INTERIOR BOARD OF LAND APPEALS

Precious Metals Recovery, Inc.

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PRECIOUS METALS RECOVERY, INC.

IBLA 2001-312 Decided November 4, 2004

Appeal from a decision of the Phoenix, Arizona, Field Office, Bureau of Land Management, issuing a Determination of Non-Concurrence and Permanent Cessation Order under 43 CFR Subpart 3715. AZA-10235.

Affirmed.

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

The Surface Resources Act, 30 U.S.C. § 612(a) (2000), bars surface use of an unpatented claim located under the mining laws for any purpose other than prospecting, mining, or processing operations and uses "reasonably incident thereto." A mining claimant's acquisition of milling equipment and placement of it on public lands does not validate the use and occupancy of a site as a mill site when the claimant did not use the equipment for significant milling operations in the ensuing 14 years.

APPEARANCES: O.B. Gregory, Haughton, Louisiana, for Precious Metals Recovery; Richard Greenfield, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Precious Metals Recovery (PMR) appeals a May 3, 2001, Determination of Non-Concurrence and Permanent Cessation Order (Cessation Order) issued by the Phoenix, Arizona, Field Office, Bureau of Land Management (BLM), informing PMR that its occupancy of four mining claims was not in compliance with regulations governing the use and occupancy of such claims at 43 CFR Subpart 3715. The Cessation Order directed PMR to remove all property from the mining claims, on which PMR was assertedly operating an independent mill site, and to reclaim the site within 90 days of receipt. (Cessation Order at 2.)

The Mining Law of 1872, as amended, permits location of valuable mineral deposits on the public lands of the United States. See generally 30 U.S.C. §§ 21-47 (2000). In addition, a mining claimant may occupy certain public lands for "mining or milling purposes." 30 U.S.C. § 42 (2000). The owner of a "quartz mill or reduction works, not owning a mine in connection therewith," id., may maintain what has come to be known as an independent mill site. 2 American Law of Mining § 32.06[3][c]. The requirements for permitted use or occupancy of the public lands under the Mining Law were statutorily revisited in section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000). The Act provides that mining 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." In 1970, the Department adopted regulations to implement the Surface Resources Act at 43 CFR Subpart 3712.

In 1996, the Department adopted additional rules at 43 CFR Subpart 3715 to implement the Act and to address the unlawful use and occupancy of unpatented mining claims or millsites for nonmining purposes. 61 FR 37115, 37116 (July 16, 1996). Consistent with the Surface Resources Act, these regulations establish procedures for beginning occupancy, standards for reasonably incidental activities, prohibited acts, and procedures for inspection and enforcement and for managing existing uses and occupancies. Dan Solecki, 162 IBLA 178, 179 (2004).

To justify an occupancy, including the placement of buildings and personal property on a mining claim or mill site, a claimant must show that both its mining activities and occupancy meet applicable regulatory standards. 43 CFR 3715.3-2(b); 43 CFR 3715.6(a). The activities justifying a claimant's occupancy of a mill site in the form of placement of structures and property, 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. They must also meet one of several standards set forth in 43 CFR 3715.2-1. In connection with mill sites, the rules define "reasonably incident" as "processing operations and uses reasonably incident thereto." 43 CFR 3715.0-5, citing 30 U.S.C. § 612; see also Thomas E. Smigel, 156 IBLA 320 (2002) (application of Subpart 3715 regulations to mill sites).

The Subpart 3715 regulations establish BLM's authority to issue a cessation order to halt an occupancy in whole or in part, either on a temporary or permanent basis. 43 CFR 3715.7-1(b). BLM may do so where, among other things, the "use or occupancy is not reasonably incident" and does not present a hazard to persons or the environment. 43 CFR 3715.7-1(b)(1)(i). A cessation order must describe the deficiencies in the occupancy, the corrective action required, and the time in which

corrective action must be taken. 43 CFR 3715.7-1(b)(2). In Jay H. Friel, 159 IBLA 150, 159 (2003), the Board affirmed the use of a cessation order in the context of a mill site.

The four mining claims at issue in this case, the Calgeco #1, Calgeco #2, Golden Fleece #1 and Golden Fleece #2 claims (AMC 328756 through 328759), are located in the SW1/4 sec. 23, T. 12 N., R. 1 E., Gila and Salt River Meridian, in Yavapai County, Arizona. The record indicates that the four mining claims were originally located in 1980, but closed on BLM files and relocated in 1993. [1/] Neither the location notices nor other information regarding the size of the mining claims, or whether they were located as mill sites, appears in the record, though PMR asserts that the Calgeco #1 was located as a five-acre mill site. (Oct. 3, 2001, letter to the Board at 1.) BLM opened the occupancy file at issue in this case, AZA-10235, in 1987, with the Calgeco #1 claim as the "lead file." All documents in the record relate the occupancy to this lead mining claim number. [2/]

The record indicates that PMR undertook to establish a milling operation, which was largely complete by 1987. In that year, PMR submitted to BLM a Notice of Intent (NOI) to "complete construction and operate a processing mill for the contract milling of precious metals from customers' ores and/or concentrates." (Feb. 5, 1987, NOI.) In the NOI, PMR noted that it was awaiting approval of an electrical power connection and that "construction work performed at the mill-site has been done by local contractors." Id. PMR stated that when the "milling and processing business" is "discontinued" it would restore the site. Id.

The record shows that PMR never used the mill or milling equipment for the purpose of milling ore. BLM records indicate that within months BLM had suspicions that PMR was attempting to run an industrial metals recovery system rather than a mill site. (June 11, 1987, Memorandum from Geologist, Phoenix Resource Area.) By 1991, BLM inspections documented the storage on the site of scrap metal, trash, and lumber. In addition, PMR had stored on the site "steel storage tankers" containing what PMR claimed was 32 tons of ceramic dura-beads. See generally Sept. 30, 1992,

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[1/] In a letter to BLM, PMR asserts that the mining claims were located in 1980, but "[s]everal years later the claims were changed to a lease plan under 43 CFR 3809 * * *." (Jan. 6, 2000, letter from PMR to BLM at 1.) This statement misstates the nature of mining claims and of the cited rule, neither of which establishes a lease or a "lease plan." It is not clear whether the change to which PMR refers in the letter might be the relocation of the claims.

[2/] It is not possible to determine from record documents the precise location of PMR's placement of milling equipment in association with any particular mining claim. Because PMR does not challenge BLM's inclusion of the four mining claims in its Cessation Order, we consider the occupancy file to pertain to all four claims.

Aug. 19, 1992, "3809 field inspection forms"; Apr. 10, 1991, photographs of AZA 10235; various handwritten notes in the record with 1991 dates. By 1992, BLM and PMR were engaged in a debate over removal of the improperly stored beads. By 1993, PMR conceded that the site had been used for storage of ceramic beads of a "type used by refineries" for 7 years. See Feb. 8, 1993, letter from PMR to BLM.

On February 26, 1993, BLM issued a violation letter pursuant to regulations governing mill sites at 43 CFR 3844.1, advising PMR that "processing of the ceramic dura-beads is not compatible with the required use of a mill site." (Feb. 26, 1993, letter from BLM to PMR.) [3/] BLM stated that it had been a "substantial length of time" since any activity had occurred on the site and, pursuant to 43 CFR Subpart 3809, ordered PMR to remove all items from the site and reclaim it. Id. [4/] On March 26, 1993, PMR sent a letter to BLM stating that it had removed "much of the scrap from the millsite" and was removing "eleven storage tankers" containing the dura-beads. PMR stated that it had entered into an agreement to "process local ore again."

Despite BLM's approval of requested extensions for compliance with the February 1993 violation letter, inspections in the fall of 1993 revealed that the ceramic beads had not been removed. BLM therefore issued a Notice of Noncompliance to PMR asserting a violation of 43 CFR 3809.1-3, for failing to prevent unnecessary or undue degradation of the public lands. (Oct. 22, 1993, Notice; Sept. 16, 1993, inspection report.) The record contains considerable written traffic between PMR and BLM on the topic; suffice it to say that PMR sold the beads and removed them in December 1993, which removal was verified during a January 1994 inspection conducted by BLM.

Subsequent inspections revealed more problems. In 1995, BLM attempted to inspect the facilities but a "locked gate prevented inspection." (Sept. 20, 1995, inspection report.) BLM's observation from outside the fence revealed a large camper and a satellite dish. A subsequent inspector was also unable, in 1997, to access the site because of locked gates. Nonetheless, he concluded that the site appeared to be inactive or abandoned and that various equipment was stored on it. (Dec. 17, 1997, inspection report.)

[3/] This letter is dated 199<u>2</u>, but internal date references and the certified mail receipt card make clear that this date is a typographical error.

[4/] The regulations at 43 CFR Subpart 3809 implement the Secretary's statutory duty under section 302(b) of the Federal Land Policy and Management Act, 43 U.S.C. § 1732(b) (2000), to manage surface uses on public lands. The regulations have been amended in various ways in the last several years not pertinent here.

As a result of the promulgation of regulations at Subpart 3715, subsequent BLM correspondence referred to those rules in addition to the regulations at Subpart 3809. On February 5, 1998, BLM issued a letter to PMR advising PMR that the site appeared abandoned and that it must remove all facilities and stored material on the site, or be liable for BLM's removal costs. Memoranda in the file indicate that PMR representatives called BLM to deny that the property was abandoned and to assert that its appearance was due to the fact that it had been vandalized by gangs. The sister of one of the PMR representatives stated to BLM that the site shuts down from November through May but would resume operation in the spring of 1998. (Feb. 19, 1998, conversation record.)

In a March 11, 1998, letter from PMR to BLM, PMR ambiguously asked for another 120 days for "clean up." In response, BLM asked PMR whether it intended to clean up the site in order to vacate it or in order to use the site and come into compliance with 43 CFR Subpart 3715. (Apr. 1, 1998, letter from BLM to PMR.) According to a conversation record, PMR had not yet decided which course it would take. (Apr. 15, 1998, conversation record.) In a letter dated April 21, 1998, PMR asked to schedule a meeting with BLM on May 21, 1998, to "discuss [its] intent." A memorandum from a meeting that took place on that date reflects that PMR agreed to remove much unnecessary material from the site, and also advised BLM that it would attempt to start a processing operation. In this meeting, BLM advised PMR of the various "county-city-state permits" it would be required to obtain to conduct such operations.

Subsequent correspondence indicates that, while PMR stated that it was looking for ore to process, it never found any. In a letter dated February 25, 1999, BLM again explained to PMR actions the company would need to take and agencies it needed to contact in order to obtain requisite permits. On January 3, 2000, PMR sent a letter to BLM, <u>inter alia</u>, describing and depicting its operational plans. PMR stated that it was testing ores "offsite" and that it hoped to obtain "financially feasible ore * * * to run 65 metric ton[s] of ore per working shift." (Jan. 3, 2000, PMR letter to BLM at 3.)

On August 2, 2000, BLM sent a letter to advise PMR that BLM would be conducting a site inspection. By letter dated August 8, 2000, PMR responded:

> Due to a hail storm and high winds * * *, a great deal of damage was done to the roofs and windows of the structures at the millsite and because of further deterioration we found it necessary to dismantle and remove four building structures. * * *

> * * * We do not extract any ore from the millsite area nor have we done any ore extraction on the millsite in the past. When and if we are able to obtain ore for milling it would be obtained from off-site sources only.

(Aug. 8, 2000, letter from PMR to BLM (emphasis added).) PMR took the position that it had paid statutorily required maintenance fees and had "made thousands of dollars of improvements on the millsite in the past twenty years," and therefore would be entitled to a patent to the lands but for a Departmental moratorium on issuing patents. Id.

BLM conducted an inspection on August 22, 2000. The inspector concluded that site conditions were unchanged since an inspection conducted on September 1, 1999. The inspector stated that "there was no evidence" that a mill had ever operated. The inspector found leaking drums of chemicals, which are depicted in photographs, as well as a dead rat (also depicted) beside a drum labeled "xanthate." The record shows that PMR subsequently removed the chemical drums at BLM's insistence. A letter from PMR states that the "Safety-Kleen Company" tested the contents of the five drums and found each one to store one of the following chemicals: arsenic, Dow Froth 250, xanthate, muriatic acid, and mercaptan. (Aug. 31, 2000, letter from PMR to BLM.) PMR's letter is silent as to its purpose in placing the chemicals on site.

On March 21, 2001, BLM conducted another inspection. The inspector found no change in the site, except for the removal of the chemical drums by Safety-Kleen. (Mar. 21, 2001, inspection form.) The inspection is verified by pictures taken on that date, as well as a diagram of the site.

On May 3, 2001, BLM issued the challenged Cessation Order. The bulk of the letter explains BLM's determination of non-concurrence. BLM concluded that PMR "failed to demonstrate that [its] activities on the claim sites are reasonably incident as defined in 43 CFR 3715.0-5" and "failed to show that your operation is reasonably calculated to lead to the extraction and beneficiation of minerals." (Cessation Order at ¶ 1.) BLM noted that there was no evidence that any substantial processing of ores had ever occurred on site, no evidence that PMR had acquired contracts for ore, and no evidence that most of the milling equipment was ever used. BLM also noted that PMR had never obtained a contract for ore in the 14 years since PMR filed its NOI. BLM concluded that "[g]iven the present metal prices and lack of mining activity in the area" it is unreasonable to expect any contracts in the near future. "Plans based on expectations of economic feasibility do not justify the current level of use and occupancy of the site. Therefore, BLM has determined that you do not meet the requirements of 43 CFR 3715.2(a) and 3715.2(c)." (Cessation Order at ¶ 1.)

BLM concluded that PMR's activities did not meet the level of "substantially regular work" as defined in 43 CFR 3715.0-5. BLM noted that none of its inspections showed any work relating to mineral processing, and concluded that it "has not been able to verify any on-the-ground activities that would substantially and directly benefit a mineral property" in violation of 43 CFR 3715.2(b) and (d). (Cessation Order at ¶ 2.) BLM noted that equipment on site was unused and was likely inoperable, and that flotation circuit and leach tanks were not appropriate for milling activities described by PMR in its January 3, 2000, letter describing its operations. Therefore, BLM found that the equipment was left on site in violation of 43 CFR 3715.2(e). (Cessation Order at ¶ 3.)

BLM stated that PMR had never submitted evidence that it had obtained appropriate "Federal, state and local mining, reclamation, and waste disposal permits, approvals, or other authorizations" in violation of 43 CFR 3715.3-1(b), 3715.5(b), (c), and (e), and 3715.6(a). (Cessation Order at ¶ 4.) Finally, BLM stated that PMR was in violation of 43 CFR 3715.4(a), because PMR had never obtained BLM's concurrence with the occupancy. Pursuant to 43 CFR 3715.4-3(a) and 3715.7-1(b), BLM issued the permanent cessation order, requiring PMR to vacate the site and reclaim it within 90 days. BLM proceeded to discuss appropriate penalties in the case of failure to comply with the order as set forth in 43 CFR 3715.5-2 and 3715.8.

PMR met with BLM on June 15, 2001. It then submitted two letters regarding its appeal, which we will identify as a Notice of Appeal (NA) and Supplemental NA. (June 17, 2001, NA; June 19, 2001, Supplemental NA.)

In its June 17, 2001, NA, PMR makes a series of charges against the Cessation Order. PMR asserts that requiring it to reclaim the site amounts to "depriving the U.S. Taxpayers & U.S. Government from income that has in the past been generated by Maintenance Fees if nothing else." (June 17, 2001, NA at 1.) It asserts that "PMR is yet in negotiations with other groups as to milling operations that will allow effective and legitimate use of these facilities." Id. With regard to BLM's assertions that it was unable to verify on-the-ground activities, PMR asserts that BLM employees "do certify that EQUIPMENT was observed." Asserting that no "damage is being done to Federal lands," PMR accuses BLM of "gestapo tactics." Id.

Noting BLM's conclusions that equipment was not presently operable, PMR asks BLM "what gives you the authority to determine if the equipment is appropriate?" and accuses BLM of violating the civil rights of PMR associates. Id. Finally, PMR asserts that "all required permits that are pertinent to [a] particular stage of operations have been requested." Id. PMR concludes that it "should not be mandated to tear down valuable structures" at the cost of income to the United States, presumably in the form of annual claim maintenance fees. Id. at 2. PMR

attaches as a "brief" a copy of materials regarding mining claims it obtained from the Congressional Research Service.

PMR's next letter supplementing the June 17, 2004, NA reiterates these points. PMR again asserts that the payment of annual maintenance fees is income to the United States and that its payment "as prescribed" is compliance enough such that BLM can ask no more of PMR with respect to its use of the mining claims. [5/] (June 19, 2001, Supplemental NA at 1.)

BLM submitted an answer on July 24, 2001. In a responsive letter submitted to the Board on October 3, 2001, PMR reiterates its statements that it paid annual maintenance fees and alleges that it believes it is entitled to a patent of the lands subject to the four mining claims. PMR details various factual points regarding the ceramic dura-beads, vandalism to the sites, and storm damage. (Oct. 3, 2001, letter at 2-4.) PMR does not argue, however, that it ever operated a mill. Rather, it states:

> It is our belief that the United States public lands should be open for use by its citizens who must use care and stewardship of this environment. PMR has spent their time and considerable sums in making many improvements to the mill site. We do not believe we have done damage to the natural plant life or ground cover. Our business difficulty was our inability to find ores or concentrates in the state of Arizona that were profitable for processing.

Id. at 4.

[1] When BLM issues a decision to implement 43 CFR Subpart 3715, BLM must ensure that it is supported by a reasoned analysis of the facts in the record. Thomas E. Swenson, 156 IBLA 299, 310 (2002); Franklyn Dorhofer, 155 IBLA 51, 54 (2001). An appellant, however, bears the burden of proving that its use or occupancy is justified under the standards of both 43 CFR 3715.2 and 3715.2-1. Dan Solecki, 162 IBLA at 191-92; David J. Flaker, 147 IBLA 161, 164 (1999).

[5/] Neither the record nor PMR verifies PMR's assertions regarding its alleged timely payment of maintenance fees in this case. The payment of annual maintenance fees is governed by the Maintenance Fee Act, 30 U.S.C. § 28f (2000), as amended, originally enacted in section 10101(d) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, and amended by various appropriation bills, and implementing regulations at 43 CFR Subpart 3833. BLM has issued no order or decision relating to the failure to pay, or late payment of, maintenance fees that is at issue in this appeal.

Starting with the second rule first, we find that PMR fails to meet its burden. PMR is correct to note that a claimant who has located a mining claim or mill site on the public lands under the Mining Law is obligated to pay annual maintenance fees under the Maintenance Fee Act. PMR is in error to suggest that this obligation either supplants or obviates the mining claimant's obligation to comply with the Mining Law or the Surface Resources Act. Thus, the maintenance fee obligation is one which a claimant must bear in order to maintain a mining claim or mill site. The mining claim or mill site itself must comply with the Federal law authorizing it in the first place. Under the Mining Law, a claimant may locate a valuable mineral deposit or it may establish an independent mill site for a "quartz mill or reduction works." 30 U.S.C. § 42 (2000). The Surface Resources Act ensures that the claimant must use or occupy the mining claim or mill site only for the purposes of conducting activities authorized under the Mining Law, and not for other reasons. If it does not conduct those activities, the claimant must leave the site.

The record shows that for the 14 years prior to the issuance of the Cessation Order, PMR's use and occupancy bore little relation to any established purpose under either statute. PMR advised BLM in its 1987 NOI that it was completing a mill for purposes of processing ore. According to PMR the equipment was tested "in or around 1988/1989 for capacities and capabilities for processing ore * * *." (Oct. 1, 2001, letter to the Board at 2.) The record shows that PMR never used the equipment for that purpose thereafter. The record also shows that in the intervening years, PMR used the public lands variously for storage of "ceramic dura-beads," for storage of trash, scrap, metal, random equipment not part of a mill, lumber, and barrel drums of toxic chemicals, and for parking of trailers and vehicles. Inspections showed that PMR kept the site in various states of disrepair for over a decade. When BLM inspected the site, PMR claimed that vandals and storms were responsible for the conditions at the site, and admitted that it had never used the site for milling. (Aug. 8, 2000, letter from PMR to BLM; Oct. 3, 2001, letter to the Board at 2-4.) The record is susceptible of many interpretations, none of which includes the conclusion that PMR tried to operate the site as a functioning mill. For this reason, we find that BLM's decision is supported by a reasoned analysis of the facts in the record.

Moreover, PMR's accusations against BLM for violating its rights and for making impossible demands proceed from the underlying view that persons are entitled to place private property on the public lands and, having done so, obtain a right to maintain equipment there at will, subject to an amorphous standard of "stewardship." (Oct. 3, 2001, letter to the Board.) This is not the case. The purpose of the Surface Resources Act is to ensure that a claimant's tenure on the public lands under the Mining Law is exclusively for the mining, prospecting and processing purposes recognized by that statute. Thus, while the Mining Law recognizes the necessity of a reasonable period of time for construction of a milling or processing facility, occupancy of any mill site, including an independent mill site, is permitted

only where the evidence demonstrates a good faith effort to use the mill site for statutorily permitted purposes in a market "with a reliable source of ore for processing." 2 American Law of Mining § 32.06[6]; see also United States v. Cuneo, 15 IBLA 304, 325-26, 81 I.D. 262, 272 (1974). Any notion that the Mining Law vests a mining claimant with "placeholder" status once he or she places milling equipment on the public lands is defeated by the Surface Resources Act and BLM regulations at 43 CFR 3712 and Subpart 3715. See also, Creole Corp., 146 IBLA 107, 117 (1998) (grant for right-of-way on public lands given for "specific purpose, not as a place-holder by which interests in land can be retained for speculative purposes for decades in anticipation of a change in economic conditions that may never materialize"). Quite simply, the admitted fact that PMR has never found the ores which would justify its occupancy on a mill site means that it must vacate the public lands of all equipment and other materials brought onto them for that alleged purpose, not that it may keep privately owned property on the public lands indefinitely.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

Lisa Hemmer
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge