

INTERIOR BOARD OF LAND APPEALS

Thomas E. Swenson

156 IBLA 299 (March 21, 2002)

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THOMAS E. SWENSON

IBLA 2000-339, etc.

Decided March 21, 2002

Appeal from a decision of the Northern Field Office, Bureau of Land Management, Fairbanks, Alaska, constituting a permanent cessation order with respect to use and occupancy of a mining claim. FF 092214.

Set aside and remanded.

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

Activities justifying occupancy of a mining claim must (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; and (e) use appropriate equipment that is presently operable. 43 CFR 3715.2.

2. Mining Claims: Surface Uses--Surface Resources Act: Occupancy--Words and Phrases

"Substantially regular work." As used in 43 CFR 3715.0-5, the phrase "substantially regular work" means work on, or that substantially and directly benefits, a mineral property including nearby properties under control of the mining claimant. The term also embraces mining activity that is intermittent in nature.

3. Mining Claims: Surface Uses--Rules of Practice: Appeals: Burden of Proof--Surface Resources Act: Occupancy

An appellant seeking to occupy a mining claim bears the burden of proving that its activities are reasonably incident to mining. Where an appellant raises questions about whether his activities come within the meaning of 43 CFR 3715.2, that are unresolved in the record, the decision may be set aside and remanded.

APPEARANCES: Thomas E. Swenson, Hibbing, Minnesota, pro se; Kenneth M. Lord, Esq., Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Thomas E. Swenson has appealed from a June 29, 2000, decision issued by the Northern Field Office, Bureau of Land Management (BLM), Fairbanks, Alaska, concluding that Swenson's occupancy of a federal mining claim is invalid and requiring Swenson to remove trailers and personal property from the claim by May 1, 2002. ^{1/} BLM issued the decision as a cessation order under 43 CFR Subpart 3715, which governs use and occupancy under the mining laws. We set aside and remand BLM's decision in this appeal because it fails to apply fully the Subpart 3715 regulations to the facts in the record.

Background

Swenson's appeal stems from BLM's enforcement of regulations implementing section 4(a) of the Surface Resources Act of 1955, 30 U.S.C. § 612 (1994). This provision 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." 30 U.S.C. § 612(a) (1994). On July 16, 1996, BLM promulgated regulations at 43 CFR Subpart 3715 to implement, inter alia, section 4(a). These rules required persons with existing uses and occupancies to notify BLM of their occupancies by October 15, 1996, in which case any such person had one year to bring the occupancy into compliance with the rules. 43 CFR 3715.4(b).

On October 15, 1996, BLM received ten notices from Swenson advising that, pursuant to the mining laws, he was occupying property within secs. 34, 35, and 36, T. 7 S., R. 33 E., secs. 30 and 31, T. 7 S., R. 34 E., and secs. 1 and 2, T. 8 S., R. 33 E., Fairbanks Meridian, Alaska. Swenson did not identify any mining claim by serial number or name on any of the notices.

On May 13, 1997, BLM sent a certified letter to Swenson, assigning to one of the ten occupancy notices serial number FF 092214. BLM rejected the other nine occupancy notices. With respect to occupancy notices relating to two claims within sec. 2, T. 8 S., R. 33 E., BLM stated that it had determined that no structures existed on those claims and that, therefore,

^{1/} The record BLM initially forwarded to the Board contained what appeared to be two additional appeals from the decision issued to Swenson, filed by Paul M. Byrd and Robert N. Roningen (IBLA 2002-65 and 2002-66, respectively). The full record forwarded to the Board in December 2001 reveals that these appeals were taken from a separate Notice of Noncompliance issued to Byrd and Roningen under 43 CFR Subpart 3809.3-2. Appeals of that order are properly filed before the BLM State Director. 43 CFR Subpart.4. Accordingly, we dismiss these two matters as mistakenly docketed as appeals of the decision issued to Swenson.

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no "occupancy" existed. With respect to the "other seven" rejected notices, BLM stated that it had no record of any valid mining claim. BLM opened a surface use and occupancy file for what it called the "Smith Bench" claim, under serial number FF 092214, and acknowledged the existence of two additional mining claims without occupancies. Nothing in Swenson's or BLM's communications identified any of these mining claims by mining claim recordation number or name. ^{2/}

In its May 13, 1997, letter, BLM notified Swenson that, pursuant to 43 CFR 3715.3-2, he was required to provide BLM with written information justifying the basis, under pertinent mining laws, for

the Smith Bench occupancy. BLM stated that Swenson could provide information verbally or in writing, and proposed to schedule a compliance inspection.

A BLM employee prepared an inspection report on May 19, 1998, regarding an investigation and resulting picture of two trailers. According to the report, the inspection took place on August 26, 1997. The report states that during the inspection, Swenson was "staying in his mobile home and repairing bear damage to his camp trailer." The report attributes to Swenson the assertion that:

he is usually at the camp one or two weeks each year doing assessment work and was going to be there one week this year. He said there were no visible workings from his current or previous activities and he did not have any equipment other than hand tools.

(Inspection Report of Dave Mickelson, May 19, 1998.)

BLM conducted an inspection on September 1, 1999. The 1999 inspection report contains pictures of the trailers, and the following statement:

- This is the newest trailer on site
- well maintained
- No operation
- Removal unless fully justified
- Silver (Alum) Trailer belongs to this owner.

(Inspection Report of Keith H. Woodworth, September 1, 1999.) This inspection report also contains a map identifying several inspection locations unrelated to this appeal, and Swenson's occupancy on the "Smith

2/ BLM contends, and a separate surface occupancy file (FF 090570) would indicate, that the relevant mining claims are the Smith Bench # 1 and # 2, FF 62596 and FF 62597, located in secs. 30 and 31, T. 7 S., R. 34 E., Fairbanks Meridian, Alaska. According to the mining claim file for the two claims, on the date of the decision, these claims were owned by Circle Investments. Swenson claims to be a limited partner in Circle Investments. (Written Narrative, April 7, 2000, at 1.)

Bench” in sec. 31, T. 7 S., R. 34 E. The Swenson investigative file is identified on the map under the number FF 092214. 3/

On February 7, 2000, BLM sent a letter to Swenson questioning whether his occupancy (FF 092214) was justified under the Subpart 3715 regulations and noting that Swenson had not filed a plan of operations under 43 CFR Subpart 3809. 4/ BLM instructed Swenson to complete and return an enclosed worksheet describing his use and occupancy under the general mining law.

According to a handwritten note, Woodworth received a call from Swenson on March 10, 2000, in which Swenson sought to move the trailers upstream. “I stated that without an active operation, this move would most likely not be approved. I also stated that his present level of use was 'casual.'” (Woodworth’s Note to File, March 10, 2000.)

On April 13, 2000, BLM received Swenson’s worksheet and written narrative describing details of the occupancy. The narrative explains that Swenson owns two "road legal travel trailers located on Smith Bench approximately [17] miles downstream from the bridge on Fortymile River." (Narrative at 1.) The trailers are about 25 years old and have been on the site for about 20 years. (Worksheet, point (pt.) 2.) Swenson alleges that the trailers are used by occupants, including himself, for fewer than 14 days per year. Id.

Swenson states that the occupancy is reasonably incident to mining, because the "housing is used annually while all occupants work full time at prospecting, exploring, and other mining related activities that are at casual use level on both Smith Bench and Discovery Bench." Id. at pt. 3. The occupancy will eventually lead to extraction and beneficiation of minerals because the work "is directed at obtaining information for financial justification, methods selection and compliance planning for future mineral extraction." Id. at pt. 4. Swenson explains that samples have been extracted and tested. Id.

By narrative, Swenson explains that he and others use the trailers for “mining activities on Smith Bench and on claims that I control on Discovery Bench.” (Narrative at 1.)

3/ Among the sites identified, the map refers to serial number FF 090570 for plans filed under 43 CFR Subpart Subpart 3809 by Byrd and Roningen on the Smith Bench claims, and a concomitant surface occupancy and use file number FF 092254.

4/ The regulations at 43 CFR Subpart 3809 require plans of operation for mining activities meeting certain qualifications. See 43 CFR Subpart 3809.1-4. “Casual use operations” are exempt from requirements to file such a plan or other notice. 43 CFR Subpart 3809.1-2; see also 43 CFR Subpart 3809.1-3 (notice of limited disturbance). Subsequent to the BLM decision in this case, the Department has undertaken regulatory revisions of Subpart 3809 not relevant here.

The activities engaged in while using this housing consist of prospecting, exploring and other mining related activities.

While using this housing, I and associates work full time in mining activities that are defined as casual use.

Id. Swenson's worksheet provides no time frames for startup, full-scale mining operations, or cessation of mining. (Worksheet at pt. 10.) Rather, he describes annual use in August and project shut-down, clean-up, and removal of structures to occur between 2008 and 2012. Id. at pts. 9 and 10.

With regard to observable, on-the-ground activity that a visitor would expect to see, the worksheet avers:

In the previously stripped areas many samples of one to three cubic feet have been extracted and the depressions and screened materials may be seen. A few sites where one cubic yard samples have been tested also may be observed.

Id. at pt. 4C. The worksheet describes presently operable equipment on the site, including a 2-inch pump, a wheel barrow, sample screens, sluice boxes, pans and various hand tools used in "the sampling phase of prospecting and exploring," as being consistent with casual use. Id. at pt. 4.D.

The worksheet asserts that the occupancy is necessary because the claims are located in an isolated area where it is not practical for workers to travel to distant housing. Id. at pt. 5. In the Narrative, at 1-2, Swenson explains:

The only access to these benches during the mining season is by power boat on the Fortymile River. This river is dangerous and recently took a life even when navigated by an experienced river boatman. The flow rises rapidly to dangerous levels and also drops to levels that do not allow prudent travel. I therefore hire local boatmen for the round trip on the river each year.

On June 29, 2000, BLM issued a decision terminating the "Fortymile River occupancy." In this decision for surface use and occupancy file FF 092214, BLM asserts that it also reviewed "Surface Management file (FF090570) and the Surface Use and Occupancy file (FF092254)." (Decision at 1.) These files correspond to a plan of operations and another occupancy on the Smith Bench claims by Paul Byrd, as lessee of land held by Circle Investments. According to the decision, "Surface Management file (FF090570)" indicates that Swenson is "involved in Circle Investments, which is the owner of Smith Creek Bench 1 and 2, #2 above Discovery, Discovery #3, and Discovery #4 mining claims." ^{5/} (Decision at 1-2.) The decision avers that on June 11, 2000, BLM officials returned to the site of

^{5/} The decision does not identify these mining claims by number or location. According to the various mining claim and surface occupancy files obtained by the Board, the five claims are identified as follows:

the trailers, and mapped the “mine and camp site,” using a global positioning system (GPS). According to the decision, at this June 11 visit, BLM determined that “no changes were noted from the previous year’s examination.” (Decision at 1.) The record shows that this investigation was conducted in response to plans of operation and reclamation filed by Paul Byrd and is documented in surface occupancy file FF 090570. BLM attached a map to the decision, with the number of surface use and occupancy file FF 092254, relating to the Byrd/Roninger occupancy, and is entitled “SMITH BENCH.” This map contains no site coordinates, and no plausible delineation between the Smith Bench or Discovery Bench claims, or the Fortymile River.

The decision recounts a chronology of events beginning with Swenson’s October 15, 1996, letter. It acknowledges that trailer occupants operate “at the casual use level on both Smith Bench and Discovery Bench.” *Id.* at 2. After discussing the June 11, 2000, inspection, it concludes that “this Permanent Cessation Order is hereby issued.” *Id.* at 2. The decision rejected the occupancy citing the terms of 43 CFR 3715.2:

In order for you to maintain permanent (or temporary) structures in support of your federal mining claim, you must be engaged in activities that:

- 1) Are reasonably incident;
- 2) Constitute substantially regular work;
- 3) [Are] reasonably calculated to lead to the extraction and beneficiation of minerals;
- 4) Involve observable on-the-ground activity that BLM may verify under 43 CFR 3715.7;
- 5) Use appropriate equipment that is presently operable, subject to the need for reasonable assembly, maintenance, repair, or fabrication of replacement parts.

Because the evidence as shown above indicates that you are not conducting mining operations which would be regulated under Subpart 3809, or that you can in any reasonable manner meet any of the above 5 elements, you are hereby directed to take the following actions[.]

(Decision at 2-3.) The decision directed Swenson to provide BLM a schedule for "removal of [the] two trailers and all other personal property located on the Smith Bench claims" by May 1, 2002. *Id.* at 3.

fn. 5 (continued)

Smith Creek Bench #1 (FF 62596) and #2 (FF 62597), #2 above Discovery (FF 62601), Discovery #3 (FF 62602), and Discovery #4 (FF 62603). A map from the mining claim files for the two Smith Bench claims reveals that the Smith Bench and Discovery claims contiguously front along the shoreline of the Fortymile River. This map identifies at least eight mining claims, the Smith Bench Nos. 1-4 and the Discovery Bench Nos. 1-4 running side by side along the Fortymile River, with the Discovery #1 and the Smith Bench #1 sharing a common boundary in the middle.

Swenson appealed. In his Statement of Reasons (SOR) Swenson avers that he became a "limited partner in Circle Investments and also purchased one fourth of the general partners' rights to profits." Id. He claims to have exercised rights to buy full ownership of the Discovery Bench claims, FF 62601, FF 62602, and FF 62603. Id. at 2.

Swenson contends that his right to occupy Smith Bench derives from the prospecting he is conducting on Discovery Bench (SOR at 1), and maintains that BLM's failure to visit Discovery Bench and thereby determine that these activities are ongoing invalidates the decision. Id. at 13. Swenson describes detailed mining activities which he is undertaking on Discovery Bench and provides pictures of mined land, and sluice boxes and other mining tools. (SOR at 2-3, 7, 9.) Swenson asserts that his sampling of floor, bedrock, and banks exposed by prior mining activity on the Discovery Bench qualifies as mining-related activity. (SOR at 3.) His SOR explains:

[O]n Discovery Bench much access has been provided by past activities. On the floor of the stripped areas I am able to sample to bedrock. (See [photos at] page 5, page 7, & page 10)[.] In the banks of the stripped areas I am able to sample equivalent to a twenty foot vertical shaft or massive backhoe excavation. (See photos page 5 & page 12)[.]

The washes, dozer trenches and river bank provide other sampling opportunities away from the stripped areas. Small samples reduced to less than ten pounds of material passing a one eighth inch sieve are usually processed by panning at the river, larger samples from remote sites are processed by either moving the sample after some screening, or moving the sluice box, or both (see photos page 7)[.]

Of course there will be little or no evidence of more than 5000 feet of steel tape measuring done to relate various reference points, the more than three hundred pounds of samples that I have taken to Minnesota for final processing, or the holes I have dug and backfilled just to determine the depth of overlaying soil and silt.

The best place to observe evidence on Discovery Bench would be in an overgrown stripped area between a relic dozer near the river bank and a large skid mounted sluice box down river.

(SOR at 3, 6.)

Swenson disagrees with BLM's implication that he needed a permit under 43 CFR Subpart 3809 to justify an occupancy. He contends that there are "adequate exposed points for prospecting, exploring, and sampling on Discovery Bench." Therefore, he asserts that he has not yet needed mechanical equipment, which would trigger the requirement for a plan of operations under 43 CFR Subpart 3809. (SOR at 13.) He asserts that BLM erred in assuming that, because he has not filed a plan of operations,

mining related activity is not taking place on Discovery Bench. Id. He faults BLM for failing "to visit Discovery Bench and to give my activities there due consideration." Id. Finally, Swenson claims that "[m]y trailers are targeted due to their location on Smith Bench where major cleanup problems exist." (SOR at 14). 6/ He requests permission to move them to Discovery Bench. (SOR at 13.)

BLM contends that activity on Discovery Bench is not relevant to the occupancy at Smith Bench. (Answer at 8-11.) BLM argues that Swenson has not demonstrated that he is actively engaging in mining operations on the Smith Bench claim or claims. Thus, BLM asserts that irrespective of any activity that may occur on Discovery Bench, 43 CFR Subpart 3809.3-7 and the use and occupancy regulations under 43 CFR Subpart 3715 require him to remove the trailers and terminate the occupancy. Id. at 5-12. Citing the Board's decision in Bradshaw Industries, 152 IBLA 57 (2000), BLM argues that mining activities on the Discovery claims are not pertinent to occupancy on the Smith Bench claims. Id. at 10.

Analysis

[1] The regulations in 43 CFR Subpart 3715 were adopted, inter alia, to establish procedures for beginning occupancy, standards for reasonably incidental use or occupancy, and procedures for inspection and enforcement and for managing existing uses and occupancies. David E. Pierce, 153 IBLA 348, 356-57 (2000); Wilbur E. Hulse, 153 IBLA 362, 367-68 (2000); Bradshaw Industries, 152 IBLA 57, 61 (2000). Subpart 3715 defines "occupancy" as follows:

Occupancy means full or part-time residence on the public lands. It also means activities that involve residence; the

* * * presence, or maintenance of temporary or permanent structures that may be used for such purposes * * *. Residence or structures include, but are not limited to, * * * motor homes, trailers, * * * and storage of equipment or supplies.

43 CFR 3715.0-5. Here, the occupancy that concerns BLM is the permanent presence of two trailers and other personal property on the Smith Bench claims. 7/

While occupancies are permitted on public lands, "activities that are the reason for * * * occupancy" must (a) be reasonably incident; (b) constitute substantially regular work; (c) be reasonably calculated to

6/ Such "cleanup problems" are identified in surface management file FF 090570, in association with Byrd's filings under 43 CFR Subpart 3809.

7/ Swenson avers that he stays in the trailers less than 14 days per year, apparently hoping that such limited presence on the claims falls within the exemption under 43 CFR 3715.2 for occupancies of 14 days or less. However, it is not his limited use of the trailers, but the permanent presence of his trailers on public lands that is the salient occupancy. The trailers are on the site all year.

lead to the extraction and beneficiation of minerals; (d) involve observable on-the-ground activity that BLM may verify under 43 CFR 3715.7; and (e) use appropriate equipment that is presently operable. 43 CFR 3715.2. In determining whether an occupancy is justified under the Subpart 3715 rules, it is incumbent upon BLM to determine whether an occupancy meets these standards. 43 CFR 3715.4-1(a), 3715.7.

[2] BLM's decision presumes that the Smith Bench mining claim occupancy (or what the decision calls the Fortymile River occupancy site) can only be justified by operations on the Smith Bench claims. The surface use and occupancy file (FF 092214) for Swenson's occupancy documents two on-

site BLM inspections of the Smith Bench occupancy. ^{8/} Acknowledging Swenson's assertions that work was conducted on Discovery Bench (Decision at 2), BLM failed to address the critical question of whether Swenson's activities on the Discovery Bench claims would bring the occupancy into compliance with 43 CFR 3715.2.

BLM's assertion that mining-related activity on a nearby claim cannot justify an occupancy is dispensed with by the definition of "substantial and regular work" found in 43 CFR 3715.0-5. That definition provides: "Substantially regular work means work on, or that substantially and directly benefits a mineral property including nearby properties under your control." (Emphasis added.) BLM failed to address this definition in reviewing the facts of this case. The definition clearly envisions that work on nearby mineral property may justify an occupancy. Therefore, it was incumbent upon BLM to investigate whether the work on the Discovery mining claims constituted "substantially regular" work, that was reasonably incident, that was reasonably calculated to lead to the extraction and beneficiation of minerals, which involved observable on-the-ground activity and which used appropriate equipment that is presently operable.
43 CFR 3715.2.

BLM cites Bradshaw Industries, Inc., 152 IBLA at 61, as holding that "the use and occupancy of one site is not reasonably incident to mining-related activity on another site." (Answer at 10.) BLM cites the Board's statement that Bradshaw's "off-site development of an extraction method was insufficient to sustain its use an occupancy of the mining claim because there had been no 'active mining or exploration occurring on the site since 1995.'" (Answer at 10 (emphasis added).)

^{8/} As noted above, surface use and occupancy file FF 092214 contains no independent evidence of the June 11, 2000, inspection which was conducted for the Byrd occupancy and his Subpart 3809 activities. BLM's attorney avers that "BLM has conducted no fewer than fourteen compliance inspections of the Smith Creek Bench claims since 1985." (Answer at 6.) According to the files supplied the Board in December 2001, these inspections relate to activities conducted by, inter alia, Byrd under various plans of operation and reclamation applicable only to the Smith Bench claims under 43 CFR Subpart 3809. See surface management file FF 090570 and surface use and occupancy file FF 092254.

BLM misreads that case and the application of the pertinent rule. In Bradshaw, the claimant had one mining claim, had failed to conduct work on the claim since 1995, and had put the claim in “standby mode * * * due to lack of discoverable minerals.” Bradshaw defended its occupancy on the basis that “the operation was ‘in standby status * * * to allow funds to be used to develop a non-chemical processing method.’” 152 IBLA at 60. While all work coming within the “activities” defined as “substantially regular work” on his mineral property had ceased, Bradshaw alleged that he was conducting scientific research on a new form of extraction in an off-site research facility. 152 IBLA at 61. That case did not address the issue of whether substantially regular work on a nearby mining claim could “hold” an occupancy. ^{9/}

Moreover, in addition to misreading Bradshaw, BLM’s assertion that “the use and occupancy of one site is not reasonably incident to mining-related activity on another site” misreads the rules. The issue is not whether use and occupancy is reasonably incident to mining-related activity. It is whether a mining claimant seeking to justify an occupancy is “engaged in * * * activities that are * * * reasonably incident.” 43 CFR 3715.2. BLM’s answer thus improperly reorders the terms of the regulation to suggest an inappropriate test for Swenson. We find BLM’s failure to review the facts surrounding Swenson’s occupancy in light of applicable regulations and definitions is sufficient basis for setting aside the decision.

Further, BLM’s decision followed from an assumption that casual use cannot justify an occupancy. BLM conceded a “casual use level on both Smith Bench and Discovery Bench.” (Decision at 2.) By proceeding to issue the cessation order because Swenson was “not conducting mining operations which would be regulated under Subpart 3809” (Decision at 3), it follows that BLM held that a claimant who engages in casual use activity that is exempt from the requirement to file a mining plan of operations under 43 CFR Subpart 3809.1-4 cannot reasonably justify any occupancy under 43 CFR 3715.2.

We find no language in Subpart 3715 to support this conclusion. To the contrary, Table 2 in 43 CFR 3715.3, expressly acknowledges that BLM will consider a proposed occupancy based on “casual use.” It states: “If you are proposing a use that would involve occupancy * * * [a]nd is a ‘casual use’ under 43 CFR Subpart 3809.1-2 or does not require a plan of operations under 43 CFR 3802.1-2 and Subpart 3809.1-4 or a notice under 43 CFR Subpart 3809.1-3, * * * [y]ou are subject to the consultation provisions of this subpart and must submit the materials required by § 3715.3-2

^{9/} Moreover, the definition of “substantially regular work” requires work that benefits a nearby “mineral property” and includes exploration, mining and beneficiation, and other development activities. It permits activities “incidental” to activities meeting the conditions of sections 3715.2 and 3715.2-1, which relate to on-site activities. It permits “off-site trips associated with these activities.”

to BLM." The Preamble to 43 CFR 3715.3 likewise acknowledges that casual use may involve an occupancy: "This section of the final rule is organized as a table that lists the requirements you must follow to consult with BLM regarding a proposed occupancy before occupancy may begin in connection with * * * casual use activities." 61 FR 37121 (July 16, 1996). Likewise, this Board expressly acknowledged the ability of a claimant to justify occupancy based on casual use in David J. Flaker, 147 IBLA 161, 165-66 (1999), when it vacated a notice of non-compliance and required adjudication under the Subpart 3715 rules.

Finally, it is not possible to determine whether BLM was persuaded to issue a cessation order because Swenson's use is limited to a short period in August. However, in promulgating 43 CFR Subpart 3715, BLM also considered this issue. The definition of "substantially regular work" provides that "[t]he term also includes a seasonal, but recurring, work program." 43 CFR 3715.0-5. With respect to whether and to what degree intermittent mining-related activity on nearby properties may justify an occupancy, the Preamble to the regulations states:

Several comments stated that the use of the phrase "substantially regular and steady work" in proposed § 3715.2 could be construed to prohibit occupancies associated with weekend or intermittent mining activities that would otherwise be legitimate under the general mining law. BLM has changed the phrase "substantially regular and steady work" to "substantially regular work" and included a definition in this section of the final rule. "Substantially regular work" * * * encompasses a seasonal, but recurring, work program. This provision does not prohibit weekend or intermittent mining activities. Such activities, if carried out in good faith, may warrant occupancy under certain circumstances.

61 FR 37120 (July 16, 1996) (emphasis added.)

We find that BLM did not properly apply the Subpart 3715 regulations as a basis for issuing the cessation order in question. Without a factual and reasoned basis for BLM's conclusion that Swenson's activities do not meet the elements in 43 CFR 3715.2, we have no basis upon which to affirm BLM's decision. 10/

10/ BLM's citations to Cat Mountain Corp., 148 IBLA 249, 253 (1999), and Gayle M. and Robert G. Hutcheson, 150 IBLA 270 (1998), do not further its case against Swenson under Subpart 3715. Those cases upheld orders to remove property from mining claims after BLM found "no evidence of mining activities having been conducted pursuant to a plan of operations." Hutcheson, 150 IBLA at 274; Cat Mountain Corp., 148 IBLA at 253. These cases were decided under 43 CFR Subpart 3809.3-7, which expressly provides that without written permission "[a]ll operators may be required, after an extended period of non-operation for other than seasonal operations, to remove all structures, equipment and other facilities" from a mining claim. Those cases did not address the question of whether Swenson's occupancy is

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[3] The burden of proving error in a BLM decision involving a mining claim is on the claimant. David J. Flaker, 147 IBLA at 164. Likewise, the burden of proving activities are reasonably incident to mining is on the claimant. 61 FR 37123 (July 16, 1996). By contrast, BLM must ensure that its decisions are supported by a reasoned analysis of facts in the record. See, e.g., Franklin Dorhofer, 155 IBLA 51, 54 (2001), and cases cited.

Swenson's SOR raises questions about whether his activities come within the meaning of 43 CFR 3715.2. Swenson submitted evidence indicating that he is engaged in mining-related activity

calculated to lead to the discovery of valuable minerals on the Discovery Bench mining claims. The record contains very little information regarding BLM's efforts to inspect these activities, as opposed to his trailers.

This decision does not find, as a matter of fact, that Swenson's submission of proof meets the requirements of 43 CFR 3715.2. We are unable to determine whether Swenson's occupancy does or does not have merit. BLM has indicated that intermittent mining activities, if carried out in good faith, may warrant occupancy under certain circumstances. 61 FR 37120 (July 16, 1996). We leave it to BLM to consider whether Swenson's actual occupancy is based on sufficient intermittent good faith mining activity to warrant occupancy under the Subpart 3715 regulations. Accordingly, we set aside and remand the decision for action consistent with the analysis set forth above.

Accordingly, pursuant to authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we set aside and remand BLM's June 29, 2000, decision for action not inconsistent with this opinion. 11/

Lisa Hemmer
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge

fn. 10 (continued)

sufficiently held by actual seasonal use on the Discovery mining claims as he alleges. This question must be addressed on the facts of this case by BLM, construing the regulations at 43 CFR 3715.0-5.

11/ Swenson has asked BLM to permit him to move his property and equipment to the Discovery Bench claims. To the extent BLM has not addressed this proposal because of its failure to apply express terms of 43 CFR 3715.2, BLM should also consider that question.