DONNA FRIEDMAN
JOHN CSUPICK

IBLA 2001-280 Decided May 2, 2005

Appeal from a decision of Phoenix (Arizona) Field Office, Bureau of Land Management, announcing a determination of nonconcurrence for occupancy of a mining claim. AZA 31594.

Affirmed.

1. 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," expressly including "trailers." Leaving a 14-foot travel trailer on a mining claim for indefinite periods of time (with claimants residing in that trailer overnight while spending time on the claim and storing equipment during their absences from the claim) constitutes "occupancy" of the claim within the meaning of 43 CFR 3715.0-5. Such use is "occupancy" even if claimants do not stay overnight in the trailer, as the "presence" of a "trailer" on the claim constitutes "occupancy" under that regulation. Accordingly, maintaining a trailer on the claim is "occupancy," and doing so for more than a prescribed period is allowed only under certain circumstances as provided in 43 CFR Subpart 3715.

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

Under 43 CFR 3715.2, in order to justify occupancy of the public lands (that is, either maintaining a residence, trailer, or other 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. Where mining activities associated with claimants' proposed occupancy are small-scale, occasional operations using very small, portable mining equipment, and where claimants' proposal involves only bi-weekly visits to the mining claim and excavating and mining only a few cubic feet of placer material per visit, those activities are not "substantially regular work" within the meaning of the regulation. Where claimants have presented a plan that only very generally describes where material would be removed and does not set out any organized exploration activity, the small level of activity is therefore not "associated with the search for and development of mineral deposits or the processing of ores"; it does not include "active and continuous exploration, mining, and beneficiation or processing of ores; and it does not "include assembly or maintenance of equipment [and] work on physical improvements" incident to mining activities, within the definition of "substantially regular work" at 43 CFR 3715.0-5.

3. 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 which 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 by obtained. If any one of the criteria of 43 CFR 3715.2-1 is met, the claim may be occupied for more than 14 days in any 90-day period (if the occupancy is otherwise in compliance with all of the five criteria of 43 CFR 3715.2). Where claimants have neither exposed any valuable mineral deposit nor created hazardous workings on the claim; where claimants' equipment is readily portable and can be protected from theft easily by removing it from their claim, thereby also protecting the public from any injury; and where claimants' claim is not so distant from a nearby community in which housing is available as to prevent them from being able to put in a full work shift on the claim, they have complied with none of the applicable criteria.

APPEARANCES: John A. Csupick and Donna Friedman, pro sese; Richard R. Greenfield, Esq., Office of the Field Solicitor, United States Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

John Csupick and Donna Friedman (appellants) have appealed the April 18, 2001, decision of the Phoenix (Arizona) Field Office, Bureau of Land Management (BLM), notifying them of BLM's determination of nonconcurrence with their request

for the occupancy of their mining claim under Departmental regulations at 43 CFR Subpart 3715.

The case record indicates that appellants first contacted BLM in January 2001, filing a notice of proposed operations on their mining claim under the surface management regulations at 43 CFR Part 3809. The claim was identified as the El Camino de Oro placer mining claim (AMC-352514), located in the NE¼ sec. 30, T. 7 N., R. 3 W., Gila and Salt River Meridian, Maricopa County, Arizona. [1/] Throughout the period preceding the issuance of the decision under appeal, appellants provided a consistent description of the extent of their proposed operations. They also provided BLM with proof of their efforts to comply with governing State and Federal requirements to operate on their claim.

The extent of the proposed operations on the claim was limited: "We are conducting placer mining with the use of the following: Our equipment consists of a gold buddy wet processor, a dry shaker, picks and shovels." (Plan of Operation Proposal filed Jan. 2, 2001, at 1.) Further,

> [t]he only activities to be conducted on the site will be digging for gold, dry washing, using our own water for the gold buddy processor, panning and other necessary functions of existing in a remote site, such as preparing meals and conducting normal essentials of existence.
>
> We do not use any chemicals or dig in the washes or wetlands.

Id. at 2; see photographs accompanying notice. Appellants also detailed their activities in removing from the site a ruined camper top, rusted auto parts, buckets, tailing piles, and other trash and debris, as well as filling and reclaiming holes on the claim. (Notice of Operations form filed Jan. 2, 2001, at 2). The record reveals elsewhere that the "Gold Buddy" is a commercially-manufactured 12-volt battery-powered sluice box measuring only 1.5 feet by 2.5 feet, and that the dry shaker is powered by a 2 to 4 horsepower gasoline blower motor and measures only 1.5 feet by 3 feet. (e.g., Amended Notice of Intent (NOI) and "3715 Filing" dated Feb. 27, 2001, at 2.)

Appellants' plan of operation proposal also contained an application "for the privilege of obtaining occupancy of [their] gold mine claim, in order to work the claim effectively." (Plan of Operation Proposal at 1.) On January 9, 2001, BLM provided appellants with a copy of 43 CFR Subpart 3715, the governing regulations,

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[1/] The record indicates that this claim was located on Sept. 17, 1999. (Revised Notice of Operations dated Feb. 27, 2001, at 1.)

and requested that they read them, particularly 43 CFR 3715.3-2. [2/] BLM also requested that appellants provide a written narrative dealing with points set out in those regulations, including (1) how the occupancy is reasonably incident to mineral prospecting, mining or processing; (2) information that shows how the activities will be substantially regular; (3) a demonstration that the activities will be reasonably calculated to lead to mineral extraction and beneficiation; (4) a description of all equipment and supplies to be used, with a proviso warning that all facilities and equipment on the mining claim had to be appropriate and reasonably incident to the operations; and (5) a map showing where temporary or permanent structures would be located, including (relevant to appellants' proposal) living quarters and storage and maintenance buildings, as well as (6) an estimate of the period of use of the structures. BLM also required appellants to state how water would be used in the operation and where it would be obtained. (Jan. 9, 2001, letter at 1-2.)

Since appellants' operation involved residential occupancy, BLM required appellants to furnish information that would allow it to determine if that occupancy met one of four criteria, which (although BLM did not so state) also arise from 43 CFR Subpart 3715: (1) Protection of exposed, concentrated, or otherwise accessible valuable minerals from theft or loss; (2) protection from theft or loss of appropriate operable equipment that is regularly used, is not readily portable, and cannot be protected by means other than occupancy; (3) protection of the public from surface uses, workings, or improvements that, if left unattended, created a hazard; and (4) allowing the operator/mining claimant to remain on site to work a full shift because of the area's isolation or lack of access. Id.

Finally, BLM required appellants to show that Federal and State water quality and building permits had been issued or were not needed. Id. at 2-3. BLM advised that it would review the submitted information and make a formal decision either concurring or not concurring with appellants' occupancy. Id. at 3.

The record indicates that appellants supplemented their filing on January 18, 2001, but that, after phone conversations with BLM personnel on February 14 and 15, 2001, filed an amended NOI and "3715 Filing" around the end of February, stating:

[2/] BLM also notified appellants that, in order to have a filing that is complete under the requirements of 43 CFR Part 3809, they would have to provide a topographic map detailing the location and layout of all portions of their proposed operations and showing the size and kind of all surface disturbances. (Letter dated Jan. 9, 2001, at 1.)

> We plan to conduct more extensive mining operations in order to move larger quantities of soil to extract more gold from our claim. In order to accomplish this type of mining, we need provisions and quarters at the site to allow the work to be performed on a regular basis. We need to secure our equipment and supplies, therefore, through information provided us in writing, we understand BLM prefers one storage area or facility instead of several means of storage or structures placed on the site. We plan to store the following equipment in a 14' x 8' 1965 Aristocrat Travel Trailer (single axle) which we plan to place at our camp on the site as indicated on the revised maps * * * . The trailer will become our storage for our equipment and shelter during the mining operations.

Id. at 1. The document lists equipment, including the dry shaker and water washer processor described above, two picks and shovels, two classifiers and three plastic gold pans, several plastic buckets and drums for panning and hauling water, and a 5-foot x 3.5-foot plywood storage box on blocks outside next to the trailer for miscellaneous supplies. The document noted that there would also be "domestic supplies" to be "stored in trailer such as bedding, canned food, cooking utensils." Finally, the document notes that there would be "[a]t least four (4) to six (6) Plastic 55 gallon drums of city tap water for use in processing and for domestic use," with "[t]wo next to the digs and three next to the trailer if possible." Id. at 2.

Appellants described their proposed operations as follows:

> The process we plan to initiate is first, digging with picks and shovels, within an area of approximately 4.5 acres (less than 5 acres as specified on our maps) a sloped trench on the side of the hill (as indicated on the maps) of approximately 20' x 10', removing and saving the top soil for reclaiming the area and placing the dirt to be processed in classifiers. After classification the remaining soil will be processed through the dry shaker, then process[ed] through the Gold Buddy water wash and will be panned out. Our process does not include the use of any chemicals or hazardous materials. The water from panning and wet washing will be recycled back into the barrels as much as possible. Domestic water from showers and dishwashing will be of minimal amounts. Any used water will not be discharged into any wash, stream, river, pond or lake. Water will not be treated with any chemicals to perform the process.

Id. at 2. Appellants noted that they planned to continue their operations for approximately 2 years, and longer if they were successful in extracting "accountable quantities of gold ore." Id. at 3.

Appellants continued to supplement BLM's records through April 2001 with copies of letters from Federal and State authorities indicating that they did not require permits for their operations.

On April 18, 2001, BLM issued the decision under appeal, holding:

> After reviewing the information supplied by you, the BLM has concluded that your occupancy does not meet the "substantially regular work" requirement of [43 CFR] 3715.2, and does not have any of the characteristics required by [43 CFR 3715.2-1]:
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> 1. Substantially regular work refers to significant work that constitutes active and continuing exploration, mining, and beneficiation or processing of ores. Your project is in the early stages of exploration or definition, and the description of your work activities indicate[s] that this is a part-time endeavor. At this point the project does not justify exploration or mining on a continual basis. The work program and use of portable equipment also do not indicate a substantial, recurring work program.
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> 2. Your 3715 filing does not meet the requirements for protecting valuable minerals from theft, protecting the public from surface hazards, or protecting non-portable equipment from theft or loss. All of the equipment that you described in your filing, and which you show in the accompanying photos, are small, portable pieces that can be transported in a pickup truck (43 CFR 3715.2-1(b)). There are not surface hazards that exist or will be created in your activities and you do not have to keep any valuable minerals or ore stockpiles on site (43 CFR 3715.2-1(c)&(d)).
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> 3. The area is not so isolated or lacking physical access as to prevent the operator from remaining on site and working a full shift. Your site is approximately 6 miles from Morristown, Arizona, or 16 miles from Wickenburg, Arizona. Additionally, your mine site is approximately 1 mile or 5 minutes from San Domingo Road which is frequently graded by Maricopa County maintenance (43 CFR 3715.2-1(e)). You are allowed to camp up to 14 days in a 90-day period on your claims (43 CFR 3715.1).

> This decision pertains to the occupancy on your mining site. You may continue to pursue your casual use mining activities and the BLM will continue to process your mining notice AZA 31594.

(BLM Decision dated Apr. 18, 2001, at 1-2.) Appellants timely appealed BLM's decision.

We note initially that we agree with BLM's assessment of appellants' occupancy request: "The occupancy requested by [appellants] is for a trailer to be parked on public lands 24 hours per day, seven days per week for a two year period of time in support of a mining operation that would be conducted approximately two days every two weeks." (BLM Answer filed July 12, 2001, at 10.) [3/] We note that appellants have filed numerous additional documents evidencing revised and expanded occupancy plans. [4/] The only decision that is presently before us is the correctness of BLM's April 18, 2001, decision, which is limited to the occupancy proposal submitted in early 2001.

Section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000), provides that claims located under the mining laws of the United States "shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." Departmental regulations found at 43 CFR Subpart 3715 implement this statutory provision by addressing the unlawful use and occupancy of unpatented mining claims and mill sites for non-mining purposes. See 61 FR 37115, 37117 (July 16, 1996). These regulations restrict use and occupancy of public lands open to the operation of

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[3/] That assessment is based on appellants' "proposed work schedule for substantially regular work" that was submitted along with their statement of reasons for appeal (SOR). That schedule (as a closely contemporaneous document submitted to describe appellants' intended occupancy proposal) is accepted as an accurate description of that occupancy proposal, which was rejected by BLM's Apr. 18, 2001, decision.

[4/] See, e.g., discussion of appellants' plans to build "permanent sluice" and increased mining activities (Additional SOR at 6; Additional SOR #2 at 8; Status Response filed July 1, 2003, at 1); appellants' placement of a "screen shelter" or "ramada" and fire bricks for a fire pit on the site (BLM's Reply to Additional SOR #2 Ex. B at 1-3; Letter from appellants filed Mar. 11, 2002, at 3-4); and appellants' Revision to Proposed Mining Activities filed Aug. 29, 2003. As BLM recognizes (Reply to Additional SOR at 10), appellants are and have been free, at any time, to provide additional information to BLM and re-submit a request for occupancy under 43 CFR Subpart 3715.

the mining laws to prospecting, exploration, mining, or processing operations and uses reasonably incident thereto. Betty Dungey, 165 IBLA 1, 8 (2005).

[1] 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," expressly including "trailers." [5/] There appears little doubt that, by requesting "occupancy" of their gold mine claim, appellants were seeking authorization to leave their trailer on the claim site for indefinite periods of time, and to reside in that trailer overnight while spending time on the claim and to store equipment during their absences from the claim. [6/] Leaving the trailer on the site would, we hold, constitute "occupancy" of the claim within the meaning of 43 CFR 3715.0-5, even if appellants were not themselves staying overnight in the trailer, as the very "presence" of a "trailer" on the claim constitutes "occupancy" under that regulation. Accordingly, maintaining a trailer on the claim as proposed by appellants would have been "occupancy," and doing so for more than a prescribed period is allowed only under certain circumstances set out in 43 CFR Subpart 3715.

[2] We note that 43 CFR 3715.2 effectively authorizes occupancy of a mining claim for up to and including 14 days in a 90-day period regardless of the surrounding circumstances. [7/] However, under 43 CFR 3715.2, in order to justify occupancy of the public lands (that is, either maintaining a residence, trailer, or other structures) for more than 14 days in a 90-day period (as proposed by appellants), 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,

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[5/] 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."

[6/] Appellants stress that 43 CFR 3715.0-5 recognizes and, in specified circumstances, authorizes "part-time" occupancy (SOR at 2), as though BLM had denied their request because part-time occupancy was not allowed. BLM did not do that; instead, it ruled that appellants' occupancy was not authorized because the requirements of 43 CFR 3715.2 had not been met.

[7/] That regulation also refers to "occupy[ing] the public lands under the mining laws * * * within a 25-mile radius of the initially occupied site." The occupancy of public lands here is evidently at the initially-occupied site.

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. Terry Hankins, 162 IBLA 198, 213 (2004). The regulations clarify that unauthorized use and occupancy of public lands are illegal uses that ipso facto constitute unnecessary or undue degradation of public lands, as to which the Secretary of the Interior is mandated by law to take any necessary action to prevent. 61 FR at 37117-18; 43 CFR 3715.0-5; see David J. Timberlin, 158 IBLA 144, 152 (2003); Firestone Mining Industries, Inc., 150 IBLA 104, 109 n.5 (1999); see also 43 U.S.C. § 1732(b) (2000).

We agree with BLM that the exploration and mineral processing activity appellants were engaging in at the time of BLM's decision did not meet those five requirements. Appellants' small-scale, occasional operations using small, portable mining equipment do not constitute "substantially regular work" within the meaning of 43 CFR 3715.0-9 and 3715.2. [8/] Appellants' plan involved only bi-weekly visits to the mining claim (see Schedule for Substantially Regular Work, SOR Ex. A) and (as shown by the small size of their excavating and processing equipment) excavating and mining only a few cubic feet of placer material per visit. Apart from designating areas where they proposed to dig, we cannot discern any plan presented by appellants at the time prior to BLM's decision that would lead to the extraction of significant amounts of minerals. The level of activity described by appellants was therefore not "associated with the search for and development of mineral deposits or the processing of ores"; it did not include "active and continuous exploration, mining, and beneficiation or processing of ores"; and it did not "include assembly or maintenance of equipment and work on physical improvements" incident to mining activities, within the definition of "substantially regular work" found at 43 CFR 3715.0-5. BLM properly determined that appellants' request for occupancy did not meet the requirements of 43 CFR 3715.2. [9/]

[8/] In Terry Hankins, supra, we found only "minimally compliant" mining and exploration activities involving a much greater removal of mineral material (at least 127.5 tons per year) using much larger and more permanent mining equipment. 162 IBLA at 216. In that case, the claimant was justified in maintaining only non-residential occupancy of the claim, in view of the availability of housing near the claim.

[9/] The "schedule for substantially regular work" submitted by appellants with their SOR does not alter our conclusion on this point. That information shows that appellants actually spent, at the very most, only 13.5 hours per person per week in actual mining operations, and that is presuming that every waking minute while at the claim (18 hours in a single day) was devoted to those activities, a presumption that is weakened by appellants' revelation that they leave their claim for extended

(continued...)

[3] Even if we could disregard the foregoing, we would affirm BLM's decision, as appellants' proposal does not meet the independent requirements set out at 43 CFR 3715.2-1. That provision establishes a requirement separate from and additional to those at 43 CFR 3715.2. Thus, under 43 CFR 3715.2-1, occupancy of the public lands in excess of 14 days in any 90-day period 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 by obtained. If any one of the criteria of 43 CFR 3715.2-1 is met, the claim may be occupied (if the occupancy is otherwise in compliance with all of the five criteria of 43 CFR 3715.2). Terry Hankins, 162 IBLA at 213-14.

Appellants' proposed occupancy meets none of these criteria. Appellants had neither exposed any valuable mineral deposit nor created hazardous workings on the claim; appellants' equipment was readily portable and could be protected from theft easily by removing it from their claim, thereby also protecting the public from any injury; and appellants' claim is not so distant from a nearby community in which housing is available as to prevent their being able to put in a full work shift on the claim.

As to the last criterion, we note that, 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

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[9] (...continued)
time periods to replenish supplies, including ice and drinking water, needed for personal sustenance rather than for mining purposes. (Additional SOR at 16.) Those hours were increased slightly by cognizable time spent in procurement of mining supplies (but not for supplies associated with personal needs) and for cleaning their wet processor, dry shaker, and picks and shovels. We do not regard time spent in transit to and from the claim from appellants' home as cognizable mining activity.

> ordinarily 8 hours and does not include travel time to the site from a community or area in which housing may by obtained.

Appellants acknowledge that there is a recreational vehicle (RV) park in Circle City, Arizona, only 10 to 15 miles from their site. (Additional SOR filed Aug. 27, 2001, at 11.) They also concede that "travel time to and from the park * * * can involve up to 30 minutes of travel * * * without pulling a trailer," although that time can increase in rainy conditions. Id. at 12, 17. We presume that appellants refer to 30 minutes of travel each way. This establishes that the claim is not located in an area so isolated as to require appellants to have to remain at their claim in order to work a full 8-hour shift.

Appellants also note that it takes "at least an hour" to travel to and from the park "if towing a trailer in and out of the site." However, it would not be necessary to tow a trailer to the site where there are residential accommodations near enough to the claim to allow the claimants to commute to and from the claim. The availability of a nearby RV park is significant in the present case because it shows that housing meeting appellants' specific circumstances is available near enough to the claim to allow them easily to commute to their claim in plenty of time to allow putting in a full 8-hour shift. [10/] Since (owing to the availability of housing nearby) it is not necessary to maintain housing on the claim, and since (under appellants' proposal as of April 2001) there is no equipment or ore to be stored there, there is no need to bring the trailer to the site. Accordingly, the relevant time in the present case is the time that it would take appellants to gain physical access to and from their claim without their trailer. Appellants themselves have indicated that this access can be managed in approximately 1 hour each day, except where rain would temporarily make the roads to their claim difficult for any access. The record does not support a finding that the claim, as a regular matter, is "lacking in physical access" within the meaning of the regulation. Mere difficulty in accessing a claim is, we hold, not

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[10/] However, we note that such residential accommodations could be of any sort that would provide the claimants housing. Thus, although appellants question whether space is available at the RV park in Circle City (SOR at 12), the location of the claim west of Phoenix leaves no doubt that there are many residential areas near enough to the claim to allow appellants access to claim in order to put in a full 8-hour shift at the claim. In view of the portability of their mining equipment, we are not persuaded that unpacking and setting up and breaking down mining equipment would be so time-consuming as to prevent completion of the full 8-hour shift, especially since there would be no trailer involved.

It is worth noting that the trailer is not instrumental to appellants' proposed mining activities. Their equipment and water used for their proposed activities is to be carried to and from their claim in their utility vehicle.

sufficient to justify occupancy due to lack of physical access. The conditions must be such as to render it impossible to complete an 8-hour day at the claim while accessing the site from off site. Appellants have not established that this is regularly the situation at their claim.

We note particularly as to the last issue that it is not relevant that appellants would have had to secure secondary housing in addition to their dwelling in Phoenix. The question under the regulations is simply whether housing is available nearby the claim. See Terry Hankins, 162 IBLA at 215. By the same token, it is immaterial that it will cost appellants additional money to pay rent at the RV park (or elsewhere). BLM is not required, as appellants suggest, to consider the costs of securing nearby housing in its decision process. Id. at 217-18.

Appellants repeatedly stress their good faith in attempting to comply with all State and Federal permitting requirements and in participating in environmentally sound practices. See, e.g., SOR at 5. Whether a party may have an occupancy is governed by the terms of 43 CFR Subpart 3715. Compliance with the laws governing mining uses is required for all miners, whether or not they establish an occupancy. See 43 CFR 3715.5, 3715.1 (Table 1). Other legal requirements, by definition, apply regardless of a claimants' entitlement to occupy a claim. The regulations specify that no occupancy can be approved unless all necessary permits are obtained. See 43 CFR 3715.5(b). However, we agree with BLM (BLM Reply to Additional SOR filed Oct. 10, 2001, at 11) that that requirement does not mean that, once all required permits are secured, BLM must approve an application for residential occupancy. To the contrary, BLM may not grant such approval unless and until the other requirements of 43 CFR Subpart 3715 are also met. Appellants' apparent belief that compliance with governing surface management requirements entitles them to occupy the claim is simply mistaken. The terms of the Surface Resources Act make clear that occupancy is allowed only in certain circumstances. The record establishes that BLM correctly held that those circumstances were not presented by appellants' proposal.

Along these lines, appellants also fault BLM for denying their occupancy request before they had completed the process of obtaining Federal, State, and local permits. See, e.g., Additional SOR #2. We remind appellants that, despite BLM's decision denying their occupancy request, they have been free to use their claim, consistent with the Surface Resources Act, provided that their use did not rise to the level designated by 43 CFR Subpart 3715 as "occupancy." Such use for exploration, mining, or milling purposes may still require appropriate approval from governmental

entities. [11] In other words, BLM's decision denying the request for occupancy was, to a large degree, independent of the process of obtaining necessary permits. As noted above, BLM would not have been required to approve appellants' occupancy under 43 CFR Subpart 3715 just because they secured required permits; nevertheless, such permits were likely still required for appellants to continue to use their claim without formally "occupying" it. [12] 43 CFR 3715.5. We agree completely with BLM that obtaining other agency permits does not automatically qualify an applicant for occupancy under 43 CFR Subpart 3715 for BLM's concurrence in the occupancy. See BLM Reply to Additional SOR #3 filed Feb. 12, 2002, at 5.

Our decision here is limited to affirming BLM's April 8, 2001, decision. What this means is that BLM properly held that appellants, while authorized to occupy their claim for up to 14 days during each 90-day period, were not authorized to occupy it during the remaining 76 days. Since "occupancy" under the regulation means not only residing on the claim, but also includes leaving a trailer or other structure on the claim, appellants are required to remove everything from the claim during the 76 days when occupancy is not permitted.

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

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[11] If the use was not "reasonably incident" to such purposes, appellants would be required to comply with other regulations, including 43 CFR Part 8360. See 43 CFR 3715.1, Table 1.

[12] Admittedly, BLM's decision denying the occupancy request rendered moot appellants' requests for permission from Maricopa County to park their trailer on the claim. See Additional SOR #2 at 4. Appellants point out that Maricopa County will not issue such a permit without a prior BLM occupancy approval, and assert that BLM will not issue an occupancy approval without such a permit. Id. at 5. However, it was unnecessary to break this apparent bureaucratic "loop" in view of BLM's decision that occupancy could not be approved for other reasons. The existence of that "loop" was in no way responsible for the denial of appellants' occupancy proposal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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David L. Hughes
Administrative Judge

I concur:

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Lisa Hemmer
Administrative Judge