

INTERIOR BOARD OF LAND APPEALS

Bradshaw Industries

152 IBLA 57 (March 10, 2000)

Title page added by:
ibiadecisions.com

BRADSHAW INDUSTRIES

IBLA 2000-58

Decided March 10, 2000

Appeal from a decision of the Phoenix, Arizona, Field Office, Bureau of Land Management, constituting a determination of nonconcurrency with residential occupancy and a permanent cessation order with respect to use and occupancy of a mining claim. AZA 28093.

Decision affirmed; request for stay denied as moot.

1. Mining Claims: Surface Uses

The regulations at 43 C.F.R. Subpart 3715 apply to any use or occupancy of a mining claim in existence when the regulations were published, and all existing uses and occupancies were required to meet the applicable requirements of that subpart by Aug. 18, 1997.

2. Mining Claims: Surface Uses

All persons dealing with the Government are presumed to have knowledge of relevant statutes and regulations, and BLM had no obligation to provide mining claimants with personal notice when it published regulations in 43 C.F.R. Subpart 3715 concerning use and occupancy of mining claims.

3. Mining Claims: Surface Uses

The term "reasonably incident" as defined in 43 C.F.R. § 3715.5(a) requires active efforts with respect to "prospecting, mining, or processing operations and uses reasonably incident thereto."

4. Mining Claims: Surface Uses

Under 43 C.F.R. § 3715.5-1, a mining claimant must remove all permanent structures, temporary structures, material, equipment, or other personal property placed on the public lands during authorized use or occupancy within 90 days after operations

end. When a mining claimant has exceeded the 1-year period of "non-operation" allowed by the regulation without previously obtaining BLM's written approval, a decision requiring removal of personal property, cessation of use and occupancy, and reclamation of the site will be affirmed.

5. Mining Claims: Surface Uses--Words and Phrases

"Occupancy." As used in 43 C.F.R. Subpart 3715, the word "occupancy" means full or part time residence, and under 43 C.F.R. § 3715.2, occupancy must not only (a) be reasonably incident but must also (b) constitute substantially regular work, (c) be reasonably calculated to lead to the extraction and beneficiation of minerals; (d) involve observable on-the-ground activity that BLM may verify under 43 C.F.R. § 3715.7; and (e) use appropriate equipment that is presently operable, subject to the need for reasonable assembly, maintenance, repair or fabrication of replacement parts.

6. Mining Claims: Surface Uses

A mining claimant who asserts that occupancy by a watchman is necessary to prevent vandalism must show that the need for occupancy is reasonably incident and continual under 43 C.F.R. § 3715.5-2. Where a mining claimant is unable to show that its use and occupancy of a site is "reasonably incident" within the meaning of 43 C.F.R. Subpart 3715, a determination of nonconcurrence and an order to cease use and occupancy will be affirmed.

APPEARANCES: Ronald Carlson, President, Bradshaw Industries, Inc., Phoenix, Arizona, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Bradshaw Industries has appealed from an October 28, 1999, decision of the Phoenix, Arizona, Field Office, Bureau of Land Management (BLM), with respect to residential occupancy of the B&C #1 mining claim (AMC 247994), located in T. 10 N., R. 2 E., sec. 29 near Bumble Bee, Yavapai County, Arizona. The decision, entitled "Determination of Nonconcurrence and Permanent Cessation Order," requires appellant within 90 days to "completely reclaim the occupancy site by removing all equipment, abandoned vehicles, and trash from the site, reclaim all disturbed lands and properly abandon the well." (Decision at 2.) The decision provided that

it would remain in effect during the appeal unless a request for a stay is granted. Bradshaw filed a request for a stay with the notice of appeal.

Background

On August 20, 1993, Bradshaw Industries filed, pursuant to 43 C.F.R. § 3809, a notice of operations for 5 acres or less of surface disturbance for the B&C #1 through #4 mining claims (AMC 247994 through AMC 247997). ^{1/} This notice (AZA 28093) identified equipment on the B&C #1 mining claim as including a ball mill, primary and secondary crushers, a water truck, a bulldozer, a concentrator, conveyors, a generator, water storage tanks, a storage pond, a well, and other small pieces of equipment.

A field inspection report dated July 11, 1995, refers to a "mining camp" on the site. However, it found "no one" and "no recent mining activity" in evidence. BLM inspected the site again on April 23, 1998, and found "no obvious changes," no reclamation, and inactive operations at least since 1995. The inspection report states that the facilities were "not maintained in safe and orderly manner." It cited and documented with pictures the existence of garbage, refuse, metal waste, junk, trash, abandoned vehicles, unmaintained equipment, and possible PCB contamination and oil spills.

