

LEADVILLE CORP.

IBLA 2002-440

Decided August 5, 2005

Appeal from a Notice of Noncompliance issued by the Royal Gorge Field Office, Bureau of Land Management, pertaining to use and occupancy of the Sherman Mine.

Affirmed as modified.

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

Occupancy of the public lands under the mining laws within the meaning of the regulations at 43 CFR Subpart 3715 includes the construction, presence, or maintenance of temporary or permanent structures, including buildings and the storage of equipment or supplies, regardless of whether they are actually used as a residence.

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

The activities justifying a claimant's occupancy of a mining claim or mill site in the form of the placement of structures and property, must (a) be reasonably incident to mining and 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. A notice of noncompliance issued under the authority of 43 CFR 3715.7-1(c), is properly affirmed when there have been no mining operations or mineral processing for more than 15 years and the buildings on site are extremely dilapidated.

APPEARANCES: John H. Gasper, President, Leadville Corporation, Indianapolis, Indiana.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Leadville Corporation has appealed from a Notice of Noncompliance issued on June 20, 2002, by the Royal Gorge Field Office (Cañon City, Colorado), Bureau of Land Management (BLM), pertaining to use and occupancy of public lands at the Sherman Mine located in Lake County, Colorado. The BLM notice was issued pursuant to provisions of the regulations at 43 CFR Subparts 3715 and 3809. Leadville contends that certain of the regulations cited do not apply and that BLM did not factually establish noncompliance with the others.

The record shows that the Sherman Mine is a high-altitude (12,800 feet), underground lead and silver mine situated in Iowa Gulch along the slope of Mount Sherman. A copy of the initial mining and reclamation permit filed with the State of Colorado Mined Land Reclamation Board (MLRB) in 1976 by Day Mines, Inc., indicates that the affected lands include patented lands owned by Leadville and public lands embraced in unpatented mill site and lode mining claims. An approved mining permit was issued by the MLRB to Day Mines on January 21, 1981. An updated plan of operations was filed with BLM on July 24, 1984, by Hecla Mining Company, successor-in-interest to Day Mines. The plan of operations indicates that the mine “portal and surface facilities are located on unpatented BLM claims.” (1984 Plan of Operations at 2.) Hecla identified the associated mining claims as CMC 69906 (McHigh), CMC 96899 (Captain Fremont), and the Sherman Millsite Nos. 1 through 7 (CMC 117358 through CMC 117364). *Id.* at 1. The plan indicates that a total of 18 acres has been disturbed. *Id.*

A request for a 5-year temporary cessation of mining activities commencing on May 1, 1985, was approved by the Colorado Division of Mined Land Reclamation (CDMLR). A subsequent BLM inspection of the mine on July 24, 1986, confirmed that the mine had been “temporarily” shut down. The report found that the mine had been appropriately reclaimed for purposes of a temporary shutdown and recommended further inquiry regarding the owner’s plans. By letter dated August 5, 1986, BLM informed Hecla that if the mine is closed permanently, then complete reclamation of the mine is required. In a subsequent letter dated September 19, 1986, Hecla informed BLM that the Sherman Mine had been conveyed to Leadville on September 1. Later inspections in 1988 found water erosion problems on the site. A BLM inspection in 1990 conducted jointly with a representative of CDMLR, found “[t]he mine site has deteriorated with extensive erosion. The mine buildings are in disrepair and very poor condition.” The report further stated that “[t]he buildings

need to be stabilized and maintained to insure their future use.” (Field Inspection Form, July 18, 1990.)

After being informed by CDMLR in 1990 that Leadville was seeking a second 5-year temporary cessation of mining operations, BLM expressed concern regarding stabilization of the mine site, noting that “[m]easures to control the erosion and prevent further deterioration of buildings need[] to be implemented as quickly as possible.” (BLM Letter of Oct. 30, 1990, to CDMLR.)

Between 1990 and 2000, BLM periodically inspected the mine, describing continuing problems with erosion and deterioration of buildings on the site. On August 21, 2001, BLM inspectors visited the mine site with a Colorado Division of Minerals and Geology (CDMG) inspector. The ensuing report contained their recommendations “to prevent further degradation.” (BLM Field Inspection Report dated Aug. 24, 2001, at 2.) Recommendations included stabilization or removal of the buildings; removal of all barrels, transformers, boilers, fuel, antifreeze, and any other hazardous/toxic chemicals; development of a reclamation plan to reestablish the original drainage; and permanent closure of the Sherman Mine adit. Id. The report also noted the presence of common variety limestone gravel on the site. Id. The contemporaneous report of the CDMG inspector noted the deterioration of the snow shed and other buildings and erosion at several locations on the site. (CDMG Inspection Report at 2.) The CDMG report recited that contact with the president of Leadville disclosed that “the company persists in trying to either re-capitalize or sell its interests outright.” Id.

Another joint inspection was conducted on June 18, 2002. The report of the CDMG inspector noted possible violations regarding mine plan compliance, processing facilities, erosion sedimentation, and off-site damage. (Inspection Report at 1.) The inspector observed that erosion of the rock dump, ditches, and access road noted in prior reports continues. Id. at 2. He also found that surface water that should be flowing through a culvert beneath the waste rock dump is bypassing the culvert. Id. He noted that “[a]ll buildings need to be either repaired or demolished,” stating that they were in such a state of damage or collapse as to be uninhabitable. Id. Regarding the possible violations cited and required corrective actions, the inspector reiterated that all of the buildings need to be either repaired or demolished and noted that erosion needs to be controlled. Id. at 3. The CDMG inspector also observed that the temporary cessation period had expired and the operator needs to “resume mining or commence reclamation.” Id.

In its June 20 Notice of Noncompliance, BLM informed Leadville that it was “in noncompliance with the 43 CFR 3715 regulations pertaining to use and occupancy under the Mining Laws” and with “performance standards in 43 CFR

3809.420 * * * causing unnecessary and undue degradation of federal lands.” The BLM notice described the following conditions at the mine: “This site has been inactive for approximately 20 years. The mine buildings are either collapsed or in complete disrepair. The site is experiencing severe erosion and the overall site is considered dangerous and unsafe.” (BLM Notice of Noncompliance at 1.) Consequently, BLM ordered Leadville to “1) initiate a full scale mining operation as described in your plan of operations or 2) initiate reclamation according to your plan of operations within 30 days.” *Id.* at 2. Under either option, BLM stipulated that Leadville was to initiate action within 30 days and, depending upon its choice, either have a full-scale mining operation in place or reclamation completed within 6 months. *Id.* at 2-3. The BLM notice also asserted ownership by the United States of the “common variety dolomite waste rock material” on the site, although BLM stated it “would not dispose of this material without a waiver from the mining claimant.” *Id.* at 2.

In its statement of reasons (SOR) for appeal, Leadville notes that 24 regulations were cited by BLM in the Notice of Noncompliance. Appellant asserts that eight of them apply to “occupancy” and argues that it is not engaged in occupancy of the mine site as defined by the regulations. Appellant then contends that 12 of the regulations were cited without any explanation of the alleged factual basis for a violation. Appellant asserts that, under the remaining four regulations, BLM alleged general factual conclusions which provided no basis for establishing noncompliance. Regarding ownership of the common variety mineral material on site, appellant contends that this issue is outside the scope of the Notice of Noncompliance and that title was not actually adjudicated by BLM. (SOR at 9-10.)

The Mining Law of 1872, as amended, permits location of valuable mineral deposits on the public lands of the United States. *See generally* 30 U.S.C. §§ 21-47 (2000). In addition, a mining claimant may occupy certain public lands for “mining or milling purposes.” 30 U.S.C. § 42 (2000). Occupancy of the surface of the public lands for mining purposes is governed in part by more recent legislation and implementing regulations. Thus, 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.” In 1996, the Department promulgated implementing regulations codified at 43 CFR Subpart 3715 to address the unlawful use and occupancy of unpatented public lands under the mining laws for non-mining purposes. 61 FR 37116 (July 16, 1996). Consistent with the Mining Law of 1872 and 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.

[1] Contrary to the contention of Leadville that BLM is wrongfully applying the regulations found in Subpart 3715 because there are no structures or activities relating to residency, we find from the record that the site was being “occupied” at the time of BLM’s decision within the meaning of the regulations. “Occupancy” is defined therein as follows:

Occupancy means full or part-time residence on the public lands. It also means activities that involve residence; the construction, presence, or maintenance of temporary or permanent structures that may be used for such purposes; or the use of a watchman or caretaker for the purpose of monitoring activities. Residence or structures include, but are not limited to, barriers to access, fences, tents, motor homes, trailers, cabins, houses, buildings, and storage of equipment or supplies.

43 CFR 3715.0-5. The cases applying the definition of occupancy under this regulation have not required the presence of actual residential use, as argued by appellant. Thus, the Board has held that:

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, 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.

Terry Hankins, 162 IBLA 198, 213 (2004). Occupancy is defined by the regulation at 43 CFR 3715.0-5 to include the construction, presence, or maintenance of temporary or permanent structures regardless of whether they are actually used as a residence. Donna Friedman, 165 IBLA 313, 321 (2005); Robert W. Gately, 160 IBLA 192, 204 n. 17 (2003); *see* Marietta Corporation, 164 IBLA 360, 362 (2005). Thus, occupancy includes barriers to access, buildings, or storage of equipment or supplies. The record shows multiple permanent structures on the site and clearly establishes occupancy.

[2] The activities justifying a claimant’s occupancy of a mining claim or mill site in the form of the placement of structures and property, must (a) be reasonably incident to mining and 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; Peter Blair, 166 IBLA 120, 125 (2005). The regulations define “reasonably incident” in the same terms as the statutory definition^{1/} to include “prospecting, mining, or processing operations and uses reasonably incident thereto.” 43 CFR 3715.0-5; Marietta Corporation, 164 IBLA at 362. The record fails to support a finding that the occupancy in this case is reasonably related to mining or processing of minerals. The mine has been shut down since 1985. Accordingly, it cannot be said that there are mining operations on the claims to which appellant’s occupancy applies.^{2/} Nor can it be said that appellant’s use of the site “constitute[s] substantially regular work” (43 CFR 3715.2(b)) or that it “involve[s] observable on-the-ground activity that BLM may verify” (43 CFR 3715.2(d)). The long period of inactivity justifies BLM’s finding that appellant’s occupancy did not meet the requirements of 43 CFR 3715.2. See Peter Blair, 166 IBLA at 125 (milling operations abandoned for 10 years); David E. Pierce, 153 IBLA 348, 358 (2000) (2 years without any mining).^{3/}

With respect to occupancies in existence at the time the regulations at Subpart 3715 were promulgated, the relevant regulation provides that such occupancy must meet the regulatory requirements by August 18, 1997. 43 CFR 3715.4(a). When BLM subsequently finds the occupancy to be in noncompliance, it may issue a notice of noncompliance as BLM did in this case, explaining the basis of the noncompliance and the actions which must be taken to correct the noncompliance. Id.; 43 CFR

^{1/} 30 U.S.C. § 612 (2000).

^{2/} Appellant takes issue with the BLM finding that its noncompliance constitutes unnecessary and undue degradation. The regulations provide, however, that unnecessary and undue degradation means those unauthorized uses that are not reasonably incident. 43 CFR 3715.0-5; Donna Friedman, 165 IBLA at 322.

^{3/} Appellant also challenges the BLM finding that it was in noncompliance with the requirements of 43 CFR 3715.2-1(c) and (d). The standards listed in 43 CFR 3715.2-1 represent an additional test for occupancy which is found to be reasonably incident under 43 CFR 3715.2. The requirements of the regulation at 43 CFR 3715.2-1 are in addition to the reasonably incident standard and need not be considered when the occupancy is not reasonably incident under 43 CFR 3715.2. Dan Solecki, 162 IBLA 178, 192 (2004).

3715.7-1(c).^{4/} Enforcement decisions issued by BLM under 43 CFR 3715.7-1 must be supported by a reasoned analysis of the facts in the record sufficient to support the decision. Precious Metals Recovery, Inc., 163 IBLA 332, 339 (2004); Thomas E. Swenson, 156 IBLA 299, 310 (2002). As quoted above, the BLM decision specifically noted that the site at issue has been inactive for 20 years, the buildings on site are either “collapsed or in complete disrepair,” the site is experiencing severe erosion, and overall the site is “dangerous and unsafe.” This summary of the facts which is supported by the record is sufficient to support the BLM finding of noncompliance with the requirements of occupancy under the regulations at 43 CFR 3715.2, as set forth above. We recognize that the BLM decision goes on to cite noncompliance with the requirements of other regulations including 43 CFR 3715.5 and 43 CFR 3809.420 without any further explanation of the factual basis for this finding. While this would be an issue if violation of these other regulatory provisions was required to support the finding of noncompliance, that is not the case here, as the record clearly supports the finding of noncompliance with the requirements of 43 CFR 3715.2 without which occupancy cannot be upheld.

Appellant bears the burden of proving that its occupancy is reasonably incident to mining and, hence, justified under the regulation at 43 CFR 3715.2. Precious Metals Recovery, Inc., 163 IBLA at 339; Thomas E. Swenson, 156 IBLA at 310. Appellant has failed to meet this burden by showing any ongoing operations involving this mine site. The assertion that the structures on site have historic significance and that Lake County is willing to allow them to remain (SOR at 5-6) does not establish that the occupancy of the public lands is in compliance with the requirements of 43 CFR 3715.2.

With respect to the issue of ownership of the common variety mineral material on site, we note that Section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (2000), provides that deposits of common varieties of sand, gravel, building stone, cinders, and certain other materials are not deemed valuable mineral deposits locatable under the mining laws. Accordingly, mining claims located after that date generally establish no right to dispose of deposits of common varieties of building stone or gravel found within the claim. Matthew J. Brainard, 138 IBLA 232, 234 (1997); United States v. Multiple Use, Inc., 120 IBLA 63, 76A (1991). Rather, such common variety mineral materials are subject to sale under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (2000). Matthew J. Brainard, 138 IBLA at 234; United States v. Multiple Use, Inc., 120 IBLA at 76A. The record before us is

^{4/} Pursuant to the latter regulation, the BLM notice ordered appellant to either initiate full-scale mining operations as described in its plan of operations or initiate reclamation according to the plan of operations within 30 days of receipt of the notice.

insufficient to adjudicate title to the mineral material on the claims. We think appellant is correct, however, that BLM has not issued a final decision adjudicating title to the “waste rock” mineral material on site. Thus, although BLM takes the position that this mineral material is the property of the United States and indicates it will consider private disposal of the material to be a trespass, BLM also states it will not dispose of this material without seeking a waiver from the mining claimant. (Notice of Noncompliance at 2.) Accordingly, we find that the issue of title to the mineral material on the site is not properly before us in the absence of a final adjudication by BLM with reasons. Seldovia Native Association, 161 IBLA 279, 286-87 (2004).

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

C. Randall Grant, Jr.
Administrative Judge

I concur:

Christina S. Kalavritinos
Administrative Judge