

INTERIOR BOARD OF LAND APPEALS

Arthur Farthing

136 IBLA 70 (June 27, 1996)

Title page added by:
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ARTHUR FARTHING

IBLA 93-549, 94-438

Decided June 27, 1996

Consolidated appeals from decisions of the California State Office, Bureau of Land Management, affirming notices of noncompliance. CAMC 164533.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Surface Management–Mining Claims: Surface Uses

Occupancy of an unpatented mining claim is properly regulated under 43 CFR 3809.2-2, barring unnecessary and undue degradation of the public land on which it is situated; 43 CFR 8365.1-6, proscribing the maintenance or occupancy of any structure or dwelling in violation of local health, building sanitation, or fire codes; and 43 CFR 8365.1-1(b)(3), requiring the drainage of sewage in proper places or receptacles. Where the occupancy fails to conform to county ordinances governing sanitation, fire hazards, and unpermitted construction, BLM properly issues a notice of noncompliance.

2. Federal Land Policy and Management Act of 1976: Surface Management–Mining Claims: Surface Uses

Occupancy of an unpatented mining claim is properly regulated under 43 CFR 3809.3-7, requiring an operator to maintain a site, structures, and other facilities in a safe and clean condition during nonoperating periods, and providing that, after an extended period of nonoperation, operators may be required to remove all structures, equipment, and other facilities, and to reclaim the site, unless they have permission from the authorized officer to do otherwise. Where the claimant moves off the claims leaving behind an abandoned trailer and other buildings, household furniture, glass bottles, tires, and refuse, BLM properly issues a notice of noncompliance.

APPEARANCES: Arthur Farthing, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Arthur Farthing has appealed from decisions dated June 25, 1993, and March 17, 1994, by the California State Office, Bureau of Land Management (BLM), affirming notices of noncompliance (NNC's) issued on January 19 and October 20, 1993, by BLM's Folsom Resource Area Office (FRAO).

On January 4, 1993, the El Dorado County, California, Building Division and BLM conducted an inspection of Farthing's occupancy site on the Dolores Mine #1 mining claim (CAMC 164533) in sec. 4, T. 10 N., R. 9 E., Mount Diablo Meridian, El Dorado County, California. The County determined that his occupancy site was in violation of County codes, in that: trailers were set up on slabs without permits; woodstoves were installed without permits; and a shop or storage building was erected without a permit. Further, there was no approved septic system, with sewage from one trailer emptying into a hole into the ground. On January 7, 1993, the County served notice of the violations, outlining necessary remedial alternatives such as securing permits or removing unpermitted construction.

On January 19, 1993, the FRAO issued an NNC to Farthing under the provisions of 43 CFR 3809.3-2, asserting that his occupancy was in violation of the following regulations: (1) 43 CFR 3809.2-2, requiring all operations to be conducted so as to prevent undue and unnecessary degradation and to be in compliance with Federal and State laws; (2) 43 CFR 8341.1(d), prohibiting the operation of an off-road vehicle in violation of State laws and regulations, relating to vehicle use, standards, registration, etc.; (3) 43 CFR 8365.1-6, proscribing the maintenance or occupancy of any structure or dwelling in violation of local health, building sanitation, or fire codes; and (4) 43 CFR 8365.1-1(b)(3), requiring the drainage of sewage in proper places or receptacles. The FRAO directed Farthing to undertake corrective action in accordance with County requirements and to obtain current registrations for five vehicles on the property identified by their expired registration numbers. A copy of the County's Notice of Inspection was attached to the FRAO's NNC.

On January 21, 1993, Farthing appealed the NNC to the California State Director (SD) as provided by 43 CFR 3809.4, asserting that compliance with County codes would be impractical because he was in the process of negotiating a sale of the claims. He further asserted that installation of a septic tank was impossible due to bad weather and "too costly." Farthing indicated that BLM had previously approved use of a cesspool in lieu of a septic system. He alleged that a BLM employee had "demanded [his] verbal agreement" on January 11 and asserted that his constitutional rights were being infringed, that BLM was not allowing sufficient time for compliance, and that BLM had made no complaints in the 8 years Farthing had been living on the property.

On June 25, 1993, the SD affirmed the FRAO's issuance of the NNC, holding that Farthing was required to comply with County codes as stated

in El Dorado County's notice to BLM, citing both 43 CFR 3809.2-2 and supplemental rules promulgated for California pursuant to 43 CFR 8365.1-6. ^{1/} The SD found that he had been afforded a reasonable time within which to remedy the code violations, and that the duty of compliance was not abrogated because there had been no BLM complaints in the prior 8 years. The SD required Farthing to complete corrective actions within 30 days of receipt of his decision.

Farthing's timely appeal of the SD's June 25, 1993, decision to this Board was docketed as IBLA 93-549.

On October 18, 1993, BLM personnel from the FRAO again inspected Farthing's site, and, on October 20, 1993, issued another NNC citing him for violations of 43 CFR 3809.2-2 and 43 CFR 3809.3-7. The NNC states that BLM's inspection disclosed that Farthing had vacated the site, removing personal property including mining and milling equipment, but had abandoned an outhouse, mill building, work shed, sleeping quarters, and a camper trailer. Junk, consisting of household furniture, tires and other refuse, was left at the site. The NNC directed Farthing, under authority of 43 CFR 3809.3-2, to remove all remaining personal property, structures, tires, and junk from the public lands within 30 days of that notice.

Farthing appealed the NNC to the SD, asserting that the agency was unlawfully interfering with his rights under the mining law. Farthing further stated that he had left the property in September 1993 to take care of other business. Farthing alleged that the property was vandalized and trashed during his absence, and that he filed a report with local law enforcement. He asserted that he had not abandoned the site and that the NNC was a "personal vendetta" against him by a BLM official.

On March 17, 1994, the SD's Office affirmed the issuance of the October 20, 1993, NNC, noting that Farthing agreed that the site was "no longer operational and has junk and litter scattered around the surface."

^{1/} Although no citation to that supplemental rule appears in the decision, a copy thereof appears in the administrative record as an attachment to a Jan. 6, 1992, letter from the FRAO Manager to Farthing, providing him with a copy. The rule, which was published in the Federal Register, provides:

"On all public lands administered by the [BLM] in the State of California, no person shall maintain, construct, place, occupy or use any structure, tent, shed, cabin, hut, trailer, motorhome, or dwelling of any kind in violation of any State or County Health, Building, Sanitation and Fire Code. This rule will apply to any structure on public lands existing on or after the effective date of this rule and will be enforceable by appropriate Federal authorities including BLM officials with delegated law enforcement authority, as well as appropriate state and local authorities."
56 FR 46642 (Sept. 13, 1991).

Holding that "[i]t is incumbent on the claimant to clean-up the public lands, and reclaim the site of operations, as stated in 43 CFR 3809.3-7," the SD's Office ruled that the FRAO had properly issued the NNC and allowed 60 days from receipt of the decision to comply by cleaning up the site.

Farthing's timely appeal of BLM's March 17, 1994, decision was docketed as IBLA 94-438. In view of the similarity of the surrounding circumstances and the issues presented by the two appeals, they are hereby consolidated.

Appellant asserts that in late 1986, a BLM geologist came to the site and said BLM had no regulations for septic tanks. Appellant states that he followed the geologist's suggestion and dug a cesspool. Appellant asserts that "for the county to regulate mining claims and/or charge for permits" is in conflict with the Mining Law of 1872 and the U.S. Constitution. Appellant asserts that the State Office decisions conflict with his constitutional rights and contractual rights. He alleges that he did not leave the claims of his own accord but was forced off by BLM interference, and that he has not abandoned the claims. Appellant contends that the regulations under which he was cited are in conflict with the mining law and with "higher Federal law" and other authorities. Appellant alleges that the Area Manager "insisted that I sign a ninety day extension or forfeit and vacate my claims."

[1] The regulations under which appellant was cited derive their authority from a number of statutes and were properly promulgated to serve as tools for the implementation of Congressional policy by the Secretary and his delegates. For example, the surface management regulations at 43 CFR Subparts 3809 and 8365 were promulgated, inter alia, under section 302(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1994), which 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. This term is defined as follows at 43 CFR 3809.0-5(k):

(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. [Emphasis supplied.]

Duly promulgated regulations have the force and effect of law and are binding on the Department. AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246, 250 (1990); Conoco Inc., (On Reconsideration), 113 IBLA 243, 249 (1990) and cases cited. As defined above, the actions cited by BLM in its first NNC, and admitted by appellant, did constitute "unnecessary and undue degradation," as they constituted a nuisance under local ordinances, as demonstrated both by complaints from neighbors documented in the record, and by issuance by the County of formal notices of violation of local ordinances. ^{2/}

We hold that the issuance of the first NNC also accords with the provisions of 43 CFR 8365.1-6, proscribing the maintenance or occupancy of any structure or dwelling in violation of local health, building sanitation, or fire codes; and 43 CFR 8365.1-1(b)(3), requiring the drainage of sewage in proper places or receptacles.

In appellant's Notice of Plan of Operations, filed with BLM on November 19, 1985, appellant indicated under item 10, "support facilities," that he would "install approved septic tank system" but wanted a "BLM representative to be on site to approve location." Under 43 CFR 8365.1-7, "State and local laws and ordinances shall apply and be enforced by the appropriate State and local authorities." This includes ordinances governing, among other things, "sanitation" and "use of fire." This regulation was in effect in 1985, having been promulgated in 1983. 48 FR 36384 (Aug. 10, 1983). The file contains no indication that BLM officials ever approved use of a cesspool or even discussed the septic system with appellant. In any event, appellant was on notice of the regulation and thus constructively aware that County specifications applied to his sewage system. See Conley P. Smith Oil Producers, 131 IBLA 313, 321 (1994).

[2] Appellant's insistence on appeal that he has not abandoned the claims does not abnegate the second NNC. Under 43 CFR 3809.3-7, an operator must maintain a site, structures, and other facilities in a safe and clean condition during nonoperating periods. After an extended period of nonoperation, operators may be required to remove all structures, equipment, and other facilities, and to reclaim the site, unless they have permission from the authorized officer to do otherwise. It is thus clear,

^{2/} As noted above, in addition, under 43 CFR 8365.1-6, BLM SD's are authorized to establish supplementary rules to provide for the protection of public lands and resources. A rule was duly published in the Federal Register, providing that "no person shall maintain, construct, place, occupy or use any structure, tent, shed, cabin, hut, trailer, motorhome, or dwelling of any kind in violation of any State or County Health, Building, Sanitation and Fire Code." 56 FR 46642 (Sept. 13, 1991).

In view of our holding that the issuance of the NNC's was authorized in order to prevent unnecessary and undue degradation of the Federal lands, as that term is defined in the regulations, it is unnecessary to consider whether we are also bound to follow supplementary rules established by SD's.

that, irrespective of his intent, appellant had to maintain specific conditions of safety and order at his mining site, even during periods of nonoperation, and to reclaim the site "after an extended period of nonoperation," unless he obtained permission to do otherwise.

The record indicates that appellant moved off the claims sometime between June and September 1993, leaving behind an abandoned trailer and other buildings, household furniture, glass acid bottles, tires, and refuse. Appellant has not disputed those facts. In these circumstances, BLM properly issued the second NNC under authority of 43 CFR 3809.3-7.

With respect to appellant's claim that his constitutional rights were infringed, we note that the Board has long held that it has no authority to declare an act of Congress unconstitutional. William B. Wray, 129 IBLA 173, 176 (1994); Amerada Hess Corp., 128 IBLA 94, 98 (1993), and cases cited therein. Such power resides with the judicial branch of Government, not the executive branch. Appellant's challenge to the constitutionality and validity of the requirements of FLPMA concerning unnecessary and undue degradation are properly resolved in court, not before this Board, which is bound to enforce laws as enacted by Congress.

However, we note that there is no infringement of constitutional rights in every case in which there is an alleged deprivation of property rights. Appellant's due process rights are satisfied by the appeal process to this Board. Santa Fe Pacific Railroad Co., 90 IBLA 200 (1986). As the Supreme Court has stated, "[r]egulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized so long as he complies with reasonable regulatory restrictions the legislature has imposed." United States v. Locke, 471 U.S. 84, 107 (1985) and cases cited. We regard the Departmental regulations enforced by BLM as eminently reasonable restrictions designed both to conserve the public lands and ensure that neighboring landholders will not be incommoded by irresponsible users.

To the extent not discussed herein, appellant's arguments have been considered and rejected. 3/

3/ We expressly note that appellant's vague allegation that he and his wife were somehow intimidated by the FRAO Manager is devoid of support in the record. The Area Manager's decision stated in his Jan. 19, 1993, NNC to appellant:

"You met with me on January 8 & 11, and informed me that you are negotiating the sale of your mining claims with Bob Baker from STL Industries. My telephone conversation with Mr. Baker on January 11, confirmed that his company is interested in purchasing your mining claims and a decision will be made in 30 days.

"Based on this information I requested El Dorado County to postpone the completion deadline and work with us in resolving this matter in a reasonable time frame due to the pending sale of your mining claims.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

David L. Hughes
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

fn. 3 (continued)

"We discussed signing an agreement whereby the BLM would postpone taking any action until April 1, 1993, in order for you to complete the sale and reclaim the occupancy site. We also discussed that if the sale did not go through you would be served a notice of noncompliance on April 1, 1993, giving you 90 days to comply with county codes or remove all personal property associated with your occupancy, reclaim and vacate the site.

"You informed me on January 19, 1993 that you are unable to sign such an agreement."
Nothing indicates that any coercion was involved in this transaction. It appears that, when appellant decided not to sign such agreement, BLM simply took appropriate steps to ensure compliance with governing regulations, namely, issuance of the NNC's.