

INTERIOR BOARD OF LAND APPEALS

Cat Mountain Corp.

148 IBLA 249 (April 27, 1999)

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CAT MOUNTAIN CORP.

IBLA 97-435

Decided April 27, 1999

Appeal from a decision of the Nevada State Office, affirming notice of noncompliance in part. N54-91-023N.

Affirmed.

1. Minerals Exploration–Mining Claims: Generally–Mining Claims: Surface Uses

Exploration work falls within the meaning of the term "operations" as defined in 43 C.F.R. § 3809.0-5(f).

2. Mining Claims: Generally–Mining Claims: Surface Uses

Under 43 C.F.R. § 3809.3-7, all operators may be required, after an extended period of nonoperation for other than seasonal operations, to remove all structures, equipment, and other facilities and reclaim the site of operations, unless the operator receives permission, in writing from the authorized officer to do otherwise. Where the record contains unrebutted reports of numerous periodical site inspections showing no mining or exploration activities on a site for 4 years, the existence of "an extended period of non-operation" on the site has been proven, and a BLM decision ordering removal of a portable swimming pool and small basin is properly affirmed on appeal.

APPEARANCES: Robert J. Michel, President, Cat Mountain Corporation.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Cat Mountain Corporation, through its president Robert J. Michel (Appellant), 1/ has appealed from the April 28, 1997, decision of the Nevada State Office, Bureau of Land Management (BLM), affirming in part an October 27, 1994, Notice of Noncompliance (NON) issued by the Stateline Resource Area, Las Vegas District Office.

1/ We shall refer to Cat Mountain Corporation and Michel collectively as "Appellant."

The NON was issued following a September 23, 1994, inspection of lode mining claims Cat Mountain Nos. 1, 2, 3, 4, and 5 (NMC 137183 to 137186, and NMC 142343) located in Clark County, Nevada. The inspection was conducted in accordance with 43 C.F.R. § 3809.3-6, under which the authorized officer "may periodically inspect operations to determine if the operator is complying with" the regulations in Subpart 3809.

As a result of the inspection, the Area Manager found Appellant to be in noncompliance with the regulations in violation of 43 C.F.R. § 3809.3-7, which requires all operators to "maintain the site, structures, and other facilities of the operations in a safe and clean condition during non-operating periods," to "remove structures, equipment, and other facilities and reclaim the site of operations" after "an extended period of non-operations for other than seasonal operations." BLM noted that routine inspections since August 1990 had revealed that no mining operations had taken place on the site for a period of 4 years, and that it viewed this as an "extended period of non-operation for other than seasonal operation."

The Area Manager also found that Appellant was in noncompliance with 43 C.F.R. § 3809.0-5(k) (defining unnecessary and undue degradation to Federal lands) for failing to have the proper building permits from Clark County. He stated that Appellant was in violation of Clark County Building Code 22.02.320 by having a mobile home on the property without a county permit. Although he did not cite a County Code provision, the Area Manager also noted that Appellant did not have an approved potable water system for disposal of sewage, and that the power line to the mobile home was not "in code."

Appellant was also found to be in noncompliance with 43 C.F.R. § 3809.3-5 (concerning maintenance and public safety) due to the presence of open trenches at the site, as well as the power line running to the house and "low running wires." (NON at 2.)

The NON gave Appellant 90 days (1) to remove the mobile home and what it described as a "swimming pool" and "jacuzzi/hot tub," as well as all other structures, equipment, and other facilities; and (2) to "reclaim the site of operations." The NON explained what reclamation would include. Appellant was also required to remove all the wire that was run across the mining claims.

The NON was appealed to the Nevada State Director, whose April 28, 1997, decision noted that the issues in the case were more "concerned with the occupancy of the mining claims, than actual exploration, mining, or milling of minerals." (Decision at 3.) The decision related that Michel had occupied the claims since 1982 with only minor exploration-related improvements and that he had admitted that his occupancy was justified only as a "watchman." *Id.* He concluded that, although occupancy of a mining claim by a watchman is a legitimate use under the mining laws, occupancy was not justified in this case, because the Cat Mountain Corporation had an address in Las Vegas different from the 60-foot "office" trailer at the

site, which suggested the "office" trailer was not needed for the purpose of an office as stated in the original Notice to BLM. ^{2/}

The State Director also determined that "an observed period of inactivity of 4 years or more may be considered an 'extended period of non-operation' and an excessive period of occupancy by a watchman, especially considering the temporary nature of the structures involved * * * and the fencing to protect any equipment or supplies stored on site." (Decision at 4.)

The State Director concluded that the cumulative amount of exploration, testing, etc., that had occurred on the claim since 1982 was minor and intermittent in relation to the overall time frame and that it was therefore doubtful that full-time occupancy of the claims was necessary, especially since the claims were located within "a major city like Las Vegas." (Decision at 4.)

The State Director found that the "swimming" pool and small basin (identified in the NON as a jacuzzi/hot tub) actually served a legitimate mining use for storage of nonpotable water and for recycling nonpotable water-effluent after coagulation/filtration processes and, thus, might be an authorized use under the Clark County permitting system. However, he concluded that these were "temporary facilities which may be required to be removed during an 'extended' period of non-operation for other than non-seasonal operations under 43 CFR 3809.3-7." (Decision at 4.) Thus, the State Director upheld the order to remove the pool and small basin under 43 C.F.R. § 3809.3-7, because of their temporary construction and the extended period of nonoperation. He also upheld the requirement that Appellant remove all of the wire running across the mining claims.

In his appeal to the State Director, dated December 23, 1994, Appellant had stated that he had removed the mobile home from the property. However, there are photographs in the case file dated January 10, 1995, showing the mobile home there. There is also a 3809 Compliance Inspection Report dated May 17, 1995, which states the mobile home still needed to be removed from the site. Another Compliance Inspection Report dated June 12, 1996, does not mention the mobile home, but does state that the site had not been occupied for some time and there was no water in the pool.

In regard to the open trenches, Appellant had argued to the State Director that the "inactive" trench was needed to preserve evidence of mineralization. The State Director concluded that 43 C.F.R. § 3809.0-5(j) (providing that reclamation may not be required where the retention of "mine workings is needed to preserve evidence of mineralization") applied in this situation. Therefore, the Area Manager's order to reclaim the trenches was not upheld and is not before this Board.

^{2/} This is a June 21, 1982, letter to BLM wherein Appellant states that in 1980 a 1-acre site had been graded for a storage area and a temporary mine site office. A Jan. 13, 1991, Notice of Operations described the mine office as a 60-foot by 14-foot mobile home installed in 1985.

In his Statement of Reasons (SOR) before this Board, Appellant states that there has been no permanent occupancy or watchman since January 20, 1995, and that the mobile home had been repossessed by the bank on May 25, 1995. He also claims that all wires and telephone cable were removed on January 20, 1995. Based on those statements, we conclude Appellant has conceded that the NON properly required removal of the mobile home and the wire running across the mining claims and that his appeal does not reach those questions. BLM's decision requiring removal of the mobile home is hereby affirmed.

Appellant has appealed that portion of the decision upholding the requirement that the pool and small basin be removed. Appellant states that the pool is a reserve of nonpotable water which is emptied in winter and washed with acid and water and then filled in the summer. He submits that, as a portable pool, it is not controlled by the County code. Furthermore, he argues that the citation for extended period of nonoperation is inappropriate because there has not been an extended period of nonoperation, in that he never started any operation. Appellant apparently bases this argument on his view that he has been involved only in exploration work (including the testing and evaluation of samples) and therefore has conducted no mining operations. In support of this view he argues that the claims are under a notice to conduct exploration, citing BLM letters of February 7, 1991, and October 8, 1992, noting receipt of Appellant's Notice to conduct exploration work. Appellant states that "Exploration works include mining exploration at the mine claims and also up to 20 miles, south and west for extended possible reserves by prospecting, drilling and blasting." (SOR at 1.) Appellant asserts that it will apply for a plan of operations when the exploration stage is completed.

[1] In managing the public lands, the Department is mandated by section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1994), to "take any action necessary to prevent unnecessary or undue degradation of" those lands. See Red Thunder, Inc., 129 IBLA 219, 236 (1994); Draco Mines Inc., 75 IBLA 278 (1983). Section 302(b) makes this nondegradation proviso directly applicable to claims under the Mining Law of 1872. The surface management regulations of 43 C.F.R. Subpart 3809 were promulgated pursuant to this authority to prevent unnecessary and undue degradation of lands by mining claimants. Differential Energy, Inc., 99 IBLA 225 (1987).

Departmental regulation 43 C.F.R. § 3809.0-5(f) defines "operations" to include "all functions, work, facilities, and activities in connection with prospecting, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws * * *." Exploration work is thus clearly included within this definition. Indeed, Appellant states that its exploration work includes prospecting. Although BLM noted receipt of what it called Appellant's Notice to conduct exploration, the notice was required by 43 C.F.R. § 3809.1-3, which permits operators whose operations cause a cumulative surface disturbance of 5 acres or less to provide notice to the authorized officer of their activities as opposed to the requirement in 43 C.F.R. § 3809.1-4 of an approved plan

of operations. Indeed the word "operations" is used numerous times in 43 C.F.R. § 3809.1-3(a) in explaining the requirement to file a notice. ^{3/} The stated purpose of the regulations at Subpart 3809 "is to establish procedures to prevent unnecessary or undue degradation of Federal lands which may result from operations authorized by the mining laws." 43 C.F.R. § 3809.01. Acceptance of Appellant's contention that exploration is not a mining operation would effectively negate the purpose of these regulations, as it would exempt exploration activities involving surface disturbances of 5 acres or less from the notice requirement. Therefore, we reject Appellant's contention that it has not started operations to bring it within the purview of 43 C.F.R. § 3809.3-7.

[2] The regulation 43 C.F.R. § 3809.3-7 provides:

All operators shall maintain the site, structures and other facilities of the operations in a safe and clean condition during any non-operating periods. All operators may be required, after an extended period of non-operation for other than seasonal operations, to remove all structures, equipment and other facilities and reclaim the site of operations, unless he/she receives permission, in writing from the authorized officer to do otherwise.

Thus, when there is an extended period of nonoperation, BLM may direct that the operator either gain written permission from the authorized officer to maintain the unused structures, equipment, and other facilities, or remove them and reclaim the site. Richard Oldham, 146 IBLA 220, 222 (1998). We have already rejected Appellant's assertion that because it is conducting exploration work (as opposed to mining) BLM cannot cite it for an extended period of nonoperation. Therefore, the only remaining question is whether BLM was correct in concluding that there has been an extended period of nonoperation.

That finding is well supported by BLM's case record. BLM's Las Vegas, Nevada, District Office conducted numerous inspections of the site, beginning with an inspection on August 27, 1990, which found that a small area had been disturbed for "mining." An inspection conducted on August 20, 1991, found that the site looked the same as during the August 27, 1990, inspection. An inspection conducted on August 21, 1992, found no mining equipment on the site, only trash. A handwritten note in the file dated September 22, 1992, recorded that Michel stated during a phone conversation that there were no operations at that time due to a lack of funding. After the NON was issued BLM continued to conduct inspections, including one on June 12, 1996, which noted that the site had not been occupied for some time, that there were no tracks observed going in or out of the site, the power remained shut off, and no water was in the pool.

^{3/} We note that the Sept. 22, 1992, notice filed by Appellant was entitled a Notice of Operation and that on Dec. 21, 1992, Appellant submitted an amendment to what he called his notice of operation.

The burden of proof is on an appellant to show error in the decision appealed from, and if he fails to do so, the decision will be affirmed. Charles S. Stoll, 137 IBLA 116, 126 (1996); B.K. Lowndes, 113 IBLA 321, 325 (1990); Differential Energy, Inc., 99 IBLA at 235. Unless an SOR shows an adequate basis for appeal and appellant's allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration. B.K. Lowndes, 113 IBLA at 325; Howard J. Hunt, 80 IBLA 396 (1984). Thus, the burden is on Appellant to disprove BLM's finding that there has been an extended period of nonoperation by showing that there have been operations or exploration work.

Appellant asserts that he has been doing exploration work at the claims by prospecting, drilling and blasting, and indicates that there has been laboratory works for testing ore samples. However, he provides no specifics as to when or how often such work has been done or its extent. The inspections conducted by BLM and noted above, as well as the September 22, 1992, conversation record indicate that no work had been done on the claims for years prior to the issuance of the NON. We conclude that Appellant has failed to meet its burden of proof to show that BLM erred in determining there was an extended period of nonoperation, and the decision to uphold the NON must be affirmed.

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.

David L. Hughes
Administrative Judge

I concur.

John H. Kelly
Administrative Judge