

INTERIOR BOARD OF LAND APPEALS

United States

v.

Lee Jesse Peterson

125 IBLA 72 (January 6, 1993)

Title page added by:
ibiadecisions.com

Editor's note: Reconsideration denied by Order dated May 20, 1993

UNITED STATES
v.
LEE JESSE PETERSON

IBLA 90-258

Decided January 6, 1993

Cross appeals from a decision of Administrative Law Judge Harvey C. Sweitzer ruling, inter alia, on the issue of whether various aspects of contestee's occupancy of a placer mining claim are incidental to mining. CO 739.

Affirmed in part; affirmed in part as modified; reversed in part; and remanded in part.

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

Sec. 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (1988), bars use of an unpatented mining claim for any purpose other than prospecting, mining, or processing operations and uses "reasonably incident thereto." Residential occupancy may be reasonably incident to mining during the conduct of operations where required to provide feasible access to remote claims and/or to provide security for equipment and material at times when operations are ongoing. These needs are obviated, however, and residential occupancy may not be reasonably incident where the claimant owns fee lands contiguous with the claim which both provide and control vehicular access to the claim and from which claimant operates a tourist shop.

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

Storage on an unpatented mining claim of numerous inoperable (junk) automobiles and trucks is not reasonably incidental to mining even though some cannibalized parts from those vehicles may potentially have utility. Similarly, storage on the

claim of more dump trucks than the record establishes can reasonably be used in claimant's mining operation is not reasonably incidental to mining.

3. Federal Land Policy and Management Act of 1976: Surface Management -- Mining Claims: Surface Uses -- Surface Resources Act: Occupancy

Occupancy of an unpatented mining claim is properly regulated to bar any unnecessary and undue degradation of the public lands as set forth in sec. 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1988). The accumulation of an excessive quantity of parts and materials stored in a disorganized manner on the surface of an unpatented mining claim causing a surface disturbance greater than would normally result when mining is performed by a prudent operator in usual, customary, and proficient operations of similar character gives rise to unnecessary and undue degradation of the public lands.

4. Federal Land Policy and Management Act of 1976: Plan of Operations -- Federal Land Policy and Management Act of 1976: Surface Management -- Mining Claims: Surface Uses

The raising of buffalo on the surface of an unpatented mining claim is barred where the record establishes that raising buffalo is not reasonably incidental to the mining operation.

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

The conduct of operations on an unpatented mining claim under an approved plan of operations may be conditioned upon provision of a bond adequate to cover the costs of reasonable stabilization and reclamation of disturbed areas. However, the basis for establishing the amount of the bond must be clear from the record.

APPEARANCES: Lee Jesse Peterson, Black Hawk, Colorado, pro se; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Cross appeals have been filed by the United States, contestant, acting through the Bureau of Land Management (BLM), and Lee Jesse Peterson, contestee, from a decision of Administrative Law Judge Harvey C. Sweitzer, dated February 15, 1990, resolving contest CO 739. The contest was commenced by

the Colorado State Office, BLM, following Peterson's objections to stipulations required as a condition of approval of his mining plan of operations. Peterson is the successor-in-interest to Stancil Couch in the Couch placer mining claim ^{1/} situated in Gilpin County, Colorado. Although this claim was central to contest CO 739, the validity of the claim was not contested in the proceeding.

By decision of December 3, 1987, the Colorado State Director, BLM, affirmed a decision of the Northeast Resource Area Manager approving contestee's plan of operations subject to certain stipulations. These stipulations required contestee to cease residential occupancy of the Couch placer claim; remove numerous items, e.g., vehicles, building materials, and trash, not reasonably incident to mining or causing unnecessary or undue degradation of public lands; remove buffalo raised on the claim; and submit a bond to ensure reclamation of this claim. Peterson appealed the State Director's decision to this Board. Subsequently, BLM sought remand of the case to file the instant contest in accordance with the precedent established in Bruce W. Crawford, 86 IBLA 350, 92 I.D. 208 (1985). The Board granted BLM's request by order of March 18, 1988.

BLM's contest complaint charged:

- a. The residential occupancy of the Couch placer mining claim by Lee Jesse Peterson and others is not reasonably incident to mining or milling operations.
- b. The Couch placer mining claim is being used for the storage of many items not necessary for whatever mining and milling operations are being conducted on that claim, which storage is not reasonably incident to mining or milling operations.
- c. The mining and milling operations being conducted on the Couch placer mining claim which are reasonably incident to mining are causing "unnecessary and undue degradation" of the surface of the Couch placer mining claim as that term is defined in 43 C.F.R. 3809.0-5(k).
- d. The use of the surface of the Couch placer mining claim as a feedlot or corral for buffalo is not reasonably incident to mining.
- e. The mining and milling operations being conducted on the Couch placer mining claim require a bond in the amount of \$ 6,000.

^{1/} Judge Sweitzer found that the Couch placer claim had been located on Aug. 11, 1960, and relocated Feb. 15, 1965. Thereafter, an amendment to this location was made on May 3, 1977. Contestee acquired a legal interest in this claim no later than 1980 (Decision at 3-4) and has resided on the claim since 1976 (Tr. 25-26). Mining previously occurred on the area described by this claim during the 1940's (Tr. 89, 1363).

In presiding over this contest, Judge Sweitzer heard testimony from many witnesses (approximately 2,400 pages of transcript) and received 81 exhibits. In his February 15, 1990, decision, the Administrative Law Judge held:

The residential occupancy of the Couch placer mining claim by contestee, his family, and Mr. Brown [contestee's employee] is reasonably related to contestee's mining activities thereon and does not cause unnecessary or undue degradation of the land.

The so-called "wood-chip plant" is not reasonably related to contestee's mining activities and must be removed from the claim within a reasonable period of time (not to exceed 6 months from date of this decision).

The trash strewn around the residence and the burn area is not reasonably related to mining and must be removed from the claim within a reasonable period of time (not to exceed 6 months from date of this decision).

The maintenance of buffalo (bison) on the claim is not reasonably related to mining and is hereby prohibited.

Other materials and items located on the claim are reasonably related to mining, but the excess parts and scrap constitute a nuisance and are therefore determined to create unnecessary or undue degradation. These items and materials are to be consolidated in a reasonably compact area in the vicinity of the mill building and stored in an organized manner so as not to constitute a danger or hazard to children who may be attracted thereto. This work is to be accomplished within a reasonable period of time (not to exceed 6 months from date of this decision).

No additional bond is presently appropriate. Any imposition of a bond requirement must be in conformance with applicable regulation and the findings of this decision.

(Decision at 23).

Counsel for BLM raises several arguments on appeal. Contestant objects first to Judge Sweitzer's holding that Peterson's residence on the Couch placer claim is reasonably incident to mining. The phrase "reasonably incident" to mining is found at section 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (1988), which states: "Any mining claim hereafter 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." (Emphasis added.) Contestant argues that Peterson exaggerated the level of mining performed on his claim and contends that actual mining operations, i.e., the mining and processing of placer material, are seasonal at best, and probably intermittent to nonexistent.

In support, contestant calls our attention to the testimony of BLM employees Jim Perry, Phillip Cloues, Phillipe de Henaut, and Roy Drew, each of whom examined the claim. Perry, a natural resource specialist, visited the claim approximately 30 times and observed as follows:

In a mining operation such as this, there should be equipment moving around, excavating gravel, transporting those gravels, putting those gravels and materials, earth materials, into mechanical processing equipment for processing those gravels and removing the ore, the gold, from those materials.

In addition to mining activities, there should have been milling activities on the claim, because there is a mill building there, the mill building does contain some milling equipment; but, on my inspections, I never saw any of the milling equipment operating. Frequently, I could see equipment that didn't look like it could operate.

(Tr. 267-68).

Cloues, a mining engineer and mineral economist, testified that the "state of disrepair suggested that the operation was in suspension and inactive as a viable operation" (Tr. 584). To the same effect, counsel argues, is the testimony of de Henaut, a geologist, who observed that had Peterson's efforts been diligent and continuous during his 12 years on the claim more placer material would have been removed (Tr. 704).

Roy Drew, a geologist, made 15 inspections of the Couch placer claim over the course of 18 months and concluded, as did Perry, that very little mining had occurred:

My visits did show and the photos pretty well document that fact that some pieces of equipment haven't moved in two years time. They've been inoperable for at least two years. Many pieces of equipment sat in one place for months at a time unused. Maybe, there was a hood raised on a vehicle, and four or five months later, the vehicle is in the same place still with its hood raised.

Another thing I have observed is that although much of the available surface area of the Couch Placer, probably eight acres or so, has been disturbed, we have a situation where we have small pits dug here, small piles of rock placed here scattered about the claim, and yet I've never seen any indication of a logical progression of mining of gravel followed by reclamation, recontouring, leveling, and such as you see in most operations involving gold placers or plain old gravel operations.

(Tr. 770-71). Counsel for BLM argues that this testimony, like that of Perry, Cloues, and de Henaut, is impossible to reconcile with Judge Sweitzer's holding that Peterson's residence on the claim is reasonably incident to mining.

Notwithstanding the testimony cited by BLM, there is substantial evidence in the record to support a finding that Peterson is engaged on a continuing basis in mining and mining-related activities on the Couch placer claim. Numerous witnesses testified on contestee's behalf, and among these was Frank R. Young, the Northeast Resource Area Manager, BLM. Young had authored BLM's October 14, 1987, decision imposing the stipulations at issue. Young acknowledged making the statement that if anyone was mining in Gilpin County, it was the contestee (Tr. 1131). From 1981 to 1983 or so, generally intense placer activity occurred (Tr. 1192). Thereafter, most of Peterson's activities (80 percent) were devoted to developing his mill facilities and repairing his equipment, although actual mining and milling occurred at times (Tr. 1191). Peterson's activity occurred "in some sort of illogical progression" (Tr. 1193).

Witnesses Albert Ytsma, Philip Criley, Norman Blake, Myron Anderson, Charles Van Cullar, James Lumpkins, Jeff Moerbe, Paul Felton, Bernard Burdett, Jeff Putt, Warren Brown, Bill Lorenz, Bill Reid, Jerry Kenyon, David Mosch, and Rochelle Peterson (contestee's wife) each testified that Peterson was mining the Couch placer claim (Tr. 1207-08, 1240-41, 1320, 1415, 1457, 1550, 1715, 1737, 1776, 1783, 1802, 1830, 1945, 2012, 2050, 2092). Thus, Anderson testified he had often seen mining operations on the claim including operation of the trommel at contestee's mill (Tr. 1415). Brown stated he had worked with Peterson at the mine and mill many times and witnessed many loads of dirt run through the trommel (Tr. 1799-1802). Brown also noted that when the large trommel was inoperative in 1985-1987, other forms of milling were used including a small trommel (Tr. 1815). Contestee's use of a trommel and sluice was a typical or traditional method of processing placer gravels for gold (Tr. 1976, 2012, 2051). Reid, a graduate of the Colorado School of Mines who studied mineral exploration and geology, acknowledged that Peterson had a viable operation, but noted he would like to see the contestee "working every day eight or ten hours, preferably ten hours a day during these longer summer days and just getting the job done" (Tr. 1948-49). Although it is clear from the record that the washing of placer gravels is precluded as a practical matter during the subfreezing winter season (approximately November to April) at the claim site, black sand concentrates are processed and equipment is worked on (Tr. 2162). The testimony of contestee's witnesses supports a finding that Peterson conducts mining and mining-related activities on a year-round basis. Mining, milling, and the repair of equipment used to perform these operations fall within the scope of the term "mining or processing operations" as used in section 4(a) of the Surface Resources Act.

[1] The next issue before us is whether Peterson's residence on the claim is reasonably incident to his mining and mining related activities. A definition of the phrase "reasonably incident" to mining, as appears in section 4(a) of the Surface Resources Act, is not found in the Act or the current regulations at 43 CFR Part 3710. 2/ However, we know that

2/ Some guidance is offered by 43 CFR 3712.1(b), which provides: "The locator of an unpatented mining claim subject to the Act * * * is forbidden

historically claimant undertaking legitimate mining endeavors generally would occupy a mining claim out of necessity and/or for security purposes. Due to the situs of a claim, such as in a remote mountainous area, a claimant might find it essential to live on the claim in order to successfully develop the claim. Also in order to protect any investment in mining equipment, regardless of the situs of the claim, the claimant might occupy a claim in order to protect that equipment.

In Bruce W. Crawford, the Board reviewed the law prior to enactment of the Surface Resources Act, and concluded that "sections 4(a) and 4(c) [of the Surface Resources Act], far from altering the surface rights obtained by the location of a mining claim were, in fact, simply declaratory of the law as it existed prior to 1955." 86 IBLA at 364, 92 I.D. at 216 (emphasis in original). Thus, the term "reasonably incident" may be considered as subsuming that pre-existing case law. Included in that case law is United States v. Rizzinelli, 182 F. 675 (D. Idaho 1910), in which the court explained:

At the same time the government confers upon the locator the right to possess and enjoy the surface of a mining claim for mining purposes without the payment of any consideration therefor, it offers for a small consideration to convey to him the entire estate. The government gives the mineral to him who finds it, and, for purposes incident to the extraction thereof, permits him to possess and use the ground in which it is found. It does not give him the ground, but empowers him to purchase it, and that he may do if he desires its permanent and unrestricted use.

182 F. at 682-83.

In United States v. Norgueira, 403 F.2d 816, 825 (9th Cir. 1968), the court found that "permanent residence of the possessor not reasonably related to prospecting, mining or processing operations is not within the uses described" in section 4(a) of the Surface Resources Act. The court in United States v. Langley, 587 F. Supp. 1258, 1263 (E.D. Cal. 1984), stated that the "necessary corollary" to that Norgueira holding is that "permanent residence that is reasonably related to mining is permissible." (Emphasis in original.) Each case, however, is to be controlled by its own particular facts. United States v. Richardson, 599 F.2d 290, 295 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980).

Judge Sweitzer concluded that Peterson resides on the claim "in order to mine and does not mine merely to provide an excuse to reside there. His residential occupancy is therefore reasonably related to his mining activities" (Decision at 14). Thus, Judge Sweitzer equated reasonably incident

fn. 2 (continued)

to use it for any other purpose such, for example, as for filling stations, curio shops, cafes, tourist, or fishing and hunting camps."

Proposed regulations which would further define the permissible limits of occupancy of a mining claim on the public lands have recently been published. 43 CFR Part 3710, 57 FR 41846 (Sept. 11, 1992).

to reasonably related and concluded that because Peterson's primary purpose was mining and not occupancy, his occupancy was permissible. We do not believe that Judge Sweitzer properly applied the law to the particular facts of this case in reaching that conclusion.

While we do not disagree with equating reasonably incident to reasonably related, we conclude that although Peterson's occupancy of the claim may be incident or related to his mining of the claim, it is not reasonably incident or reasonably related under the facts of this case.

Contestee's rationale for residing on the claim, which he has done since purchasing the claim in 1976 (Tr. 25-26, 2986), is revealed through questions he posed to his witnesses regarding whether it was necessary for him to reside on the claim to prevent theft and vandalism and to maximize his operating time. Criley testified it was necessary to reside on the claim to run off tourists and other people who trespass on the claim and might injure themselves (Tr. 1246-47). Blake testified that it "may not be necessary," but he recognized trespass as a problem (Tr. 1341). He also felt that Peterson "probably" did more work on the claim due to his residence thereon (Tr. 1341). According to Lumpkins, residency by Peterson is necessary to prevent theft and to protect the public from injury on the claim (Tr. 1556-57). In Brown's opinion, someone should be there at all times to discourage trespassers and prevent theft (Tr. 1806-07).

Thus, the basis for Peterson's residency is protection of his property and maximization of his operating time on the claim. 3/

In this case, there is no necessity to live on the claim strictly due to its situs. It is not located in a remote area. In fact, it borders the west side of Colorado State Highway 119, 1-1/2 half miles from the city limits of Black Hawk, Colorado, and is easily accessible from the highway (Tr. 2246; Exh. 5). The record shows, however, that for that same reason the situs of the claim poses security problems since buildings, vehicles, and equipment are clearly visible from the highway. Nevertheless, while residency to prevent theft and vandalism might support a conclusion that occupancy of a mining claim is reasonably incident to mining, it does not in this case.

Contestee owns fee land, consisting of four patented mining claims, the Chaffee, Etta, Maggie, and Mabel, bordering on the west of the Couch claim (Tr. 34-35; Exh. 5; Exh. 6A at 56). One of contestee's buildings used in connection with his Couch claim operation is situated on such fee land (Identified by the symbol "#3" on Exhs. 1, 2, 3, and 5, and

3/ Peterson also indicated that he resides on the claim because it is more convenient to live there and less costly than moving off the claim (Tr. 2246).

sometimes described in the record as "Vic's Gold Panning"). That building is described by Peterson as follows:

A That's the tourist building. Basically what we use that for is, there's not a lot of tourist[s] anyway, and we have a lot of people wandering around being that we're on a major highway, and we use that as a glorified guard shack basically. My wife spends time there during the time of year where people wander around and keeps people from wanting to go anywhere closer to the mine. Whatever tourist[s] pan or buy gold, pays for somebody sitting there. Also, my wife, she process[es] concentrate to keep her busy and she does the concentrate -- it's the material we take out of the mill, we clean up and take five gallon buckets up to the guard shack, tourist operation, and she processes that all day long and kills two birds with one stone. Or actually more, she keeps the tourists from going down to the mining operation, she makes a little bit of money off the tourist[s], and she processes a quantity of my finds.

(Tr. 32-33).

Vehicular access to the Couch claim is a road from Colorado State Highway 119 at the north end of the claim (Tr. 293; Exh. 5). Shortly after entering the claim that road divides and then converges at the "tourist building" or "glorified guard shack" (Tr. 32-33; Exh. 5). Continuing south on that road leads to contestee's residence and mill building. As described by Perry, "Vic's Gold Panning essentially controlled the vehicular access to the rest of the Couch Placer" (Tr. 293).

Through the testimony of Brown, Peterson established that he has a electronic security system set up on the Couch claim:

A I can't tell you the technical name of it, but it's a sensor device the army uses that's set up on a series of four on one frequency. They were set at various spots of the property so that when -- oh say, if you was down at the lab and one would go off, you would know somebody was messing around down at the lab by the different beeps and stuff that's on that frequency. If it was a man, it would be a heavier beep; or if it was a cow or a deer, it would be a different type of beep, heavier or lighter. You can kind of distinguish it.

ADMINISTRATIVE LAW JUDGE SWEITZER: The beeps sound inside the house?

THE WITNESS: Yes, it's on like a transistor radio, picked up inside the house.

(Tr. 1920-21).

It is clear from the record that contestee's occupancy of the claim is not necessary for security purposes. His fee lands control access to his claim and, in fact, the building thereon is used for that very purpose, as Peterson stated, during the "time of year where people wander around" (Tr. 32). From that area, one can see most of the claim (Tr. 293). The security system Peterson has on the claim may be monitored from a location other than the residence on the claim.

In addition, sometime after January 25, 1989, Peterson moved a double-wide mobile home onto the Couch claim, locating it adjacent to his residence, which he proposed to tear down (Tr. 1457; Exhs. 38, 56, 58). Regarding that mobile home, Cullar, a geologist and Gilpin County Commissioner from January 1977 until January 1985, testified that according to county regulations, it could not be used just as a residence: "If it also serves a purpose as a guard shack, that's the big thing, and an office and they claim that they must have somebody on that site 24 hours a day for the protection of the equipment, then it is allowed" (Tr. 1454; 1512). Peterson described the mobile home as a "mobile guard shack/residence/office trailer" (Tr. 1458).

We find ourselves in agreement with BLM's contention that the proximity of Peterson's fee lands removes the need for him to reside on the claim to provide security for his operations, since such a requirement may be met by contestee's residence on the adjacent fee land where the "Vic's Gold Panning" building is located (Tr. 539, 1374-76). The other factor relied on by Peterson to support residence is his ability to maximize his operating hours by living on the claim. That reason does not support residence on the Couch claim either under the facts of this case because residence on his fee lands would be as convenient as residence on his claim and would provide him the same opportunity to work odd hours on his claim.

Accordingly, while Peterson's residential occupancy of his claim is incident to his mining operation, under the circumstances of this case it is not reasonably incident.

Judge Sweitzer also found that Brown's residence on the claim was reasonably incident to mining. Brown testified that he had moved a trailer onto the claim in May 1989, which was located adjacent to contestee's double-wide mobile home (Tr. 1898; Exh. 58). He then stated that his residency on the claim was for his own convenience and that he had let his trailer lease go, "so I am just living up there for right now until I find an apartment up there" (Tr. 1899). Later, he testified, however, that he was going to move his trailer "down to fee land," a portion of the patented Chaffee claim owned by Peterson (Tr. 1923, 1928-30; Exh. 5). Having determined that contestee's residence is not reasonably incident to mining, it necessarily follows that Brown's residency is not.

Since we have determined that Peterson's residence on the claim is not reasonably incident to mining, we need not address the question whether his occupancy caused unnecessary or undue degradation. As the Board stated in Bruce W. Crawford, 86 IBLA at 396, 92 I.D. at 233: "For, if the use is, itself, not allowable, it is irrelevant whether or not any adverse impact is

occurring since that use may be independently prohibited as not reasonably incident to mining." (Footnote omitted.)

With respect to aspects of occupancy other than residence on the claim, BLM charges error in Judge Sweitzer's holding that nearly all of the items stored on the claim are reasonably incident to mining. Although BLM does not contest Peterson's storage of "items currently being used in an active mining or milling operation" (emphasis in original), e.g., one dozer or loader, two power shovels, two dump trucks, and one mill building (Exh. 6-A at 76 (1987)), it does seek removal of numerous items, as described by Cloues:

What appears to look like a vast accumulation of rusty pipe, gears, old tires, junk cars, excess dump trucks, old boards, sheet metal, used duct, hose, rusty motors, plastic pipe, obsolete blowers, rail, dilapidated trailer hulks, broken down pickup trucks, unfinished construction, and a tremendous accumulation of "junk" is, in fact, just that. Mr. Peterson's explanations of "utility" associated with all of the equipment more clearly resembled wishful or hopeful dreams rather than practical application.

(BLM Exh. 6-A at 54 (1987)).

BLM witness Perry offers like testimony: "On the Couch Placer there was lots of what you described in the dictionary as 'junk.' Whether it's broken down vehicles, machinery, showers, tubs, old transformers, paper, burned rubbish" (Tr. 294). Cloues also testified at the hearing to the "excess salvage" on the claim (Tr. 634). Similarly, when questioned what the surface of the Couch placer claim was being used for, BLM witness de Henaut stated: "Well, it appears to me that it's used for storing salvaged parts and junk, I mean, for lack of a better word. It does not appear to me to be used for mining or milling. And also, when I was there it was being used for a buffalo feedlot" (Tr. 701).

In his decision Judge Sweitzer held that the weight of the evidence led to the conclusion that nearly all of the materials stored on the claim were potentially useful in the mining operation and were reasonably incident thereto (Decision at 18). Expressly excluded by Judge Sweitzer was certain "trash or debris" identified on BLM Exhibit 4. In support of his holding, Judge Sweitzer relied in part upon the testimony of BLM Resource Area Manager Young. Testifying about the commonplace nature of extra parts on a mining claim, Young stated, "[T]here is always some kind of extra equipment around unless * * * you're observing a super highly financed company, you're going to have used parts, replacement parts, whatever" (Tr. 1192-93). However, Young also acknowledged that the storage of salvage materials on the Couch placer was excessive and this was the basis of the decision he sent to Peterson which initiated these proceedings (Tr. 1192-93). Similarly, Cloues testified there were too many dump trucks on the claim for what is essentially a one-person operation (Tr. 586, 656). Geologist de Henaut testified to the presence of 11 dump trucks on the claim (Tr. 685). Contestee's witness Lumpkins testified to a need for two loaders and four dump trucks in

a one or two man operation such as that of the contestee (Tr. 1557-58). Criley testified that there were no inoperable dump trucks on the claim (Tr. 1242). Cloues acknowledged that the dump trucks on the claim appeared operable, but not the pickup trucks or cars (Tr. 576).

Judge Sweitzer looked also to the testimony of contestee's witnesses Kenyon, Blake, Waltner, Burdett, Lumpkins, and Felton. Kenyon stated that equipment he was aware of on the Couch placer claim was reasonably incident to the operation of the claim (Tr. 2041). He further stated, "[T]here is a lot of things here that look as though they may be scrap that is pertinent to a successful operation for a small man who's nothing more than making a living" (Tr. 2043).

The testimony of contestee's witness Mosch is consistent with that of Kenyon. When questioned by Judge Sweitzer whether Peterson stored items on the claim not necessary for mining or milling, Mosch replied:

As far as I know, most of the material on his placer claim is equipment that can be incorporated into what he is doing now or to some modification in this process in the future. These operations oftentimes have to be modified to the point where you don't know what type of equipment you're going to need. You store equipment until it is necessary to utilize that equipment.
(Tr. 2051).

Witnesses Blake, Waltner, and Burdett each testified about the presence of a scrap pile on the mining operation he conducted (Tr. 1392, 1753, 1776). Even a well-financed operation may have a scrap pile, said Kenyon (Tr. 2043). Contestee's witness Lumpkins asserted that a bathtub, washing machine, and refrigerator were useful for mining purposes because the bathtub and washer can wash carpets used at the sluice; the refrigerator can store tools (Tr. 1559).

Contestee's witness Waltner testified that non-operating automobiles are a source of parts, such as pulleys (Tr. 1759). Similar testimony was offered by Kenyon, who stated that miners have used the chassis or engine of disabled cars on numerous occasions. The differential of an automobile can be used as a gear reduction unit for a drive unit on a trommel (Tr. 2046). Contestee's witness Mosch agreed (Tr. 2052). Criley also noted the use of refrigerators for equipment storage (Tr. 1248) and asserted it is just a question of finding a use for the scrap on the claim (Tr. 1250).

[2] It is clear from the record that almost any item of equipment and/or materials salvaged from discard may eventually have a use in a low-budget operation such as that conducted by the contestee. Given the passage of sufficient time and the lack of necessity to diligently obtain substantial production, virtually anything may eventually find a use. This is the principle upon which salvage yards prosper. However, this does not make everything in the salvage yard reasonably incidental to mining. In this regard we are unable to affirm Judge Sweitzer's finding

that nearly all of the salvage materials found on the claim are reasonably incidental to mining because they are "potentially" useful (Decision at 18). Contestee's witness Cullar, a geologist, testified that the abandoned cars stored on the claim should be removed (Tr. 1506). Similarly, Lumpkins, another geologist called to testify on behalf of contestee, acknowledged that the storage of cars on the claims is not reasonably incident to mining (Tr. 1611-12).

Although both Kenyon and Mosch testified to the "reasonably incident" character of the materials on Peterson's claim, each later qualified his testimony. Mosch, for example, stated that sheet metal from an automobile has no conceivable use on the claim (Tr. 2052). With respect to the disabled cars stored on the claim, Kenyon testified that some parts such as an engine or differential may be useful, but not the chassis (Tr. 2045-46). Kenyon stated that "there is a bunch, quite a number of scrap items there that are not pertinent to what [Peterson's] operation would be" (Tr. 2047). During the course of his testimony, Kenyon identified these non-pertinent items as "chrome material, a hubcap, and other stuff" (Tr. 2019). ^{4/} Mosch testified that automobile bodies or sheet metal were not useful in mining, but indicated that a chassis could be used for mounting a portable trommel (Tr. 2052). ^{5/}

The preponderance of the evidence supports a finding that the storage of inoperable automobiles and pickup trucks on the claim is not reasonably incident to mining and we find it necessary to reverse the decision of the Administrative Law Judge in this regard. ^{6/} Similarly, the storage of 11 dump trucks on the claim cannot be held to be reasonably incident to Peterson's mining operation. The testimony established that this was too many trucks for the scope of the operation and contestee's witness acknowledged that four dump trucks would suffice for an operation of this scope. We recognize that there are indications in the record that at least some of the vehicles may have already been removed from the claim (Exh. 6A at 78 (1988)). To the extent that the inoperable automobiles and pickup trucks and dump trucks in excess of four have not been removed from the claim, they shall be removed at the earliest possible date but not later than June 1.

^{4/} Rochelle Peterson, contestee's wife, acknowledged that not all material on the Couch placer claim is reasonably incident to mining, but "a great portion" of it is (Tr. 2166).

^{5/} Despite the testimony that this could be done, there was no indication of any intent of contestee to make such a use which would seem unlikely in view of his investment in a substantial trommel at his mill building and the presence of dump trucks to transport the placer materials to the trommel.

^{6/} The proposed regulations dictate that activity justifying occupancy shall "utilize appropriate equipment that is presently operable, subject to reasonable maintenance, repair, or fabrication time." 43 CFR 3715.2(b)(2), 57 FR 41849 (Sept. 11, 1992) (proposed).

Even if the inoperable automobiles and pickup trucks and the excessive number of dump trucks on the claim were found to be reasonably incidental to mining, the storage of these vehicles on contestee's claim would constitute unnecessary and undue degradation. Judge Sweitzer held that Peterson's excess parts and scrap constitute a nuisance and cause unnecessary or undue degradation of the claim. Regulation 43 CFR 3809.0-5(k) makes clear that "creation of a nuisance may constitute unnecessary or undue degradation." (Emphasis added.)

Judge Sweitzer interpreted the word "nuisance" to mean an attractive nuisance, a source of danger to children, and held that photographic evidence and his own onsite observation supported a finding that the accumulation of scrap on the claim posed potential danger to children. This scrap and excess parts constituted a nuisance, the Judge held, and created unnecessary or undue degradation. To remedy this situation, Judge Sweitzer ordered Peterson to consolidate and store his scrap in an orderly manner on a designated portion of the claim.

BLM does not attack Judge Sweitzer's finding of nuisance, but it contends that the Judge erred when he further found that there was no evidence of record showing that materials on the Couch placer claim were any more degrading than the collection of excess parts and scrap on the Waltner, Burdett, and Blake minesites. Waltner and Burdett are partners in two patented mining claims, BLM explains, and one claim has a scrap pile that measures 10 by 10 feet; the second claim has a scrap pile that measures 10 by 20 feet, excluding wheel barrows, trailers, extra motors, tanks, etc. The agency also acknowledged Blake's statements that he houses part of his scrap in a 60-by-100 foot building and needs another 50 percent to house the rest. It would not be difficult to conclude that the Waltner-Burdett scrap piles cause less degradation than the scrap and trash strewn about the Couch placer claim, BLM contends.

Contestee disputes Judge Sweitzer's finding that a nuisance exists on the Couch placer claim. The presence of excess parts and scrap on the claim removes the need to drive several miles to purchase a small amount of a needed item, contestee states. Purchasing such items in large quantities is prudent and cheaper, Peterson states, and no nuisance results.

[3] Section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1988), mandates that: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." (Emphasis added.) See also 43 CFR 3809.2-2. A definition of this term appears at 43 CFR 3809.0-5(k), which states in part:

(k) Unnecessary or undue degradation means surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses

outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation.

Our review of the record and the arguments of the parties causes us to affirm Judge Sweitzer's holding that contestee's excess parts and scrap create unnecessary or undue degradation. Our basis for so concluding, however, is broader than that relied upon by the Judge, for we do not rely solely on the presence of a nuisance on the claim, although the evidence does support such a finding (Tr. 316, 1200).

We rely, in addition, upon the testimony of BLM witnesses Cloues and Young. Cloues is a mining engineer who has inspected numerous mines and is well versed in the equipment needs of a mine operator (Tr. 561, 578; Exh. 26). Referring to the salvage materials stored on the Couch placer claim, Cloues stated that the quantity accumulated by Peterson was "excessive" and that "an operation of this size didn't merit that vast quantity of material" (Tr. 590). "[W]e've got a one-man operation," Cloues stated, "with enough equipment for ten or 20 people" (Tr. 675). Storage was "very disorganized" (Tr. 591). Structures were placed "on the very gravels that are supposed to be ore-bearing." ^{7/}

The effect of such an accumulation was to interfere with mining (Tr. 597). "[I]n this particular case I think it exceeded the bounds of common reasonableness that we had to shut down and clean up before we could really do a whole lot of mining here," Cloues testified (Tr. 598). A recommendation to this effect was forwarded to Peterson (Tr. 596).

A similar characterization of contestee's claim was offered by BLM Area Manager Young. As noted above, Young testified that a scrap pile was commonplace on a mining site. When questioned whether other mines similar in size to the Couch were encumbered by the same amount of material, Young replied, "I think in this particular one that there was an excess of spare parts or excess metal, scrap material, on the claim than what was really needed for the operation of the claim" (Tr. 1193).

Our conclusion is supported too by correspondence from Gilpin County, dated January 3 and March 8, 1989 (Exhibits 12 and 39 respectively). Exhibit 12 speaks of the "considerable improvement" in the condition of Peterson's property and in the BLM property where he has a claim, but nevertheless informs BLM that it (BLM) "has been in violation of the Gilpin County trash ordinance for quite some time." Therein, the County explains that it feels that the owner of property in the County, such as BLM, is responsible for any violation of County ordinances. Exhibit 39 clarifies

^{7/} Testimony of BLM witness Drew at Tr. 771 and 994-95.

the meaning of exhibit 12 by informing BLM, without alleging a violation of the County's trash ordinance, that the County would "greatly benefit" if the trash on the Couch placer claim were cleaned up. 8/

The above evidence preponderates over that offered by Peterson. Contestee's witnesses Waltner and Burdett, for example, testified that scrap piles on their claims measured 10 by 10 feet and 10 by 20 feet. These dimensions clearly are easily exceeded by the scrap present on the Couch placer claim. No effort is made by contestee to explain this disparity or distinguish the character of the operation involved. Such testimony appears to support, rather than rebut, BLM's position. Blake's statements that he houses scrap in a building 60 by 100 feet (with a need for 50-percent additional area) may offer limited support for contestee's position, but little is said to determine whether Blake's operation is similar in character to Peterson's. Contestee's evidence is inconclusive at best. See also testimony of Kenyon at Tr. 2022 and Mosch at Tr. 2051.

The record reveals that the quantity and disorder of material on the Couch placer claim causes a surface disturbance greater than would normally result when mining is performed by a prudent operator in a usual, customary, and proficient operation of similar character, taking into consideration the effects of operations on other resources and uses outside the area of operations. A prudent operator would not retain such a quantity of materials on the claim.

The remedy to this excessive accumulation of material is removal, as provided below. Materials other than fully operable vehicles (e.g., dozer, loader, dump truck, power shovel) are to be stored within the perimeter of contestee's mill building and unroofed extension. Any increase in this storage space must be approved in advance by BLM. Absent such approval, materials not able to be stored within this area shall be removed from the claim at the earliest feasible date but not later than June 1. Where storage within the perimeter of contestee's mill and unroofed extension would be unsafe or violate applicable law e.g., storage of fuel, storage elsewhere will require BLM's advance approval in a plan of operations.

Contestee's statement of reasons raises a number of additional issues. To begin, contestee objects to Judge Sweitzer's holding that the "wood-chip plant" on the claim is not reasonably related to mining activities. Peterson contends on appeal that this plant is used to clean "the waters of heavy metals and to neutralize the acids that are known to be in mine drainage." In contestee's view, to limit the use of such equipment is contrary to environmental cleanup. The fact that it is not now operating does not mean that it will not be operating in the future, contestee argues.

8/ We do not overlook the fact too that contestee has in the past conducted salvage operations and that on occasion the purchaser of salvage must take unwanted items in order to obtain needed items (Tr. 183, 628, 797-98).

In his decision, Judge Sweitzer held that the wood-chip plant was not reasonably incident to Peterson's mining activities because it had been abandoned and rendered inoperative. He referred also to the testimony of Dr. Baki Yarar, a BLM witness and professor of metallurgical engineering at the Colorado School of Mines.

Dr. Yarar pointed to a number of problems in the plant and in the theory underlying its operation. In Dr. Yarar's view, the plant operated upon the incorrect assumption that gold was present in ionic form in Clear Creek which runs through the claim; that the wood chips or sawdust used in the plant to capture such gold could be processed without clogging; that gold would vaporize at temperatures within the capacity of the wood-chip plant to reach; and that the plant could operate as a closed circuit system (Tr. 422-26). While acknowledging that he could not say whether Clear Creek contained halogens necessary to put gold in ionic form, Dr. Yarar was emphatic that gold "won't vaporize under any conditions that I know of" (Tr. 434). Referring to the process used in the wood-chip plant, Dr. Yarar used the words "garbage" and "waste of time" (Tr. 437). No testimony offered at the hearing questioned his conclusions. Contestee's witness Criley noted that the wood chip or sawdust plant failed to work (Tr. 1294-95, 1309). Similar testimony was offered by Kenyon who sold \$ 12,000 worth of equipment to the people who installed the wood chip operation and tried to make it work (Tr. 2014-15).

On the basis of the testimony we agree with Judge Sweitzer that the wood-chip plant is not reasonably incident to Peterson's mining activities. Contestee's wood-chip plant shall be removed from the claim at the earliest feasible date but not later than June 1.

Peterson also disputes Judge Sweitzer's use of the word "trash" when ordering contestee to remove certain materials strewn around the residence and burn area. "Trash" is too vague a term, contestee argues, and to allow BLM to define it is to "lead to the same position I am already in. * * * If I can use something in my scrap pile, then by definition it is not trash" (Appellant's Statement of Reasons for Appeal at 1).

In the body of Judge Sweitzer's decision, "trash" or debris is identified in this way:

[A]ny trash or debris as can be seen in the vicinity of the residence on Exh. 4 (as of July 28, 1987) immediately behind the residence, immediately behind the green panel truck at point "C," and immediately north of the above point "AA," are not reasonably incident to mining and should be removed. Likewise, the trash at the burning area at the point marked by an "N" within a circle on Exh. 4 is not reasonably incident to mining and should be removed. 3/

3 I note that much of this cleanup has already been accomplished. See Exh. 58 (as of May 10, 1989).

Judge Sweitzer removed the uncertainty accompanying the phrase "trash or debris" by specifically identifying certain materials by letter on BLM Exhibit 4. This identification occurred only after Judge Sweitzer had personally inspected the claim in the company of the parties. We find the phrase "trash or debris" to be well defined in this context. Any vagueness present occurs in contestee's statement of reasons, which fails to identify with clarity the mining purpose of any object described by Judge Sweitzer as trash or debris.

[4] Further, contestee argues that maintenance of buffalo on the claim is reasonably related and incident to the mining operation on the Couch placer claim. Buffalo provide meat for the mining operation and fertilizer for reclamation of disturbed areas, contestee contends.

Judge Sweitzer disposed of this issue in the following manner:

With respect to the maintenance of a buffalo herd on the claim, the contestant submitted substantial evidence to support its charges that such a use is not reasonably related to mining (Tr. 301-305, 511-512, 595, 692-695, 708). Mr. Peterson submitted little evidence to the contrary. Indeed, with the exception of Mr. Peterson himself, and the possible exception of Mr. Mosch, all of the witnesses who testified regarding the buffalo testified that their maintenance on the claim was not reasonably incident to mining. The only witnesses who was equivocal on the subject, Mr. Mosch, testified that they were useful primarily as a source of food for the contestee and that the fertilizer they produced was of no benefit because there is no requirement that the claim be revegetated (Tr. 2067). The buffalo (or "bison") have all been removed from the claim and Mr. Peterson testified that he did not intend to return any buffalo to the claim (Tr. 2284). The weight of the evidence establishes that the maintenance of bison or buffalo on the surface of the Couch placer mining claim is not reasonably incident to mining. (Decision at 20-21).

The contestee has presented nothing which persuades us that the administrative law judge's finding in this regard, which is clearly supported by the preponderance of the evidence, was in error. Accordingly, Judge Sweitzer's decision is affirmed in this respect.

A further issue on appeal is raised by BLM's contention that Judge Sweitzer erred in holding that no additional bond is appropriate. In his decision, Judge Sweitzer referred to the Department's comments in the preamble to 43 CFR Subpart 3809, which state that "bonding will be imposed only when necessary to protect the public lands from unnecessary or undue degradation." 45 FR 78902, 78907 (Nov. 26, 1980). BLM'S request for a bond in the amount of \$ 6,000 is flawed, Judge Sweitzer held, because "it assesses the costs of complete reclamation, not just those costs associated with any unnecessary or undue degradation, and because costs (such as seeding) were included for reclamation that is not required" (Decision at 22).

Having found that unnecessary or undue degradation on the Couch placer claim could be remedied by relocating and organizing the scrap, Judge Sweitzer ordered contestee to complete this action and denied additional bonding as unnecessary and inappropriate.

[5] Contrary to the Judge's ruling, BLM contends, a bond is required whenever the surface of a mining claim, for which a plan of operations is required, is disturbed. In support of its position, BLM also looks to the Department's comments and quotes therefrom at 45 FR 78907, "Reclamation is an integral part of any effort to prevent unnecessary or undue degradation." The agency relies also upon 43 CFR 3809.1-9(b), which states:

Any operator who conducts operations under an approved plan of operations * * * may, at the discretion of the authorized officer, be required to furnish a bond in an amount specified by the authorized officer. * * * In determining the amount of the bond, the authorized officer shall consider the estimated cost of reasonable stabilization and reclamation of areas disturbed. [Emphasis added.]

This regulation does not limit bonds to situations where unnecessary or undue degradation is present, BLM contends.

Underlying BLM's argument is the premise that Peterson is required to file a plan of operations. Contestee objects to any such notion, stating that he affects less than 5 acres of land and has filed a notice of operation instead. Judge Sweitzer addressed contestee's argument by pointing out that contestee had failed to appeal from a notice of noncompliance, dated July 1, 1987, requiring him to submit a plan of operations within a date certain. No appeal having been taken, the decision was final for the Department, Judge Sweitzer held. This holding was clearly correct. 9/

We find that the decision below erred in holding that no bond is appropriate. Regulation 43 CFR 3809.1-1 makes clear that all operations, whether conducted as casual use or pursuant to notice or plan, shall be reclaimed as required in title 43. An indication of what area is to be reclaimed is set forth in a number of regulations, among them 43 CFR 3809.0-2(b). This regulation states that one objective of 43 CFR Subpart 3809 is to "[p]rovide for reclamation of disturbed areas." (Emphasis added.) However, we note that by regulation BLM has determined that no bonding is required for operations that constitute casual use or that are conducted under a notice. 43 CFR 3809.1-9(a).

Bonding may only be required for approved plans of operations and BLM correctly points out that when it exercises its jurisdiction to require a bond, the amount of this bond is to be fixed upon consideration of the

9/ Other evidence of record supports a finding that Couch placer claim operations cause a cumulative surface disturbance in excess of 5 acres per year (Tr. 770). See Differential Energy, Inc., 99 IBLA 225 (1987).

"estimated cost of reasonable stabilization and reclamation of areas disturbed." 43 CFR 3809.1-9(b) (emphasis added). Language similar to that underscored above is found also in 43 CFR 3809.1-3(d)(3) ("At the earliest feasible time, the operator shall reclaim the area disturbed") and 43 CFR 3809.1-5(c)(5) ("The plan shall include: * * * (5) Measures to be taken to prevent unnecessary or undue degradation and measures to reclaim disturbed areas resulting from the proposed operations, including the standards listed in § 3809.1-3(d).") 10/

Preamble language relied upon by Judge Sweitzer ("bonding will be imposed only when necessary to protect the public lands from unnecessary or undue degradation") must be read with that preamble language quoted by BLM ("Reclamation is an integral part of any effort to prevent unnecessary or undue degradation of the lands"). Thus, a failure to reclaim disturbed areas may constitute unnecessary or undue degradation. 43 CFR 3809.0-5(k).

The manner in which reclamation is to be accomplished is set forth at 43 CFR 3809.1-5(c)(5), which incorporates by reference the detailed provisions of 43 CFR 3809.1-3(d). The latter regulation provides:

(4) Reclamation shall include, but shall not be limited to:

- (i) Saving of topsoil for final application after reshaping of disturbed areas have been completed;
- (ii) Measures to control erosion, landslides, and water runoff;
- (iii) Measures to isolate, remove, or control toxic materials;
- (iv) Reshaping the area disturbed, application of the topsoil, and revegetation of disturbed areas, where reasonably practicable; and
- (v) Rehabilitation of fisheries and wildlife habitat.

Contrary to Judge Sweitzer's holding, reclamation is not confined to the disturbance caused by Peterson's collection of scrap on the claim.

Although we disagree with Judge Sweitzer's view of the scope of reclamation, we share his concern that BLM did not adequately set forth the basis for calculating the amount (\$ 6,000) of the bond. BLM witness Perry testified that the amount of bond was reached by subtracting the salvage value of contestee's scrap iron, vehicles, timbers, etc. (\$ 5,360) from reclamation costs of \$ 12,250 (Tr. 283). These reclamation costs included earthwork expenses of \$ 2,520 (Exh. 6-A (1988) at 79). Contestee's witness Young testified that earthwork expenses were estimated "to establish the cost if

10/ See also 43 CFR 3809.0-6. ("[I]t is the policy of the Department of the Interior to encourage the development of Federal mineral resources and reclamation of disturbed lands.")

we, the BLM, had to go in and completely reclaim the site. And again, that is a higher level of activity or expectation of reclamation activity than would be required of you" (Tr. 1171). We read Young's statement as contradictory to that made by Perry.

Moreover, we find that both Perry and contestee misread Exhibit 6-A (1988) at page 80. Perry states that the salvage value of contestee's scrap iron, vehicles, and timbers, etc. amounts to \$ 5,360 (Tr. 283). This is clearly incorrect. The cost to remove those items, designated "miscellaneous steel" and "vehicles" on page 80 is \$ 5,250 + \$ 1,640 = \$ 6,890. The cost of removing these items is reduced to nothing when an allowance for salvage value is included. Contestee appears to misunderstand this also (Tr. 1172). The \$ 5,360 figure regarded by Perry as salvage value is, in fact, the reclamation cost that BLM appears to attribute to contestee's disturbed areas less salvage value for miscellaneous steel and vehicles.

We find an insufficient basis for the \$ 6,000 bond calculated by BLM. On remand, this amount should be recalculated in accordance with 43 CFR 3809.1-9 and this opinion. In so doing, BLM shall set forth with clarity those reclamation costs (updated to 1992) for which it holds contestee responsible. Consideration should also be given to the following advice from the preamble:

A comment was made that the rulemaking should not apply to areas disturbed before its effective date. The final rulemaking does not apply to those areas that were disturbed prior to the effective date of this final rulemaking unless operations continue or begin again in the same project area, a term defined in this rulemaking. In that event, the provisions of this rulemaking will apply.

45 FR at 78906 (Nov. 26, 1980).

Our holdings may be summarized as follows. Judge Sweitzer's decision is affirmed to the extent it held that the "wood-chip plant" is not incidental to contestee's mining activities and must be removed; that trash strewn around the residence and the burn area is not reasonably related to mining and must be removed from the claim; and that maintenance of buffalo (bison) on the claim is not reasonably related to mining and is hereby prohibited. Judge Sweitzer's decision is also affirmed insofar as it held that contestee's excess parts and scrap constitute a nuisance and create unnecessary or undue degradation, but modified to reflect our conclusion that these excess parts and scrap, by virtue of their sheer quantity, create a surface disturbance greater than would normally result when mining is performed by a prudent operator in a usual, customary, and proficient operation of similar character, taking into consideration the effects of operations on other resources and uses outside the area of operations. Any such parts and scrap are to be stored within the perimeter of contestee's mill building and unroofed extension in the absence of

any prior authorization by BLM in an approved plan of operations, failing which they are to be removed from the claim at the earliest feasible date but not later than June 1.

Judge Sweitzer's decision is reversed insofar as it held that residential occupancy of the Couch placer mining claim by contestee, his family, and Brown is reasonably incident to contestee's mining activities thereon. Judge Sweitzer's decision is also reversed to the extent it held that storage of inoperable scrap automobiles and pick up trucks and more than four dump trucks are reasonably incidental to contestee's mining operation and do not constitute unnecessary and undue degradation. Judge Sweitzer's opinion is also reversed insofar as it concludes that no additional bond is appropriate and this case is remanded to BLM for recalculation of the amount of the bond required in accordance with 43 CFR 3809.1-9 and this opinion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Sweitzer is affirmed in part, affirmed in part as modified, reversed in part, and the case is remanded to BLM to allow recalculation of the amount of the bond.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge