

L. JOEI NETOLICKY

IBLA 2003-131

Decided November 9, 2005

Appeal from a Cessation Order/Notice to Remove Decision regarding mining claim occupancy issued by the Barstow, California, Field Office, Bureau of Land Management. CACA 30239.

Decision set aside and remanded.

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, the activities that are the reason for the occupancy must include 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. In order to be reasonably incident, occupancy must be commensurate with the scope and nature of current mining activities.

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

When BLM is unable to concur after inspection under the regulations at 43 CFR Subpart 3715 that a mining claimant's occupancy is reasonably incident to mining and processing activities, it may issue a cessation order describing the ways in which the occupancy is not reasonably incident. The cessation order must be supported by a reasoned analysis of the facts in the record and, when the record lacks copies of recent inspection reports as well as any analysis of the asserted scope of claimant's operations, the decision is properly set aside and the case remanded for adjudication.

APPEARANCES: L. Joei Netolicky, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

L. Joei Netolicky (appellant) has appealed a January 2, 2003, "Cessation Order/Notice to Remove Decision" issued by the Barstow, California, Field Office, Bureau of Land Management (BLM). The Cessation Order (CO) directed appellant to remove all equipment and structures from appellant's mining claim, referred to as the "Mission Mine" (CAMC 11382), located in sec. 14, T. 2 S., R. 12 E., San Bernardino Base & Meridian, in the Dale Lake area of California. The decision also required appellant to remove and dispose of "all trash and miscellaneous debris" and reclaim waste piles and other disturbed areas to blend in with the surrounding terrain. (CO at 1-2.)

The decision outlined briefly the basis for issuance of the CO. Specifically, BLM approved appellant's plan of operations for the Mission Mine, which included use of a mobile home by a watchman, on February 6, 1995. (CO at 1.) The decision noted that during a recent inspection on December 19, 2002, BLM observed that the mobile home had "deteriorated to such a state as to be uninhabitable, and adjacent buildings appear unusable." Id. Further, BLM found from the inspection that "[m]uch of the equipment is in a state of disrepair and does not appear to be operable." Id. Finally, BLM stated that its "staff has not observed any mining related activity subsequent to the approval of the 1995 plan." Id. The CO asserted that these conditions constituted unnecessary and undue degradation of the public lands in violation of both the surface management regulations at 43 CFR Subpart 3809 and the regulations governing use and occupancy under the mining laws codified at 43 CFR Subpart 3715. (CO at 1.)

The record discloses that BLM had previously warned appellant that by law any occupancy of the claim must be reasonably incident to mining or processing

operations and that “activities must constitute substantially regular work.” (BLM Letter of July 13, 2001). In the letter, BLM stated that “[n]o mining has been noted on this claim for at least seven years.” *Id.* The BLM letter also disclosed that at the time of a July 2001 field examination BLM found access roads to the claim barred by locked cables. Appellant responded in a letter dated September 7, 2001, indicating that a corporation under contract to her had invested over a million dollars on the property and that mining had been conducted approximately in accordance with the tonnage specified in the plan of operations.

On appeal, appellant disputes BLM’s findings regarding the “operational condition” of the mining equipment and buildings, stating that in 1997 the site was active underground and undergoing a process of rehabilitation, which permitted extraction of a bulk sample.<sup>1/</sup> Appellant’s engineer acknowledges that the decrease in gold prices in the last few years has reduced activity on the claim to prospecting. (Jan. 20, 2003, letter at 1.)<sup>2/</sup> Appellant contends the tonnage called for in the plan of operations has been produced from the site each year. *Id.*<sup>3/</sup>

The Mining Law of 1872, as amended, authorizes 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). Occupancy of the surface of the unpatented public lands for mining and related 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 provides that mining claims located under the mining laws of the United States “shall not be used, prior to

---

<sup>1/</sup> Appellant’s appeal is set forth in two documents. The first is a letter dated Jan. 20, 2003, signed by Kim Drossulis, who indicates he is a mining engineer retained by appellant as a development engineer at the site. We note that a person filing an appeal on behalf of an appellant must demonstrate that he is qualified to practice before the Department pursuant to the regulations at 43 CFR 1.3(b). When the person filing an appeal fails to demonstrate that he is qualified to practice before the Department under 43 CFR 1.3(b), the appeal will ordinarily be dismissed. Klamath Siskiyou Wildlands Center, 157 IBLA 332, 336 (2002); Resource Associates of Alaska, 114 IBLA 216, 218-219 (1990). In this case, we need not reach that question since appellant herself filed an appeal within the time allowed.

<sup>2/</sup> Appellant disputes characterization of activities as prospecting, asserting that an operator spent over \$1 million on the Mission Mine from 1997 to 1999. (Letter of Feb. 14, 2003.)

<sup>3/</sup> A similar assertion was made by appellant in the Sept. 7, 2001, letter to BLM responding to the BLM letter of July 13, 2001. The plan of operations (filed June 10, 1994) called for operations totaling less than 500 tons per year with less than 100 tons of ore per year to be removed. (Plan of Operations at 4.)

issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.” 30 U.S.C. § 612(a) (2000). Implementing regulations codified at 43 CFR Subpart 3715 address the unlawful use and occupancy of unpatented public lands under the mining laws for non-mining purposes. 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. These are the regulations which guide our disposition of this appeal.<sup>4/</sup>

[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 actual residential use. 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). It appears from the record that

---

<sup>4/</sup> Occupancy which is not reasonably incidental to prospecting, mining, or processing operations constitutes unnecessary or undue degradation if it has not been authorized under other legal authority. 43 CFR 3715.0-5; see 43 CFR 3809.415(b).

this mining claim is occupied by a residential trailer and a substantial accumulation of equipment (some of which is inoperable) and structures.

[2] Under the relevant regulation, 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; (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. 43 CFR 3715.2. In order for occupancy to be permissible under 43 CFR 3715.2, all five of 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.<sup>5/</sup> Occupancy of public lands pursuant to the Mining Laws must be related to the scope of the operations involved and limited or dormant operations have been held not to justify continuous occupancy in the form of trailers, buildings, or equipment. See Las Vegas Mining Facility, Inc., 166 IBLA 306, 314 (2005) (extent of permissible occupancy is determined by the extent of mining and milling activities conducted); John B. Nelson, 158 IBLA 370, 379 (2003) (permissible occupancy is directly related to the extent of activity conducted on the claim); Thomas E. Smigel, 156 IBLA 320, 324 (2002) (structures and equipment maintained on site must be related to and commensurate with operations).

[3] When BLM determines that all or part of a claimant's use and occupancy is not reasonably incident, it may order a cessation of all or part of the use and occupancy. 43 CFR 3715.4-3(a). A CO will describe the ways in which the use and occupancy are not reasonably incident. 43 CFR 3715.7-1(b)(2)(i). This Board has held that when BLM issues a decision enforcing the occupancy regulations at 43 CFR Subpart 3715, it must ensure the decision is supported 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, 309-310 (2002); Franklin Dorhorfer, 155 IBLA 51, 54 (2001). In this case, BLM has not provided a record sufficient to support the decision under appeal.<sup>6/</sup>

---

<sup>5/</sup> The activity must also satisfy one or more of several standards set forth in 43 CFR 3715.2-1.

<sup>6/</sup> In this respect, BLM disregarded advice provided in an internal BLM memorandum dated Nov. 15, 1996, highlighting the importance of a "well done surface use determination \* \* \* that lays out all the facts," as well as a discussion of the relevant regulations and the application of the regulations to the facts.

The CO requires removal of all equipment and structures, closure of the portal to the underground mine, and reclamation. There is no report, itemization, or other documentation of the structures and equipment found on the public lands. Although the CO states that it is based on BLM inspections on “numerous occasions over the last ten years, most recently on December 19, 2002” (CO at 1), there is no report of the December 2002 inspection in the file.<sup>7/</sup> We find no copy of any BLM inspection report since 1996. The BLM decision fails to address appellant’s assertion that mining has been conducted every year, at least to the extent of the tonnage described in the plan of operations, or to explain why the occupancy is not deemed reasonably incident. Recognizing that mining activities must involve observable on-the-ground activity that BLM may verify upon inspection, 43 CFR 3715.2(d) and 3715.7(a), the record is deficient when no report of that inspection is provided to support the decision. This is particularly true in cases such as this involving an underground mine.

As noted above, the controlling issue is whether the occupancy found on the public lands is commensurate with the mining activities conducted. In Las Vegas Mining Facility, Inc., 166 IBLA at 314, we found that the processing of 150 to 200 tons per year was not such substantially regular work as would justify claimant’s occupancy in the form of the structures and the large array of equipment found on site.<sup>8/</sup> By contrast, in this case we set aside the CO and remand the case to BLM to allow it to provide the factual record and analysis to support its conclusion that the occupancy is not reasonably incident to mining activities. 43 CFR 3715.5.

---

<sup>7/</sup> There are some long-distance photographs showing structures and equipment on site. Without further explanation or analysis, however, these photographs are insufficient to sustain the CO.

<sup>8/</sup> In Las Vegas the record contained a report describing in detail the structures, equipment, and barriers constituting the occupancy as disclosed in the inspection.

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 set aside and remanded to BLM.

---

C. Randall Grant, Jr.  
Administrative Judge

I concur:

---

Will A. Irwin  
Administrative Judge