



CYNTHIA BALSER, *ET AL.*

184 IBLA 123

Decided August 22, 2013



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

CYNTHIA BALSER, *ET AL.*

IBLA 2012-185

Decided August 22, 2013

Appeal from a Cessation Order of the Eastern Interior Field Office (Fairbanks, Alaska), Bureau of Land Management, ordering mining claimants to cease use and occupancy of public lands. FF-092206.

Affirmed.

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

When a person or entity legally acquires property on a mining claim or mill site through a chain of title, by virtue of contract, agreement, or the exercise or operation of law, and exercises dominion and control over it, the pronouns in the regulations at 43 C.F.R. §§ 3715.5-1 and 3715.5-2 are properly construed to include a subsequent successor-in-interest to the property left on the mining or mill site claim.

APPEARANCES: Cynthia and Dennis Balsler, and George O'Guinn, *pro sese*; Mike Gieryic, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE ROBERTS

Cynthia and Dennis Balsler and George O'Guinn appeal from a March 27, 2012, Cessation Order (CO) issued by the Eastern Interior Field Office (Fairbanks, Alaska), Bureau of Land Management (BLM), ordering them to cease their use and occupancy of public lands at O'Brien Creek. For the following reasons, we affirm BLM's issuance of the CO.

HISTORY OF OCCUPANCY

The question of appellants' use and occupancy of the lands at issue was before this Board in *Cynthia Balser*, 170 IBLA 269 (2006). The record shows:

The three [placer] mining claims at issue were located on August 17, 1970 (Thurber No. 1 and Hobart) [AKFF-052190 and AKFF-052191], and April 1, 1911 (No. 7 Below Mouth of Dick Dale) [AKFF-055440], 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.

170 IBLA at 270.

Following an August 31, 1999, inspection, BLM found no evidence of mining activity, and by letter dated February 2, 2000, BLM asked the appellants to explain the various structures and items observed on the claims. Appellants responded on March 14, 2000, by returning a "Worksheet Describing Use and Occupancy Under the General Mining [Law]" stating that occupancy was necessary in order to clean up debris and other items left by the previous claimants and to protect their equipment and any exposed minerals.

On January 16, 2001, BLM completed an environmental assessment and issued a finding of no significant impact regarding the appellants' proposed operations for suction dredging on the claims. By letter dated January 31, 2001, BLM concurred in the claimants' occupancy pursuant to 43 C.F.R. § 3715.3-4, expressly conditioning such concurrence upon the claimants' compliance with 43 C.F.R. § 3715.2, and stated that the use of structures on their mining claims for activities not conducted under the mining law was not approved. BLM approved appellants' plan of operations (AKFF-093045), which had been filed under 43 C.F.R. Subpart 3809, authorizing them to undertake suction dredging on the claims for a period of 5 years.

In April 2004, BLM issued a CO pursuant to 43 C.F.R. Subpart 3715, stating that it had been unable to confirm, based on numerous on-site inspections of the three claims, that the appellants had satisfied the regulatory prerequisites for occupancy. In the CO, BLM reported that it found no evidence that the appellants

were engaging in mining activity more than just recreational use or hobby mineral-collecting, activity not reasonably calculated to lead to the extraction and beneficiation of minerals at a level that would warrant occupancy, and that they had failed to respond to its requests that they contact BLM with evidence that activity on the claims was mining related. BLM documented the presence of an 18- by 26-foot log cabin, likely to have been erected in the 1970s and thus pre-dating the appellants' ownership of the claims, two storage sheds, an outhouse, a trailer, a camper shell, a propane tank, metal drums, debris, and other personal property.

The appellants appealed, asserting that all of BLM's requests had been accomplished—the outhouse had been moved, the prior claimholder's debris had been removed, and the requested clean-up had been completed in a timely manner. Regarding the cabin, they claimed that BLM's plats refer to it as a "Shelter Cabin" used by local residents as a survival shelter in times of need and suggested that it would be appropriate to consider the cabin for possible historical site preservation. Finally, they challenged BLM's notion that their dredging activity under the plan of operations does not justify occupancy.