On May 11, 1998, BLM issued a letter (misdated April 11, 1998) to Bradshaw Industries stating that inspections indicated that the claimant was not using the facilities on the claim and that the storage of equipment and other operations require "concurrence from BLM to remain on the public lands." The letter cited and provided a copy of regulations governing use and occupancy of mining claims at 43 C.F.R. Subpart 3715. These regulations were published on July 16, 1996, 61 Fed. Reg. 37115 (July 16, 1996), and became effective 30 days later. See 61 Fed. Reg. 37116. BLM stated its belief that the equipment had been abandoned, and notified Bradshaw that under agency regulations at 43 C.F.R. § 3715.5-2, operations could remain suspended on Federal lands for at most 1 year. The letter advised appellant that in order to retain the facilities, appellant must "demonstrate how the occupancy is reasonably incident to prospecting, mining or processing operations" within 30 days. Appellant received the letter on May 13, 1998.

A conversation record dated June 9, 1998, indicated a telephone contact with an individual identified as Gary John. He claimed to have

^{1/} The record contains some discrepancies with respect to the names of these mining claims. Some documents refer to them, or some of them, as the "B&C" mining claims; others refer to them as "B G" mining claims. Because the parties appear to be in agreement that the recordation number for the relevant mining claim is AMC 247997, the discrepancy over the name is irrelevant and we will identify it as the B&C #1 mining claim.

leased the property from Ron Carlson of Bradshaw Industries, and stated that the property was in "standby status trying to get money to start back up." BLM indicated that it would be "willing to grant additional time if needed." A conversation record dated July 8, 1998, indicated that John called to request further time to "drop info off on or before 7/20/98," and this extension was granted.

BLM inspected the site again on September 3, 1998, and found no changes or reclamation since the April 23 inspection. The inspection report noted that BLM had not yet received the response "letter promised on or before 7/20/98."

BLM inspected and photographed the site again on October 5, 1999. It found that some equipment had been removed, but that much equipment and trash remained. The inspector recommended a letter of nonconcurrence, given that BLM had never received the information sought in its May 11, 1998, letter.

BLM issued the decision of nonconcurrence with residential occupancy and the cessation order on October 28, 1999. BLM made the following findings:

1. You are not engaged in any activities which are reasonably incident, constitute substantially regular work, are reasonably calculated to lead to the extraction and beneficiation of minerals, or involve observable on-the-ground activity that BLM may verify under §3715.7. (43 CFR 3715.2).
2. You have not obtained all federal, state and local mining, reclamation and waste disposal permits, approvals or authorizations. (43 CFR 3715.3-2(b), 43 CFR 3715.5(b) and (c)).
3. You are maintaining or using structures for occupancy not meeting the conditions of occupancy under §§ 3715.2 and 3715.2-1. (43 CFR 3715.6(a)(1)).

Having found that appellant had never established that its use and occupancy of the site was "reasonably incident to mining" as defined in 43 C.F.R. § 3715.0-5, BLM ordered complete reclamation of the site.

Bradshaw Industries filed a notice of appeal on December 1, 1999. There, Bradshaw asserts that it mailed, and attaches, a copy of a handwritten letter to BLM, dated November 11, 1998, stating that the operation was in "standby status * * * to allow funds to be used to develop a non-chemical processing method." This letter also stated that the "health of 2 of the principals is slowing the development and operations," and that operations would begin "when the parties concerned [sic] and the processing method is complete." The letter contains a handwritten notation stating "Mailed 11-11-98." It does not appear that this letter was received by BLM. It is not part of the case file forwarded to the Board.

Bradshaw responds to each of the three BLM findings in the Determination of Nonconcurrency. In response to the finding that the company was not engaged in activities reasonably incident to mining, Bradshaw asserts that it is "developing an extraction system, which is the reason for a standby mode." Bradshaw provides copies of assay reports and receipts for materials purchased, each prepared in 1995. Bradshaw notes that it "went to the standby mode in early 1995 due to the lack of recovery of minerals" and states that it was "researching [an economical] and safe recovery method." (Notice of Appeal at 1.) Appellant offers to provide medical records in support of its assertion that work was delayed in 1998 due to health problems of the principals.

In response to BLM's finding that Bradshaw never acquired the various permits that would have been needed for a mining operation, appellant responds that none were required when it went into "standby mode." *Id.* As for BLM's third finding that Bradshaw was maintaining structures for occupancy, appellant states that a watchman was present to prevent vandalism while the operation was in standby mode. Finally, appellant responds to BLM's April 23, 1998, inspection report which stated that no changes were observed on the site from the time of the 1995 inspection; Bradshaw states that the mineral recovery system was started off-site and the water storage tank was cleaned.

