



AUSTIN SHEPHERD

178 IBLA 224

Decided December 3, 2009



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

AUSTIN SHEPHERD

IBLA 2009-288

Decided December 3, 2009

Appeal from a decision of the Shoshone (Idaho) Field Office, Bureau of Land Management, issuing a cessation order under 43 C.F.R. Subpart 3715. (IDI-31717)

Affirmed in part, and vacated in part.

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

Section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2006), 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.”

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

Departmental regulations clarify that unauthorized uses and occupancies on public lands are illegal uses that 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. 43 C.F.R. § 3715.0-5 (“*Unnecessary or undue degradation*, as applied to unauthorized uses, means those activities that are not reasonably incident and are not authorized under any other applicable law or regulation.”)

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

Under 43 C.F.R. 3715.7-1(b)(1)(i), to the extent that a use or occupancy is not reasonably incident to prospecting, mining, or processing operations, but does not endanger health, safety, or the environment, BLM may order a temporary or permanent cessation of all or any part of the use or occupancy.

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

Even if BLM orders use and occupancy to cease, a mining claimant retains the right to pursue mining, exploration, and/or milling operations, subject to the limitations imposed by the regulations at 43 C.F.R. Subparts 3715 and 3809. If and when a claimant determines to re-enter his claim to commence authorized activities after he has fully complied with a cessation order, including reclaiming the site to BLM's satisfaction, he can do so only under a new mining notice or plan of operations that complies with the regulations in 43 C.F.R. Subparts 3715 and 3809, pursuant to which he may also propose new use and occupancy.

APPEARANCES: Austin Shepherd, Milton, Washington, *pro se*; Holly Hampton, Acting Field Manager, Shoshone Field Office, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Austin Shepherd has appealed from a June 8, 2009, decision, styled a "Cessation Order" (decision or CO), issued by the Field Manager, Shoshone (Idaho) Field Office, Bureau of Land Management (BLM), in accordance with 43 C.F.R. Subpart 3715, ordering Shepherd to immediately cease all occupancy of the McCoy Gold Mine (IDI-31717) site for a period of 5 years from the date he received the order, and to remove all structures, material, parts, equipment, and personal property from the site within 90 calendar days of the receipt of the decision, or 30 days from the date this Board affirms the CO. The site of the occupancy at the McCoy Gold Mine is a part of the acreage included in the mining claim that was the subject of a 2001 mining Notice (IDI-31717) (Notice).¹ See Case File IDI-31717. The Field Manager determined that Shepherd's occupancy of the mining claim was unauthorized as his Notice had expired in 2003, and further stated that such occupancy was not reasonably incident to any authorized prospecting, mining, or processing operations, as required by 30 U.S.C. § 612 (2006) and its implementing regulations at 43 C.F.R. Subpart 3715. Decision at 2.

In this decision, we affirm in part BLM's decision to the extent it ordered Shepherd to cease his unlawful occupancy of the mining claim, because that part of the CO is predicated on an earlier decision declaring the Notice expired that is final for the Department, and Shepherd has failed to show that BLM erred in determining

¹ The mining claim is located in S¹/₂, sec. 31, T. 2 N., R. 18 E., Boise Meridian, Blaine County, Idaho.

in the CO that the unauthorized occupancy persists. However, BLM does not have the authority to bar any future lawful use and occupancy of the mining claim by Shepherd for a period of 5 years. We therefore vacate this portion of BLM's decision.

I. *Background*

On June 5, 1996, Shepherd filed with BLM a notice of intent to conduct mining operations at the McCoy Mine. BLM notified Shepherd that the mining notice was incomplete on June 11, 1996, and on January 19, 2001, after resolving certain questions, BLM approved Notice IDI-31717, notifying Shepherd that he “may continue mining under this notice that was originally filed in 1996.”²

The history of BLM's efforts to secure appellant's compliance with the use and occupancy regulations of 43 C.F.R. Subpart 3715 is long and tortured, as reflected in the record before us, which includes 14 compliance inspection reports, with carefully documented narrative and photographic support. As early as October 18, 2001, the Shoshone Field Office Manager informed Shepherd that a compliance check earlier that month revealed a considerable amount of equipment at the mine that was not reasonably incident to his present mining operations, and asked him to review the enclosed photographs and complete a questionnaire showing how the equipment was incidental to mining operations. The record contains repeated follow-up requests by BLM, but no evidence of Shepherd's compliance with the requests.

A November 5, 2002, letter from BLM notified Shepherd that, under the new surface management regulations at 43 C.F.R. Subpart 3809, effective January 20, 2001, if he wished to extend his notice beyond January 20, 2003, Shepherd had to notify BLM and, within 30 days, provide an acceptable reclamation cost estimate, followed by a financial guarantee to cover the reclamation cost. BLM advised Shepherd that if he failed to satisfy those requirements he would have to cease operations and complete reclamation or file a new notice or plan of operations subject to the revised regulations. *See* 43 C.F.R. § 3809.300; 43 C.F.R. § 3809.116(a). Shepherd notified BLM of his intent to extend his existing mining notice, thereby triggering the financial guarantee requirements, but he never satisfied those requirements. Consequently, in a decision dated June 24, 2003, BLM declared Notice IDI-31717 to have expired effective May 10, 2003, because Shepherd failed to meet the financial guarantee requirements of 43 C.F.R. § 3809.503, pursuant to 43 C.F.R. § 3809.333. BLM notified Shepherd that any use and occupancy³ of the

² Shepherd had filed a second notice for the same mine on Nov. 14, 2000.

³ The term “occupancy” is defined broadly at 43 C.F.R. § 3715.0-5 to mean “full or part-time residence on the public lands,” as well as

(continued...)

site after May 10, 2003, except to perform reclamation, would be unauthorized and must cease, and ordered him to immediately suspend occupancy of the claim and begin reclamation unless he filed a new notice or plan of operations in compliance with 43 C.F.R. Subpart 3715. Shepherd neither appealed the expired Notice decision, nor filed a new notice or a plan of operations.

Numerous e-mail communications and compliance inspections followed over the next few years, with BLM consistently noting that while some property had been removed, much abandoned and apparently inoperable equipment and other property remained on the mining site. Considerable attention was also given to a collapsed access road, which had been built by the mine operators, and on which BLM spent \$8,000 to stabilize. Throughout this period Shepherd acknowledged that all of the equipment at the mine had been destroyed, that he was not actively mining, and that he had not completely cleared the site of all such property. He maintained his belief that he was not subject to the use and occupancy and surface management regulations, asserting that he has “surface rights on that claim so can use it in the same manner as if it were a patented claim.” E-mail from Shepherd to Johnny Garth, Geologist, Shoshone Field Office, dated July 23, 2004; *see also* July 28, 2009, e-mail from Shepherd to Garth; Letter dated Aug. 13, 2005, to Tom Askew, Hazardous Wastes Science Officer, Analyst III, Idaho, Department of Environmental Quality (DEQ).

BLM issued Shepherd a letter dated September 2, 2004, the purpose of which was “to respond to your recent e-mails” and expressing the hope that “this letter answers all your questions regarding the following issues at the McCoy Mine.”

³ (...continued)

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 C.F.R. § 3715.0-5. *See, e.g., Pilot Plant, Inc.*, 168 IBLA 201, 214 (2006), and cases cited. BLM described the mine as unattended for several years and showing substantial evidence of vandalism and neglect that included a 500-gallon rusty storage tank and large yellow separator that had rolled down the mountainside, batteries, leaking storage containers, junked vehicles, abandoned equipment, and a significantly vandalized, unattended mobile home.

Sept. 2, 2004, letter at 1.⁴ The BLM letter explained the regulatory framework and requirements, referenced the June 24, 2003, expired notice decision, and stated that “Final reclamation, as described in your expired Notice (IDI-31717) should be completed by September 1, 2005. If final reclamation is not completed by September 1, 2005, then BLM will reclaim the site, and BLM will initiate cost recovery procedures from you.” *Id.* at 2. Though not referenced in the decision on appeal, the record also includes a Notice of Noncompliance, dated March 24, 2005, stating that Shepherd had not complied with the September 2, 2004, letter because a February 14, 2005, compliance check at the mine revealed that most of the equipment remained on site and no reclamation had begun. The letter requested that Shepherd notify BLM when he complied with the reclamation requirements, but does not provide a specific timeframe as required for notices of noncompliance under 43 C.F.R. § 3715.7-1(c)(ii), (iii).

On April 19, 2005, BLM issued a “Permanent CO,” under the explicit authority of 43 C.F.R. § 3715.7-1(b)(1)(i) (“all or any 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”). Permanent CO at 4. It recounted, in great detail, the years of inspections until that date, reporting the presence of abandoned, vandalized property, storage tanks, batteries, petroleum spills, vehicles, and a mobile home, in addition to the underground mine and four adits. The Permanent CO noted that the site was devoid of evidence of active mining since the notice was approved in 2001. *Id.* at 1-4. It explained that, pursuant to 30 U.S.C. § 612 (2006) and 43 C.F.R. § 3715.2, in order to occupy the public lands under the mining laws, a mining claimant’s activities must be reasonably incident, but, as Shepherd had no active notice or plan of operation, the continued, unauthorized presence of equipment and other property on the claim constituted an occupancy that is not reasonably incident. *Id.* at 4. The Permanent CO ordered Shepherd to immediately and permanently cease all operations and occupancies at the McCoy Mine,” and to “immediately remove all equipment” stored at the mine. *Id.* The order set a timeline for work that was to be accomplished within 20, 40, and 60 working days, setting September 1, 2005, as the deadline for completing “full reclamation and remediation.” *Id.* at 4-5. The order warned Shepherd that, if he did not complete reclamation in accordance with the prescribed timeframe, BLM would hold him liable for any costs BLM incurred in removing and disposing of the property, pursuant to 43 C.F.R. § 3715.5-2. Finally, the Permanent CO warned that failure to comply with the order could result in a civil action in United States District Court, arrest and trial, a fine not to exceed \$100,000 and imprisonment, as provided in 43 C.F.R. § 3715.8, and that still more penalties could attend the making of false statements to BLM. *Id.* Shepherd failed to appeal the Permanent CO.

⁴ The letter is not identified as an enforcement action and does not reference any orders authorized under 43 C.F.R. § 3715.7-1.

Subsequent BLM compliance inspection reports with photographs, as well as correspondence and warnings from the Idaho DEQ, make it clear that significant amounts of abandoned equipment remained on the mining claim.

II. *Cessation Order*

The June 8, 2009, CO on appeal describes the annual inspection reports, and BLM's many unheeded attempts to secure compliance with the use and occupancy regulations. BLM in effect provides several bases for the decision. It states that the occupancy is not reasonably incident. Decision at 2 ("The prolonged period of inactivity at the site" is evidence that the "current occupancy cannot be considered reasonably incident"). The CO enumerates other violations of 43 C.F.R. § 3715.5, stating that Shepherd's occupancy does not involve substantially regular work, is not reasonably calculated to lead to extraction and beneficiation of minerals, does not involve observable on-the-ground activity, nor include the use of appropriate equipment that is presently operable. *Id.*; see 43 C.F.R. § 3715.2(b)-(e). The decision further states that Shepherd is violating 43 C.F.R. § 3715.5, because he is occupying the mining claim without a valid notice or plan of operations on file with BLM. Decision at 2.

The decision ordered Shepherd to "cease all occupancy of the McCoy Mine site" for a period of 5 years from the date he received the order, and remove all structures, material, equipment, or other personal property "within 90 days of [] receipt of this order, or 30 days from the date the Interior Board of Land Appeals affirms this order." It advised him that none of the items may be disposed of on public land, and that any property left on the public lands beyond the 90-day period would become the property of the United States and would be removed or disposed of at BLM's discretion, with Shepherd "liable for the costs BLM incurs in removing and disposing of the property." Decision at 2; see 43 C.F.R. § 3715.5-2. He was further warned that, under 43 C.F.R. § 3715.6, failure to comply with the order could subject him to additional sanctions, including arrest, imprisonment, and fines. Decision at 2.⁵

III. *Arguments of the Parties*

Shepherd timely filed a notice of appeal (NOA) on July 2, 2009. He refers to an unspecified meeting with the Shoshone Field Office geologist, at which time Shepherd claims to have filled out paperwork in order "to get in under the old rules." NOA at 1. He states his belief that "we have grandfather rights on the McCoy claim

⁵ The Shoshone Field Office also issued Shepherd a Forfeiture of Financial Guarantee Decision, dated June 8, 2009. His appeal of that decision was docketed by the Board as IBLA 2009-287.

because we located it in 1947 and have been working it every year since that date,” adding that “the claim has surface rights which means we can use the surface area.” *Id.* He avers that he was sent “paperwork to fill out but it was for a big mining operation and was totally irrelevant to our one man operation on a part time basis.” *Id.* at 2. Regarding the orders to remove property and equipment, Shepherd states: “We have been progressively removing equipment because the vandals have destroyed it as you ask[ed] me to do. I hired someone from Fairfield to do that and he got most of it.” *Id.* at 1. By one-page letter dated July 5, 2009, Shepherd added he has been “doing work including sampling and remov[ing] small amounts of ore for testing and sending to potential buyers each year,” that he believes he “did the correct paperwork to keep the claims active,” and that he “spent over \$500,000 developing the McCoy claim so that when gold reached today’s \$800 per oz. Level [he] could begin recovering [his] investment.”

The Acting Field Manager submitted an Answer in response, noting that Shepherd did not appeal any of the earlier decisions, and, as of June 2009, still had not removed all of the equipment or begun reclamation. Answer at 3. Referring to Shepherd’s filings on appeal, BLM characterizes the July letter as dealing primarily with unrelated mining claim issues. Alleging that the NOA does not provide a clear statement of reasons for appealing, BLM nevertheless addresses the statements contained therein as follows.

Regarding the unspecified meeting with BLM’s geologist, BLM avers that appellant mischaracterizes the meeting, where Garth explained the use and occupancy regulations in 43 C.F.R. Subpart 3715 and the Surface Management regulations in 43 C.F.R. Subpart 3809. Answer at 5. With respect to “grandfather rights on the McCoy Mine” and surface rights, BLM states that possession of surface rights does not exempt an operator from the use and occupancy provisions, which require that the use be reasonably incident to mining as defined in 43 C.F.R. § 3715.0-5. Answer at 6. BLM further states that even pre-1955 claims with surface rights and mining operations are subject to the reclamation cost estimate and financial guarantee requirements. *Id.* at 5-6. Finally, BLM disputes the assertion that Shepherd is actively complying with BLM’s orders to remove his property, noting the following:

According to the most recent compliance check, items remaining on site include equipment stored on top of the hill above the mine, a partly disassembled storage shed and metal duct piping located near the Level 3 portal, a storage tank, shed, ore bin, grizzly, rock crusher and other debris located near the Level 2 portal, and a large amount of metal duct piping, an ore bin, storage tanks, barrels, miscellaneous

equipment and a ball mill located near the Level 1 portal. There is also a 500 gallon storage tank and other equipment located below the Level 1 portal.

Answer at 6; *see also* Compliance Inspection Report, dated June 30, 2009.

IV. Discussion

A. Applicable Law and Burden of Proof

BLM classifies operations on mining claims at one of three levels: casual use, notice level, and those requiring a plan of operations. With casual use activity involving no or negligible disturbance, an operator need not notify BLM (43 C.F.R. § 3809.5); notice-level operations involve exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed (43 C.F.R. § 3809.21(a)); and operations greater than casual use and notice level use occurring when there is bulk sampling in which 1,000 tons or more of presumed ore will be removed for testing, and certain other circumstances (43 C.F.R. § 3809.11) require a plan of operations. To occupy public lands under the mining laws for more than 14 days in any 90-day period, a claimant must be engaged in activities that meet the requirements of 43 C.F.R. § 3715.2. *LKA International, Inc.*, 175 IBLA 225, 230-31 (2008).

[1] Section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2006), also referred to as the Multiple Use Mining Act of 1955, 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 C.F.R. Subpart 3715 implement this statutory provision by defining permissible use and occupancy of unpatented mining claims and uses reasonably incident thereto⁶ and establishing procedures for beginning occupancy, performance

⁶ The term “reasonably incident” “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, using methods, structures, and equipment appropriate to the geological terrain, mineral deposit, and stage of development and reasonably related activities.” 43 C.F.R. § 3715.0-5 (citing 30 U.S.C. § 612(a) (2006)). “Reasonably incident” is one element of a five-part requirement for permissible occupancies. The other four are: that the operations do not constitute substantially regular work; are not reasonably calculated to lead to the extraction and beneficiation of minerals; do not involve observable on-the-ground activity verifiable by BLM; and do not use appropriate equipment that is presently

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standards for reasonably incident use or occupancy, prohibited acts, and procedures for inspection and enforcement and for managing existing uses and occupancies. *See, e.g., Pilot Plant, Inc.*, 168 IBLA at 214, and cases cited.

BLM is required by section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2006), and 43 C.F.R. Subpart 3809 to ensure that no proposed activity under the mining laws results in unnecessary or undue degradation of the public lands. *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 33, 41-46 (D.D.C. 2003); *LKA International, Inc.*, 175 IBLA at 234; *Cat Mountain Corp.*, 148 IBLA 249, 252 (1999); 66 Fed. Reg. 54834, 54841 (Oct. 30, 2001) (“For the past 20 years, BLM’s 3809 regulations have been in place to protect the public lands against unnecessary or undue degradation”).

[2] Any use or occupancy of a mining claim that is not allowed under the public land laws, the mining laws, the mineral leasing laws, or other applicable laws is unauthorized and prohibited. 43 C.F.R. § 3715.1. Departmental regulations clarify that unauthorized uses and occupancies on public lands are illegal uses that 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. 43 C.F.R. § 3715.0-5 (“*Unnecessary or undue degradation*, as applied to unauthorized uses, means those activities that are not reasonably incident and are not authorized under any other applicable law or regulation.”); *see* 43 U.S.C § 1732(b) (2006); *Combined Metals Reduction Co.*, 170 IBLA at 72; *Pilot Plant, Inc.*, 168 IBLA at 214, and cases cited.

Any occupancy by a mining claimant must be reasonably related to actual activities on the claims involving *authorized* prospecting, mining, or processing operations, and the extent of any permissible occupancy must directly relate to the magnitude of the mining and related activities conducted on the claim. *See, e.g., Joe Gutierrez*, 174 IBLA 207, 218 (2008); *Cynthia Balser*, 170 IBLA 269, 276 (2006); *Combined Metals Reduction Co.*, 170 IBLA at 74, and cases cited.

[3] The regulation at 43 C.F.R. § 3715.7-1(b)(i) authorizes BLM to “order a temporary or permanent cessation of all or any part of your use or occupancy if . . .

⁶ (...continued)

operable. 43 C.F.R. § 3715.2. Failure to comply with any element renders occupancy impermissible. *Combined Metals Reduction Co.*, 170 IBLA 56, 74 n.11 (2006).

In addition, 30 U.S.C. § 625 (2006) provides that all mining claims and millsites located on public lands “shall be used only for the purposes specified in section 621 of this title and no facility or activity shall be erected or conducted thereon for other purposes.”

[a]ll or any 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” See also 43 C.F.R. §§ 3715.4(a) and 3715.4-3; *Combined Metals Reduction Co.*, 170 IBLA at 73.

BLM is also authorized to order that the land affected by unauthorized use or occupancy shall be reclaimed within a specified, reasonable time period. See 43 C.F.R. §§ 3715.4(a) (“BLM will also order you to reclaim the land under 43 C.F.R. part 3800, subpart 3802 or 3809 to BLM’s satisfaction within a specified, reasonable time”) and 3715.4-3(b) (“BLM may order the land to be reclaimed to its satisfaction and specify a reasonable time for completion of reclamation under 43 C.F.R. part 3800”); see also 43 C.F.R. § 3809.5 (defining “Reclamation”).

When BLM issues a decision enforcing the use and occupancy requirements of 43 C.F.R. Subpart 3715, it must ensure, as an initial matter, that the decision is supported by a reasoned analysis of the facts in the record. *L. Joie Netolicky*, 167 IBLA 193, 197 (2005). Thereafter, a party challenging a BLM decision that is based on a finding that a claimant’s use or occupancy of a mining claim is not reasonably incident to prospecting, mining, or processing operations bears the burden of proving by a preponderance of the evidence that the use or occupancy is, in fact, in compliance with section 4(a) of the Surface Resources Act of July 23, 1955, and 43 C.F.R. § 3715.5(a). *Combined Metals Reduction Co.*, 170 IBLA at 74; *Jason S. Day*, 167 IBLA 395, 400 (2006); *Leadville Corp.*, 166 IBLA 249, 255 (2005). In such a situation, the claimant’s burden is to show that the occupancy is reasonably related to actual activities on the claims involving *authorized* prospecting, mining, or processing operations, that the extent of the use or occupancy is directly related to the extent of mining activity conducted on the claim, and that the structures and equipment maintained on site are related to and commensurate with the operations. *Combined Metals Reduction Co.*, 170 IBLA at 74 and cases cited. The relevant period of time for determining whether the level of activity on mining claims is appropriate is the time immediately prior to BLM’s issuance of the CO. *Id.*

Here, however, we will not address the merits of BLM’s determination that Shepherd’s mining claim Notice had expired, rendering his occupancy of the site under that Notice unauthorized, and requiring him to cease all occupancy immediately and reclaim the site. Those determinations were first made in BLM’s June 24, 2003, decision declaring Shepherd’s mining claim Notice expired effective May 10, 2003. Since he declined to appeal the June 24, 2003, decision, it is administratively final for the Department, and no longer subject to review by the Board.⁷

⁷ Shepherd also failed to appeal the Apr. 19, 2005, Permanent CO, which provided explicit deadlines for ceasing occupancy and completing reclamation, and advised

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B. Analysis

On appeal, Shepherd disputes BLM's finding that he persists in unlawfully occupying the site by minimizing the extent of his occupancy. Shepherd also maintains, as he has for the past 8 years, that he is not subject to the use and occupancy or surface management regulations, and that the regulations relied upon by BLM do not authorize BLM's actions. In these circumstances, there are three issues before us: (1) whether Shepherd is correct in his assertion that he is not subject to the regulatory requirements of 43 C.F.R. Subpart 3715; (2) whether the record shows that Shepherd's occupancy of the claim continues, and if so, (3) whether BLM was authorized in the CO to prohibit Shepherd's occupancy on the claim for 5 years.

1. Applicability of 43 C.F.R. Subpart 3715

Shepherd asserts "grandfather rights to the McCoy Claim because we located it in 1947 and have been working it every year since that date" and avers that "the claim has surface rights which means we can use the surface area." NOA at 1. In addition, he does "not understand why [BLM] keep[s] sending letters indicating we don't have a right to continue mining on a very small scale as we have been doing." *Id* at 2. He claims to have a "one-man operation on a part time basis," and states that "[f]or all practical purposes[,] what we have and now want to do is pretty much on a recreational level, except it is pretty hard to extract hard rock from a tunnel with just a gold pan and shovel." *Id*. He asserts that his operation is subject to "the old rules," and implies that BLM has no authority to regulate his activities on the claim under the use and occupancy regulations.

Shepherd is mistaken in his belief that he is not subject to the requirements of 43 C.F.R. Subpart 3715.⁸ As we stated in *Rivers Edge Trust*, 166 IBLA 297, 300 n.2 (2005), where the appellant presented a similar argument, reliance on rights arising under the Mining Law of 1872 is misplaced for the following reasons:

⁷ (...continued)

him that BLM would seek to hold him liable for the costs it incurs in removing and disposing of the property, and that he may be subject to future enforcement and civil actions. That decision is likewise administratively final for the Department.

⁸ Shepherd, like all persons dealing with the Government, is presumed to have knowledge of relevant statutes and duly promulgated regulations. *Dan Adelman*, 169 IBLA 13, 18 (2006); *Max Buckner*, 156 IBLA 30, 33 (2001); *William Jenkins*, 131 IBLA 166, 168 (1994) (citing *Federal Crop Insurance Corp. v. Merrill*, 332 U. S. 380, 384-85 (1947)).

Although mining claimants on the public lands do indeed retain a possessory interest in property under the Mining Law, that interest *does not take the form of an unfettered right to reside upon and occupy the public lands*. Even prior to the enactment of the 1955 Surface Resources Act, exclusive possession and use of a claim site by a mining claimant was recognized by the United States only so long as it was incident to prospecting and mining. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1281, 1285 (9th Cir. 1980). [Emphasis added.][⁹]

See also *Teller v. United States*, 113 F. 273, 280 (8th Cir. 1901) (right to use the surface and surface resources of a mining claim limited to uses “reasonably necessary in the legitimate operation of mining”); *United States v. Rizzinelli*, 182 F. 675, 684 (D. Idaho 1910) (limited to uses “incident to mining operations”).

The claim was located in 1951 (Answer at 1), and therefore, Shepherd enjoys the “exclusive right of possession and enjoyment of all the surface” of the land encompassed by the claim under 30 U.S.C. § 26 (2006). *Nevada Pacific Mining Co.*, 164 IBLA 384, 390-91 (2005). However, this right must be exercised in a manner that is reasonably incident to mining. Thus, Shepherd’s exclusive right of possession and enjoyment was not changed by the requirement of section 4(a) of the Surface Resources Act of 1955 or the duty imposed upon the Secretary of the Interior by section 302(b) of FLPMA and 43 C.F.R. § 3809.1-5(c), to prevent “‘unnecessary or undue degradation’ of the affected public lands.” *Nevada Pacific Mining Co.*, 164 IBLA at 392.

2. Status of the Unauthorized Occupancy

Shepherd challenges the CO, arguing that he has “been progressively removing equipment because the vandals have destroyed it,” and that the individual he hired to clean the site “got most of it.” NOA at 1. This argument, however, is essentially an admission that at least some of the occupancy remains, and our review of the record confirms that a significant amount of equipment and other property remains on site. We conclude, therefore, that the decision ordering Shepherd to remove those materials and cease the occupancy is supported by a reasoned analysis of the facts in the record. See *L. Joeli Netolicky*, 167 IBLA at 197. Accordingly, we affirm BLM’s decision to the extent it found that the unauthorized occupancy persists on the McCoy Mine site and ordered Shepherd to cease such occupancy within the timeframe stated.

⁹ To be clear, what is at issue now is occupancy of the McCoy mining claim, whether by persons, structures, or personal property (including mining equipment), and related use of the claim. BLM’s decision does not affect the validity of the claim or prohibit the undertaking of annual assessment work.

3. Authority to Bar Occupancy for 5 Years

With respect to the first issue, as stated, BLM properly relied upon its enforcement authority in 43 C.F.R. § 3715.7-1(b)(1)(i) to order cessation of the occupancy initiated under the expired Notice. BLM went further, and purported to bar any occupancy of his claim for a period of 5 years from the date of receipt of the CO. We find that BLM overstepped its authority.

[4] As written, the CO purports to prohibit an occupancy on Shepherd's claim under any circumstances for a period of 5 years. We can find no statutory or regulatory authority for such a restriction. The regulation at 43 C.F.R. § 3715.7-1(b)(2)(iv) requires BLM to describe the "length of the cessation" in a CO, which means that BLM must specify whether it is ordering a temporary or permanent cessation of the particular occupancy at issue—in this case occupancy initiated under the 2001 Notice. *Rivers Edge Trust*, 166 IBLA at 304. It cannot be construed to authorize issuance of a CO prohibiting any future occupancy for any length of time.¹⁰ As we stated in *Combined Metals Reduction Co.*, 170 IBLA at 76, "[t]he validity of a mining claim and permissibility of occupancy of the claim are separate questions." Even if BLM orders use and occupancy to cease, a mining claimant retains the right to reenter the claim to conduct mining, exploration, and/or milling operations, subject to the limitations and requirements imposed by 43 C.F.R. Subparts 3715 and 3809. If and when Shepherd determines to re-enter his claim to commence authorized activities after he has fully complied with the June 2009 CO, including reclaiming the site to BLM's satisfaction, he can do so only under a new mining notice or plan of operations that complies with the regulations in 43 C.F.R. Subparts 3715 and 3809, pursuant to which he may also propose new use and occupancy. BLM must act on the proposal and information then submitted and issue a decision that shall be appealable to this Board.

¹⁰ We note that, in addition to the enforcement actions and penalties provided in 43 C.F.R. §§ 3715.8 and 3715.8-1, the regulation at 43 C.F.R. § 3715.7-2 authorizes BLM to request the United States Attorney to institute a civil action in United States District Court for an injunction or order to prevent the operator from using or occupying the public lands in violation of the regulations in that subpart.

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 in part and vacated in part to the extent it prohibits, for a period of 5 years, any occupancy after the permanent cessation of the occupancy initiated under Notice IDI-31717.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
T. Britt Price
Administrative Judge