The Board's evaluation of the disputed CO turned on whether the appellants' use and occupancy of the mining claims was reasonably incident to their prospecting, mining, or processing operations as set forth in 43 C.F.R. Subpart 3715. 170 IBLA at 274, 279. We set aside and remanded the matter, explaining as follows:

Appellants bear the burden of proving that their occupancy is reasonably incident to prospecting, mining, or processing operations and is justified under 43 [C.F.R.] Subpart 3715 and that BLM's decision is erroneous. *See, e.g., Pilot Plant, Inc.*, 168 IBLA [201, 216 (2006)]; *Thomas E. Swenson*, 156 IBLA [299, 310 (2002)]. 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 [C.F.R. §] 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 [C.F.R. §] 3715.0-5, we cannot say that BLM was justified in issuing the CO under 43 [C.F.R. §] 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 [C.F.R. §] 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.

170 IBLA at 279. It does not appear that subsequent to our decision BLM further considered whether the level of appellants’ mining activities satisfies the Subpart 3715 use and occupancy prerequisites. Rather, the next record document, dated January 30, 2007, finds BLM instructing the appellants to properly submit bond fund renewal forms and annual placer mining applications for their dredging operations.

On October 4, 2007, BLM issued a decision announcing the subject mining claims forfeited by operation of law based on the appellants’ failure to timely pay the maintenance fee or file a waiver for the upcoming assessment year ending September 1, 2008. The maintenance fee payment had been received by BLM on September 18, 2007, well after the due date. The Balsers and O’Guinn did not appeal. Because the lands embraced by the mining claims were withdrawn from mineral entry in 1980 (wild and scenic river corridor), the claims could not be relocated.

BLM’S REQUESTS FOR RECLAMATION OF PROPERTY

In the October 2007 decision, BLM advised the Balsers and O’Guinn that “[i]f your occupancy has been terminated and you fail to remove structures, material, equipment, and any personal property . . . , the BLM may dispose of the property. . . . [Y]ou will remain liable for the costs the BLM incurs in removing and disposing.” On March 14, 2008, BLM afforded the Balsers and O’Guinn until September 25, 2009, to reclaim all disturbed areas, including “your occupancy cabin,” by removing all permanent structures, temporary structures, material, equipment, and other personal property. In April 2009, Cynthia Balser contacted BLM concurring with the September reclamation deadline. *See* e-mail to Larry Jackson, BLM, dated Apr. 20, 2009. She, however, asserted that she had “not signed any agreement to remove the cabin, propane tanks or any outbuilding that predates our ownership.” *Id.*¹ She stated that “[p]ursuant to [IBLA’s July 26, 2004, Stay Order in IBLA 2004-205], the claimholders cannot be held responsible for the removal of the cabin, outbuildings, etc. that ‘predates appellants’ ownership . . . under any circumstances.’” *Id.* On September 18, 2009, BLM extended “the reclamation and occupancy closure

¹ The Eastern Interior Field Office, BLM, reports in a Sept. 11, 2009, Memorandum to the Fairbanks District Manager, BLM, that it received e-mails from Balser on Apr. 20 and June 25, 2009. BLM then states that it responded to the June 25 email by telephone. However, the record before us does not include a copy of that email or a report of the telephone conversation.

schedule” to September 25, 2010, thus allowing time for additional analysis regarding reclamation responsibilities.²

On November 8, 2010, BLM informed the Balsers and O’Guinn that

[i]t is BLM’s position that you are responsible for removing that property that predates your ownership of the claims over which you have exercised dominion and control[.] That would include the cabin and anything else that was used in association with your occupancy and mining activities.