Analysis

Resolution of this appeal requires answers to two questions: (1) whether the regulations in 43 C.F.R. Subpart 3715 apply to Bradshaw's use and occupancy of the B&C #1 mining claim which predated those regulations, and (2) whether Bradshaw's use and occupancy was reasonably incident to mining as required by those regulations. If those regulations apply and Bradshaw's use and occupancy is not reasonably incident within the meaning of those regulations, then BLM's decision must be affirmed. See Firestone Mining Industries, Inc., 150 IBLA 104 (1999).

The Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (1994), provides that claims located under the mining laws of the United States "shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." The regulations in 43 C.F.R. Subpart 3715 were adopted to implement, *inter alia*, this statutory provision. They restrict use and occupancy of public lands open to the operation of the mining laws, limiting such use and occupancy to prospecting or exploration, mining, or processing operations and reasonably incidental uses. They also establish procedures for beginning occupancy, standards for reasonably incidental use or occupancy, prohibited acts, and procedures for inspection and enforcement, and for managing existing uses and occupancies. 61 Fed. Reg. 37115-30 (July 16, 1996).

[1] Bradshaw has no basis for claiming that the 1996 regulations do not apply to its use and occupancy of the B&C #1 mining claim. The

regulations themselves made clear that they apply to a use or occupancy that was in existence when the regulations were published, and gave mining claimants with preexisting uses and occupancies a year to come into compliance with the regulations. "By August 18, 1997, all existing uses and occupancies must meet the applicable requirements of this subpart." 43 C.F.R. § 3715.4(a). Subsection (b) allowed a claimant who was occupying the public lands under the mining laws on August 15, 1996, to continue occupancy for 1 year after that date, without being subject to the procedures imposed by Subpart 3715 if the claimant notified BLM by October 15, 1996, of the existence of the occupancy. Bradshaw did not file a notice with BLM by October 15, 1996, and therefore became subject to various enforcement actions and penalties. See 43 C.F.R. §§ 3715.4-2, 3715.7-1, 3715.7-2, 3715.8.

Bradshaw does not state any basis for this Board to conclude these regulations do not apply. Rather, Bradshaw's claim is that it never received or was notified of the regulations when they were published in 1996. We infer that Bradshaw seeks an exemption from the regulations based on this alleged lack of notice.

[2] But we cannot waive the regulations. All persons dealing with the Government are presumed to have knowledge of relevant statutes and regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). BLM had no obligation to provide appellant with personal notice concerning the regulations. See Harlow Corp., 135 IBLA 382, 385-87 (1996). Nonetheless, the May 11, 1998, BLM letter specifically referred to the regulations, copied them as an attachment, and identified the things appellant had to do to comply with them. The certified receipt shows that this letter was received by appellant on May 13, 1998. Accordingly, Bradshaw Industries cannot be heard to complain that it was unaware of the significance of those regulations to its own mining claim. Nor can its complaint of lack of notice change that the regulations nonetheless apply to preexisting occupancies. See Firestone Mining Industries, Inc., 150 IBLA 104 (1999) (order suspending use and occupancy of a mill site and removal of mill building and personal property from the site abandoned for 10 years affirmed under 43 C.F.R. Subpart 3715.) 2/

Bradshaw's November 1998 handwritten letter, had it been received by BLM, would have done nothing to either meet the terms of the regulations at 43 C.F.R. Subpart 3715, or to justify an exemption from them. Despite the

2/ The preamble to the final rule implementing the Subpart 3715 regulations rejected the notion that the rules would not apply to claims in existence prior to the 1955 passage of the Surface Management Act claims. 61 Fed. Reg. at 37719. According to the record, the B&C #1 mining claim was first located in 1986. Bradshaw does not argue that, even if the regulations did not apply, his use or occupancy meets the statutory provision of 30 U.S.C. § 612(a) (1994), or should be exempt from it.

fact that Bradshaw did not comply with the regulatory requirement to file a notice with BLM by October 15, 1996, or come into compliance by August 18, 1997, BLM provided Bradshaw instructions on how to come into compliance after those dates, again orally extended the deadline into July 1998, and, by delaying its order until October 1999, effectively gave Bradshaw another year to follow the regulations. Bradshaw's November 1998 letter seeks an effective exemption from the regulations based on "standby status." Such an exemption is not available under the statute or regulations, and would not have been available had BLM received the letter.

[3] Having determined that the regulations clearly apply to the B&C #1 mining claim, we turn to the second question whether Bradshaw's use and occupancy was "reasonably incident" to mining as set forth at 43 C.F.R. § 3715.5(a). BLM's regulations define "reasonably incident" as follows:

Reasonably incident means the statutory standard "prospecting, mining, or processing operations and uses reasonably incident thereto" (30 U.S.C. 612). It is a shortened version of the statutory standard. It includes those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit, using methods, structures, and equipment appropriate to the geological terrain, mineral deposit, and stage of development and reasonably related activities.

43 C.F.R. § 3715.0-5.

Bradshaw does not and cannot sustain any claim that its siting of materials, vehicles, trash, or any other use of the B&C #1 mining claim was "reasonably incident" to mining under this standard. Bradshaw does not dispute that it has done nothing on the site with respect to "prospecting, mining, or processing operations and uses reasonably incident thereto" since at least 1995. Although Bradshaw claims to be developing an "extraction system" and "researching * * * a recovery method," it does not state that there has been active mining or exploration occurring on the site since 1995. To the contrary, it concedes that since 1995, it has suffered "a lack of recovery of minerals." The only thing which Bradshaw identifies as even relating to mining is its claimed development of a "recovery system" which it is accomplishing "off site." The only evidence of such development exists in the 1995 assay reports and documents which Bradshaw submits. Bradshaw has not documented any activities off site that would justify its on-site use and occupancy. Further, depositing material unused on, and occupying, a different mining claim for years after those development efforts have ended is not permitted under the statute or the regulations. ^{3/}

^{3/} In the preamble to the final rule, 61 Fed. Reg. 37120, BLM expressly acknowledged the importance of new technology, and its desire to include development of such technologies in the term "reasonably incident." However, BLM required that the development of new technology must be a "good

[4] Further, Bradshaw's singular claim that operations have been in "standby status" since 1995 no more meets the regulatory definition outcome of "reasonably incident" to mining, than it provides an exemption from the regulations. BLM regulations specifically allow companies to suspend operations, but not for half a decade as has happened here. Moreover, the suspension must be for "market or labor conditions." As BLM notified Bradshaw in its May 11, 1998, letter, BLM regulations at 43 C.F.R. § 3715.5-1 provide for temporary suspensions of operations of up to 1 year. That regulation provides:

Unless BLM expressly allows them in writing to remain on the public lands, you must remove all permanent structures, temporary structures, material, equipment, or other personal property placed on the public lands during authorized use or occupancy under this subpart. You have 90 days after your operations end to remove these items. If BLM concurs in writing, this provision will not apply * * * to operations that are suspended for no longer than one year due to market or labor conditions.

(Emphasis added.) BLM correctly points out that "[b]y [its] own admission, Appellant has substantially exceeded the one-year period of 'non-operation' allowed by the regulations." (Answer at 23.) Apparently, Bradshaw has not devised a successful methodology for processing minerals from the mining claim. While we may be sympathetic with the company that this has not yet happened, the regulation provides no conceivable suspension for "non-operation" for more than 1 year in such circumstances.

[5] Finally, Bradshaw is not entitled to an occupancy, by a night watchman or otherwise, to protect material on the site if the material has no basis for being there to begin with. The regulations define "occupancy" as follows:

Occupancy means full or part-time residence on the public lands. It also means activities that involve residence; the construction, presence, or maintenance of temporary or permanent structures that may be used for such purposes; or the use of a watchman or caretaker for the purpose of monitoring activities. Residence or structures include, but are not limited to, barriers to access, fences, tents, motor homes, trailers, cabins, houses, buildings, and storage of equipment or supplies.

43 C.F.R. § 3715.0-5. While occupancies, including use of watchmen, are permitted on the public lands, under 43 C.F.R. § 3715.2, "activities that

fn. 3 (continued)

faith effort to improve the methods of prospecting or exploration, mining, or processing locatable minerals," and that it must be "active and continuing." Id., citing 43 C.F.R. § 3715.2.

are the reason for *** occupancy" must also "(a) Be reasonably incident; (b) Constitute substantially regular work; (c) Be reasonably calculated to lead to the extraction and beneficiation of minerals; (d) Involve observable on-the-ground activity that BLM may verify under 43 C.F.R. § 3715.7; and (e) Use appropriate equipment that is presently operable ***." Bradshaw does not even attempt to assert that its installment of a night watchman and occupancy of the claim satisfies any of these requirements.

[6] Although appellant asserts that occupancy by a watchman is necessary to prevent vandalism, the need for occupancy by a watchman must be "reasonably incident and continual." 43 C.F.R. § 3715.5-2. Because appellant is unable to show that its occupancy of the site is "reasonably incident" within the meaning of 43 C.F.R. Subpart 3715, BLM's order to cease use and occupancy must be affirmed on that basis. See Firestone Mining Industries, Inc., 150 IBLA at 104.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed and appellant's request for a stay is denied as moot.

Lisa Hemmer
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge