

LAS VEGAS MINING FACILITY, INC.

IBLA 2002-445

Decided August 25, 2005

Appeal from a Notice of Noncompliance issued by the Las Vegas, Nevada, Field Office, Bureau of Land Management, pertaining to use and occupancy under a notice of intent to conduct mining activities, N-72121.

Affirmed.

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 Surface Resources Act, 30 U.S.C. § 612(a) (2000), bars surface use of an unpatented claim located under the mining laws for any purpose other than prospecting, mining, or processing operations and uses “reasonably incident thereto.” Under 43 CFR 3715.2, in order to justify occupancy of the public lands for more than 14 days in a 90-day period, the activities that are the reason for the occupancy must include all five elements: (a) be reasonably incident to mining or mineral processing 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 by inspection; and (e) use appropriate equipment that is presently operable. Where the record demonstrates that an appellant’s activities do not meet the standards of 43 CFR 3715.2, BLM’s conclusion that an occupancy is not permitted will be affirmed on that ground.

APPEARANCES: Thomas A. Henry, Esq., Sacramento, California, for Las Vegas Mining Facility, Inc.; Mark R. Chatterton, Assistant Field Manager, Las Vegas Field Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Las Vegas Mining Facility, Inc. (LVMF) has appealed from a Notice of Noncompliance issued on July 22, 2002, by the Las Vegas, Nevada, Field Office, Bureau of Land Management (BLM), pertaining to use and occupancy on the ERI Mill Site #1 through #3 claims and associated lode mining claims located near Searchlight, Nevada. This Notice of Noncompliance was issued by BLM because “[t]he activities taking place on these claims are found to not be reasonably incident to prospecting, mining, or processing operations within the meaning of” the relevant statute, 30 U.S.C. § 612(a) (2000), and regulations, 43 CFR Subpart 3715. (Notice of Noncompliance at 3.)

It appears from the record that LVMF is the successor-in-interest to ERI Gold and Silver Corp. (ERI) which filed a notice of intent to conduct activities disturbing 5 acres or less (N54-95-011N) with BLM on March 24, 1995, as required by regulation at 43 CFR 3809.1-3 (1995).^{1/} This notice was filed pursuant to the regulations at 43 CFR Subpart 3809 addressing surface management to prevent unnecessary and undue degradation of Federal lands from operations conducted under the mining laws. The notice designated ERI as the claimant and Walter Dorethy as the operator. Operations were proposed for the period commencing March 1, 1995, and ending March 1, 2000. On September 12, 1996, ERI filed a notice of existing occupancy with BLM under the regulations at 43 CFR Subpart 3715 regarding use and occupancy of the public lands under the mining laws. A report of a subsequent inspection confirmed that “[t]here is occupancy at this site.”

On February 7, 1997, BLM was notified of the transfer of the ERI claims group consisting of “52 unpatented mining claims and 9 unpatented mill sites” to LVMF. Subsequently, by letter dated May 11, 1998, BLM notified LVMF that as a result of an inspection of the site on May 5 it concluded that LVMF was not in compliance with the regulations at Subpart 3809 since the March 1995 notice of intent on file was insufficient. In support, BLM noted, among other deficiencies, that a new notice is required if LVMF is the new operator. On June 25, 1998, a new notice of intent to conduct activities disturbing 5 acres or less was filed by LVMF as claimant, specifying Glenn Frank as the operator. The mill sites and associated mining claims were identified as NMC 270881 through NMC 270888, NMC 292363 through

^{1/} The regulations at 43 CFR Subpart 3809 were revised in 2000 and 2001. Similar requirements are found under the current regulations at 43 CFR 3809.21.

NMC 292378, NMC 349535 through NMC 349558, and NMC 386882 through NMC 386897. The notice stated that: “No new structures or facilities are proposed. Operation will include processing of mine dumps and tailings, sampling and testing * * *, and processing of precious metals.” (Notice of Intent dated June 25, 1998, at 2.)

In a January 6, 2000, letter BLM informed LVMF that it was also required by the regulations at 43 CFR Subpart 3715 to submit information regarding use and occupancy under the mining laws. A letter from LVMF received by BLM on March 3 asserted generally that occupancy was justified by the need to protect on site exposed valuable minerals and operable equipment which is regularly used and not readily portable. A report of BLM inspections occurring on September 27 and October 30, 2000, states that:

There was no observable mining activity taking place at the site during the site visits. There is a lot of equipment on the site. * * * The gate precludes access to the public land behind it. The current level of activity does not justify the types of structures and facilities located on this site.

(Inspection Report at 1.)

On July 11, 2001, and January 10, 2002, BLM again inspected the occupancy site for the purpose of evaluating compliance with the Subpart 3715 regulations. Glenn Frank, the operator representing LVMF, accompanied the inspectors during the first inspection and explained the status of operations to BLM officials. He indicated that the site was used mainly as a research facility and that approximately 150 to 200 tons of material were processed annually from old dumps on the surrounding claims, but that the dumps do not provide sufficient values for a continuous operation. (July 20, 2001, BLM letter to Frank confirming statements made during inspection, at 1.) Inspectors found the watchman’s trailer was unoccupied and no one was currently living on the site. Id. The findings from these inspections were set forth in a Mineral Report, Surface Use Determination, dated June 13, 2002 (Mineral Report).

Buildings, equipment, and other property found on the ERI Mill Site #1 include a shop building (open on one side), storage building, mixing tanks, electrical control building, generator, fuel tanks, and an extensive processing circuit including hoppers, beltlines, crushers, and screens. (Mineral Report at 11.) On the ERI Mill Site #2, BLM’s inspection disclosed an office trailer, lab building, dump truck, backhoe/loader, air compressor, water storage tanks, and various other items of equipment and parts. Id. at 11-12. A mobile home used as a watchman’s trailer was found on the ERI Mill Site #3. Id. Other aspects of occupancy found by BLM

included a gate across the access road on the ERI #39 mining claim and a cable across the road on the ODM #21 mining claim. Id. at 10-11.

In its July 22, 2002, notice of noncompliance, BLM recited the following conclusions resulting from the inspections and the follow-up Mineral Report on surface use determination:

- 1) No milling or mining operations are taking place that would require the level of occupancy which is taking place.
- 2) Activities on the site do not constitute substantially regular work.
- 3) Activities and equipment on the site can not be reasonably calculated to lead to the extraction and beneficiation of minerals.
- 4) Operations do not involve observable on-the-ground activities that BLM may verify under [s]ec. 3715.7.
- 5) The primary use of the claims is for non-mining related occupancy * * *.
- 6) Since no valuable minerals are stockpiled on the mill sites, the present occupancy is beyond that needed to protect exposed, concentrated or otherwise accessible minerals from theft or loss.
- 7) The occupancy is not needed to protect from theft or loss appropriate, operable equipment which is regularly used, is not readily portable and cannot be protected by means other than occupancy * * *.
- 8) The occupancy is not needed to protect the public from appropriate, operable equipment * * *. Equipment on site is beyond that which is necessary for processing 150 - 200 tons of material per year.
- 9) The occupancy is not needed to protect the public from surface uses, workings, or improvements which, if left unattended, create a hazard to public safety * * *.
- 10) The site is not located in an area so isolated or lacking in physical access as to require [residency].
- 11) Having equipment, machinery and other personal property on site that is inoperable or inappropriate for the purposes to which the claim[s] are actually put, and could not be adapted for actual mineral production or mining operations causes unnecessary and undue degradation of the public lands and resources.

(Notice of Noncompliance at 2-3.) Thus, BLM found that the activities on the claims are not “reasonably incident to prospecting, mining, or processing operations within the meaning of 30 U.S.C. [§] 612(a).” Id. at 3. Accordingly, pursuant to 43 CFR 3715.7-1(c), BLM ordered LVMF to remove the gate located on the ERI #39 mining claim and the cable located on the ODM #21 mining claim. (Notice of

Noncompliance at 3.) BLM also ordered removal of “the trailers and other structures, personal items, equipment and trash” from the mill sites. Id.

In its statement of reasons (SOR) for appeal, LVMF argues that the notice of noncompliance is legally deficient for vagueness because BLM failed to specify what action is required and the basis for seeking removal of equipment. Appellant asserts that the decision does not specify the equipment required to be removed, making it impossible for LVMF to comply with BLM’s determination or to effectively contest the notice on appeal. It contends that BLM is obligated to explain how the operator has failed to comply with the regulatory requirements and the actions required to achieve compliance. Further, LVMF argues that even the low level of activity on the claims justifies some level of occupancy. Finally, LVMF contends that the effect of an unusually low price of gold should have been considered when determining the level of occupancy warranted.

In its answer, BLM states that “[f]rom June 1988 to 1995, the primary activity observed by the BLM at the mill was reclamation, maintenance, and repair of equipment.” (BLM Answer at 1.) Thus, BLM asserts that “very limited milling activity has occurred” and that regular milling activity has not been observed at the site. Id. at 2. As evidence of this fact, BLM notes the absence of any piles of tailings and the fact that the settling pond is dry and has been so for a long period of time as evidenced by the fact that it contains shrubs 3 to 4 feet high and 4 to 5 feet wide. Id. With respect to appellant’s assertion that the decision is vague as to the equipment required to be removed from the site, BLM replies that the decision clearly provides that all equipment must be removed from the claims. Id. Further, BLM contends that a “research facility” does not constitute either prospecting, mining, or processing activities leading to the extraction and beneficiation of minerals or substantially regular work. Id. at 3. Similarly, the processing of 150 to 200 tons of material per year is not deemed by BLM to establish substantially regular work. Id. Finally, BLM disputes appellant’s assertion that it should take the temporarily depressed price of gold into account when determining the allowable level of occupancy, noting that the issue is not the validity of the claims under the mining law, but whether the level of use and occupancy is commensurate with the mining or processing operations being conducted. Id.

The Mining Law of 1872, as amended, permits the location of mining claims encompassing 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 and other purposes under the mining laws is governed in part by more recent legislation and implementing regulations. Section 4(a) of the Surface Resources Act of 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 of 1955, these regulations set forth restrictions on the use and occupancy of public lands open to the operation of the mining laws.

[1] The term occupancy is defined broadly under 43 CFR Subpart 3715:

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. 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). Thus, occupancy is defined 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). Further, occupancy includes barriers to access, buildings, or storage of equipment or supplies. As BLM found, the

record in this case clearly establishes occupancy in the form of various buildings, trailers, items of equipment, and parts, as well as a gate and a cable blocking access. None of this is disputed by appellant.

When it finds that compliance with 43 CFR Subpart 3715 is not taking place, BLM will issue a notice of noncompliance requiring corrective action and may also order cessation of the existing occupancy and reclamation of the public lands. Id.; 43 CFR 3715.7-1(c); Peter Blair, 166 IBLA 120, 125 (2005). Appellant asserts that the notice of noncompliance at issue here is defective in that BLM has failed to specify how the operator has failed to comply with the applicable regulations or how the operator may bring itself into compliance with the law. See 43 CFR 3715.7-1(c).

The BLM notice of noncompliance was based on its Mineral Report which analyzed the occupancy of the claims in relation to the mining and milling operations being conducted on the claims. BLM found that limited operations are taking place on the mill site claims, that there are no stockpiles of materials to be processed other than some barrels of mineral materials which have been on the site for “some time,” and that the operator has indicated that the site is mainly used as a research facility with approximately 150 to 200 tons of material processed in a year. (Mineral Report at 13.) Noting the presence of a large quantity of processing equipment on the site and that the equipment is set up in a circuit, BLM concluded that the equipment was more than was needed to process 150 to 200 tons per year and noted that the equipment exhibits few signs of use. Id. Also noted was the presence of a ball mill which is not currently operable and “a number of large mixing tanks * * * which do not appear to function as a part of the current processing circuit.” Id. BLM concluded that the processing of 150 to 200 tons of material per year does not represent substantially regular work or observable on-the-ground activity which BLM can verify and, therefore, such activity does not justify the occupancy which is occurring. Id. at 14.

[2] Under 43 CFR 3715.2, in order to justify occupancy of the public lands for more than 14 days in a 90-day period, the activities that give rise to the occupancy must (a) be reasonably incident to mining; ^{2/} (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 by physically inspecting the site; and (e) use appropriate equipment that is presently operable. In order for occupancy to be permissible under 43 CFR 3715.2, all five of

^{2/} The rule defines “reasonably incident” to include “processing operations and uses reasonably incident thereto,” thus encompassing mill sites. 43 CFR 3715.0-5, citing 30 U.S.C. § 612 (2000); see also Thomas E. Smigel, 156 IBLA 320 (2002) (application of Subpart 3715 regulations to mill sites).

the requirements must be met. See Terry Hankins, 162 IBLA at 213; Dan Solecki, 162 IBLA 178, 192-93 (2004); Robert W. Gately, 160 IBLA at 208-09.^{3/}

When BLM issued its decision implementing 43 CFR Subpart 3715, it was required to support that action by a reasoned analysis of the facts in the record. Precious Metals Recovery, Inc., 163 IBLA 332, 339 (2004); Thomas E. Swenson, 156 IBLA 299, 310 (2002). On appeal, however, an operator bears the burden of proving that its use or occupancy is justified under the standards of both 43 CFR 3715.2 and 3715.2-1. Dan Solecki, 162 IBLA at 191-92.

