



CARL G. OBERG

173 IBLA 143

Decided December 10, 2007



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

CARL G. OBERG

IBLA 2007-16

Decided December 10, 2007

Appeal from a decision of the Bakersfield, California, Field Office, Bureau of Land Management, requiring removal of a cabin and other materials within 90 days from the former Flora D mining claim. CAMC 278868.

Affirmed in part; set aside and remanded in part.

1. Exchanges of Land: Generally--Mining Claims: Surface Uses--Surface Resources Act: Occupancy--Torts: Trespass--Trespass: Generally

A proposal to exchange land is a relevant factor to be considered in resolving an unauthorized occupancy that involves a structure, and a determination by BLM that an exchange would not be in the public interest must be supported by a rational basis. Where BLM has required removal of a structure despite ongoing exchange negotiations, but there is nothing in the record to support BLM's determination that an exchange would not be in the public interest, the Board will set aside that decision so that BLM may complete assessment of the proposed exchange, make a determination regarding whether the exchange would or would not be in the public interest, and include its assessment as a part of the record supporting any subsequent decision.

APPEARANCES: Carl G. Oberg, *pro se*; Nancy S. Zahedi, Assistant Regional Solicitor, Office of the Regional Solicitor, Southwest Region, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Carl G. Oberg appeals from an August 15, 2006, decision of the Bakersfield, California, Field Office, Bureau of Land Management (BLM), requiring removal of a cabin and other materials within 90 days from the former Flora D mining claim,

CAMC 278868.¹ BLM found that the cabin was an unauthorized structure and that there had been no observable mining activity for over 12 years.

Oberg does not dispute these findings. Rather, the record shows that BLM has been considering a land exchange for some years to resolve appellant's unlawful occupancy. BLM determined that an exchange would not be in the public interest but did not explain why it had reached this conclusion. Oberg objects to it and notes that, even after the decision was rendered, BLM continued to consider a possible exchange. Because BLM did not provide a rational basis to support its conclusion that an exchange would not be in the public interest, we set aside BLM's decision and remand the case so that BLM may reassess the proposed exchange, make a determination regarding whether the exchange would or would not be in the public interest, and make that assessment a part of the record supporting its decision, consistent with our decisions in *Norman Reid*, 163 IBLA 324, 329 (2004), and *Clive Kincaid*, 111 IBLA 224, 234 (1989).

Background

The history of this dispute may be drawn from BLM's case file, Oberg's Statement of Reasons (SOR), BLM's Answer, Oberg's Rebuttal, and an Additional Statement we received from Oberg on October 17, 2007. According to a Surface Use Report prepared by BLM in 1997, the Flora D was one of several mining claims associated with the Flora Mine where mineral development occurred before 1950. Surface Use Report at 3. The first Flora D claim, CAMC 60450, was located in 1947 and remained in effect until it was declared abandoned and void in a 1979 BLM decision that was affirmed by this Board.² *Carl Oberg*, 46 IBLA 319, 321 (1980). The parties agree that a cabin was erected on the claim in the 1940s. SOR at 1; BLM Answer at 2.

Oberg had a cabin on an adjacent claim that was found to be nonmineral in character in 1964. Oberg received a patent that year for 2.5 acres including the cabin under the Mining Claims Occupancy Act, 30 U.S.C. §§ 701-709 (2000). 1997 Surface Use Report at 9. After the abandonment of the first Flora D claim, Oberg located another Flora D claim, CAMC 76488, on November 8, 1980.

The cabin at issue in this case has been used as a residence by Nicolas Rogers, who had located the French Doctor and Smoky claims, which partly overlap the

¹ The serial register shows that the claim was declared forfeited by a decision issued on Aug. 12, 2003.

² The 1997 Surface Use Report asserts that Carl Oberg located the claim in 1947. By contrast, Oberg claims to have purchased the claim and the cabin on it in 1963.

Flora D. Surface Report at 2. Rogers lived in the cabin at issue and served as a caretaker for Oberg's cabin on the patented land. As required by 43 C.F.R. § 3715.4(b), Carl and Marlene Oberg filed an Existing Occupancy Notification with BLM on August 21, 1996.³ On June 3, 1997, BLM sent the Obergs a letter stating that their occupancy of the claim would be inspected under the criteria of 43 C.F.R. Part 3715, and explaining that occupancy of the mining claim could only be justified by use reasonably incident to mining.⁴ The letter also advised the Obergs that, if there were no mining activity and no plans to begin mining, "it may be possible to obtain title to the land through a land exchange process . . . at fair market value," and invited them to express any interest in obtaining the land by exchange to BLM's Realty Officer. By letter dated June 6, 1997, the Obergs expressed interest in an exchange.

After inspecting the claim on August 21, 1997, BLM prepared its Surface Use Report. The report identified a cabin and a warehouse and listed various items of equipment, supplies, and vehicles. *Id.* at 4-7. The report found that the occupancy was not reasonably incident to mining. The Report contains two page 3s, identical in all respects, except in their separate recommendations. On the first page 3, the Report noted that the Obergs indicated an interest in resolving the occupancy issue with a land exchange, and recommended that the exchange be consummated; if not, the report recommended that an order to cease occupancy be issued. The second page 3 recommends a temporary suspension order to cease occupancy.

By letter dated December 18, 1998, BLM notified the Obergs that the use of land for non-mining purposes was unauthorized, but that an "administrative action [for their acquisition of the site where the cabin is located] is occurring. However, if for any reason the land is not exchanged, a notice of noncompliance or an order for you to suspend or cease your occupancy" would be issued.⁵

The record indicates that 4 years later, the exchange was still in progress and involved BLM, the Obergs, and a third party. *See* Rebuttal and attachments.

³ This notice referred to the Obergs' mining notice 032649 that BLM had approved in 1993.

⁴ Under 43 C.F.R. § 3715.2, activities justifying occupancy of a mining claim must (a) be "reasonably incident" to mining 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 that BLM may verify; and (e) use appropriate equipment that is presently operable. *See Robert B. Wineland*, 169 IBLA 212, 220-21 (2006).

⁵ Oberg asserts that at every meeting with BLM after that time, he was told not to worry about compliance. Rebuttal at 1. We cannot verify this assertion.

Conservation Partners, Inc. (CPI), sent a letter to the Obergers which presumed that CPI would be acquiring by exchange the site where the Obergers' cabin was located, after which the Obergers would purchase it. Oberg has attached a 2002 agreement between CPI and the Obergers, by which the Obergers deposited money into an escrow account for the purchase of the exchanged land.

The Obergers failed to file the annual maintenance fee for the 2001 fee year, and the mining claim was declared forfeited on June 27, 2001. Oberg located a new Flora D claim on July 19, 2001; it was assigned serial number CAMC 278868. The Obergers' desire to acquire the claim with its structures became more urgent after the cabin on their patented land burned in 2002 or 2003. *See* Additional Statement.⁶ Nonetheless, BLM declared the Flora D claim forfeited by a decision issued on August 12, 2003, for their failure to submit required maintenance fees. Oberg claims that he allowed the claim to lapse "because the BLM offered to sell [him] the land and the land was in escrow." SOR at 1. He concedes that this was a mistake. *Id.*

Although a land exchange between BLM and a third party later occurred, it did not involve the Flora D mining claim. According to BLM, the Flora D claim and other parcels were excluded from the exchange in order to equalize values for the parcels involved in the completed exchange. Answer at 4.

As stated above, BLM's August 15, 2006, decision found that appellants' occupancy of the former claim was unauthorized and required removal of the cabin and other items within 90 days, concluding without explanation that an exchange would not be in the public interest. In the absence of any objection to the occupancy finding, we affirm BLM's finding that the occupancy was unlawful.

In his SOR, Oberg recognizes that he no longer has a mining claim and that BLM's decision is in compliance with applicable regulations and land use plans.⁷ He nevertheless points to the historic nature of the property and his efforts to work with BLM to develop options for preserving the site. He notes that the mine appears on tourist maps for the area and, in fact, submits a map with such notation. The record documents that Oberg proposed to exchange his 2.5-acre patented parcel for 2.5 acres of land on which the cabin is located, and that BLM employees have worked with Oberg, since the 2006 decision, to "determine an acceptable plot to exchange."

⁶ Although the Additional Statement refers to a fire in 2002, an attached copy of a letter to BLM refers to 2003 as the year of the fire that destroyed the cabin.

⁷ Although Oberg requested a stay when he filed his SOR, he did not file a petition for a stay together with the Notice of Appeal as required by 43 C.F.R. § 4.21(a)(2). Nevertheless, BLM in its Answer has stated its agreement to allow the cabin and its caretaker to remain until the appeal is resolved. Answer at 5.

Apparently, a 3-acre plot located within the former Flora D mining claim and containing the Oberg cabin is under consideration for exchange. June 7, 2007, letter from Oberg to BLM. Oberg has documented a clean-up effort on the site.

BLM's Answer refers to an April 2003 Cultural Resource Inventory Report which determined that none of the items inventoried on the site are of historic value for preservation.⁸ Answer at 4-5. Notwithstanding the finding in its decision that an exchange would not be in the public interest, BLM acknowledges that it has not foreclosed the possibility of pursuing a land exchange to resolve appellants' unauthorized occupancy, but states that an exchange can take 5 or more years to complete. Answer at 5 n.1.

In his Rebuttal, Oberg states that BLM has offered to pursue an exchange but would require him to drop his appeal. If he drops his appeal, however, Oberg fears that he would have no recourse if BLM decides against disposing of the land. The purpose of his appeal, he explains, is to prevent the destruction of the site until the options for its preservation have been assessed. He asserts that the cabin should be removed only if the exchange does not occur and if he is otherwise unable to incorporate it into an operation that complies with 43 C.F.R. Part 3715. We agree that the record does not yet support BLM's order compelling removal of the cabin. *See Robert B. Wineland*, 169 IBLA at 212 (affirming BLM's notice of non-compliance which required consultation with archaeologist).

[1] This Board has previously stated that a proposal to exchange land is a relevant factor to be considered in resolving an unauthorized occupancy such as a trespass that involves a structure. *E.g.*, *Norman Reid*, 163 IBLA at 329; *see Clive Kincaid*, 111 IBLA at 231-34; *see also BLM Manual*, BLM Handbook H-9232-1 "Realty Trespass Abatement," V.H. (Rel. 9-300, 8/14/89). In *Kincaid*, the appellant did not dispute a finding of trespass and his appeal was focused on BLM's determination that

⁸ We do not consider the April 2003 Report as an adequate rebuttal to appellants' arguments as to the historic value of the property. Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (2000), requires that the head of any Federal agency having authority to license any undertaking take into account the effect of the undertaking on any property eligible for inclusion on the National Register of Historic Places. *See* 36 C.F.R. § 60.4 (treatment of "reconstructed historic buildings"). Inasmuch as the cabin is more than 50 years old, it is not clear why the Report did not at least mention it for the purposes of stating whether or not it was eligible for inclusion in the National Register. We recently affirmed a BLM decision not to renew the permit of an archaeological firm that had received a warning letter for submitting a report that failed, *inter alia*, to identify sites that included "an extensive historic scatter and dump with dozens of pre-1960 cans and bottles." *Archaeological Services by Laura Michalik*, 169 IBLA 90, 110 (2006).

an exchange would not be in the public interest and that the offending structures should be removed from public land. 111 IBLA at 233. We vacated BLM's decision requiring removal of the offending house and BLM's conclusion that an exchange would not be in the public interest, finding that BLM's decision was not supported by a rational basis. *Id.* at 234. In *Reid*, we affirmed BLM's decision concerning imposition of reclamation and other costs, but because nothing in the record supported BLM's determination that an exchange would not be in the public interest, we set aside that decision to allow BLM an opportunity to reassess the proposed exchange, make a determination regarding whether the exchange would or would not be in the public interest, and make the assessment a part of the record supporting any subsequent decision. *Reid*, 163 IBLA at 330. The record shows that Oberg and BLM are engaged in active exchange discussion over a particular land parcel including the cabin. Therefore, adherence to these precedents requires similar action here.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the finding, in the decision appealed from, that the occupancy on the former Flora D mining claim is unlawful is affirmed; in all other respects the decision is set aside and remanded for further action consistent with this opinion.

_____/s/
Lisa Hemmer
Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge