

INTERIOR BOARD OF LAND APPEALS

Wilbur L. Hulse

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WILBUR L. HULSE

IBLA 2000-240

Decided September 29, 2000

Appeal from a decision and notice of noncompliance issued by the Field Manager, Las Vegas, Nevada, Field Office, Bureau of Land Management, requiring the removal of certain items from mining claims and the securing of a mine pursuant to the use and occupancy regulations at 43 C.F.R. Subpart 3715. N54-93-094N.

Affirmed.

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

Section 4(a) of the Surface Resources Act, 30 U.S.C. § 612(a) (1994), bars use of an unpatented mining claim for any purpose other than prospecting, mining, or processing operations and uses "reasonably incident thereto." Under the authority of 43 C.F.R. § 3715.7-1(c), BLM properly requires the removal of a locked gate blocking access to mining claims, a mobile home, a wooden shack, and personal items from the site where the record supports BLM's determination that the level of the use and occupancy by the claimant are not reasonably incident to mining operations.

APPEARANCES: Wilbur L. Hulse, pro se; Mark R. Chatterton, Assistant Field Manager, Non Renewable Resources, Las Vegas, Nevada, Field Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Wilbur L. Hulse has appealed a decision and notice of noncompliance issued by the Field Manager, Las Vegas, Nevada, Field Office, Bureau of Land Management (BLM), dated April 10, 2000, advising him that the activities taking place on the Tiger Lily (NMC 118627) and Tiger Lily #5 (NMC 241612) lode mining claims 1/ were found to be not reasonably incident

1/ We note that the Tiger Lily #6 (NMC 241613) was not mentioned in BLM's decision. We assume that this omission was a mistake on BLM's part because the decision deals with a locked gate blocking the road leading to the claims which is located on the Tiger Lily #6. See Surface Use Determination Report dated Mar. 14, 2000, at 9.

to prospecting, mining, or processing operations within the meaning of the section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (1994), 43 C.F.R. §§ 3712.1 and 3715. Thus, pursuant to its authority at 43 C.F.R. § 3715.7-1(c), BLM ordered Hulse to remove a locked gate blocking the road leading to the claim, a single-wide mobile home, and a wooden shack, personal items, and junk vehicles. The decision also required Hulse to "permanently secure the deep mine to remove it as a hazard to the public." *Id.* at 2.

With his notice of appeal, Hulse included a petition to stay the effect of BLM's decision pending appeal. Our review of the record to determine whether a stay should be granted resulted in our consideration of issues going to the merits of the appeal; thus, in the interest of judicial economy, we proceed to decide this appeal.

The Tiger Lily lode claim was located on December 21, 1958, and the Tiger Lily #5 and Tiger Lily #6 lode claims were located on May 28, 1982. Hulse purchased the claims in July 1993. They are situated in secs. 34 and 35, T. 28 S., R. 61 E., Mount Diablo Meridian, Clark County, Nevada.

A Notice to carry out surface disturbing activities on the claims was submitted to BLM August 27, 1993, pursuant to the surface management regulations at 43 C.F.R. Subpart 3809. The Notice, N54-93-094N, listed Hulse as the claimant/operator and proposed an operation on the claims consisting of trench/open pit exploration with a minimum of small equipment use. The Notice estimated an area of less than 1 acre of surface disturbance with mining to commence in September 1993 and be completed in 1999. Hulse filed an Existing Occupancy Notification with BLM on August 27, 1996, pursuant to 43 C.F.R. § 3715.4(b)(1).

BLM inspected the site six times from 1994 through 1999. BLM first inspected the site on June 16, 1994, and found some old cars and garbage on the claims, but reported no mining activity. Nor was there any mining activity noted during the next inspection on March 16, 1995. During the April 4, 1997 inspection, BLM found a mobile home and a wooden building, but "no visible mining activity other than historic."

When BLM inspected the site on June 24, 1999, it found that the site was clean, but that it appeared "not to have been worked for some time." (Undated Inspection Report, "reviewed" June 28, 1999.) BLM made the following observations: The road leading into the site showed no recent traffic; the gate is still up; the trailer does not appear to have hook-up for sanitary facilities and no sewage pipes were visible underneath it; and no mining equipment was found on the site. Photographs were included showing the road, the gate, and the trailer.

By letter dated June 29, 1999, BLM notified Hulse of the results of the June 24, 1999, inspection and advised him that "the site has occupancy in the form of a mobile home and a locked gate" and that all occupancies on public lands must be reasonably incident to mining operations. Hulse was directed to inform BLM in writing how his occupancy of the claims meets the criteria for occupancy set forth in 43 C.F.R. §§ 3715.2 and 3715.2-1.

In his response dated July 12, 1999, Hulse explained that the gate was there before he purchased the claims in 1993, at which time he discussed locking the gate with BLM and was informed that it was permissible to do so. He stated that the gate is open on both ends and that anyone can walk or drive around it. Hulse also stated that in accordance with his Mining Notice N54-93-094N he moved the trailer onto the site in 1994 to be used for storage and for a future office, clarifying that it had never been used as a residence and that it still had the tires on it and was not equipped with either water or a septic system.

Hulse also explained that he goes to the site for purposes of exploration and prospecting "whenever time allows." He reported that recently he had spent several days on the site with miners, surveyors, and geologists; that he had a considerable amount of time and money invested in the various ore samples presently being assayed; and that all of his use of the site is reasonably incident to mining.

To determine whether activities reasonably incident to prospecting, mining, or processing operations within the meaning of the Act and regulations were taking place that would warrant occupancy, BLM conducted a surface use field examination September 16, 1999, and a follow-up inspection on October 27, 1999. The resulting "Mineral Report Surface Use Determination for the Tiger Lily, Tiger Lilly 5, Tiger Lily 6 Lode Claims" (Report) was approved and acknowledged by the Field Manager on April 6, 2000. The Report states with respect to claim development under the "Analysis of Surface Use" section that:

A locked gate located on the Tiger Lily #6, blocks access to the claim group (photos 1, 4, 12).

A deep mine is located on the Tiger Lily lode claim. A head frame sits above the deep mine. Access to the mine from the head frame is not possible without a lot of work to make it safe. A fence around the mine is not kept up (photos 10, 11, 16). According to the claimant the mine shaft is flooded. A wooden shack sits southeast of the deep mine. The shack has personal items stored in it (photos 7, 17). A storage tank, that is empty, sits on the ridge to the west of the deep mine (photos 8, 14). Two abandoned cars sit to the southwest of the deep mine (photos 9, 15).

A mobile home is located on the Tiger Lily #5 lode claim (photos 3, 5, 6, 13). The mobile home is to be used as an office and lab. The mobile home had one window out and still has the tires on. No septic system is installed but there is no sign that sanitary facilities associated with the mobile home are being used.

(Report at 8-9.)

Based upon the inspections of September 16, 1999, October 27, 1999, and the prior inspections, the BLM Minerals Specialist and Certified Mineral Examiner who prepared the Report stated that in their professional

opinion activities on the site did not meet the requirements of 43 C.F.R. §§ 3715.2, 3715.2-1, or 3715.5, concluding that:

- 1) There are no milling or mining operations taking place that would require the level of occupancy which is taking place.
- 2) Activities on the site do not constitute substantially regular work. Other than sporadic sampling of surface areas and storage of items the site is only used for occupancy.
- 3) There are no activities and equipment on the site that can be reasonably calculated to lead to the extraction and beneficiation of minerals.
- 4) Operations do not involve observable on-the-ground activities that BLM may verify under Sec. 3715.7.
- 5) There is no appropriate equipment that is presently operable on the site.
- 6) The present occupancy is beyond that needed to protect exposed, concentrated or otherwise accessible valuable minerals from theft or loss.
- 7) The occupancy is not needed to protect from theft or loss appropriate, operable equipment which is regularly used, is not readily portable and cannot be protected by means other than occupancy.
- 8) The occupancy is not needed to protect the public from appropriate, operable equipment which is regularly used, is not readily portable, and if left unattended, creates a hazard to public safety.
- 9) The occupancy is not needed to protect the public from surface uses, workings, or improvements which, if left unattended, create a hazard to public safety. There are old mine workings present but they can be secured by fencing and signs at their point of occurrence or permanent closure.
- 10) The site is not located in an area so isolated or lacking in physical access as to require the mining claimant, operator or workers to remain on site in order to work a full shift of a usual and customary length. The site is approximately 1.5 hours from Las Vegas, Nevada. Searchlight and Prim, Nevada are within a half hour of the site. There is no continuous activity taking place on the claims that would warrant occupancy of the site.

(Report at 3-4.)

In its April 10, 2000, decision BLM summarized the occupancy found on the claims during the September 16, 1999, field examination as discussed in the Report and listed the 10 conclusions set forth in the Report. BLM stated that the activities taking place on these claims were found to be not reasonably incident to prospecting, mining, or processing operations within the meaning of 30 U.S.C. § 612(a) (1994), 43 C.F.R. § 3712.1 and 43 C.F.R. § 3715. Under the authority of 43 C.F.R. § 3715.7-1(c), BLM ordered Hulse to remove the locked gate blocking the road leading to the claims, the single-wide mobile home and wooden shack, personal items, and junk vehicles. BLM also required Hulse to permanently secure the deep mine to remove it as a hazard to the public.

In his statement of reasons (SOR), Hulse reiterates the assertions set forth in his July 12, 1999, letter responding to BLM's letter of June 29, 1999. Hulse argues that there is no occupancy taking place on the claims that is not covered by the Notice of Intent submitted August 27, 1993, and explains the nature of the activity taking place. Hulse notes that less than 1 acre of ground has been disturbed; that a trench and other excavations were made to obtain samples. He describes the mobile unit on the site as a self-contained trailer on tires; the locked gate as permitted by BLM open on both sides so as not to prevent entry.

Hulse states that he visits the site at regular intervals, performs the required assessment work, and has done substantial work on the site to prevent soil erosion. He explains that he brings equipment onto the site only when necessary, and that any item left on the grounds, not under lock, would be stolen or vandalized. He believes that much of his ore, landscape rocks, and desirable cactus and Joshua trees would "disappear" if he were not on the site regularly.

Hulse contends that all activities on the site are reasonably incidental to prospecting and mining. He states that he intends to pump out the existing mine shaft and will "commence mining on a small scale as soon as economically feasible." Hulse expresses concern that permanently sealing the shaft would prevent any future development.

While BLM does not dispute that the occupancy taking place was as set forth in Hulse's original Notice of Intent, BLM states that its responsibility under the regulations at 43 C.F.R. Subpart 3715, required it to inspect all sites and that, based on its evaluation, BLM determined that Hulse's occupancy is not in compliance with the 43 C.F.R. Subpart 3715 which is causing undue and unnecessary degradation of public lands and resources.

BLM points out that since no equipment is stored on the site, no gate or trailer is needed for protection against theft or vandalism. Similarly, BLM notes that there are no stockpiles of ore currently on the site. BLM asserts that Hulse has no right to any "landscape rocks," and has no right to remove cactus or Joshua trees. BLM concludes that there is no need for the site to be gated to prevent access and reports there is no evidence in the case file that BLM consented to a locked gate.

While BLM acknowledges that small scale sampling on a regular basis may be taking place on the claims, BLM indicated that such sampling activities could not be determined from inspecting the site. Assuming such activity is taking place, BLM asserts that the type of work described does not require permanent occupancy of the site. Further, BLM argues that a number of alternatives exists to permanently sealing the mine from public access that would not preclude future development, arguing that closure should not be delayed while the claimant waits for the site to become economically feasible to mine.

[1] Section 4(a) of 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."

Effective August 16, 1996, BLM adopted 43 C.F.R. Subpart 3715, which implements those statutory provisions by addressing the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. See 61 Fed. Reg. 37115, 37117 (July 16, 1996). These regulations set forth restrictions on the use and occupancy of public lands administered by BLM open to the operation of the mining laws, limiting such use and occupancy to those involving 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. 37116 (July 16, 1996). Additionally, the regulations clarify that unauthorized uses and occupancies on public lands are illegal uses that *ipso facto* constitute unnecessary or undue degradation of public lands which the Secretary of the Interior is mandated by law to take any action necessary to prevent. 61 Fed. Reg. 37117-18 (July 16, 1996); see 43 U.S.C. § 1732(b) (1994). ^{2/}

The applicable regulation 43 C.F.R. § 3715.2 provides in pertinent part that in order to occupy public lands for more than 14 days in a 90-day period, those activities that are the reason for the occupancy must:

- (a) Be reasonably incident;
- (b) Constitute substantially regular work;

^{2/} The preamble explains that the unnecessary or undue degradation controlled by these rules includes uses not authorized by law, specifically those activities which are not reasonably incident and are not authorized under any other applicable law or regulation, while uses that are reasonably incident and do not involve occupancy are governed by the surface management requirements of 43 C.F.R. Part 3800. 61 Fed. Reg. 37118 (July 16, 1996).

(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 § 3715.7.

Under 43 C.F.R. § 3715.2-1, occupancy must also involve one or more of the following:

(a) Protecting exposed, concentrated or otherwise accessible valuable minerals from theft or loss;

(b) Protecting from theft or loss appropriate, operable equipment which is regularly used, is not readily portable, and cannot be protected by means other than occupancy;

(c) Protecting the public from appropriate, operable equipment which is regularly used, is not readily portable, and if left unattended, creates a hazard to public safety;

(d) Protecting the public from surface uses, workings, or improvements which, if left unattended, create a hazard to public safety; or

(e) Being located in an area so isolated or lacking in physical access as to require the mining claimant, operator, or workers to remain on site in order to work a full shift of a usual and customary length. A full shift is ordinarily 8 hours and does not include travel time to the site from a community or area in which housing may be obtained.

