted use or occupancy of the public lands under the Mining Law were revised in section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000). The Act provides that mill site 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 * * * processing operations and uses reasonably incident thereto.” See Precious Metals Recovery, Inc., 163 IBLA 332 (2004) (discussion of application of Surface Resources Act to mill site claims).

In 1996, the Department adopted rules at 43 CFR Subpart 3715, to implement the Surface Resources Act and to address the unlawful use and occupancy of unpatented mining claims or mill sites for purposes not reasonably incident to mining or processing. 61 FR 37115, 37116 (July 16, 1996). The rules establish procedures for beginning occupancy, standards for activities reasonably incidental to mining or milling, prohibited acts, and procedures for inspection and enforcement and for managing existing uses and occupancies. Dan Solecki, 162 IBLA 178, 179 (2004). The rules also “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.” Wilbur L. Hulse, 153 IBLA 362, 367 (2000), citing 61 FR 37117-18 (July 16, 1996); 43 U.S.C. § 1732(b) (2000).

^{1/} The owner of a “quartz mill or reduction works, not owning a mine in connection therewith,” id., may maintain what has come to be known as an independent mill site. 2 American Law of Mining § 32.06[3][c] (2d ed.).

To justify an occupancy, including the placement of buildings and personal property on a mining claim or mill site, a claimant must show that both its activities and its occupancy meet applicable regulatory standards. 43 CFR 3715.3-2(b) and 3715.6(a). An “occupancy” of public lands includes “full or part-time residence on the public lands,” and also “the construction, presence, or maintenance of temporary or permanent structures.” 43 CFR 3715.0-5; see also Terry Hankins, 162 IBLA 198, 213 (2004). It follows that “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.” 162 IBLA at 213.

The activities justifying a claimant’s occupancy of a mill site in the form of the placement of structures and property, must (a) be reasonably incident to the milling operations; (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; and (e) use appropriate equipment that is presently operable. 43 CFR 3715.2. Those activities must also meet one of several standards set forth in 43 CFR 3715.2-1. In connection with mill sites, the rules define “reasonably incident” as “processing operations and uses reasonably incident thereto.” 43 CFR 3715.0-5, citing 30 U.S.C. § 612; see also Thomas E. Smigel, 156 IBLA 320 (2002) (application of Subpart 3715 regulations to mill sites).

Subpart 3715 establishes BLM’s authority to issue notices of immediate suspension, cessation orders, and notices of noncompliance to halt an unauthorized occupancy in whole or in part, either temporarily or permanently. 43 CFR 3715.7-1. In Jay H. Friel, 159 IBLA 150, 159 (2003), and Precious Metals Recovery, 163 IBLA at 340, the Board affirmed the use of cessation orders issued pursuant to that regulation in the context of unauthorized occupancy of a mill site. Should an entity fail to comply with an enforcement order issued under 43 CFR 3715.7-1, BLM has additional options to enforce the order in Federal court, seeking civil penalties under 43 CFR 3715.7-2, or criminal penalties under 43 CFR 3715.8.

The present appeals stem from BLM’s application of Subpart 3715 to an unpatented mill site. The subject mill site was located by Comstock on February 3, 1999, at “American Flat” on public lands in the SE¼ sec. 6, T. 16 N., R. 21 E., Mount Diablo Meridian, Storey County, Nevada, to embrace the pre-existing “Comstock Mill,” constructed in 1978 by the Houston Oil & Minerals Corporation (HOM), on what was then mill site HOM RF#1, NMC-189979. The facility consists of buildings housing a primary crusher, secondary crusher, ore bins, pump, leach tanks, mill/refinery, and offices. It was operated by HOM and its successor-in-interest, United Mining Corporation, for the purpose of processing gold ores using cyanide extraction. Operations ended in 1985. BLM states that construction and operation of the facility, which encompasses a five-acre site, took place without any BLM

authorization pursuant to 43 CFR Subpart 3809. (Motion to Dismiss at 3 n.2.) Appellants submit no evidence to the contrary.

BLM reports and the record confirms that “in March 1987, the U.S. Environmental Protection Agency (EPA) identified th[e] [Comstock Mill] as a potential hazardous waste site and entered it into the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) [or Superfund] database.” (Motion to Dismiss at 3; 1990 EPA Report.) The EPA investigated the site in 1990, specifically identifying “contamination of the groundwater and surface water by cyanide and other heavy metals” which might be coming from mill “tailings.” (BLM’s Notice of Immediate Suspension, dated Apr. 2, 2001, at 2.) In response to EPA’s CERCLIS designation, BLM pursued reclamation of the site with HOM, United Mining, and their successors-in-interest under 43 CFR Subpart 3809. (Motion to Dismiss at 3.) The record confirms extensive efforts to obtain reclamation from prior operators on the mill site.

Such efforts were complicated by the fact that, beginning in the mid-1990s and no later than 1997, Marietta purchased from United Mining, and asserted ownership of, the buildings and personal property on the mill site. Marietta also paid maintenance fees associated with the mill site prior to 1997, though it never submitted information or required documentation reflecting a transfer of ownership of the mill site itself. A February 20, 2003, Serial Register Page for the site states that BLM declared it forfeited and void by operation of law as of September 1, 1997, as a result of a deficiency in mining claim maintenance fee requirements. The record reflects that BLM repeatedly sought Marietta’s assistance in removing the buildings, equipment, and chemicals over which it asserted ownership, because the presence of such materials on the site was unauthorized and hindered or precluded full reclamation of the site by prior operators and their successors. Nonetheless, the record shows that Dennis Nelson established a residence on the site, asserting that he had been given permission by Marietta to stay at the site as a watchman.