At Cynthia Balser’s request, she and BLM conducted a teleconference on December 16, 2010, confirming her position that she has no responsibility for the cabin, outbuildings, propane tank, and other property remaining on the forfeited mining claims. On January 11, 2011, BLM sent separate letters to O’Guinn and the Balsers requesting acknowledgment that Cynthia Balser also represents O’Guinn and Dennis Balser in her discussions with BLM. In addition, BLM outlined the basis for its determination that the three claimants are responsible for removing the remaining property from the forfeited claims: Our records indicate that you (1) lawfully acquired your mining claims through a legal transfer of property; (2) requested and were approved by BLM on August 9, 2000, to utilize the existing cabin as a Subpart 3715 occupancy; (3) requested and were approved to construct a gate and post a sign preventing public access to the cabin occupied by you; and (4) paid for a 1-acre reclamation bond to cover your liability for occupancy of the cabin and associated items. BLM also stated that the letter served as a notice that it would issue a CO under Subpart 3715 if appropriate.³

On March 27, 2012, BLM issued separate COs to the claimants, identifying a September 22, 2011, inspection report showing a continued occupancy through a presence of the remaining structures and property not removed, ordering the parties to cease such use and occupancy, and requiring removal of the remaining structures and personal property by July 31, 2012. BLM further advised that failure to comply

² In response to BLM’s request to inspect the site due to damage occurring during the 2009 Spring flooding and secure the site for Winter and possible 2010 Spring flooding, Balser sent BLM confirmation that the site was inspected and attached a photograph of a trailer loaded with items removed. Letter received Nov. 16, 2009.

³ By separate letters dated Feb. 10, 2012, BLM notified O’Guinn and the Balsers that, due to a personnel change, a CO had not been issued within 30 days of receipt of the Jan. 11, 2011, letter. This latter communication reiterated what was said in the former letter.

could result in liability for costs incurred by BLM should it be required to remove the remaining property, plus possible civil actions.

ARGUMENTS ON APPEAL

After filing a timely notice of appeal, the Balsers and O’Guinn submitted a document styled “Petition for Stay/Partial Statement of Points on Appeal.”⁴ Appellants contend therein that the CO is both invalid and untimely, arguing that BLM took control of the cabin and other structures in 2007 and, 4½ years later, the claimants are not in possession. They further assert that they successfully complied with and completed all of BLM’s reclamation demands during 2007 and 2008 and therefore argue that it is too late to require them to again sanitize these lands, especially when any debris now present was left by others. A primary concern expressed by appellants is the cost in removing the cabin. They assert that this structure predated their possession of the mining claims and argue that they never owned or maintained it. They further note that it is listed as a “shelter cabin” on several maps and postulate that it is often used by others. Appellants challenge the removal deadline as arbitrary and argue that BLM’s behavior in misleading and misguiding the claimants in all matters related to BLM’s takeover of the claims should not be condoned.

BLM has replied and its responses establish that there is no merit in Appellants’ statements.

DISCUSSION

In 2006 our discussion in *Cynthia Balser* set forth the principles governing use and occupancy in clear terms:

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

⁴ This petition for stay apparently was not considered by the Board in accordance with 43 C.F.R. § 4.21(a). We have received nothing from the parties to indicate that BLM has proceeded to enforce the CO and assume that a stay *de facto* is in effect.

Counsel for BLM argues that the document Appellants filed does not constitute the statements of reasons required under 43 C.F.R. § 4.412(a), (c). We disagree as Appellants clearly set forth their reasons and arguments why they consider BLM’s decision to be in error. We deny BLM’s motion to dismiss under 43 C.F.R. § 4.402(c).

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 [at 214], 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.

170 IBLA 274-75. Without dwelling on what structures and personal property constituted the purported unauthorized use and occupancy, the Board focused on the reasons given by BLM for its determination that use and occupancy by appellants was inappropriate under the Subpart 3715 regulations.⁵ Hence, we concluded that neither a casual use operation nor a short mining season was a factor militating against a determination permitting use and occupancy reasonably incident to mining

⁵ We clarified the scope of our review in footnote 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.” *Cynthia Balser*, 170 IBLA at 279 n.4.

In conversations with BLM, Cynthia Balser stated that our 2006 decision “says she is not responsible for the cabin.” Dec. 21, 2010, Memorandum to File at 2. We did not. We opined that “[t]here is considerable question whether appellants . . . may properly be required, under 43 [C.F.R.] Subpart 3715, to remove the cabin, under any circumstances.” *Id.* We then cited *Marietta Corp.*, 164 IBLA 369, 376 n.10 (2005), for the principle “[w]hether 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.” *Id.* Thus, it is in our review here, not in our prior decision, that we consider Appellants’ responsibility for the cabin and other remaining property.

activities and remanded to BLM for reconsideration of the claimants' mining operations. 170 IBLA at 279.

The issue reviewed in the earlier *Cynthia Balse* decision is no longer relevant to our discussion as there can be no legitimate mining activity to evaluate because the claims no longer exist. Regardless, Appellants' obligations under Subpart 3715 survive the forfeiture of their claims. See *Betty Dungey*, 165 IBLA 1, 8, 16 (2005); *Marietta Corp.*, 164 IBLA at 371-72. When asking Appellants' to remove their property, BLM was properly implementing 43 C.F.R. § 3715.5-1:

What standards apply to ending my use or occupancy?

Unless BLM expressly allows them in writing to remain on the public lands, you must remove all permanent structures, temporary structures, material, equipment, or other personal property placed on the public lands during authorized use or occupancy under this subpart. You have 90 days after your operations end to remove these items.

Thus, the CO was validly issued for any remaining property belonging to appellants. See, e.g., *Marietta Corp.*, 164 IBLA at 374.

[1] It is clear from the regulations that the Department meant to ensure that a mining claimant conducting a valid, authorized operation would be expected to remove all equipment, buildings, and personalty from the site within 90 days of when the operation is no longer permitted. In *Marietta Corp.*, we recognized that BLM had previously struggled with applying the regulations to cases in which a party acquires a mining claim where property has been placed on site by another party. 164 IBLA at 375. However, we were able to distinguish one situation:

We hold that where a party lawfully acquires title to structures and/or personal property placed on a mining or mill site claim through a chain of title, by virtue of contract, agreement, or the operation of law, and exercises dominion and control over it, the pronouns in the regulations at 43 [C.F.R. §§] 3715.5-1 and 3715.5-2 are properly read to apply to such subsequent successors-in-interest to the property. Here, appellants' exercise of dominion and control over the property through purchase and contract renders them properly subject to those rules

Id. at 376. This conclusion is consistent with the regulations governing surface management of mining claims at 43 C.F.R. Subpart 3809. Under those rules, a mining claimant retains responsibility for obligations that accrued or conditions that were

created while the claimant or operator was responsible for operations conducted on the claim or project area. 43 C.F.R. § 3809.116(a).

The issue here is to ascertain whether BLM properly concluded that what remains is indeed Appellants' property. While it is BLM's duty to ensure that its decision is supported by a reasoned analysis, Appellants bear the burden of proving that BLM's decision is erroneous. *See Cynthia Balser*, 170 IBLA at 279. BLM refutes Appellants' contention that it had no control over or interest in the cabin and other property situated on the claims. Answer at 5-8. The mining claims were acquired by the Balsers and O'Guinn in 1999 under recorded quitclaim deeds in a chain of title from the original locators. BLM observes that there was nothing on these claims prior to location and the cabin, storage shed, propane tank, other mining equipment, and personal property were placed thereon by the mining claimants. These items were definitely part of the mining claim operations when those claims were transferred to Appellants. *Id.* There is nothing to suggest that Katherine Mann, the grantor to Appellants, intended to either retain any interest or abandon the property separate from the deeds. By all inferences, the cabin and other property was conveyed under the deeds and Appellants have offered no proof showing otherwise. BLM further explains that Appellants exercised control consistent with ownership when it contacted BLM in March 2000 regarding use and occupancy. Answer, Exh. 3, Worksheet Describing Use and Occupancy Under the General Mining Law (signed and dated by Cynthia Balser). In their statements to BLM, Appellants detailed use and occupancy of the cabin and other structures. They also reported to BLM that they would affix signs and erect a gate to protect their property and deter others. BLM inspectors later verified that Appellants were using the cabin and other property in a manner consistent with ownership. *See Compliance Inspection Sheet* (June 19, 2001). BLM reports that Appellants strung a steel cable across the access road to the cabin, maintained locks on the cabin door, placed an "Authorized Personnel Only" sign on the cable, and posted a "No Trespassing, Keep Out" sign in the cabin window. Answer at 8.