We find that the analysis in the Mineral Report supports BLM's notice of noncompliance. The activities justifying occupancy must be reasonably incident to mining or milling, but inspection of the claims disclosed no evidence of regular mining or milling operations. There are no stockpiles of minerals on the claims awaiting processing. No tailings from past processing operations are found on the mill sites and the settling pond has clearly not been used for a substantial period of time in view of the 4 to 5 foot shrubs found in the pond. Inspections disclosed that the equipment set up in a processing circuit exhibited few signs of use. Additional pieces of equipment on site were inoperable (ball mill) or showed no signs of use (mixing tanks). A total of 13 different BLM inspections over the interval from March 1995 to January 2002 disclosed no ongoing processing of mineral materials. (Mineral Report at 8-9.) The operator indicated that values found on the associated mining claims were insufficient to support a continuous operation.

We have held that the Surface Resources Act and BLM regulations at 43 CFR 3712 and Subpart 3715 preclude any assertion that the Mining Law vests a mining claimant with "placeholder" status once he or she places milling equipment on the public lands. Precious Metals Recovery, Inc., 163 IBLA at 340-41. Thus, occupancy of a mill site is allowed only when there is a good faith effort to use the mill site for processing operations with a reliable source of ore for processing. Id. Substantial periods of inactivity may justify a finding that an operator'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). Furthermore, the possibility that milling will commence sometime in the future when the economics of such an undertaking become favorable does not justify current use and occupancy of a mill site.

^{3/} The activity must also satisfy one or more of several standards set forth in 43 CFR 3715.2-1. In view of our finding of noncompliance under 43 CFR 3715.2, we need not address compliance with the requirements of 43 CFR 3715.2-1.

Firestone Mining Industries, Inc., 150 IBLA 104, 111 (1999).^{4/} On the record in this case, we find the occupancy was not reasonably incident to any processing operations.^{5/}

Under the regulations at 43 CFR Subpart 3715, the extent of permissible occupancy is determined by the extent of processing activity conducted on a mill site claim. Therefore, the structures and equipment maintained on a mill site must be related to and commensurate with the operations. Jay H. Friel, 159 IBLA 150, 159 (2003); John B. Nelson, 158 IBLA 370, 379 (2003); see David E. Pierce, 153 IBLA at 358. This is consistent with the requirements that occupancy must constitute substantially regular work (43 CFR 3715.2(b)), that it be reasonably calculated to lead to the beneficiation of minerals (43 CFR 3715.2(c)), and that it involve observable on-the-ground activity that BLM may verify under 43 CFR 3715.2(d) and 3715.7 (43 CFR 3715.2(d)). The processing of 150 to 200 tons of material per year is not substantially regular work which would justify appellant's occupancy in the form of the structures and large array of equipment found by BLM on site.^{6/} While the processing of this volume of material would require some equipment on occasion, there is nothing in the record to indicate that it reaches the level of substantially regular work which, under 43 CFR 3715.2, would justify maintaining the structures and equipment on the site for more than 14 days in any 90-day period. Hence, we must reject appellant's contention that the minor activity involved justifies such occupancy. Accordingly, we find the record supports the notice of noncompliance.

Appellant also challenges the adequacy of BLM's notice of noncompliance on the ground that it is improperly vague as to what actions are necessary to achieve compliance. The regulations provide that a notice of noncompliance should describe

^{4/} We must reject appellant's contention that currently depressed market prices or the likelihood that prices will increase in the near future should be considered in evaluating whether its current occupancy is in compliance. Such prices may have a bearing on the validity of a mill site claim, see United States v. Cuneo, 15 IBLA 304, 326-27, 81 I.D. 262, 273 (1974), but do not reflect whether an occupancy of a mill site claim is justified under 43 CFR 3715.2.

^{5/} Rather, as the operator indicated, it appears that the site is being used as a research facility.

^{6/} In order to establish compliance, occupancy in the form of milling equipment must consist of appropriate, presently operable equipment. 43 CFR 3715.2(e). In this case, BLM found that the equipment present exceeded that needed to process 150 to 200 tons of material annually, that many pieces of equipment were not in use at all, and that the processing circuit was not operating.

the actions necessary to correct the noncompliance. 43 CFR 3715.7-1(c)(ii). Contrary to appellant's assertion, we think the notice was quite clear as to the aspects of occupancy required to be removed to establish compliance. Thus, pursuant to 43 CFR 3715.7-1(c), BLM ordered LVMF to remove the gate located on the ERI #39 mining claim and the cable located on the ODM #21 mining claim. (Notice of Noncompliance at 3.) BLM also ordered removal of "the trailers and other structures, personal items, equipment and trash" from the mill sites. *Id.* Since we reject appellant's assertion that the limited level of activity on the claims justifies the continuing storage of any equipment on the claims, we do not find the notice is defective for failure to specify the equipment which must be removed from the claims.

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.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Christina S. Kalavritinos
Administrative Judge