Departmental regulation 43 C.F.R. § 3715.5(a) provides that use and occupancy must be reasonably incident and prevent or avoid "unnecessary or undue degradation" of public lands and resources. Under 43 C.F.R. § 3715.5(b) and (c), all uses and occupancies must conform to all applicable Federal and state environmental standards and all required permits and authorizations must have been obtained before commencing activities. 43 C.F.R. § 3715.5(d) and (e) state that any temporary structure placed on public lands during prospecting or exploration will be allowed only for the duration of the activities, absent written approval from BLM, and such temporary structure must conform with the applicable state or local codes and occupational safety and health and mine safety standards.

The regulations define "reasonably incident" as being a shortened version of the statutory standard "prospecting, mining, or processing operations and uses reasonably incident thereto" and "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 * * *." 43 C.F.R. § 3715.0-5.

We find that Hulse's activities on these claims are not "reasonably incident" to prospecting, mining, or processing operations within the meaning of 43 C.F.R. § 3715.0-5. Hulse has made no showing that the locked gate blocking the road leading to the claims, the single-wide mobile home, wooden shack, personal items, and junk vehicles are "reasonably incident" to prospecting, mining, or processing operations. Other than his assertions that a trench and other excavations were made to obtain samples and that assessment work was performed, Hulse has presented no evidence that he has done anything on the site with respect to "prospecting, mining, or processing operations and uses reasonably incident thereto." Therefore, the presence of the structures and items found on the site is not justified. See Bradshaw Industries, 152 IBLA 57, 63 (2000).

During the September 16, 1999, BLM inspection a deep mine was observed on the Tiger Lily claim. BLM noted that access to the mine from the head frame which sits above the mine is not possible without extensive work to make it safe. In his SOR, Hulse asserts that it is his "intention to pump out the existing mine shaft." Thus, Hulse, in acknowledging that the mine shaft is flooded, confirms that it not currently being used in connection with mining activity.

The inspections of the site revealed that there was no recent mining activity and no mining equipment on the site. BLM did not find any evidence of observable on-the-ground activity on this claim as required by 43 C.F.R. § 3715.2(d). See Firestone Mining Industries, Inc., 150 IBLA 104, 109 (1999).

During its inspections dated June 24, 1999, and September 16, 1999, BLM found a locked gate located on the Tiger Lily #6, blocking access to the claim group. 43 C.F.R. § 3715.6(g) prohibits placing gates to exclude the general public without BLM's concurrence. There is nothing in the case file to indicate a locked gate is necessary or to support Hulse's assertions that BLM allowed him to maintain a locked gate. Assuming BLM had at some point permitted a locked gate, BLM may properly order its removal where it subsequently determines that such is not reasonably incident to a mining operation. There is no support in the record to find that Hulse needs a gate to protect against the theft of mining equipment or valuable minerals. Further, having been ordered to permanently secure the deep mine opening to remove it as a public hazard, no gate is necessary to protect the public from danger from the mine shaft. See 43 C.F.R. 3715.2-1.

In addition to being "reasonably incident," activities that are the reason for occupancy must constitute substantially regular work. See 43 C.F.R. § 3715.2(b). Hulse has presented no evidence that he has met the substantially regular work standard, which "includes active and continuing exploration, mining, and beneficiation or processing of ores." See 43 C.F.R. § 3715.0-5.

Hulse asserts that he intends to "commence mining on a small scale as soon as economically feasible." However, mining plans based on expectations of economic feasibility do not justify the current level of use and occupancy of the site. See Firestone Mining Industries, Inc., *supra* at 111.

Because Hulse has no right to use or occupy the surface of the site unless actual mining or mining-related operations are taking place, his use and occupancy are not reasonably incident. Consequently, the presence of structures and items on the site constitute unnecessary or undue degradation of the public lands and resources which must be avoided or prevented under 43 C.F.R. § 3715.5(a). Accordingly, we affirm BLM's conclusion that Hulse violated 43 C.F.R. §§ 3715.2, 3715.2-1, and 3715.5.

In accordance with 43 C.F.R. § 3715.7-1(c), we find that, BLM properly ordered Hulse to remove the gate, the single-wide mobile home, wooden shack, personal items, and junk vehicles from the site. Also, BLM properly ordered Hulse to permanently secure the deep mine to remove it as a hazard to the public. Appellant will have 30 days from receipt of the Board's decision to comply with BLM's decision and notice of noncompliance.

Having decided the appeal on its merits, the petition for stay is moot.

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 and notice of noncompliance appealed from are affirmed, and the petition for stay is denied as moot.

Gail M. Frazier
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge