



DAVID KORTE

186 IBLA 338

Decided December 1, 2015



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Interior Board of Land Appeals
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DAVID KORTE

IBLA 2016-14

Decided December 1, 2015

Appeal from and petition for a stay of the effect of a decision issued by the Field Manager, Central Yukon (Alaska) Field Office, Fairbanks District, Bureau of Land Management, styled an Occupancy Nonconcurrency Cessation Order. AKFF-093064.

Decision affirmed as modified; petition for stay denied as moot.

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

The Surface Resources Act, 30 U.S.C. § 612(a) (2012), bars use of an unpatented claim located under the mining laws for any purpose other than prospecting, mining, or processing operations and uses “reasonably incident thereto.” A mining claimant has no right to use or occupy the surface of a mining claim site unless the activity constituting the reason for the use or occupancy is reasonably incident to mining-related operations.

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

Under the authority of Departmental regulations at 43 C.F.R. § 3715.7-1(b), BLM properly issues a cessation order when the claimant’s use and occupancy is not reasonably incident to mining-related operations and does not endanger health, safety or the environment, to the extent it is not so reasonably incident.

APPEARANCES: David Korte, Oregon City, Oregon, *pro se*; Michael P. Routhier, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

David Korte (Korte or appellant) has appealed from and petitioned for a stay of the effect of a September 18, 2015, decision, styled an Occupancy Nonconcurrency Cessation Order, of the Field Manager, Central Yukon (Alaska) Field Office (CYFO), Fairbanks District, Bureau of Land Management (BLM). The decision directed Korte to cease his use and occupancy of the Starlight Nos. 1 and 2 association placer mining claims, AKFF-096591 and AKFF-096592 (Claims), because such use and occupancy was not in compliance with 43 C.F.R. Subpart 3715, and because the claimants had failed to comply with a September 8, 2014, Immediate Temporary Suspension Order (ITSO).^{1,2}

Because we find that Korte has failed to establish any error of fact or law in that decision, with respect to the determination that the use and occupancy is not in compliance with 43 C.F.R. § 3715.7-1(b), we will affirm the decision, as modified, and deny Korte's stay request as moot.

¹ The decision was delivered, by certified mail, return receipt requested, on Sept. 22, 2015, at the joint record address of David and Donald Korte, the record owners and operators of the Claims. David Korte timely appealed on behalf of himself. Donald Korte did not file a notice of appeal (NOA), and, in his NOA, David Korte does not indicate that he also filed the NOA on behalf of Donald Korte, which would have been permissible under 43 C.F.R. § 1.3, since the Kortes appear to be members of the same family.

We, therefore, conclude that the decision is administratively final for the Department, to the extent that the September 2015 decision affected Donald Korte's interest in the Claims. See, e.g., *Robert D. McGoldrick*, 115 IBLA 242, 247-48 (1990).

² At issue is use and occupancy of the Claims under 43 C.F.R. Subpart 3715, which is serialized as AKFF-093064. Operations on the Claims under 43 C.F.R. Subpart 3809 are separately serialized as AKFF-092866.

For the purposes of 43 C.F.R. Subpart 3715, “[o]ccupancy” of a mining claim is defined, by 43 C.F.R. § 3715.0-5, to encompass “full or part-time residence on the public lands,” as well as, *inter alia*, “activities that involve residence” and “*the construction, presence, or maintenance of temporary or permanent structures that may be used for [residential] purposes,*” noting that “[r]esidence 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.” (Emphasis added.)

Background

This case involves the Starlight Nos. 1 and 2 association placer mining claims, each of which covered a total of approximately 40 acres of public land situated in sec. 1, T. 28 N., R. 12 W., Fairbanks Meridian, Alaska, along the Clara Creek (Creek), near its junction with the Middle Fork of the Koyukuk River.^{3,4} The mine site is accessible over existing cross-country trails, following the Creek east from the nearby Dalton Highway.

In a Use and Occupancy Worksheet dated, May 23, 2000, the Kortés notified BLM they intended to occupy the Claims, erecting a temporary 8- x 12-foot cabin for use in connection with their mining operation, which would extract materials from the Creek and adjacent areas, for the recovery of valuable minerals. AR Vol. 1, Use and Occupancy Worksheet, dated May 23, 2000. Their stated intent was to occupy the cabin while undertaking operations from May 15 to October 1, and to store necessary equipment in the cabin year-round. They also indicated that mining operations would continue for an indefinite period of time. *Id.*

BLM analyzed the likely environmental impacts in a 2000 Environmental Assessment (EA) (EA-AK-025-00-092), and, by decision dated June 9, 2000, concurred in the Kortés' proposed occupancy of the Claims. AR Vol. 1, decision dated June 9, 2000. BLM expressly stated its concurrence was contingent on the Kortés' continued compliance with 43 C.F.R. §§ 3715.2, 3715.2-1, and 3715.5. *Id.*; see 43 C.F.R. § 3715.3-5(a). Thereafter, in letters dated July 25, 2003, March 19, 2004, and April 26, 2005, BLM acknowledged the Kortés' continued occupancy for 2003, 2004, and 2005, respectively, indicating that authorization for continued occupancy was contingent on the claimants' continued compliance with 43 C.F.R. Subpart 3715. *Id.*, BLM letters dated July 25, 2003, Mar. 19, 2004, and Apr. 26, 2005.

³ The Kortés also located the Starlight No. 3 association placer mining claim, AKFF-096593, on Mar. 26, 2013, in sec. 1. Evidently, their mining activity has been confined to the Starlight No. 1 and/or Starlight No. 2 claims, which were also located on Mar. 26, 2013, both of which are referred to in BLM's September 2015 decision.

⁴ In her September 2015 decision, the Field Manager incorrectly referred to the Starlight Nos. 1 and 2 claims, AKFF-083943 and AKFF-083944, which, according to their case abstracts, originally were located by the Kortés on Mar. 10, 1984, but were later declared abandoned and void, effective Dec. 30, 2012, by decision dated Feb. 25, 2013. It seems clear that she meant to refer to the more recent locations. For the purposes of this decision, references hereinafter to the "Claims" encompass both the 1984 and 2013 locations.

At BLM's first inspection, dated July 14, 2000, inspectors observed a cabin built uphill from the Creek, but little or no active mining operations. AR Vol. 1, BLM Compliance Inspection Sheet, dated July 14, 2000.

On February 17, 2004, the Kortés notified BLM that they intended to continue their mining operations, and process a total of 450 cubic yards of material each year. They proposed to dig two exploratory trenches to a depth of six feet near the Creek. The cabin would continue to be occupied during summer operations, and continue to house equipment year-round. AR Vol. 1, letter from Kortés to BLM, dated Feb. 17, 2004. During its July 16, 2004, inspection, BLM noted a marked increase in mining operations, involving, *inter alia*, the use of an excavator, a wash plant and sluice box, and two settling ponds, improved access, and no environmental concerns. See 3715 & 3809 Field Compliance Inspection Sheet (Inspection Sheet), dated July 16, 2004. While active mining operations were not occurring at the exact time of the inspection, subsequent inspections disclosed continued operations.

Mining operations on the Claims were initially covered by a Notice. However, as required pursuant to 43 C.F.R. Subpart 3809, on June 6, 2006, the Kortés filed with BLM a Plan of Operations (POp), in the form of a State of Alaska Annual Placer Mining Application (APMA). See AR Vol. 1, BLM letter responding to APMA. They proposed to extract material from a 30- x 100-foot pit by means of a track loader, starting in the existing trench. To recover valuable minerals, they would run the material through a wash plant and sluice box, and pump water from a settling pond, with the expectation of processing a total of 300 cubic yards of material each year. They would continue to occupy the cabin each year during late summer operations, generally from August 1 to September 1, and store equipment year-round. *Id.*

BLM analyzed the likely environmental impacts in a 2006 EA (EA-AK-025-06-069), and approved the POp.⁵

The AR includes a series of Inspection Sheets from 2006 until 2010, which reflect the status of the operations and reclamation activities, and indicate that BLM inspectors had not noted any environmental concerns during those visits. See AR Vol. 1. However, at the time of the June 19, 2012, inspection, BLM inspectors noted that the cabin was perched atop an "almost vertic[al] slope," which was "potentially

⁵ The administrative record supplied by BLM does not indicate when the POp was approved, but it is undisputed that approval occurred, and the Kortés thereafter operated under the POp. See Decision at unpaginated (unp.) 1 ("You have an approved Mining [POp] pursuant to 43 CFR [Subpart] 3809").

unstable.” Inspection Sheet, dated July 25, 2012, at 1. They also observed the Creek “running through” the settling ponds. *Id.*

The Kortes located both claims on March 26, 2013, pursuant to the U. S. Mining Laws, 30 U.S.C. §§ 21-54 (2012).⁶ It appears that, thereafter, they properly maintained the Claims, either by paying claim maintenance fees or filing small miner waiver certifications, along with affidavits of assessment work or notices of intent to hold the claims. *See* Administrative Record (AR) Volume (Vol.) 1.

On August 29, 2014, BLM inspectors again inspected the mine site, finding that the mining operation was inactive, no one was present at the site, and reclamation was deficient. *See* Inspection Sheet, dated Aug. 29, 2014. They reported that the Creek was running through settling ponds and the mine site, which caused environmental concerns regarding fish and water resources. They also noted that the mine site was unbonded since 2011. *Id.*

On September 8, 2014, the Field Manager issued a decision, styled an “Immediate Temporary Suspension Order” (ITSO) pursuant to 43 C.F.R. § 3809.601(b), directing the Kortes to immediately suspend all operations on the Claims.⁷ She issued the ITSO because the Kortes had failed to maintain a bond or other financial guarantee, as required by 43 C.F.R. § 3809.582. The Field Manager also issued the ITSO because the Kortes had failed to take measures to control erosion, landslides, and water runoff, in violation of 43 C.F.R. § 3809.420(b)(3), and these were causing unnecessary or undue degradation of the public lands, prohibited by 43 C.F.R. § 3809.605. She stated that, by allowing the Creek to flow through the settling ponds and mine site, they were causing the site to erode, creating the potential for the “[s]teep unconsolidated slopes” above the ponds to fail, which, in turn, would cause sedimentation of the Creek. ITSO at unpag. 2.

The Field Manager required the Kortes to stabilize the mine site, within 30 days of receipt of the ITSO, by placing the Creek “in a stable stream channel,” in order to prevent any unnecessary or undue degradation of the public lands, and to provide evidence that they had obtained a bond or other financial guarantee, including “for the years 2012-2014.” ITSO at unpag. 2. The Field Manager warned that, should the Kortes fail to comply with the ITSO, BLM would take all reasonable measures necessary to ensure the absence of unnecessary or undue degradation of the public

⁶ *See* http://sdms.ak.blm.gov/acres/acres_menu (last visited Nov. 23, 2015).

⁷ In its September 2015 decision, BLM indicates that the Kortes were served with, but did not appeal, the ITSO. *See* Decision at unpag. 1.

lands, and might take additional actions, including, but not limited to, revoking their POP and making them subject to civil and criminal penalties.⁸ *Id.*

During its most recent inspection, on August 4, 2015, BLM inspectors found that the mining operation was inactive, no one was present at the site, and reclamation was no longer being undertaken, and described the access route as “rough” and in need of maintenance work. Inspection Sheet, dated Aug. 10, 2015, at 1. They reported that the Kortés had failed to obtain a bond or other financial guarantee “since 2011,” and that the Creek, which had breached the settling ponds, was “running through” them, raising environmental concerns regarding fish and water resources. *Id.* at 1-2. A photograph of the area near the cabin was described as depicting “[m]assive erosion,” and others revealed the presence of a cabin, two washplants (one of which was situated virtually in the Creek), and scattered debris at the site. Attachments, *id.*

In her September 18, 2015, decision, the Field Manager informed the Kortés that recent inspections of the mine site in 2014 and 2015 disclosed they were engaging in “little if any mining . . . greater than casual use[.]”⁹ Decision at unp. 1. She found the Kortés in noncompliance with 43 C.F.R. § 3715.2, because their activities on the Claims were not reasonably incident to mining, did not constitute substantially regular work, were not reasonably calculated to lead to the extraction and beneficiation of any minerals, and did not involve observable on-the-ground activity. The Field Manager noted that, while the Kortés had obtained an approved mining POP, under which they previously had undertaken activities at the mine site, they did not have an approved bond or other financial guarantee. She also concluded that the activity was causing unnecessary and undue degradation, as

⁸ So far as we are aware, BLM has yet to take action to revoke the POP, or seek to impose civil and/or criminal penalties.

⁹ The Field Manager described the September 2015 decision as a “Cessation Order” in the text of the decision, as well as the title of the decision. However, she only stated that the decision served as a nonconcurrency with the Kortés’ occupancy of the Claims in the title of the decision. We note that BLM is authorized, pursuant to 43 C.F.R. § 3715.3-4, to express its nonconcurrency with a claimant’s *proposed* occupancy, after the claimant has submitted information in compliance with 43 C.F.R. § 3715.3-2, and BLM has completed the process envisioned in 43 C.F.R. § 3715.3-3. BLM originally concurred in the Kortés’ proposed occupancy in a June 9, 2000, decision, allowing the cabin to be erected and used thereafter for residency during operations and for storing equipment. We need not decide whether BLM may, in effect, withdraw such concurrence, since we do not think that BLM has adequately established that it sought to do so in its September 2015 decision.

defined by 43 C.F.R. Subpart 3715, and that the Kortés also were not in compliance with the September 2014 ITSO.

Ordering the Kortés to cease all use and occupancy of the Claims, pursuant to 43 C.F.R. § 3715.7-1(b), the Field Manager explained that, to resume occupancy of the Claims, the Kortés must comply with 43 C.F.R. § 3715.2. First they must reclaim the mine site, and remove all “chemicals” within 5 days of receipt of the decision. Decision at unp. 2. They also were directed to remove all trailers and other “wheeled equipment” not specifically used in reclamation within 15 days of receipt of the decision, and remove all “equipment, person[a]l property and trash,” and complete “all dirt work,” within 30 days of receipt of the decision.¹⁰ *Id.* In addition, the Field Manager required the Kortés to notify BLM within 5 days of completing reclamation of the mine site, and to request an inspection of the site. The Field Manager warned that, at BLM’s discretion, any property remaining on public lands 30 days after receipt of the decision would become the property of the United States, and subject to removal and disposal by BLM at the Kortés’ expense, pursuant to 43 C.F.R. § 3715.5-2.¹¹ *Id.*

David Korte filed a timely appeal from the Field Manager’s September 2015 decision, requesting a stay of the effect of the decision, during the pendency of his appeal.¹¹

In his single-page NOA, appellant states his “reason for the appeal” is that BLM’s September 2015 decision arose as a result of “a lack of communication” between BLM and the Kortés. NOA. Korte states that the mining operation at issue is an “active operation,” but admits “[t]here ha[ve] been very little activities the last few years,” owing to deaths in the family. In his NOA, he describes operations consisting of the use of “heavy equipment” and a 6-inch suction dredge, and says he “plan[s] to bring all fees and permits current.”¹² Conversation Record of George

¹⁰ The Field Manager did not specify the nature of “dirt work.”

¹¹ Even were we to address Korte’s stay request, we would deny it, since he has failed to address and demonstrate how he has satisfied the four stay criteria, set forth at 43 C.F.R. § 4.21(b). For instance, he fails to demonstrate that a stay is warranted in the public interest, that the balance of harms tips in his favor, that he would suffer irreparable harm, and that he is likely to succeed on the merits of his challenge.

¹² During a Sept. 19, 2015, phone call, prior to filing his appeal, Korte notified BLM that “he plans to work next summer and submit a new APMA and bond before the end of 2015.” Conversation Record of George Garner, Mining Compliance Inspector,

(..continued)

Garner, Mining Compliance Inspector, CYFO, dated Sept. 29, 2015. In his brief stay request, Korte also does not aver he is engaged in ongoing mining operations, but states that the Claims are the situs of a cabin, which he uses for storage of equipment.

Neither in his NOA nor stay request does Korte indicate he intends to file a separate statement of reasons (SOR) in support of his appeal, pursuant to 43 C.F.R. § 4.412(a). “A notice of appeal may include a[n SOR] for the appeal.” 43 C.F.R. § 4.411(b). Appellant’s NOA includes his SOR. We, therefore, conclude that Korte intended his NOA to serve as his SOR.

Discussion
Legal Framework

[1] At issue here is the principle that, where any use and occupancy of a mining claim is not reasonably incident to prospecting, mining, or processing operations, it is precluded by section 4(a) of the Multiple Use Mining Act of 1955 (also known as the Surface Resources Act), 30 U.S.C. § 612(a) (2012), and 43 C.F.R. § 3715.5(a). *See, e.g., Precious Metals Recovery, Inc.*, 163 IBLA 332, 340-41 (2004); *Thomas E. Smigel*, 156 IBLA 320, 323 (2002). The regulation at 43 C.F.R. § 3715.0-5 describes the term “[r]easonably incident” as encompassing

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.

We have also long held that any use and occupancy of a claim must be reasonably related to and commensurate with the level of prospecting, mining, or processing operations actually being undertaken on the claim. *See, e.g., Karen V. Clausen*, 161 IBLA 168, 177 (2004); *Robert W. Gately*, 160 IBLA 192, 208-09 (2003).

In addition, 43 C.F.R. § 3715.2 specifically provides that, in order to occupy a claim for more than 14 calendar days in any 90-day period, a claimant must be engaged in activities that (a) are reasonably incident; (b) constitute substantially regular work; (c) are reasonably calculated to lead to the extraction and beneficiation of minerals; (d) are observable on-the-ground and verifiable by BLM; and (e) use

(..continued)

CYFO, dated Sept. 29, 2015. So far as we are aware, no bond or other financial guarantee has been submitted by the claimants.

appropriate equipment that is presently operable.¹³ We have stated that to be permissible under 43 C.F.R. § 3715.2, the occupancy must meet all five of those requirements. *Las Vegas Mining Facility, Inc.*, 166 IBLA 306, 312-13 (2005); *Betty Dungey*, 165 IBLA 1, 8 (2005).

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. Joeli Netolicky*, 167 IBLA 193, 197 (2005). A party challenging a BLM decision that is based on a finding that a claimant's use and occupancy of a mining claim is not reasonably incident to prospecting, mining, or processing operations or is otherwise not in compliance with 43 C.F.R. Subpart 3715 bears the burden to prove, by a preponderance of the evidence, that the use and occupancy is, in fact, in compliance with section 4(a) of the Surface Resources Act and 43 C.F.R. Subpart 3715. *Jason S. Day*, 167 IBLA 395, 400 (2006); *Leadville Corp.*, 166 IBLA 249, 255 (2005).

BLM's Cessation Order expressly states it is issued "pursuant to 43 C.F.R. § 3715.7-1(b)," because the Kortess' *occupancy* of the Claims was not in compliance with 43 C.F.R. Subpart 3715. Decision at unp. 1. It also states it is additionally justified by the Kortess' failure to comply with the September 2014 ITSO.

Claimants Use and Occupancy were "Not Reasonably Incident" to Mining

[2] The rule at 43 C.F.R. § 3715.7-1(b) authorizes BLM to issue a cessation order when the claimant's "use or occupancy is not reasonably incident but does not endanger health, safety or the environment, to the extent it is not reasonably incident[.]"¹⁴ See *Austin Shepherd*, 178 IBLA 224, 232-33 (2009). By contrast, 43 C.F.R. § 3715.7-1(a) provides that BLM may issue an ITSO when the claimant's "use or occupancy is not reasonably incident or is not in compliance with [43 C.F.R.] §§ 3715.2, 3715.2-1, [or] . . . 3715.5[,]. . . and . . . an immediate, temporary suspension is necessary to protect health, safety or the environment."

¹³ "Substantially regular work" is defined, at 43 C.F.R. § 3715.0-5, as work "associated with the search for and development of mineral deposits or the processing of ores," including "active and continuing exploration, mining, and beneficiation or processing of ores" and "a seasonal, but recurring, work program."

¹⁴ 43 C.F.R. § 3715.7-1(b) also provides for issuance of a cessation order "when there is a failure to comply with an earlier enforcement action under 43 CFR Subpart 3715." *Robert W. Gately*, 160 IBLA at 206. We find no such prior action here, upon which BLM could predicate the Cessation Order.

Our review of the record persuades us that the Kortés' use and occupancy of the Claims were not reasonably related to, or commensurate with, any observable efforts "to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit," and, therefore, were "not reasonably incident"¹⁵ to mining, as required by 43 C.F.R. § 3715.7-1(b) for issuance of a cessation order. 43 C.F.R. § 3715.0-5 ("Reasonably incident"); see, e.g., *Combined Metals Reduction Co.*, 170 IBLA 56, 74-75 (2006); *Rivers Edge Trust*, 166 IBLA 297, 303 (2005); *Bruce M. Lewis*, 156 IBLA at 296-97. Indeed, they did not constitute substantially regular work, were not reasonably calculated to lead to the extraction and beneficiation of any minerals, and did not involve observable on-the-ground activity. See, e.g., *Joe Gutierrez*, 174 IBLA 207, 218-20 (2008); *Dan Solecki*, 162 IBLA 178, 192-94 (2004).¹⁶

On appeal, Korte concedes as much, offering no argument or evidence demonstrating that the claimants have been engaged in activities, required under 43 C.F.R. § 3715.2, to justify their continued occupancy of the Claims. In his NOA, Korte reports there have been "very little activities the last few years" at the site, and states his intent to put operations in compliance with applicable regulations, by "bring[ing] all fees and permits current." However, "[t]he possibility that mining or milling might commence sometime in the future does not justify current occupancy of a mining claim or mill site" under 43 C.F.R. § 3715.2. *Jason S. Day*, 167 IBLA at 401; see *Combined Metals Reduction Co.*, 170 IBLA at 75.

In addition, as BLM properly notes, from the time BLM issued the unappealed September 2014 3809 ITSO, Korte has not been authorized to engage in any operations. See *Opposition to Petition* at 4 ("[B]ecause Appellant has failed to take

¹⁵ Since the use and occupancy of the Claims, though authorized, are not reasonably incident, as required by section 4(a) of the Surface Resources Act and 43 C.F.R. Subpart 3715, they also constitute unnecessary or undue degradation of the public lands, as BLM also determined in its September 2015 decision. See 43 C.F.R. §§ 3715.0-5 ("Unnecessary or undue degradation"), 3715.5(a), and 3809.5 ("Unnecessary or undue degradation").

¹⁶ In support of its Cessation Order, BLM cited evidence in the record that "little if any mining . . . greater than casual use" was found to be occurring on the Claims, during the Aug. 29, 2014, and Aug. 4, 2015, inspections. *Decision* at unp. 1. We have held that a claimant is not precluded from occupying his claim simply because he is only engaged in "[c]asual use" operations, as defined in 43 C.F.R. § 3809.5, but we find no indication that BLM meant to suggest that the Kortés were engaged in casual use. See *Cynthia Balsler*, 170 IBLA 269, 277-78 (2006). In any event, we think the record establishes that, in recent years, the Kortés were not engaged in *any* prospecting, mining, or processing operations on the Claims.

any corrective action, the suspension remains in place[.] . . . Appellant has failed for the last five years to provide required financial guarantees to assure future performance of reclamation obligations[.]”). Without an approved bond or other financial guarantee, Korte has been barred from undertaking any operations under a notice or Pop. See 43 C.F.R. § 3809.500.

We are persuaded that the Kortés’ use and occupancy of the Claims were “not reasonably incident” to mining at the time of the decision on appeal.¹⁷

Having properly concluded that mining operations had long since “end[ed],” BLM was authorized, by 43 C.F.R. § 3715.5-1, to order the claimants to 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 [43 C.F.R. Subpart 3715].” See 43 C.F.R. § 3715.6(a). Here too, appellant has not preponderated in showing error in BLM’s decision.

We conclude that, in her Cessation Order of September 2015, the Field Manager did not err in directing the Kortés to cease their use and occupancy of the Claims, and requiring them to clear the mine site. See *Combined Metals Reduction Co.*, 170 IBLA at 75; *Jay H. Friel*, 159 IBLA 150, 159 (2003).

The Decision is Affirmed as Modified

BLM identified the September 2014 ITSO, issued pursuant to 43 C.F.R. § 3809.601(b)(2), as additional authority for its Cessation Order. In the ITSO, BLM found the Kortés’ *operations* on the Claims in noncompliance with the requirements of 43 C.F.R. Subpart 3809, because the Kortés had failed to maintain a bond or other financial guarantee or otherwise satisfy the regulatory requirements,

¹⁷ BLM’s reliance upon 43 C.F.R. § 3715.7-1((b), as authority to issue the Cessation Order, indicates it determined that the use and occupancy, although not reasonably incident to mining, “do[] not endanger . . . the environment.” Here too we find no error. While the record establishes that *operations* on the Claims were “causing erosion” and threatening to cause a landslide, both of which had the potential to cause sedimentation of the Creek, thereby likely endangering the environment with respect to fish habitat (ITSO at unp. 2; see also Aug. 29, 2014, inspection; EA (EA-AK-025-06-069) at unp. 8, 12-13). BLM did not determine, in its Cessation Order or elsewhere, that the Kortés’ *use and occupancy* of the Claims was endangering the environment. See *Bruce M. Lewis*, 156 IBLA 287, 296, n.9 (2002).

and an immediate, temporary suspension of operations was necessary to protect the environment from imminent danger or harm.¹⁸

Under Departmental regulations, failure to comply with an ITSO issued pursuant to 43 C.F.R. § 3809.601(b)(2) may justify revocation of a POP under 43 C.F.R. § 3809.602, and may justify the institution of a civil action for the recovery of damages and/or an injunction or other enforcement action, pursuant to 43 C.F.R. § 3809.604(a), and/or the imposition of criminal penalties, pursuant to 43 C.F.R. § 3809.700(a). However, failure to comply with an ITSO issued pursuant to 43 C.F.R. § 3809.601(b)(2) does not justify the issuance of a cessation order pursuant to 43 C.F.R. § 3715.7-1(b). We, therefore, conclude that BLM erred to the extent it predicated the 43 C.F.R. § 3715 Cessation Order, in part, on the Kortés' failure to comply with the ITSO issued pursuant to 43 C.F.R. § 3809.601(b)(2). Because BLM's decision was adequately authorized under 43 C.F.R. § 3715.7-1(b), based on its well-supported determination that the claimants' use and occupancy were not reasonably incident to mining, we affirm the decision, as modified.

Accordingly, 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, and the petition for a stay is denied as moot.

/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

/s/
James F. Roberts
Administrative Judge

¹⁸ Having failed to obtain a bond or other financial guarantee, the Kortés are subject to further penalties pursuant to 43 C.F.R. Subpart 3809, but not 43 C.F.R. Subpart 3715. The rules at 43 C.F.R. Subpart 3715 do not require a claimant to secure a financial guarantee. Therefore, the Kortés' failure to obtain a bond or other financial guarantee does not support issuance of the 3715 Cessation Order.