With regard to Appellants' contention that BLM took possession and control of the cabin and other property in 2007 when the claims were forfeited, the record evinces that BLM did not. Beginning with the October 2007 forfeiture decision, BLM has consistently instructed Appellants to remove all personal property, including the cabin. In defense of Appellants' assertion that they have knowledge of BLM arranging with another miner to use the cabin and items on the claims in conjunction with his nearby mining operations, BLM maintains that it has never sanctioned use of the cabin or the other property except by Appellants and one other predecessor claimant. Answer at 7.

Appellants' actions clearly are evidence that they accepted responsibility for the cabin and property they claimed for use and occupancy. Their exercise of

dominion and control over the property purchased renders them properly subject to the Subpart 3715 rules, and we affirm the CO issued to them as it pertains to the cabin and other remaining property.

Appellants' other arguments also fail to show error. The determination to allow 90 days from notice of the CO to remove all personal property was not arbitrary but is the time period established by the Department in 43 C.F.R. § 3715.5-1 ("You have 90 days after your operations end to remove these items"). Appellants assert that the cabin functions as a "shelter cabin" as shown on maps of the area. Several maps attached to documents prepared to describe Appellants' use and occupancy show the "Dome Creek Shelter Cabin" to exist in close proximity to the mining claims. Annual Placer Mining Applications (APMA No. F009638); Worksheet Describing Use and Occupancy (Mar. 9, 2000). BLM explains that this is an older shelter about ½-mile from Appellants' cabin and the more detailed maps depict it as the "old cabin." *Id.* As Appellants helped to assemble these maps, there is no basis to conclude that they confused the actual shelter with their cabin.

Appellants' argument that the CO is untimely because BLM has waited for more than 4½ years since first warning them that such a decision was forthcoming lacks merit. In this instance, a decision was delayed at Appellants' urging so that the Department could further examine whether the cabin and other property did indeed belong to Appellants. Nonetheless, "[t]he authority of the United States to enforce a public right or to protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties." 43 C.F.R. § 1810.3(a); *Alfred Jay Schritter*, 177 IBLA 238, 255 (2009), and cases cited. All that BLM did in the CO was in furtherance of an obligation to protect the public lands. That obligation is not diminished over time.

Finally, we note that Appellants have requested costs and fees be awarded if available. Under section 203 of the Equal Access to Justice Act, 5 U.S.C. § 504 (2006), such claims may be awarded to a party prevailing in an adversary adjudication unless the Department was substantially justified in its position. *See* 43 C.F.R. Part 4, Subpart F; *see also Donald E. Eno v. United States*, 179 IBLA 227, 232-34 (2010). As the claim was made by Appellants prior to a determination, it is premature. 43 C.F.R. § 4.613(a). Regardless, this appeal is not an adversary adjudication, the Appellants have not prevailed, and the Department was substantially justified in its position; aside from being premature, their claim is without merit.

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 CO is affirmed as it pertains to the cabin and other property left by Appellants.

_____/s/_____
James F. Roberts
Acting Chief Administrative Judge

I concur:

_____/s/_____
Christina S. Kalavritinos
Administrative Judge