

CYNTHIA BALSER, ET AL.

IBLA 2004-245

Decided October 24, 2006

Appeal from a Cessation Order issued by the Northern Field Office, Bureau of Land Management, Fairbanks, Alaska, pursuant to 43 CFR Subpart 3715. AKFF-092206.

Set aside and remanded.

1. 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.” A mining claimant has no right to use or occupy the surface of a mining claim unless the activity constituting the reason for the use or occupancy is reasonably incident to mining-related operations. The fact that a mining claimant’s use of a mining claim constitutes “casual use,” however, does not by itself exclude all types of “occupancy” under the terms of 43 CFR Subpart 3715.

2. Mining Claims: Surface Uses--Surface Resources Act: Occupancy--Words and Phrases

“Substantially regular work.” As used in 43 CFR 3715.0-5, the phrase “substantially regular work” means work on, or that substantially and directly benefits, a mineral property including nearby properties under control of the mining claimant. The term also embraces mining activity that is intermittent and/or seasonal in nature.

APPEARANCES: Cynthia Balser, Dennis Balser, and George O. Guinn, Soldotna, Alaska, pro sese.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Cynthia and Dennis Balser and George O'Guinn (hereinafter, appellants or claimants) current owners and operators of the Thurber No. 1, Hobart, and No. 7 Below Mouth of Dick Dale placer mining claims (AKFF-052190, AKFF-052191, and AKFF-055440, respectively), have appealed from an April 26, 2004, Cessation Order (CO) of the Northern Field Office, Alaska, Bureau of Land Management (BLM), ordering them to cease their occupancy of the claims because of noncompliance with the surface occupancy requirements of 43 CFR Subpart 3715.^{1/}

The three mining claims at issue were located on August 17, 1970 (Thurber No. 1 and Hobart), and April 1, 1911 (No. 7 Below Mouth of Dick Dale), on public lands situated in secs. 33 and 34, T. 6 S., R. 32 E., Fairbanks Meridian, Alaska, at the confluence of Dome and O'Brien Creeks, near the Taylor Highway. All three claims are situated within the Fortymile Wild and Scenic River Corridor, which was designated on December 2, 1980, as a component of the National Wild and Scenic Rivers System under the Wild and Scenic Rivers Act, as amended, 16 U.S.C. §§ 1271-1287 (2000). Appellants acquired ownership of the claims by quitclaim deeds dated April 29 and June 2, 1999.

On August 31, 1999, BLM inspected the claims and found various structures, as well as items stored on the claims, but “[n]o evidence of a current mining operation or other activity as allowed under the 1872 Mining Law was observed.” In a letter to claimants dated February 2, 2000, BLM requested that they complete an attached “Worksheet Describing Use and Occupancy Under the General Mining [Law]” (Worksheet) “showing how the items shown on the enclosed site sketch map (8/31/99) are being used by your present or anticipated future mining operations,” and return it before March 15, 2000.

On March 14, 2000, appellants returned the Worksheet explaining that occupancy was necessary in order to clean up debris and other items left by the previous claimants. They asserted that substantial time would be invested removing waste oil and batteries, and securing containment berms around fuel. They stated

^{1/} BLM corrected its April 2004 CO by decision dated May 4, 2004, in order to provide the current address of the Board, for purposes of filing a statement of reasons (SOR) for appeal and proofs of service of the SOR and other documents on the Solicitor and any adverse parties. That decision, which constituted BLM's final decision, was received by appellants on May 7 (the Balsers) and May 11, 2004 (O'Guinn).

that “[a]ssessment and suction dredging on-site is expected to occur for a period of at least 7 hrs daily during season,” approximately May 1 to September 1. (Worksheet at 1.) Further, they stated that the location of the claims in a remote area prevented the daily transportation of equipment back and forth, that in 1999 they suffered a substantial loss of equipment during the season when the claims were left unattended, that substantial amounts of money had been expended to purchase new equipment and to retain an independent geological consultant. They claimed that “[i]t is not economically feasible for owners to secure off-site living accommodations in Eagle or Chicken due to risk of loss of equipment and exposed minerals.” Id. Finally, they asserted that occupancy would allow them to protect their equipment and any exposed minerals from further theft or loss, and to avoid having the equipment pose a hazard to any members of the public who might venture onto the mining site. Id.

BLM completed Environmental Assessment (EA) AK-026-01-022 on January 16, 2001, and issued a finding of no significant impact/decision record on January 25, 2001. By letter dated January 31, 2001, BLM concurred in appellants’ occupancy pursuant to 43 CFR 3715.3-4. BLM expressly “conditioned” such concurrence upon appellants’ compliance with 43 CFR 3715.2, and further stated that the use of structures on their mining claims for activities not conducted under the mining law was not approved. In addition, BLM approved appellants’ March 3, 2000, plan of operations (AKFF-093045), which had been filed under 43 CFR Subpart 3809, thus authorizing them to undertake suction dredging on the claims for a period of 5 years.

BLM issued its April 2004 CO pursuant to 43 CFR 3715.7-1(b), asserting that it had been unable to confirm, based on numerous on-site inspections of the three claims, that appellants had satisfied the regulatory prerequisites for occupancy established by 43 CFR 3715.2. In its CO, BLM stated that based upon its review of the 3809/3715 Compliance Inspection Sheets, it had determined that appellants’ “activity on the mining claims * * * does not meet any level of mining that can be reasonably calculated to lead to the extraction and beneficiation of minerals that would warrant the authorization of [their occupancy on the claims],” that during the inspections it “found no evidence of a mining operation that would support an occupancy under the 3715 regulations,” and that it estimated appellants’ “level of use at or below casual use, and may more accurately be classified as recreational mining or hobby mineral collecting.” (CO at (unnumbered) 1-2.) BLM provided the following description of appellants’ activity on the mining claims during a series of compliance inspections from October 6, 2000, through September 30, 2003:

Every notice of your continued approval for that year’s mining activity was prefaced with a statement that you must stay in compliance with the 3715 Regulations. Casual use is not “in compliance” with the 3715

regulations for occupancy. On your request for occupancy worksheet, dated 9 March 2000, you stated that occupancy was necessary for the camp cleanup, which has not been completed to date. You also asked for occupancy to safeguard your investment in equipment and open minerals. At this time, there is no equipment considered hazardous from which the public must be protected. The site is left unattended for long periods with only simple locks to secure the buildings. The inspectors have not seen any evidence of exposed minerals that are in jeopardy of being removed. As far as being in an isolated area, the subject mining claims are located less than a mile from the Taylor Highway, which provides all weather road access to the claims. The mine access road from the Taylor Highway to the mine is also an all weather road during the summer months.

(CO at 3.) BLM stated that the claimants had failed to respond to its requests, contained in the Compliance Inspection Sheets that they contact BLM “and/or submit evidence that the activity on the claim[s] is reasonably incident and constitutes substantial regular work as required by the regulations.” *Id.* at 2.

During its most recent inspection on September 30, 2003, BLM documented the presence of an 18- by 26-foot log cabin, which pre-dates appellants’ ownership of the claims. BLM states that the cabin was likely to have been erected in the 1970s, but in any event no more than 50 years ago, given its depiction on a 1974 U.S. Geological Survey topographic map and the fact that “no features or artifacts” are deemed to be older than 50 years. (Conversation Record of Randy S. Griffith, BLM Natural Resources Specialist, dated Apr. 23, 2004.) Also present on the claims were two storage sheds, an outhouse, a trailer, a camper shell, a propane tank, metal drums, debris, and other personal property. Stating that “using the surface of a federal mining claim for storage, casual use, hobby mineral collecting, or recreational purposes is not appropriate under the General Mining laws and regulations,” BLM required appellants to initiate efforts to remove the cabin and all other structures, as well as personal property, from the subject claims within 30 days of receipt of the CO, and to complete such activity by August 1, 2004. (CO at 4.) The structures and personal property were depicted on a “field examination sketch map and photographs.”^{2/} *Id.* Appellants were initially required to submit a schedule for dismantling and/or removing all structures and personal property, and a plan for reclaiming all disturbed areas of the claims, including returning the areas to their “approximate * * * pre-disturbance shape or slope” and redistributing any “remaining topsoil/organic material.” *Id.* BLM noted that it might reevaluate the August 1

^{2/} We note that the sketch map attached to BLM’s April 2004 CO was prepared as part of an Oct. 6, 2000, inspection, and the photographs were taken in conjunction with an Aug. 31, 1999, inspection.

deadline following receipt of the reclamation plan, based on any “additional information” provided by appellants. Id. at 5.

Appellants appealed from and petitioned for a stay of BLM’s CO, and by order dated July 26, 2004, the Board granted their petition for stay.

Appellants filed a Petition for Stay/Partial Statement of Points on Appeal (Petition/Partial SOR) and a Statement of Points/Reasons on Appeal (SOR) in which they vigorously dispute BLM’s presentation of the facts. They state that as of September 30, 2003, the date of BLM’s last compliance inspection, they had “completed all requested clean-up in a timely manner,” and that they had moved the outhouse, had removed “old debris from the prior claimholder,” and had complied with “all other requests.” They assert that “upon removal of debris from the claims to a BLM approved transfer site, BLM returned the debris back to the mining location and called appellants to inform them that they had littered and the debris would be returned to the mining site.” (Petition/Partial SOR at 3.) They note that, even after BLM returned the debris to the existing sites, they “once again” moved the debris to the approved transfer site. Id. at 2. As to the “BLM approved transfer site,” appellants note that “BLM admitted to hauling debris to this site from various locations throughout the 40-Mile Mining District,” and that “[a]s evidenced by the attached GPS [General Positioning System] coordinates and overlays with BLM’s own topographical map, the transfer site created by BLM is clearly located on appellants’ claim.” Id. at 4 (footnote omitted); see Exs. 5-7.

Appellants contend that BLM’s CO fails to take into account their attempts to keep BLM informed of ongoing efforts to comply with BLM directives concerning use and occupancy of the mining claims. (Petition/Partial SOR at 2.) They further dispute the assertion in BLM’s CO that appellants failed to contact BLM’s Tok Field Office to arrange a site examination, stating that Cynthia Balsler, on two separate occasions, contacted BLM and “was at the Tok Field Office in person on April 21, 2003, and was unable to meet with Mr. [Randy] Griffith.” Id. at 5. They also note that they are in the process of “obtaining affidavits from two individuals who worked on site during the 2003 mining season,” and will later submit these affidavits, presumably for the purpose of demonstrating that their occupancy of the claims was justified by ongoing mining activity on the claims. Id.

Regarding the cabin in question, appellants point out that BLM’s plats refer to it as a “Shelter Cabin” and claim that “local residents in the area use the cabin as a survival shelter in times of need.” They state that they “are in the process of attempting to document the age of the cabin for determination regarding historical site preservation.” Id. at 5-6.

In their subsequently filed SOR, appellants challenge BLM's notion that casual use activity can not justify an occupancy. They contend that 43 CFR 3515.0-5 "does not state that if a claimant is working at casual use level that they may not have a valid occupancy," and that 43 CFR 3809.5, which defines "casual use," "does not say that occupancy may not occur properly on a valid mining claim if the owner is involved in regular work that will result in production of minerals." (SOR at 2, citing Thomas E. Swenson, 156 IBLA 299, 308-09 (2002).) Further, they argue that under 43 CFR 3515.0-5 "a valid occupancy in and of itself raises the level of surface disturbance above the casual use level and that a plan of operations or notice level will be required if a claim owner wishes to exercise his or her rights to occupy their claim." (SOR at 2.) They state that they have "submitted a plan of operation at BLM's insistence (Plan No. FF093045)." Id. They contend that they "operate a 4" suction dredge every year in the streambed," and "have excavated a portion of a hilltop to exposed rock which is observable to anyone who hikes the hilltop." Id. at 3. They assert that they "do not use the claims for any other purpose than prospecting and mining operations and all use is incident thereto." Id. Finally, they claim that two other miners had been "given a reprieve and told that BLM would do an on-site inspection with the miners to direct them to the observable mining activity," and that BLM had denied them "the same opportunity afforded the other two miners in the same situation," in violation of their "rights to equal opportunity under the Constitution of the United States." Id. at 4-5.

[1] Our evaluation of the disputed CO turns on whether appellants' use and occupancy of the mining claims is reasonably incident to their prospecting, mining, or processing operations under 43 CFR Subpart 3715. 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 at 43 CFR Subpart 3715 implement this statutory provision by addressing the unlawful use and occupancy of unpatented mining claims for non-mining purposes. See 61 FR 37115, 37117 (July 16, 1996). These regulations restrict use and occupancy of public lands open to operation of the mining laws to prospecting, exploration, mining, or processing operations and uses reasonably incident thereto. They establish procedures for beginning occupancy, standards for reasonably incident use or occupancy or prohibited acts, and procedures for inspection and enforcement and for managing existing uses and occupancies. 61 FR 37116 (July 16, 1996); see, e.g., Pilot Plant, Inc., 168 IBLA 201, 214 (2006), and cases cited. Further, the regulations clarify that unauthorized uses and occupancies on public lands are illegal uses that ipso facto constitute unnecessary or undue degradation of public lands, which the Secretary of the Interior is mandated by law to take any action necessary to prevent. 61 FR at 37117-18; 43 CFR 3715.0-5; see 43 CFR 1732(b) (2000);

Combined Metals Reduction Co., 170 IBLA 56, 72 (2006); Pilot Plant, Inc., 168 IBLA at 214, and cases cited.

The term “occupancy” is defined broadly at 43 CFR 3715.0-5 to mean “full or part-time residence on the public lands,” as well as

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.

Actual residence is not required under 43 CFR 3715.0-5; instead, occupancy encompasses the construction, presence, or maintenance of temporary or permanent structures, regardless of whether they are actually used as a residence. See, e.g., Pilot Plant, Inc., 168 IBLA at 214, and cases cited.

As noted, BLM issued the contested CO under 43 CFR 3715.7-1(b)(1)(I), which provides: “BLM may order a temporary or permanent cessation of all or any part of your use or occupancy if * * * [a]ll or part of your use or occupancy is not reasonably incident but does not endanger health, safety or the environment, to the extent it is not reasonably incident.” In evaluating the disputed CO, we need only address whether appellants’ activities are “reasonably incident” to mining-related activity, cognizant that failure to meet this criterion, by itself, renders their occupancy impermissible.^{3/} The regulations define “reasonably incident” as those actions

^{3/} The activities justifying an occupancy of a mining claim for more than 14 calendar days in any 90-day period must (a) be “reasonably incident” to mining-related activity; (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 verifiable by BLM; and (e) use appropriate equipment that is presently operable. 43 CFR 3715.2. To be permissible under 43 CFR 3715.2, an occupancy must meet all five of those requirements. E.g., Combined Metals Reduction Co., 170 IBLA at 74 n.10; Pilot Plant, Inc., 168 IBLA at 215, and cases cited; Las Vegas Mining Facility, Inc., 166 IBLA 306, 312-13 (2005); Betty Dungey, 165 IBLA 1, 8 (2005); Dan Solecki, 162 IBLA 178, 180 (2004).

In addition to meeting the requirements of 43 CFR 3715.2, a claimant’s occupancy must involve one or more of the elements set forth in 43 CFR 3715.2-1(a) through (e): (a) protecting exposed, concentrated or otherwise accessible minerals from loss or theft; (b) protecting appropriate, regularly used, and not readily portable operable equipment from theft or loss; (c) protecting the public from such equipment
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involving the “statutory standard” of “prospecting, mining, or processing operations and uses reasonably incident thereto.” 43 CFR 3715.0-5, citing 30 U.S.C. § 612 (2000). The term “includes those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit * * * and reasonably related activities.” Id. Any occupancy proposed by a mining claimant therefore must be reasonably related to actual activities on the claims involving prospecting, mining, or processing operations, and the extent of any permissible occupancy directly relates to the magnitude of the mining and related activities conducted on the claim. See, e.g., Combined Metals Reduction Co., 170 IBLA at 74; Pilot Plant, Inc., 168 IBLA at 217; Dan Solecki, 162 IBLA at 180; Karen V. Clausen, 161 IBLA 168, 177 (2004).

In reviewing this record, we note that appellants reported to BLM on January 16, 2002, that the work performed on their claims, at the end of the 2001 assessment year and the beginning of the 2002 assessment year, consisted of “exploration, mineral extraction [and] drilling of new [and] existing test holes to facilitate asses[s]ment of ore samples,” and was “re[a]sonably regular work calculated to lead to the discovery of additional * * * minerals.” (Letter to BLM, dated Jan. 15, 2002, at 1.) Affidavits of assessment work filed by appellants with BLM for the 1999 through 2003 assessment years indicate that they have been engaged in some level of suction dredging from the creek beds and obtaining material from new or existing test holes for mineral testing purposes. Although BLM’s inspections disclosed little or no evidence of such dredging activity, we note that BLM reported, at the time of its August 7, 2001, inspection, that the area along the creeks was subject to being washed out during high water flows, which may have obscured mining activity along the creeks.

In granting appellants’ petition for stay, we observed that BLM had yet to establish conclusively, as a matter of fact, that appellants had not engaged in suction dredging and mineral exploration associated with test holes. We stated: “At this preliminary stage, appellants should be permitted to provide evidence that they have, in fact, engaged in suction dredging and mineral exploration associated with test holes, and specifying the duration and extent of such activity.” (Order, IBLA 2004-245 (July 26, 2004), at 4.) Id. Moreover, we left open the question

^{3/} (...continued)

which, if unattended, creates a hazard to public safety; (d) protecting the public from surface uses, workings, or improvements which, if unattended, create a hazard to public safety; and/or (e) being located in an area so isolated or lacking in physical access as to require the claimant, operator, or workers to remain on the site in order to work a customary full 8-hour shift. See, e.e., Combined Metals Reduction Co., 170 IBLA at 74 n.10; Pilot Plant, Inc., 168 IBLA at 215; Dan Solecki, 162 IBLA at 180.

“whether such activity, if it exists, would qualify to support occupancy under 43 CFR 3715.2.” Id. We observed that “BLM is clearly of the opinion that suction dredging constitutes ‘casual use,’ as defined under the surface management regulations, 43 CFR Subpart 3809, and that such use does not qualify as bona fide mining activity under 43 CFR 3715.2.” Id.; see CO at 3 (“Casual use is not ‘in compliance’ with the [43 CFR Subpart] 3715 regulations for occupancy), 4 (“[U]sing the surface of a Federal mining claim for * * * casual use * * * is not appropriate under the General Mining Laws”); Letter to appellants from BLM dated Dec. 11, 2001, at 1 (“[P]ossibly minimal impact suction dredge testing [is] not what the regulations require under 43 CFR 3715.2”); and EA at 1 (“Because the level of occupancy that can be authorized under [43 CFR Subpart] 3715 is related to the level of mining activity, the owners are being forced into some level of activity above casual use under the [43 CFR Subpart] 3809 regulations”).

We remain of the opinion that “[g]enerally speaking, casual use is that activity which, if undertaken on a mining claim, does not require the claimant to file and/or obtain BLM’s approval of a notice or plan of operations under 43 CFR Subpart 3809,” id. at 4-5; that “suction dredging may fall into a special category of mining activity which requires a notice or plan of operations, even where it constitutes casual use”; and additionally, that “suction dredging causing a surface disturbance greater than casual use in a component of the National Wild and Scenic Rivers System may require a plan of operations.” Id. at 5 n.5; see 43 CFR 3809.10, 3809.11, and 3809.21. Moreover, we again state that we find no evidence that the Department intended to preclude any form of casual use from qualifying under 43 CFR 3715.2. As we stated in Dan Solecki, 162 IBLA at 190: “BLM’s conclusion that because appellants’ activities are ‘casual use’ operations, they cannot comply with 43 CFR 3715.2, is simply not sustained by Subpart 3715.” See also Thomas E. Swenson, 156 IBLA at 308-09.

Appellants assert that the facts and circumstances of their appeal are similar to those in Swenson, and that “BLM should not now be allowed to, in essence, overturn the Swenson decision, by way of this appeal.” (SOR at 4.) Upon review of the record, we agree with appellants that the Board’s analysis in Swenson guides, if not controls, our analysis of the casual use question raised in this appeal. In Swenson, the Board found that “BLM’s decision followed from an assumption that casual use cannot justify an occupancy.” 156 IBLA at 308. The Board rejected BLM’s conclusion that “a claimant who engages in casual use activity that is exempt from the requirement to file a mining plan of operations under 43 CFR Subpart 3809.1-4 cannot reasonably justify any occupancy under 43 CFR 3715.2.” Id. BLM’s apparent assumption that because appellants’ dredging and other activity falls into the category of “casual use” it cannot justify their occupancy under 43 CFR 3715.2 is dispelled by the following analysis:

We find no language in Subpart 3715 to support this conclusion. To the contrary, Table 2 in 43 CFR 3715.3, expressly acknowledges that BLM will consider a proposed occupancy based on “casual use.” It states: “If you are proposing a use that would involve occupancy * * * [a]nd is a “casual use” under 43 CFR Subpart 3809.1-2 or does not require a plan of operations under 43 CFR 3802.1-2 and Subpart 3809.1-4 or a notice under 43 CFR 3809.1-3, * * * [y]ou are subject to the consultation provisions of this subpart and must submit the materials required by § 3715.3-2 to BLM.” The Preamble to 43 CFR 3715.3 likewise acknowledges that casual use may involve an occupancy: “This section of the final rule is organized as a table that lists the requirements you must follow to consult with BLM regarding a proposed occupancy before occupancy may begin in connection with * * * casual use activities.” 61 FR 37121 (July 16, 1996). Likewise, this Board expressly acknowledged the ability of a claimant to justify occupancy based on casual use in David J. Flaker, 147 IBLA 161, 165-66 (1999), when it vacated a notice of non-compliance and required adjudication under the Subpart 3715 rules.

156 IBLA at 308-09. In this case, appellants submitted a plan of operations, which BLM approved for 5 years, covering the suction dredging that BLM asserts is casual use activity. On this record, we conclude that BLM’s analysis and conclusion is without legal or factual basis.

[2] In addition, the record suggests that BLM issued the CO because appellants’ use is limited to short periods on a seasonal basis. In Swenson, the Board addressed this issue, stating:

[I]n promulgating 43 CFR Subpart 3715, BLM also considered this issue. The definition of “substantially regular work” provides that “[t]he term also includes a seasonal, but recurring, work program.” 43 CFR 3715.0-5. With respect to whether and to what degree intermittent mining-related activity on nearby properties may justify an occupancy, the Preamble to the regulations states:

Several comments stated that the use of the phrase “substantially regular and steady work” in proposed § 3715.2 could be construed to prohibit occupancies associated with weekend or intermittent mining activities that would otherwise be legitimate under the general mining law. BLM has changed the phrase “substantially regular and steady work” to “substantially regular work” and included a definition in this section of the final rule.

“Substantially regular work” * * * encompasses a seasonal, but recurring, work program. This provision does not prohibit weekend or intermittent mining activities. Such activities, if carried out in good faith, may warrant occupancy under certain circumstances.

61 FR 37120 (July 16, 1996) (emphasis added.)

156 IBLA at 309. There is no indication in the record that appellants’ claimed seasonal, intermittent activities are not carried out in good faith. Such activities may warrant occupancy as reasonably incident to mining, provided, as noted supra, the other standards of 43 CFR 3715.2 and 3715.2-1 are met.

Appellants bear the burden of proving that their occupancy is reasonably incident to prospecting, mining, or processing operations and is justified under 43 CFR Subpart 3715 and that BLM’s decision is erroneous. See, e.g., Pilot Plant, Inc., 168 IBLA at 216; Thomas E. Swenson, 156 IBLA at 310. By contrast, BLM must ensure that its decisions are supported by a reasoned analysis of facts in the record. Id.; see also Franklyn Dorhofer, 155 IBLA 51, 54 (2001). Under this standard, we conclude that BLM’s notion that appellants’ activity falls within the rubric of “casual use” and thus cannot justify their occupancy under 43 CFR 3715.2 renders the CO unsupportable on the record. Because the question remains as to whether their activities are reasonably incident to mining activity under 43 CFR 3715.0-5, we cannot say that BLM was justified in issuing the CO under 43 CFR 3715.7-1(b)(1)(I). See Howard Sadlier, 156 IBLA 311, 318-19 (2002). As in Swenson, however, we do not find, as a matter of fact, that appellants’ occupancy meets the requirements of 43 CFR 3715.2. The record suggests that appellants’ intermittent mining activities, carried out in good faith, may warrant occupancy of the claims. Again, “[w]e leave it to BLM to consider whether [appellants’] actual occupancy is based on sufficient intermittent good faith mining activity to warrant occupancy under the Subpart 3715 regulations.” 156 IBLA at 310. We set aside and remand the matter to BLM for action consistent with Swenson and Solecki.^{4/}

^{4/} In the absence of a sustainable finding that appellants’ occupancy is unauthorized under 43 CFR 3715.2, it is premature for us to determine whether or not the cabin is reasonably incident to their qualifying mining activity on the claims, or otherwise justified under 43 CFR Subpart 3715. It may be that the cabin, which constitutes a permanent structure, is not permitted by such regulations. BLM raised, in the disputed CO, the issue of appellants’ compliance with 43 CFR 3715.5(d), which precludes a claimant from “plac[ing] [a] permanent structure[] on the public lands” when he or she is engaged in “prospecting or exploration activities involv[ing] only surface activities.” In addition, BLM has, at times, questioned the justification, under
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Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we set aside the disputed CO and remand this case for action consistent herewith.

James F. Roberts
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge

^{4/} (...continued)

the General Mining Laws, for a cabin on the claims. We note, however, that it seems clear that the cabin predates appellants' ownership of, and involvement with, the claims at issue here. Thus, they cannot be said to have "place[d]" the cabin on the claims, in violation of 43 CFR 3715.5(d).

There is considerable question whether appellants, whose occupancy (and, thus, use and maintenance) of the cabin may be barred, may properly be required, under 43 CFR Subpart 3715, to remove the cabin, under any circumstances. See Betty Dungey, 165 IBLA at 15 ("We follow the holding in Marietta Corp. [, 164 IBLA 360 (2005),] to conclude that the pronouns 'you' and 'your' in 43 CFR 3715.7-1 include persons who acquire property on a mining claim or mill site by transfer, contract, agreement, or exercise or operation of law, and who exercise or assert dominion and control over that property."); Marietta Corp., 164 IBLA at 376 n.10 ("Whether an occupant can be required to remove abandoned property by virtue of its interest in a mining claim is not before us and will be considered on a case-by-case basis."); Karen V. Clausen, 161 IBLA at 179-80 ("In this case, it is unclear whether Clausen owns the building or buildings constructed approximately 70 years ago on the mining claim. * * * BLM must also determine the proper application of the regulations at 43 CFR Subpart 3715 in light of our decision in McColl and in conjunction with BLM trespass regulations."); James R. McColl, 159 IBLA 164, 181 (2003) ("[I]t seems to us that a person consulting the regulations to ascertain his or her responsibilities before initiating an occupancy would not conclude that any use of abandoned mining and milling facilities * * * renders them liable for removal of such facilities and reclamation of the acreage disturbed by predecessors.").