TRUEMAN HULEGAARD

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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

TRUEMAN HULEGAARD

IBLA 2007-20 Decided December 31, 2007

Appeal from a cessation order issued by the Field Manager, Hassayampa Field Office, Phoenix District Office, Bureau of Land Management, directing cessation of use and occupancy of mining claims. AZA-24534.

Affirmed as modified.

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

BLM properly issues a cessation order pursuant to 43 C.F.R. § 3715.7-1(b)(1)(ii) when the claimant has failed to comply with a notice of noncompliance that both required him to cease his use and occupancy of mining claims because he had failed to timely submit the requisite financial guarantee, had no accepted mining notice, and had continued to occupy the site without receiving BLM concurrence for that occupancy and also granted him 15 days to submit a new mining notice and financial guarantee.

APPEARANCES: Trueman Hulegaard, Wickenburg, Arizona, *pro se*; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GREENBERG

Trueman Hulegaard has appealed the September 14, 2006, cessation order (CO) issued by the Field Manager, Hassayampa Field Office, Phoenix District, Bureau of Land Management (BLM), directing him to cease his use and occupancy of a mining site consisting of various mining claims located on public lands in secs. 2, 3, 10, and 11, T. 6 N., R. 5 W., Gila and Salt River Meridian (G&SRM), Maricopa County, Arizona. The Field Manager based the CO, which he issued pursuant to 43 C.F.R. § 3715.7-1(b), on Hulegaard's failure to comply with a May 24, 2006, Notice of Noncompliance (NON), issued under 43 C.F.R. § 3715.7-1(c)(1), that found Hulegaard in violation of 43 C.F.R. §§ 3715.3-1(a), 3715.3-6, 3715.5(c), and

3715.6(a)(2)[1] because he had not timely filed the financial guarantee required by 43 C.F.R. §§ 3809.312(c), 3809.503, and 3809.552 and was occupying the site without an accepted mining notice and without receiving BLM's concurrence for the occupancy. The NON ordered Hulegaard to immediately cease his use and occupancy of the mining site and to submit a new mining notice and acceptable financial guarantee or reclamation bond within 15 days if he wanted to resume his occupancy. Because the record shows that Hulegaard did not timely comply with the NON, we generally affirm BLM's CO. However, we modify the CO to clarify that 43 C.F.R. § 3715.7-1(b)(2) relates only to use or occupancy and does not empower BLM to order a claimant to cease mining-related operations on a valid mining claim.

BACKGROUND

On April 26, 1988, Hulegaard filed a mining notice (AZA-24534) pursuant to 43 C.F.R. § 3809.1-3 (1988), outlining planned mining activities on various mining claims, which he generally identifies as the Vulture Mine site.[2] He conducted operations on the mining site in accordance with that notice, as periodically amended, until June 28, 2004, when, as discussed below, the notice expired.

On October 15, 1996, in compliance with the then newly promulgated "Use and Occupancy Under the Mining Laws" regulations, 43 C.F.R. Subpart 3715, Hulegaard filed an "Existing Occupancy Notification" with BLM, which enabled him to continue his existing occupancy of the mining site until August 18, 1997, at which point he was required to meet all the applicable requirements of that Subpart. *See* 43 C.F.R. § 3715.4. Hulegaard continued to occupy the site after August 18, 1997, without taking any further steps to comply with 43 C.F.R. Subpart 3715.

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[1] Although BLM cited 43 C.F.R. § 3715.6(a)(1), the correct citation for the identified violation is 43 C.F.R. § 3715.6(a)(2), which prohibits conducting an occupancy not meeting the standards of occupancy set forth in 43 C.F.R. § 3715.5, including the requirement that a claimant obtain all necessary permits and authorizations. We refer to the correct regulatory subsection throughout this decision.

[2] The Apr. 26, 1988, mining notice indicated that mining, testing, and reclamation work would affect a total of 30 lode and placer mining claims described as the Digmore Nos. 1 through 3 (AMC-7267, AMC-180671, and AMC-236186), the Enigma Nos. 1 through 7 (AMC-235675, AMC-235676, AMC-236511, AMC-236512, and AMC-237912 through AMC-237914), Lost Nugget Nos. 1 through 6 (AMC-180670, AMC-180671, and AMC-97664 through AMC-97667), and Rhyolite Nos. 7 through 14 (AMC-174227 through AMC-174234 and AMC-248590 through AMC-248595). BLM's current records show that all but seven of the claims identified in the original notice (Digmore Nos. 2 and 3, Lost Nugget Nos. 2 and 5, and Rhyolite Nos. 1 through 3) have a "Closed" status. Nov. 28, 2006, "List of Mining Claims by Section."

As required by the revised 43 C.F.R. Subpart 3809 regulations and demanded by BLM in a letter to mining claimants, Hulegaard filed an extension request for mining notice AZA-24534 on December 30, 2002. *See* 43 C.F.R. § 3809.333.[3] After requesting and receiving additional information, including reclamation cost estimates, BLM issued a decision on October 30, 2003, setting the financial guarantee for the extension of the mining notice required by 43 C.F.R. §§ 3809.333 and 3809.503 at $22,410. Hulegaard sought State Director review of the amount of the financial guarantee. *See* 43 C.F.R. § 3809.800(a). In light of revised calculations from the Field Office, the Arizona State Director issued a decision, dated May 25, 2004, reducing the amount of the financial guarantee to $10,300, and directing Hulegaard to provide a financial guarantee in that amount, in a form specified by 43 C.F.R. § 3715.555, within 30 calendar days of receipt of the decision. The State Director advised Hulegaard that failure to file a financial guarantee would cause the mining notice to expire on the 31st day following receipt of the decision. May 25, 2005, State Director decision at 1. Hulegaard did not appeal the State Director's decision to the Board.

Hulegaard attempted to comply with the financial guarantee requirement on June 28, 2004, by collaterally assigning a life insurance policy to BLM. By decision dated April 25, 2005, BLM returned the life insurance policy as unacceptable. BLM explained that, while 43 C.F.R. § 3715.555(f) allowed insurance to serve as the requisite financial guarantee if its form and function were such that the funding or enforceable pledges of funding were used to guarantee performance of regulatory obligations in the event of default by the operator, the life insurance policy did not meet those qualifications. Hulegaard did not file any other financial guarantee.

By decision dated November 10, 2005, BLM determined that mining notice AZA-24534 had expired effective June 28, 2004, for failure to comply with the State Director's decision.[4] BLM ordered Hulegaard to immediately cease all operations with the exception of reclamation, advising him that if he wanted to resume operations, he could postpone reclamation if he filed either a new notice pursuant to 43 C.F.R. §§ 3809.300 - 3809.320 or a plan of operations pursuant to 43 C.F.R. §§ 3809.400 - 3809.415 within 30 days of receipt of the decision and complied with,

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[3] On Nov. 21, 2000, BLM amended the regulations in 43 C.F.R. Subpart 3809. These regulations became effective Jan. 20, 2001. *See* 65 Fed. Reg. 69998. BLM again amended 43 C.F.R. Subpart 3809 with publication of final rulemaking in the Federal Register on Oct. 30, 2001, effective Dec. 31, 2001. *See* 66 Fed. Reg. 54834.

[4] BLM also pointed out that, in any event, the notice would have expired when Hulegaard failed to submit, on or before Jan. 20, 2005, the written notification required by 43 C.F.R. § 3809.333 stating his desire to extend notice AZA-24534 for an additional 2 years.

inter alia, the financial guarantee requirements outlined in 43 C.F.R. §§ 3809.500 - 3809.555. Nov. 10, 2005, decision at unnumbered p. 2.

Hulegaard sought State Director review of BLM's decision on December 9, 2005. The State Director affirmed BLM's Notice of Expiration on January 20, 2006, finding that Hulegaard's failure to submit the requisite bond justified BLM's Notice. He ordered Hulegaard to immediately cease operations at the site and begin reclamation within 30 days, with all reclamation activities to be completed within 1 year from receipt of the decision. He added that Hulegaard could resume operations if he submitted either an accepted notice or an approved plan of operations and produced an acceptable financial guarantee. Hulegaard did not appeal the State Director's decision to the Board.

On December 19, 2005, while the State Director review request was pending, BLM received Hulegaard's new Notice of Intent, filed pursuant to 43 C.F.R. § 3809.301.[5] Hulegaard simultaneously filed a Notice of Existing Occupancy in accordance with 43 C.F.R. Subpart 3715, stating that the reasons for his occupancy included (1) protection of equipment and personal property; (2) protection of product and minerals stockpiled and in place; (3) protection of equipment and mining areas from theft, vandalism, and degradation; (4) protection of the general public from hazardous equipment and working areas; (5) location in a remote area with no enforcement patrols; and (6) elimination of the costs of travel to and from the mine. *See* 43 C.F.R. § 3715.2-1.

By decision dated February 10, 2006, BLM advised Hulegaard that his December 19, 2005, notice, coupled with the April 2004 reclamation cost estimate and other information in the case file, was complete. BLM informed him that before beginning operations, he had to provide the financial guarantee required by 43 C.F.R. §§ 3809.312(c), 3809.503, and 3809.552, the amount of which, BLM agreed, was the $10,300 specified in the State Director's May 25, 2004, decision. BLM granted Hulegaard 60 days from receipt of the decision to provide an acceptable financial guarantee, adding that if he failed to provide the financial guarantee within that period, BLM would consider his notice to have been withdrawn. Feb. 10, 2006, decision at 1-2. BLM explained that the notice would not become effective until BLM accepted the financial guarantee, at which time BLM would assess whether the notice was acceptable. BLM also reminded Hulegaard that, in accordance with 43 C.F.R. §§ 3809.415 and 3809.420(a)(6), he was required to notify or obtain permits from appropriate Federal and State agencies before beginning operations. Feb. 10, 2006, decision at 3.

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[5] This notice lists 10 claims (Lost Nugget Nos. 1 through 5, Rhyolite Nos. 1 through 3, and Digmore Nos. 2 and 3), as the site of the mining activities. As noted, only seven of these claims are currently listed as not being closed. *See* n.2, *supra*.

On February 28, 2006, BLM issued a decision entitled "Occupancy Nonconcurrence," stating that BLM could not at this point concur in Hulegaard's occupancy of the mining site because his existing occupancy did not comply with 43 C.F.R. § 3715.5(c) due to his failure to file with BLM the reclamation bond (*i.e.*, the financial guarantee) required by 43 C.F.R. § 3809.503(a) or (c). BLM informed him that, in order for it to concur with his occupancy, he had to furnish an acceptable financial guarantee for his December 19, 2005, notice in the amount of $10,300 specified in the February 10, 2006, decision within the 60-day period set by that decision. Feb. 28, 2006, decision at unnumbered p. 2. BLM warned Hulegaard that if he did not timely furnish the reclamation bond, BLM would issue him a NON pursuant to 43 C.F.R. § 3715.7-1(c). Feb. 28, 2006, decision at unnumbered p. 2. BLM explained to Hulegaard that he could resume mining "at any time" if he submitted the financial guarantee and obtained approval of a plan of operations or acceptance of a notice.

Hulegaard did not submit the financial guarantee described in both the February 10, 2006, and the February 28, 2006, decisions. Nevertheless, he continued to occupy and conduct mining operations at the mining site. *See* May 19, 2006, 3809/3715 Field Inspection Form at 1-2.[6]

On May 24, 2006, BLM issued a NON pursuant to 43 C.F.R. § 3715.7-1(c)(1). BLM found that Hulegaard's use and occupancy of the site were unauthorized and violated 43 C.F.R. Subpart 3715. Specifically, BLM determined (1) that he had violated 43 C.F.R. § 3715.3-1(a) by beginning his occupancy before complying with 43 C.F.R. Subpart 3809's notice and financial guarantee requirements, pointing out that, as stated in the February 10, 2006, decision, BLM considered the failure to timely file the financial guarantee to be tantamount to withdrawal of the notice; (2) that he contravened 43 C.F.R. § 3715.3-6 by commencing his occupancy without receiving BLM's concurrence for the occupancy, citing BLM's February 28, 2006, "Occupancy Nonconcurrence" decision; (3) that he had violated 43 C.F.R. § 3715.5(c) by failing to conform to all applicable Federal and State environmental standards and obtain all required permits under 43 C.F.R. Subpart 3715 and Part 3800 before beginning the occupancy, adverting to Hulegaard's continued mining and occupancy of the site without furnishing the requisite financial guarantee; and (4) that he had contravened 43 C.F.R. § 3715.6(a)(2) by placing, constructing, maintaining, or using residences or structures for occupancy not

[6] This extensive inspection report documents considerable material in the form of personal property on site, a residential occupancy in a trailer on the site, and activities for which state and local permits should have been obtained. The inspector also photographed evidence of the removal of common variety minerals for which a mineral material contract should have been, but was not, obtained. *See* 43 C.F.R. Subpart 3602.

meeting the conditions of occupancy under 43 C.F.R. § 3715.5(c), again referencing Hulegaard's failure to supply the requisite financial guarantee. NON at 2-3.

BLM directed Hulegaard to cease immediately all unauthorized use and occupancy of the mining site. BLM informed Hulegaard that if he wanted to resume his use and occupancy, he had 15 days in which to submit to BLM a new mining notice and an acceptable bond in the amount of $10,300. NON at 3. BLM added that, if he did not submit the new notice and bond within the 15-day time frame, it would issue a CO ordering him to permanently cease his use and occupancy and allowing him 90 days to remove all structures and equipment from the site and reclaim any ground disturbance caused by his operations. *Id*. at 4.

Hulegaard did not appeal the NON. Nor did he file the notice and financial guarantee by the July 28, 2006, extended deadline agreed to in a June 27, 2006, meeting between Hulegaard and BLM.[7] *See* Conversation Record dated June 28, 2006, prepared by Matt Plis, at 2. The Field Manager therefore issued the September 14, 2006, CO pursuant to 43 C.F.R. § 3715.7-1(b)(1)(ii) for failure to timely comply with the NON.

In the CO, the Field Manager found that Hulegaard had failed to comply with the NON and that his continued occupancy of the mining site, as documented by a September 8, 2006, site inspection, violated both BLM's February 28, 2006, "Occupancy Nonconcurrence" and the May 24, 2006, NON.[8] CO at 5. The Field

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[7] Hulegaard claims to have attempted to submit the financial guarantee to BLM at a June 19, 2006, meeting in BLM's office, although the record is ambiguous on that point. *See* Conversation Record dated June 20, 2006, prepared by Kirk Rentmeister. He did attempt to deliver a $10,300 cashier's check at a June 27 meeting with BLM away from the office. *See* Conversation Record dated June 28, 2006, prepared by Matt Plis, at 2; *see also* Conversation Record dated June 28, 2006, prepared by Kirk Rentmeister. BLM advised Hulegaard at the June 27 meeting that it could not accept the proffered certified check outside of the office and that he should submit the check, along with his new notice, to the Hassayampa Field Office. Conversation Record dated June 28, 2006, prepared by Matt Plis, at 2. At this meeting, BLM and Hulegaard apparently discussed his submitting a revised plan of operations with a new reclamation cost estimate, and revised amount, within 2 weeks. *Id.* Hulegaard did not resubmit the financial guarantee to the Field Office, nor did he submit a new mining notice prior to the July 28, 2006, extended deadline.

[8] The Sept. 8, 2006, site inspection found that "[a]ll of the equipment, vehicles, and residential structures seen and photographed at the site on 05/19/06 were still present," and that "[a]ll evidence indicates that the site is being occupied as a

(continued...)

Manager concluded that Hulegaard's use and occupancy of the site remained unauthorized and in violation of 43 C.F.R. Subpart 3715 and the NON, essentially adopting the NON's delineation of Hulegaard's regulatory violations. CO at 5-6; *see* NON at 2-3.

Citing 43 C.F.R. § 3715.7-1(b)(2)(iii), the Field Manager ordered Hulegaard to (1) immediately cease his mining-related operations onsite; and (2) cease his use and all forms of occupancy, including his residential occupancy, of the site within 30 days from receipt of the CO. CO at 6. In accordance with 43 C.F.R. § 3715.5-1, the Field Manager directed Hulegaard to remove all structures, material and equipment, or other personal property from the site and reclaim any ground disturbance created by his mining operations within 90 days of receipt of the CO. CO at 6. The Field Manager advised Hulegaard that, once he had met the CO's conditions, he was precluded from conducting an occupancy, as defined in 43 C.F.R. § 3715.0-5, of the site under the mining laws for more than 14 days in any 90-day period unless he was engaged in the activities described in 43 C.F.R. §§ 3715.2 and 3715.2-1, filed the information required by 43 C.F.R. § 3715.3-2, met the requirements of 43 C.F.R. Subpart 3809, and received BLM's written concurrence before beginning the occupancy. The Field Manager also informed Hulegaard that no operations greater than casual use level operations, as defined in 43 C.F.R. § 3809.5, could be conducted onsite until Hulegaard had submitted a complete notice or plan of operations, including an acceptable financial guarantee instrument, to BLM as required by 43 C.F.R. Subpart 3809.[9] CO at 6. Hulegaard appealed the CO to the Board and sought a stay of the CO, which the Board denied by order dated December 28, 2006.

DISCUSSION

On appeal Hulegaard contends that he complied with the State Director's January 20, 2006, decision by ceasing all operations and beginning and continuing the required reclamation activities, averring that, contrary to BLM's May 19, 2006, field inspection, he has not been mining on the site. He asserts that he tried to give BLM a certified check and a new notice on both June 19, 2006, and June 27, 2006,

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[8] (...continued)
primary residence. No appreciable recent mining related activity was seen." Sept. 12, 2006, Memorandum to Case File at 1; *see* CO at 5.

[9] According to an Oct. 16, 2006, Conversation Record prepared by Matt Plis, Hulegaard tried to submit another notice and a $10,300 check for the financial guarantee to the Field Manager, but the Field Manager refused to accept them because the CO required Hulegaard to reclaim the site before submitting the new notice and financial guarantee.

but that BLM would not accept them. He also states that, after issuance of the CO, he met with BLM personnel on October 16, 2006, to try to give them the check and notice but that, once again, they refused to accept them, advising him to file an appeal and request for stay. He further provides the reasons for his occupancy, including the lack of regular law enforcement and the need to protect both his "equipment material" and the public from harm or injury caused by his equipment. He maintains that, as a 72-year old man who has dedicated himself and everything he has earned to the operation for the last 22 years, who has built most of his own equipment to recover ore minerals, and who has stockpiled ore and material over the years, he has earned the right to continue his operation and recover his efforts and investments, especially since he has stayed within BLM regulations and requirements.[10]

[1] Occupancy of the surface of public lands for mining and other purposes under the mining laws is governed in part by section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000), which 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." On July 16, 1996, BLM adopted 43 C.F.R. Subpart 3715, which implements this statutory provision by addressing the unlawful use and occupancy of unpatented mining claims for non-mining purposes.[11] *See* 61 Fed. Reg. 37115, 37117 (July 16, 1996).

These regulations restrict the use and occupancy of public lands administered by BLM open to the operation of the mining laws, limiting such use and occupancy to those involving prospecting or exploration, mining, or processing operations and reasonably incident uses. They also establish procedures for beginning occupancy, standards for reasonably incident use or occupancy, prohibited acts, and procedures for inspection and enforcement and for managing existing uses and occupancies. 61 Fed. Reg. 37116 (July 16, 1996); *see Robert B. Wineland*, 169 IBLA 212, 220 (2006); *Pilot Plant*, 168 IBLA 201, 214 (2006); *Marietta Corp.*, 164 IBLA 360, 361 (2005); *Dan Solecki*, 162 IBLA 178, 179 (2004); *Firestone Mining Industries, Inc.,* 150 IBLA 104, 109 (1999). Additionally, the regulations clarify that unauthorized uses and occupancies on public lands are illegal uses that *ipso facto* constitute

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[10] Hulegaard requests either a hearing or a meeting to discuss issues not in the appeal. Since we discern no disputed issues of fact warranting a hearing, we deny his request. *See* 43 C.F.R. § 4.415.

[11] There is no dispute that, in accordance with 43 C.F.R. § 3715.4(a), as of Aug. 18, 1997, Hulegaard's pre-existing use and occupancy were required to comply with the 43 C.F.R. Subpart 3715 regulations. *See Robert Gately*, 160 IBLA 192, 204 (2003); *David J. Timberlin*, 158 IBLA 144, 152 (2003).

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 Fed. Reg. 37117-18 (July 16, 1996);[12] *see* 43 U.S.C. § 1732(b) (2000); *Robert B. Wineland*, 169 IBLA at 220; *Pilot Plant*, 168 IBLA at 214; *Marietta Corp.*, 164 IBLA at 361; *Wilbur L. Hulse*, 153 IBLA 362, 367 (2000); *Firestone Mining Industries, Inc.*, 150 IBLA at 109.

The term occupancy is defined broadly under 43 C.F.R. § 3715.0-5 and includes not only full or part-time residence on the public lands, but also activities involving residence; the construction, presence, or maintenance of temporary or permanent structures such as barriers to access, fences, tents, motor homes, trailers, cabins, houses, buildings, and storage of equipment or supplies; and the use of a watchman or caretaker. Actual residential use is not required; instead, occupancy encompasses the construction, presence, or maintenance of temporary or permanent structures regardless of whether they are actually used as a residence. *Pilot Plant*, 168 IBLA at 214; *Las Vegas Mining Facility, Inc.*, 166 IBLA 306, 311 (2005); *Donna Friedman*, 165 IBLA 313, 321 (2005); *Terry Hankins*, 162 IBLA 198, 213 (2004); *Robert W. Gately*, 160 IBLA at 204 n.17; *see Marietta Corporation*, 164 IBLA 360, 362 (2005). Hulegaard does not dispute that he occupies the mining site or that he currently does not have BLM's concurrence for that occupancy.

Hulegaard maintains that he attempted to submit the notice and financial guarantee to BLM on two occasions before issuance of the CO. While Hulegaard's claim that he attempted to furnish the financial guarantee before the end of the NON's compliance period is confirmed by the record, his assertion that he also attempted to submit a new mining notice is not.

Hulegaard asserts that he first tried to present those instruments on June 19, 2006, but that BLM refused to accept them at that time. BLM's June 20, 2006, conversation record documenting a phone call to Hulegaard concerning the meeting the previous day states: "Called Trueman [Hulegaard] as I told him I would do at our meeting of yesterday. I told him that we would accept his bond and work with him to get a plan of operations for his operation [and] told him that we would meet on Tuesday, June 27, 2006, at 9:00 am in Wickenburg." Conversation Record dated June 20, 2006, prepared by Kirk Rentmeister. Although the Conversation Record refers to a bond and a then non-existent plan of operations, it is not clear what, if anything, Hulegaard attempted to submit related to a bond, although it is clear that a

[12] The preamble explains that the unnecessary or undue degradation controlled by these rules includes uses not authorized by law, specifically those activities which are not reasonably incident to mining or milling activities and are not authorized under any other applicable law or regulation, while uses that are reasonably incident to such activity and do not involve occupancy are governed by the surface management requirements of 43 C.F.R. Part 3800. 61 Fed. Reg. 37118 (July 16, 1996).

current notice or plan of operations, while imminent, was not yet available. Accordingly, we find that the record does not support Hulegaard's allegation that he presented a mining notice at that meeting.

Hulegaard avers that he again tried to present the check and notice to BLM in the parking lot of the Safeway Store in Wickenburg, Arizona, on June 27, 2006, but that BLM again would not accept those documents. Neither of the two BLM Conversation Records memorializing that meeting mention that Hulegaard tried to submit a mining notice or a plan of operations at that meeting. In fact, the Conversation Record dated June 28, 2006, prepared by Kirk Rentmeister states that BLM "[g]ave [Hulegaard] 30 days to submit a complete notice with an equipment list, reclamation plan, bond estimate, maps, and drawings as described in 43 C.F.R. 3809." *See* 43 C.F.R. § 3809.301(b). The implication of this statement is that, even if Hulegaard had tried to submit a "notice" at that meeting, that purported notice was not an adequate mining notice under the regulations. The other Conversation Record documenting the meeting was prepared by Matt Plis and reiterates BLM's agreement to grant Hulegaard an additional 30 days to comply with the NON by filing a new notice and reclamation bond. Conversation Record dated June 28, 2006, prepared by Matt Plis, at 1. That Conversation Record further recites that

> Hulegaard replied that he would be able to compile and submit to BLM his new notice within two weeks. He told Kirk and I that he had with him a cashier's check for $10,300 that he wanted us accept as the financial guarantee amount for his 3809 notice, and Kirk replied that we couldn't accept the check while away from the office and that he needed to submit the check to BLM's Hassayampa Field Office in Phoenix, along with his new notice, before July 28, 2006.[[13]]

Conversation Record dated June 28, 2006, prepared by Matt Plis, at 2. These conversation records confirm our conclusion that the record does not support Hulegaard's contention that he tried to submit the mining notice to the appropriate BLM office within the time frame set by the NON. Accordingly, we find that Hulegaard was conducting an occupancy without having the requisite accepted mining notice or approved plan of operations in contravention of 43 C.F.R.

[13] The regulations direct a claimant to file a mining notice with the local BLM *office* with jurisdiction over the lands. 43 C.F.R. § 3809.301(a). The June 27, 2006, meeting took place in the field, and the cashier's check was proffered in a parking lot, not in the BLM office specified in the regulation.

§§ 3715.5(c) and 3715.6(a)(2).[14] *See Robert W. Gately*, 160 IBLA at 205; *see also* 43 C.F.R. § 3809.300(d).

BLM's reliance on Hulegaard's failure to timely furnish a financial guarantee to support its findings of violations of 43 C.F.R. §§ 3715.5(c) and 3715.6(a)(2) is somewhat problematic because of Hulegaard's attempts to submit the guarantee, but nevertheless is supported by the record. The Conversation Record dated June 20, 2006, prepared by Kirk Rentmeister, is ambiguous as to whether Hulegaard tried to present the financial guarantee at the June 19, 2006, meeting at the BLM office, and we do not fault BLM for refusing to accept the certified check proffered on June 27, 2006, at a location away from the BLM office where it must be filed for accurate recording and processing. In any event, despite BLM's granting him an additional 30 days until July 28, 2006, to file the alleged refused financial guarantee (and notice), Hulegaard did not do so. We therefore affirm BLM's conclusion that Hulegaard had violated 43 C.F.R. §§ 3715.5(c) and 3715.6(a)(2).[15]

Hulegaard's explanation of the reasons for his occupancy relate to whether his occupancy complies with 43 C.F.R. §§ 3715.2 and 3715.2-1.[16] BLM neither

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[14] We note that, although the lack of an accepted notice violates 43 C.F.R. §§ 3715.5(c) and 3715.6(a)(2), BLM did not cite that omission as a basis for the violations of those regulations.

[15] We do not address BLM's findings with respect to violations of 43 C.F.R. §§ 3715.3-1(a) or 3715.3-6, and our decision should not be construed as affirming those findings.

[16] In accordance with 43 C.F.R. § 3715.2, activities justifying an occupancy of a mining claim or millsite 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 presentably operable. To be permissible under 43 C.F.R. § 3715.2, the occupancy must meet all five of those requirements. *Pilot Plant*, 168 IBLA at 215; *Las Vegas Mining Facility, Inc.*, 166 IBLA at 312-13; *Betty Dungey*, 165 IBLA 1, 8 (2005); *Terry Hankins*, 162 IBLA at 213; *Robert W. Gately*, 160 IBLA at 208-209; *James R. McColl*, 159 IBLA 167, 178 (2003). Additionally, the occupancy must also involve one or more of the elements set forth in 43 C.F.R. § 3715.2-1(a) though (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 which, if unattended, creates a hazard to public safety; (d) protecting the public from surface uses, workings, or improvements which, if

(continued...)

addressed nor relied on these regulations and we therefore need not determine here whether his use and occupancy conform to those regulatory mandates.

We find, however, that we must modify the CO to the extent it cited 43 C.F.R. § 3715.7-1(b)(2)(iii) as the authority for ordering Hulegaard to "immediately cease [his] mining-related operations onsite." CO at 6. That regulation provides that a CO will describe "[t]he time by which you must cease use or occupancy, not to exceed 30 days from the date the Interior Board of Land Appeals affirms BLM's decision." 43 C.F.R. § 3715.7-1(b)(2)(iii). That regulation on its face does not authorize BLM to order a claimant to immediately cease all mining-related activity. *See Combined Metals Reduction Co.*, 170 IBLA 56, 78 (2006) (as long as a mining claim remains valid, BLM cannot bar a claimant from re-entering the claim to conduct mining or mining-related operations).[17] Therefore we modify the CO to the extent it ordered Hulegaard to immediately cease all mining-related operations.

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[16] (...continued)
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 Pilot Plant*, 168 IBLA at 215; *Robert W. Gately*, 160 IBLA at 208 n.21; *Thomas E. Smigel*, 156 IBLA 320, 324 n.3 (2002); *Wilbur L. Hulse*, 153 IBLA at 368; *David E. Pierce*, 153 IBLA 348, 358 (2000).

[17] Hulegaard's attempt to furnish the notice and financial guarantee after issuance of the CO does not affect the validity of the underlying CO. We find, however, that BLM employees did not act appropriately in advising Hulegaard that they could not accept a new mining notice or plan of operations, after issuance of the CO. *See* Oct. 16, 2006, Conversation Record. BLM should have accepted any filing by Hulegaard of a new plan or notice, and appropriate bond, and processed them in accordance with BLM regulations. Hulegaard should not, however, mistake the opportunity to resume permitted and approved mining activity as an opportunity to effectively cease the reclamation and removal of his occupancy which BLM ordered in the CO and which this decision affirms. It is evident from the many photographs attached to the May and September 2006 inspection reports that Hulegaard's activities consist primarily of non-mining-related residency. Regardless of whether BLM approves any subsequent notice or plan, submitted with an approved bond, non-mining-related activity would not constitute a part of an approved plan of operations or accepted mining notice.

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 decision appealed from is affirmed as modified by this opinion.

/s/
Sara B. Greenberg
Administrative Judge

I concur:

/s/
Lisa Hemmer
Administrative Judge