The record contains no evidence that Marietta ever attempted to establish a mill or processing facility. See, e.g., Aug. 20, 2001, BLM e-mail describing discussion by Marietta’s representative, Larry Atkinson, regarding use of the site for water storage. In fact, Marietta’s representative asserted to BLM that operation of a mill was not an objective on the site, and that doing so was “no longer viable.” (Apr. 30, 1998, Memorandum of Telephone conversation between BLM and Atkinson.) It appears that Atkinson believed that, by virtue of Marietta’s purchase of personalty and/or fixtures on a mill site, he would eventually be able to obtain a patent for fee ownership of the public land on which such property was located. Id.

By letter dated February 25, 1998, BLM notified Marietta that, in order to allow BLM to proceed with reclamation of the site, Marietta was required, within

30 days, to begin removing from the mill site any building or structure of the “Comstock Mill facility” claimed by Marietta, the presence of which was unauthorized and considered to be in trespass: “After this time frame has lapsed, the BLM will presume that you have no interest in the site, the structures, or the unpatented mining claims and will move forward with site rehabilitation.” The February 25 letter was received by Marietta on March 2, 1998, as evidenced by certified mail return receipt.

In a March 10, 1998, letter, addressed to “Unauthorized Occupant at Comstock Mill,” BLM stated that reclamation of the site, including the destruction and removal of buildings and structures, “could begin as early as [June 1998].” The letter was hand-delivered to individuals residing on the mill site claim on March 10, 1998, including Nelson.

On July 9, 1998, BLM issued Notice of Noncompliance N37-96-003P to Marietta, pursuant to 43 CFR 3715.7-1(c), stating that Marietta had failed to obtain BLM’s concurrence with its occupancy of the HOM RF#1 mill site on or before August 18, 1997, pursuant to 43 CFR 3715.4-1, and in violation of 43 CFR 3715.4(a). That latter regulation required any use or occupancy of a mining claim or mill site in existence on August 15, 1996, the effective date of BLM’s 43 CFR Subpart 3715 regulations, 61 FR 37116 (July 16, 1996), to come into compliance with those regulations “[b]y August 18, 1997,” failing which BLM was entitled to “issue * * * a notice of noncompliance” pursuant to 43 CFR 3715.7-1(c). 43 CFR 3715.4(a). The notice of noncompliance asserted that BLM required Marietta, within 10 days of receipt, to document its ownership of the buildings on the site and provide a schedule for their removal, and to remove such buildings and foundations no later than September 1, 1998. BLM stated that: “Failure to comply within this time frame[] will result in the issuance of a cessation order, * * * [pursuant to] 43 CFR 3715.7-1(b).” (July 9, 1998, Notice of Noncompliance at 2.) Marietta received the Notice of Noncompliance on July 13, 1998.

By letter dated August 3, 1998, BLM extended the deadline for removal of buildings and foundations to October 1, 1998. BLM stated that, since it hoped to complete final reclamation of the mill site “this coming fall, this matter regarding * * * unauthorized occupancy must be timely resolve[d].” (Aug. 3, 1998, Letter to Marietta at 2.) Marietta failed either to document its ownership of or to remove buildings on the HOM RF#1 mill site in response to the July 1998 Notice of Noncompliance.

Marietta appealed BLM’s August 3, 1998, letter in a case docketed Marietta Corp., IBLA 98-422. Marietta chose not to submit a statement of reasons (SOR) or otherwise explain its legal position. By order dated November 17, 1998, the Board dismissed the appeal for Marietta’s failure to file an SOR. (BLM Exhibit 11.)

It was at this juncture that Comstock first appeared in the record, with Nelson as its representative. Comstock prepared and filed with BLM its February 3, 1999, notice of location for the Goldhill mill site, serialized NMC 804079.^{2/} In addition, Comstock and Marietta entered into an agreement by which Marietta would maintain ownership of certain property and buildings on the mill site and Comstock would, as the claimant of record, allow Marietta to continue to occupy the site. As a result of these events, appellants assert that Marietta voluntarily “abandon[ed]” the site on February 4, 1999, the day after Comstock’s location. (Marietta’s SSOR at 1; Comstock’s SSOR at 1.)

Nonetheless, Marietta and Comstock continued to maintain, unchanged, the occupancy in the form of personalty and buildings and Nelson’s residence. Subsequent to February 1999, Marietta continued to assert that it owns property on the site by virtue of its agreement with Comstock. Nelson states that the Goldhill mill site “include[s] the area of the buildings remaining at American Flat,” with some buildings belonging to Comstock and “the remainder of the structural steel belong[ing] to Marietta Corporation pursuant to an agreement reached in 1999.” (Sept. 9, 2000, Letter to BLM.)

BLM conducted a site visit on June 7, 2000, during which the inspector discovered “new occupants at the Comstock Mill Site.” He also noted “numerous autos * * *, a camper, a trailer, a burro, and 2 dogs,” and an unidentified woman. (June 7, 2000, memorandum to file.)

Apparently unaware of Marietta’s arrangement with Comstock, on August 21, 2000, BLM issued Cessation Order NV37-90-003P to Marietta, pursuant to 43 CFR 3715.7-1(b). BLM required Marietta to cease the storage of all equipment, supplies, and debris on the claim, and to remove within 30 days of Marietta’s receipt of the order all buildings and personal property on the claim for which it claimed ownership. BLM stated that any property remaining on the claim 120 days after receipt of the order would become property of the United States and be subject to removal and disposition by BLM at Marietta’s expense, pursuant to 43 CFR 3715.5-2.

On September 12, 2000, Marietta notified BLM that the HOM RF#1 mill site had been “abandoned.” (Sept. 10, 2000, Letter to BLM.) On that same date,

^{2/} According to appellants, the Goldhill mill site is smaller than the HOM RF#1 site and encompasses only a portion of the old Comstock Mill facility, presumably that portion containing the property purchased by Marietta from United Mining. (Marietta’s Supplemental Statement of Reasons for Appeal (SSOR), dated Mar. 29, 2002, at 1; Comstock’s SSOR, dated Mar. 28, 2002, at 1.) The record verifies that a tailings dam and pond, a part of the old Comstock Mill facility, were not within the Goldhill mill site.

Comstock notified BLM that it had located the Goldhill mill site, and sought BLM's approval for a watchman who would reside on the claim, in order to prevent public access and loss of property through theft or vandalism. (Sept. 9, 2000, Letter to BLM.) Comstock stated that it intended to operate a custom mill which would process ore obtained from other sources. See Oct. 14, 2000, Letter from Comstock to BLM; see also Jan. 3, 2001, letter from Comstock to BLM (Comstock "plans to develop a processing facility"). Despite these general averments that it wished to operate a mill, from the time it located the Goldhill mill site in 1999, Comstock never submitted any plan of operations for a mill on the site. The record contains no indication that Comstock ever undertook any physical changes to the mill site toward that goal.

Marietta appealed BLM's August 2000 Cessation Order. In support of its appeal, however, Marietta queried only whether BLM planned to withdraw the order on the basis of the notification to BLM regarding Comstock's location of the Goldhill mill site. That appeal, docketed as IBLA 2000-397, was dismissed by this Board on March 16, 2001, for failure to file an SOR. (BLM Exhibit 15.) In its SSOR, Marietta concedes that it "elected not to perfect its appeal" because it thought that BLM could not pursue the cessation order against Marietta once Comstock located the Goldhill mill site. (SSOR at 1.)

By letter dated October 24, 2000, BLM informed Comstock that it "intends to demolish th[e] unauthorized facility [on the Goldhill mill site] and complete reclamation of this site." (Oct. 24, 2000, Letter to Comstock at 1.) BLM declined to approve a watchman and stated that it would not authorize the use of the existing buildings for any mining or milling activity pursuant to 43 CFR Subpart 3715, but would instead pursue removal of the buildings and reclamation of the site. Id. at 2. The record contains extensive evidence of BLM's efforts to cooperate with a successor to HOM on a reclamation plan for the site and to secure the site from public hazard and documents the fact that the ability to move forward on the reclamation of the site was foreclosed by Nelson's residence there. BLM reiterated this point in a November 29, 2000, letter to Comstock:

BLM intends to move forward with reclamation of this unauthorized facility. Your past occupancy and that of your current watchman are unauthorized per 43 CFR [Subpart] 3715. Once the site has been vacated, and [prior] to demolition, we will secure the site to prevent access to the buildings and will post the area to inform the public of the site hazards. Doors and windows will be welded or otherwise secured to prevent access to the buildings. Rungs will be welded to preclude access to the higher structures. A fence or berm around the area may be constructed. Demolition will commence as soon as possible once the site is secured.

(Nov. 29, 2000, Letter to Comstock at 1.)

BLM inspected the Goldhill mill site on December 13, 2000. It determined that there was no substantially regular work reasonably calculated to lead to the extraction and beneficiation of minerals or any observable on-the-ground mining or milling activity, as required by 43 CFR 3715.2. BLM found that, despite the absence of such activity, the site was being occupied by a 20-foot long trailer, and the old Comstock Mill mill/refinery building was being used as a residence. It also discovered exposed tailings on roads and, in deteriorated vat leach tanks, household waste, litter, and debris. Photographs in the record verify these findings, as well as the presence of pets, food items, vehicles, and miscellaneous debris, including what appears to be household trash. BLM considered the site a hazard to the general public.

On April 2, 2001, BLM issued Notice of Immediate Suspension 70052 to Comstock, pursuant to 43 CFR 3715.7-1(a). BLM notified Comstock that it was deemed to be in violation of 43 CFR Subpart 3715 for having failed to obtain concurrence from BLM for its occupancy of the Goldhill mill site claim, or the necessary Federal, State, and local permits and other authorizations. It stated that the occupancy of the site was not reasonably incident to prospecting, mining, or processing operations, and did not otherwise comply with the standards set by 43 CFR 3715.2, 3715.2-1, and 3715.5. BLM concluded that an immediate suspension of Comstock's occupancy of the site was "necessary to protect health, safety, and the environment." (Apr. 2, 2001, Notice of Immediate Suspension at 3.) BLM therefore ordered Comstock to remove all personal property, litter, and debris from the site within 15 days of receipt of the notice, and to cease its residential occupancy of the site including the use of a watchman. BLM stated that pursuant to 43 CFR 3715.5-2, any property remaining on the site 105 days after receipt of the order would become the property of the United States and be subject to removal and disposition by BLM at Comstock's expense. Comstock received BLM's April 2001 Notice of Immediate Suspension by certified mail, return receipt requested, on April 5, 2001. Comstock did not appeal that notice to the Board or otherwise respond to it.

Thereafter, BLM issued Federal Court citations to Nelson and Shawna O'Leary to physically remove them and end their residence on the site so that reclamation could proceed. See 43 CFR 3715.7-2 (civil penalties) and 3715.8 (criminal penalties). The record indicates that Nelson and O'Leary were required to appear in response to the citations on June 21, 2001. It also indicates that Nelson's attorney obtained continuances until August 16, at which time the court granted a further continuance until October 11, 2001, conditioned on a meeting between the parties. (Aug. 20 and Aug. 21, 2001, electronic mail.) On August 21, 2001, a local teenager entered the mill site and fell several stories from a catwalk, sustaining serious trauma

and injuries. See Aug. 24, 2001, Virginia City Register, “Fall at Mill”; Aug. 21, 2001, District 1 Virginia City Incident Report; Aug. 21, 2001, Storey County Fire Department Report.

Marietta and Comstock agreed to meet with BLM. At a September 26, 2001, meeting with Nelson (Comstock) and Atkinson (Marietta) on the Goldhill mill site, BLM determined that all personal property, litter, and debris associated with Nelson and O’Leary had been removed from the claim, and that all residential occupancy had ceased. During this meeting, Atkinson represented that Nelson’s residence had been cleared from the site for “two years.” (Sept. 26, 2001, Field Meeting minutes.) BLM dismissed the Federal court citations against Nelson and O’Leary on October 11, 2001. However, buildings and other personal property remained. Efforts by BLM, at the September 26 meeting and in subsequent letters dated November 5 and December 15, 2001, and phone conversations, to make arrangements with Marietta and/or Comstock to have the site immediately secured and the buildings and personal property removed proved unsuccessful.

On January 29, 2002, BLM issued the Thirty Day Notice of Intent to Remove Property (2002 Notice of Intent) advising appellants that BLM would, in accordance with 43 CFR 3715.5-2, be removing and disposing of all remaining personal property from the site and that removal of Marietta’s and Comstock’s property would be at their expense. The Notice stated that removal would begin March 1, 2002. See also Feb. 12, 2002, Letter from BLM to appellants.

Marietta and Comstock separately appealed from the January 2002 decision. In their notices of appeal and statements of reasons (NA/SORs), appellants contend that BLM’s removal of their property from the Goldhill mill site would constitute a “taking” without due process of law or the payment of just compensation, in violation of the Fifth Amendment of the Constitution of the United States. They argue that BLM’s purported basis for going forward with removal of the buildings and other personal property from the claim in order to protect the public from a safety and/or environmental hazard is unsupported by the record or is disingenuous.

On April 12, 2002, BLM submitted a motion to dismiss both appeals. First, BLM argues that the Board’s adjudication of the 2002 Notice of Intent is barred by the doctrine of administrative finality. Second, BLM argues that appellants’ contention that the decision to remove personal property from the Goldhill mill site constitutes a “taking” of property in violation of the Fifth Amendment of the U.S. Constitution does not come within the subject matter jurisdiction of the Board, or, at least, is not ripe for review by the Board.

In response to the Motion to Dismiss, Marietta and Comstock submitted largely overlapping SSORs, in which they argue that the July 1998 Notice of Noncompliance

and August 2000 Cessation Order could not be enforced in the 2002 Notice of Intent because Comstock located the Goldhill mill site. Once this occurred these first two decisions issued to Marietta “related to a property interest that * * * did not exist.” (SSORs at ¶ 1.) They argue that BLM cannot “invalidate Comstock’s Goldhill Millsite claim because one or more [of] its employees desires to do so.” *Id.* at ¶ 2. They argue that the effect of BLM’s actions has been to “invalidate Comstock’s commercial contract with Marietta or impose arbitrary and unreasonable deadlines in the interest of some unexplained agenda.” *Id.* at ¶ 3. Finally, apparently referring to the April 2001 Notice of Immediate Suspension issued to Comstock, appellants assert that BLM’s decision to prohibit a watchman on site was arbitrary as evidenced by the fall of a teenager on August 21, 2001, “after the BLM required Comstock to remove its watchman.” *Id.* at ¶ 4.

We agree in large part with BLM’s first argument based on the doctrine of administrative finality, which bars the Board from adjudicating, absent compelling legal or equitable reasons, the merits of a prior BLM decision when the current appellant had an opportunity to obtain review of the decision within the Department and took no appeal, or where an appeal was taken and the decision was affirmed. (Motion to Dismiss at 10, citing *Mary Sanford*, 129 IBLA 293, 298 (1994).) BLM contends that, given Comstock’s failure to appeal BLM’s April 2001 Notice of Immediate Suspension and Marietta’s unsuccessful appeal of the August 2000 Cessation Order, the Board is precluded from adjudicating the propriety or validity of BLM’s January 2002 Notice of Intent.

Both of these [earlier] decisions specifically instructed Appellants that (1) BLM would remove and dispose of any property remaining on the mill site after the relevant period for complying with the decisions and removing the property had expired; and (2) BLM would hold Appellants liable for the costs it incurred in that removal and disposal effort. * * * The Notice at issue here is simply the logical implementation of those decisions.

(Motion to Dismiss at 11.)

BLM is correct that appellants are barred by the doctrine of administrative finality from challenging any aspect of BLM’s January 2002 decision to proceed with the removal of appellants’ property from the Goldhill mill site, to the extent those issues were resolved finally by the three previous unappealed or otherwise final decisions of BLM. The 2002 decision to exercise BLM’s regulatory authority to remove property from the Goldhill mill site, in response to appellants’ failures to comply with prior enforcement orders regarding the topic, is merely a continuation of the enforcement stated in those orders, particularly given that the August 2000 Cessation Order issued to Marietta and the April 2001 Notice of Immediate

Suspension issued to Comstock expressly cited 43 CFR 3715.5-2 and notified appellants of BLM's plans to remove their property at their own expense.

The cited rule, 43 CFR 3715.5-2, provides that property left behind on the public lands "beyond the 90-day period provided for its removal," 43 CFR 3715.5-1, becomes the property of the United States and is subject to removal and disposition, the cost from removal of which a mining claimant or one occupying the land is liable. By citation of this rule, and statement of its intention to follow it, BLM's 2000 and 2001 enforcement orders to Marietta and Comstock, respectively, fully apprised appellants that enforcement of that rule was a part of BLM's enforcement action.

BLM's 2002 Notice of Intent derived directly from its prior enforcement actions under 43 CFR 3715.7-1, and proceeded in conformity with and as a direct consequence of appellants' noncompliance with the 1998, 2000, and 2001 enforcement orders under 43 CFR 3715.7-1. BLM reasonably chose to move forward with its goal of site reclamation, having provided appellants multiple opportunities to remove their property themselves. In this, BLM's reliance on Toni Hutcheson Moore, 146 IBLA 168 (1998), is well placed. In Moore, we held that the appellants were barred by the doctrine of administrative finality from challenging BLM's 1997 notice of its intention to remove wild horses from a particular part of the Federal range, where the Board had already affirmed BLM's 1995 plan for removing the horses. 146 IBLA at 171. The challenged 1997 notice was "integral" to what had previously been decided when BLM approved the 1995 plan. Id. at 169. The same is true here with respect to the Notice of Intent.

BLM's Notice of Immediate Suspension, Notice of Noncompliance, and Cessation Order are all administratively final for the Department, and thus no longer subject to review by the Board. Granite Construction Co., 137 IBLA 151, 154 (1996); Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111, 121 (1988). Thus, to the extent appellants challenge any issue decided finally in the 1998, 2000, and 2001 enforcement orders, those matters are final and may not be revisited here.

We are not prepared, however, to dismiss the entire appeal, because we find that appellants have raised arguments which pertain exclusively to the 2002 Notice of Intent, and which are based on facts post-dating the earlier enforcement orders. Appellants are entitled to object to the Notice of Intent to Remove on the basis of arguments regarding issues that were not decided in the final enforcement orders. We deny BLM's motion to dismiss the appeals, but the underlying decisions on which the challenged action is based are not before this Board and we entertain this appeal on the basis that the orders issued under 43 CFR 3715.7-1 are final and valid.

On the merits, appellants argue that the 2002 Notice of Intent is no longer enforceable because the HOM RF#1 mill site on which the July 1998 Notice of Noncompliance and the August 2000 Cessation Order were issued to Marietta no longer exists. (SSORs at ¶ 1.) They argue that the August 2000 Cessation Order, from which the Notice of Intent derives, was issued in response to Marietta's failure to comply with the July 1998 Notice of Noncompliance, which was founded on Marietta's occupancy of the HOM RF#1 mill site. Appellants thus assert that, since that mill site no longer existed, BLM could not then premise its subsequent January 2002 Notice of Intent on that order.

[1] We disagree.^{3/} BLM's January 2002 Notice of Intent was factually predicated on Marietta's failure to comply with BLM's July 1998 Notice of Noncompliance, which then resulted in issuance of the August 2000 Cessation Order. Appellants' argument proceeds from a misunderstanding of the nature of those earlier orders. Neither enforcement order invalidated the HOM mill site.^{4/} Rather, each order pertained to Marietta's use or occupancy of the mill site, which consisted of the maintenance of property and Nelson's residence. 43 CFR 3715.0-5. That use and occupancy began on the HOM RF#1 mill site and persisted through the date of the Notice of Intent. Indeed, both appellants admit on appeal that they own personal property remaining on the Goldhill mill site, and thus they concede that at the time of the January 2002 Notice, their property remained there. (Feb. 27, 2002, Marietta NA/SOR, (Marietta "owns personal property that is located on the Goldhill Mill site Claim * * * [and] subject to a formal written agreement between Marietta and [Comstock]"); Feb. 28, 2002, Comstock NA/SOR at 1 (Comstock "is party to an enforceable commercial agreement respecting certain of the personal property present on the [Goldhill mill site]").)

We expressly reject appellants' suggestion that a BLM enforcement action against use or occupancy on a mining claim or mill site evaporates with a change in the legal status of the mill site. Were we to adopt this suggestion, BLM's ability to enforce the Surface Resources Act would lie in the hands of persons and entities

^{3/} It is worth noting that, even if appellants were to prevail on their claims that the 2002 Notice of Intent could not be enforceable against Marietta, their arguments do not account for the fact that BLM's Notice of Immediate Suspension was properly issued in 2001 to Comstock during Comstock's occupancy of the Goldhill mill site. The 2002 Notice of Intent is properly enforceable against Comstock for its failure to appeal the 2001 Notice of Immediate Suspension, which is final for the Department.

^{4/} Likewise, contrary to appellants' assertion, nothing in the January 2002 Notice of Intent or the April 2001 Notice of Immediate Suspension issued to Comstock affects the legal status of the underlying Goldhill mill site or operates to "invalidate" it. (SSORs at ¶ 2.)

occupying a mining claim or mill site, instead of in the Department. Such a construction of the Subpart 3715 regulations is not possible viewing its language, nor would it constitute a viable exercise of the Secretary's obligation to manage the public lands by implementing the Surface Resources Act. We reject the argument that the 2002 Notice of Intent could not be issued, or even that the underlying enforcement orders could be invalidated, because parties chose to relocate and rename a mining claim in order to maintain a non-compliant occupancy.

The 1998, 2000, and 2001 enforcement orders against Marietta and Comstock under 43 CFR 3715.7-1 became final when Marietta chose not to present arguments on appeal and Comstock failed to appeal. Those orders survived appellants' tactics in asserting that Marietta allegedly "abandoned" the mill site by reason of Comstock's locating a new one on the site, while nonetheless avoiding any action that would constitute a change in or cessation of Marietta's or Nelson's use or occupancy. Likewise, in general, we find that an enforcement order issued under 43 CFR 3715.7-1 survives the deliberate forfeiture of a mining claim or mill site or the abandonment of such claim or site that attends the conclusion of a permitted exploration, mining, or milling operation.^{5/} Any other conclusion would render enforcement of Subpart 3715 an ephemeral notion without consequence to the "user" or "occupant" of public lands. To the contrary, the possible results of appellants' receipt of the prior enforcement orders included (a) their compliance; (b) their pursuit of appeals to this Board; (c) BLM's decision to remove property at cost to appellants under 43 CFR 3715.5-2; and (d) BLM's choice in the absence of the first two options to enforce the orders in court with civil and criminal penalties under 43 CFR 3715.7-2 and 3715.8 for failure to comply.^{6/} Appellants' options did not include avoiding the obligations established in final enforcement orders by means of private agreements between themselves purporting to transfer or rename the mill site. Appellants' occupancies related to a mill site and were properly subject to regulation under 43 CFR Subpart 3715.^{7/} Our conclusion is supported by BLM's

^{5/} To the extent we were to agree in any given case that an enforcement order did not survive or was invalid because of the forfeiture of a mining claim or mill site, the continued presence of a party's property or residence on the public lands would be subject to enforcement action as a trespass, with similar consequences. 43 CFR 2920.1-2; Subpart 9239.

^{6/} The Federal court citations against Nelson and O'Leary, though not in the record before us, presumably were issued under that authority.

^{7/} Because Marietta did not pursue its appeals to this Board, those orders are final and not subject to appeal. We note, however, that to the extent the 1997 forfeiture of HOM RF#1 mill site might have justified a trespass order, that issue would have been raised in an appeal of the 1998 Notice of Noncompliance issued to Marietta.

(continued...)

preamble to the Subpart 3715 rules, in which BLM ensures that they apply prior to or notwithstanding “the proper location of a mining claim or millsite” so long as mining-related action is initiated under the auspices of the mining laws of the United States. 61 FR 37120.

Appellants’ only argument with respect to the April 2001 Notice of Immediate Suspension issued to Comstock is their assertion (SSORs at ¶ 4) that the order to remove the watchman was “arbitrary” in that it led to the subsequent injury to the teenage trespasser onto the mill site. We disagree once again. The 1998, 2000, and 2001 orders are final and their alleged “arbitrariness” is not now before us to review.

To the extent appellants’ assertion that BLM was arbitrary in refusing to permit a watchman on the mill site may be characterized as challenging the reasonableness of the 2002 Notice of Intent, we expressly repudiate any suggestion that the teenager’s injury plausibly explains or justifies either their extended use and occupancy of the site or their consequent refusal to cure the defects identified in BLM’s enforcement orders. BLM had been attempting to end Nelson’s use or occupancy of the site as a residence for years, and had ordered his departure under Subpart 3715 as early as 1998. BLM ultimately was compelled to proceed in Federal Court against Nelson in 2001 because he would not voluntarily leave so that the site could be reclaimed and secured. The record contains extensive documentation of BLM’s efforts to remove Nelson, as well as the fact that HOM’s successor-in-interest, who was working with BLM to reclaim the property, was substantially impeded by Nelson’s continued residence on the site. It was not until after BLM sued in court to force compliance with the enforcement order that the record indicates any progress toward compelling appellants to dismantle the residence. It was only after the injury occurred on August 21, 2001, that appellants first began to assert that Nelson had departed two years before, despite photographic record evidence of a residence during the period in question. The issue of what exactly happened and when is not before us in this appeal; however, we affirm the 2002 Notice of Intent and expressly reject any suggestion that events in August 2001 undermined BLM’s enforcement actions.

We likewise reject appellants’ assertion that they were not given enough time to remove their property to support their claim that BLM imposed “impossible” or “unreasonable” deadlines. (SSORs at ¶ 2.) Appellants give no hint as to what they believe might have been reasonable on BLM’s part, but at the time of BLM’s January 2002 Notice of Intent to Remove, Marietta and Comstock had been given through official enforcement orders over 16 and 8 months, respectively, to remove

⁷ (...continued)

Marietta’s failure to pursue its appeal precludes any further review of that order at this time. See n.4, supra.

buildings and other personal property from the mill site, and more time through informal contacts. In the absence of any good faith effort on the part of appellants to comply with BLM enforcement efforts beginning in 1998, we find that they have not shown error in BLM's 2002 Notice of Intent, on the basis of either insufficient notice or insufficient time to comply.^{8/}

[2] We find that BLM properly invoked 43 CFR 3715.5-2 as the basis for removing appellants' property. In order to square this holding with prior Board precedent, however, it is necessary at this juncture finally to answer a question that has lurked in the Board's recent interpretation of the Subpart 3715 regulations. The rule at 43 CFR 3715.5-2 directly refers to 43 CFR 3715.5-1. Through a series of decisions the Board has expressed concern with BLM's efforts to apply the latter rule.

The two rules together read:

Sec. 3715.5-1 What standards apply to ending my use or occupancy?

Unless BLM expressly allows them in writing to remain on the public lands, you must remove all permanent structures, temporary structures, material, equipment, or other personal property placed on the public lands during authorized use or occupancy under this subpart. You have 90 days after your operations end to remove these items. If BLM concurs in writing, this provision will not apply * * * to operations that are suspended for no longer than one year due to market or labor conditions.

Sec. 3715.5-2 What happens to property I leave behind?

Any property you leave on the public lands beyond the 90-day period described in Sec. 3715.5-1 becomes property of the United States and is subject to removal and disposition at BLM's discretion consistent with applicable laws and regulations. You are liable for the costs BLM incurs in removing and disposing of the property.

It is clear from these regulations that BLM meant to ensure that a mining claimant or entity conducting a valid, authorized mining, prospecting or milling operation would be expected to remove all equipment, buildings and personalty from

^{8/} Nor do we find any evidence that BLM's January 2002 Notice of Intent infringes on any contractual rights operative between Marietta and Comstock. (SSORs at ¶ 3.) Whatever contractual rights the parties may have between themselves have no bearing on BLM's regulatory authority under 43 CFR Subpart 3715.

the site within 90 days of the closure of an operation on a site, subject to approval for a limited suspension based on market or labor conditions. Bradshaw Industries, 152 IBLA 57, 64 (2000). If the property was not removed, BLM could remove it, charging costs to the claimant or entity.^{2/} In this sense, 43 CFR 3715.5-1 and 3715.5-2 are consistent with trespass regulations, which ensure that BLM may assess damages for a trespass, including costs of rehabilitation. See 43 CFR 2920.1-2 and 9239.1-3. For example, the Board recently established in Stanley DiMeglio, 164 IBLA 365, 378 (2004), that a trespasser “shall be liable to the United States for damages, including the administrative costs incurred by the United States as a consequence of such trespass.” See 43 CFR 2920.1-2(a)(1).

The difficulty we have identified in applying 43 CFR 3715.5-1 and 3715.5-2 arises in cases in which a party acquires all or part of a mining claim or mill site where property has been placed on site by another party. Noting that the use of pronouns (I, you) in the rules raises substantial questions as to how an unrelated successor could be required to remove the property of another, we have refused to apply 43 CFR 3715.5-1 and 3715.5-2 in situations where an entity acquired a mining claim and appeared to disclaim any interest in property abandoned by a predecessor claimant or trespasser on Federal lands. James R. McColl, 159 IBLA 167, 182 n.11 (2003), discussing unpublished order in Tony and Pamela Fabor, IBLA 2000-220 (Order dated June 6, 2001) (BLM decision requiring claimant to remove cabin placed on mining claim 50 years previously). In subsequent cases we questioned without deciding the extent to which an “occupant” could be required to remove property left by a prior occupant under those rules, considering that the language of 43 CFR 3715.5-2 required removal of property “placed” on site during an authorized use or occupancy. In Karen V. Clausen, 161 IBLA 168, 179 (2004), we noted the concern expressed in McColl that the Subpart 3715 rules did not expressly cover the situation in which a claimant occupied buildings left by a predecessor, and refused to require Clausen to remove buildings constructed 70 years earlier, when the circumstances of its construction were not established and it was not clear that Clausen had title to the building. In Dan Solecki, 162 IBLA 178 (2004), we refused to enforce that part of a BLM decision compelling removal of a trailer left on site by a prior claimant because removal was not shown to be a plausible remedy. However, we again noted “concern that Subpart 3715 does not, and BLM has not sufficiently considered how it construes the rules to, adequately cover the situation where a claimant occupies buildings left by a predecessor.” In Solecki, unlike in McColl, Fabor, and Clausen, the claimants noted that they had actually purchased the trailer from the prior occupant.

^{2/} The rule requires removal of property “placed * * * during authorized use or occupancy.” 43 CFR 3715.5-1. We leave it to another case to address the complicated questions raised by this phrasing, given that the enforcement orders at issue here are final for the Department and relied only on 43 CFR 3715.5-2.

Some aspects of this dilemma will be resolved here. Like Solecki, Marietta purchased the property on the mill site from the prior occupant. Marietta and Comstock have entered into an agreement involving the property; they assert full ownership of it and even a “taking” if it is moved. Whether they placed the property there or not, they have exercised complete dominion and control over certain buildings, personalty, and material left on site. Were we to hold in such circumstances that appellants could not be required by 43 CFR 3715.5-1 to remove the property at the “end” of an occupancy, or, alternatively, liable for the costs of removal under 3715.5-2, we would be reading into the Subpart 3715 regulations a requirement that, despite the transfers of ownership of the mill site claim and property thereon from HOM to United Mining and to Marietta, HOM nonetheless could remain liable for removal of property it sold. We will not read into the Subpart 3715 rules such a requirement.

We hold that where a party lawfully acquires title to structures and/or personal property placed on a mining or mill site claim through a chain of title, by virtue of contract, agreement, or the operation of law, and exercises dominion and control over it, the pronouns in the regulations at 43 CFR 3715.5-1 and 3715.5-2 are properly read to apply to such subsequent successors-in-interest to the property. Here, appellants’ exercise of dominion and control over the property through purchase and contract renders them properly subject to those rules, and we affirm the Notice of Intent issued to them under 43 CFR 3715.5-2. ^{10/}

This conclusion is consistent with and must be squared with regulations governing surface management of mining claims at 43 CFR Subpart 3809. Under those rules, a mining claimant retains responsibility for obligations that accrued or conditions that were created while the claimant or operator was responsible for operations conducted on the claim or project area. 43 CFR 3809.116(a). Such obligations may be transferred, but the mining claimant nonetheless remains liable until BLM receives documentation that a transferee accepts responsibility for the transferor’s previously accrued obligations, and accepts a replacement financial

^{10/} To be clear, the line we draw is one limited to a construction of the rules that recognizes a legal transfer of property from one entity to another. In drawing this line, we answer the question of construction left open in Solecki, and carefully distinguish property that is, as in McCull or Fabor, or as might have been, as in Karen V. Clausen, abandoned. Under 43 CFR 3715.5-2, property left behind becomes property of the United States. See also Stanley DiMeglio, 164 IBLA at 379, citing KernCo Drilling Co., 71 IBLA 53, 56 (1983); Kelly E. Hughes, 135 IBLA 130, 134 (1996) (“improvements placed upon Federally-owned lands by trespassers belong to the United States from their inception”). Whether an occupant can be required to remove abandoned property by virtue of its interest in a mining claim is not before us and will be considered on a case-by-case basis.

guarantee adequate to cover such previously accrued obligations and the transferee's new obligations. 43 CFR 3809.116(c). Marietta's and Comstock's actions clearly are evidence that they accepted responsibility for the buildings and property they claim to own, while the predecessor retained responsibility for other site conditions as demonstrated by their efforts to remedy them.

Finally, appellants argue that the January 2002 decision constitutes an unconstitutional taking of their property. BLM correctly notes that the question of whether BLM's January 2002 decision constitutes an unconstitutional taking is not within the subject matter jurisdiction of the Board. Laguna Gatuna, Inc., 131 IBLA 169, 173 (1994). We note, however, that appellants were given multiple opportunities to remove property that they consider to be of value. It is unclear how they infer that BLM has "taken" property, including buildings, apparently not valuable enough to them to remove to another site. Moreover, Marietta purchased from United Mining property associated with a milling operation that ceased functioning in 1985, without any verified expectations of using the property for processing or milling purposes. As it pertains to mill sites, the purpose of the Mining Law of 1872, 30 U.S.C. § 42 (2000), was to permit certain milling or processing operations on the Federal lands. Appellants chose to purchase property placed on the public lands solely for the purpose of mining, prospecting, or milling, and never used it for such purposes. That fact does not change the purpose of the mining laws, or the fact that, in the absence of mining or milling operations, any property left or maintained on public lands without authority is essentially in trespass.^{11/}

It appears that appellants' constitutional argument and dispute derive from their erroneous belief that Marietta's purchase of the property and/or fixtures on the mill site might one day justify a fee patent to the public lands covered by the claim notice. It is worth clarifying here any misapprehension as to the nature of the right of occupancy that arises from a mill site under the Federal mining laws. In a recent appeal in which we upheld BLM's rejection of a similar mill site occupancy, we responded to arguments that an appellant's rights simply to maintain property and fixtures on a mill site were violated.

[Appellant's] accusations against BLM for violating its rights and for making impossible demands proceed from the underlying view that persons are entitled to place private property on the public lands and, having done so, obtain a right to maintain equipment there at will, subject to an amorphous standard of "stewardship." * * * This is not the case. The purpose of the Surface Resources Act is to ensure that a claimant's tenure on the public lands under the Mining Law is

^{11/} Whether BLM might have found Marietta to be in trespass is not before us, given Marietta's failure to appeal the orders issued under 43 CFR 3715.7-1.

exclusively for the mining, prospecting and processing purposes recognized by that statute. Thus, while the Mining Law recognizes the necessity of a reasonable period of time for construction of a milling or processing facility, occupancy of any mill site, including an independent mill site, is permitted only where the evidence demonstrates a good faith effort to use the mill site for statutorily permitted purposes in a market “with a reliable source of ore for processing.” 2 American Law of Mining ¶ 32.06[6]; see also United States v. Cuneo, 15 IBLA 304, 325-26, 81 I.D. 262, 272 (1974). Any notion that the Mining Law vests a mining claimant with “placeholder” status once he or she places milling equipment on the public lands is defeated by the Surface Resources Act and BLM regulations at 43 CFR 3712 and Subpart 3715. * * * Quite simply, the admitted fact that [appellant] has never found the ores which would justify its occupancy on a mill site means that it must vacate the public lands of all equipment and other materials brought onto them for that alleged purpose, not that it may keep privately owned property on the public lands indefinitely.

Precious Metals Recovery, Inc., 163 IBLA at 340-41. It follows that the mere purchase of mill site property and/or fixtures gives rise to neither a right to nor a legitimate expectation of a patent, because a mill site patent can issue only for nonmineral lands that are used or occupied for mining or milling purposes. 30 U.S.C. § 42 (2000).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM’s motion to dismiss appellants’ appeals from the Field Manager’s January 29, 2002, decision is denied, and that decision is affirmed.

Lisa Hemmer
Administrative Judge

I concur:

T. Britt Price
Administrative Judge