



JOE GUTIERREZ

174 IBLA 222

Decided April 14, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

JOE GUTIERREZ

IBLA 2007-174

Decided April 14, 2008

Appeal from a Notice of Noncompliance issued by the Las Cruces, New Mexico, District Office, Bureau of Land Management, for unauthorized use and occupancy of a mining claim not reasonably incident to prospecting, mining, or processing operations. NM 96548; NMNM 117952.

Affirmed; Motion for Stay of Confiscation Denied.

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

When inspections of a mining claim site reveal no activity that is reasonably incident to prospecting, mining, or processing operations, or that meets the other criteria of 43 C.F.R. § 3715.2, and the claimant does not have a current notice of operations under 43 C.F.R. § 3809.21, a notice of noncompliance under 43 C.F.R. § 3715.7-1(c) requiring the claimant to cease occupancy and remove personal property will be affirmed when the claimant offers nothing more than unsubstantiated assertions to rebut the inspection findings and accompanying photographic evidence. Such assertions do not meet an appellant's burden of proving that his occupancy is reasonably incident to prospecting, mining, or processing operations.

APPEARANCES: Larry P. Ausherman, Esq., and Adam H. Greenwood, Esq., Albuquerque, New Mexico, for appellant Joe Gutierrez; John L. Gaudio, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

Joe Gutierrez has appealed from an April 19, 2007, Notice of Noncompliance (NON) issued by the Las Cruces, New Mexico, District Office, Bureau of Land Management (BLM), in accordance with 43 C.F.R. § 3715.7-1(c), for unauthorized use and occupancy under the mining laws. BLM concluded that Gutierrez' occupancy of the Mammoth Apex lode mining claim, NMMC 150724, located on public land in sec. 31, T. 16 S., R. 13 W., New Mexico Principal Meridian, in Grant County, New Mexico, is not reasonably incident to prospecting, mining, or processing operations and violates various provisions of 43 C.F.R. Subpart 3715. In the NON, BLM ordered Gutierrez to cease residence and remove all personal property from the claim. Gutierrez argues that his occupancy complies with the standards prescribed in 43 C.F.R. § 3715.2. For the reasons explained below, we affirm the NON.

*BACKGROUND**A. Gutierrez' Occupancy of the Apex Mammoth Claim*

Gutierrez has resided on the Mammoth Apex claim since at least 1996.¹ In October 1996, he filed mining notice NM 96548 with BLM, proposing various operations on the claim, including the digging of trenches and construction of drill sites. There is no evidence in the record that any of the mining operations described in NM 96548 have occurred. At the same time, Gutierrez filed with BLM an existing occupancy notification for the claim.²

By its notice dated October 16, 1996, BLM acknowledged receipt of the mining notice and also informed Gutierrez that, while his observed occupancy did not comport with 43 C.F.R. Subpart 3715, he could continue to occupy the claim until August 18, 1997.³ In a letter to Gutierrez dated May 12, 1997, BLM confirmed that

¹ Gutierrez states that “[h]e first came on to the claim as a watchman and a caretaker for the prior claimant in 1969.” Statement of Reasons (SOR) at unpaginated 1. It appears that he may not have resided at the claim site since receipt of the NON, but how much of his personal property has been removed is unclear from the record.

² Gutierrez's notice was in response to the promulgation of regulations, 61 Fed. Reg. 37125 (Jul. 16, 1996), requiring those occupying public land under the mining laws on Aug. 15, 1996, to notify BLM by Oct. 15, 1996. 43 C.F.R. § 3715.4(b)(1). Those who complied could continue occupancy for one year after Aug. 15, 1996. *Id.*

³ Title 43 C.F.R. § 3715.4(a) provides in relevant part: “By August 18, 1997, all existing uses and occupancies must meet the applicable requirements of this subpart. (continued...)”

occupancy past August 18, 1997, would not be approved and advised Gutierrez to move his non-mining property from the mining claim. Gutierrez appealed, but his appeal was dismissed as premature because BLM had not issued an appealable decision. Order in IBLA 97-485 dated Sept. 24, 1997. When August 18, 1997, passed, BLM did not at that time initiate any further action against Gutierrez regarding his occupancy.⁴ BLM later issued a Surface Use Determination for the Mammoth Apex claim on September 10, 1997, concluding that there was no evidence that Gutierrez had conducted any exploration or mining operations on the claim and recommending that a cessation order be issued. However, no order or other action resulted from that determination.

In December 2000, BLM notified Gutierrez that under new surface management regulations at 43 C.F.R. Subpart 3809 taking effect on January 20, 2001, existing notices of operations⁵ would expire after 2 years unless extended under specific conditions. *See* 65 Fed. Reg. 69998 (Nov. 21, 2000). Gutierrez filed an extension request dated January 16, 2003. Therein, Gutierrez describes his “sampling” activities as involving “portable” equipment. BLM acknowledged receipt of the extension request and advised Gutierrez that it would review his request. Gutierrez submitted a cashier’s check in the amount of \$1,000 as a surety amount (*see* the financial guarantee requirements of 43 C.F.R. §§ 3809.503(b) and 3809.555(b)). However, BLM returned the cashier’s check with the explanation that the appropriate amount of the required bond had yet to be determined. There is no

³ (...continued)

If not, BLM will either issue you a notice of noncompliance or order any existing use or occupancy failing to meet the requirements of this subpart to suspend or cease under § 3715.7-1.”

⁴ An Aug. 13, 1997, memorandum to the case file for NM 96548 memorializes a visit to the claim by BLM Surface Compliance Specialist Russell Lummus on Aug. 12, 1997. Lummus reported:

Joe informed me he was preparing to move from the old building which he was occupying. Took me inside to show me that he was packing and preparing to move. Said he had arranged for a trailer this week which he would begin loading up with appliances, tin, and other material on the property to remove to another location. . . . He also said he would be removing the old building (which he owns) off the claim site and to another private site. Joe said he would try to be out (including the travel trailer) by the August 18 deadline but would appreciate 2 or 3 days grace to be gone.

⁵ The regulations classify operations as “casual use,” “notice-level operations,” and “plan-level operations.” 43 C.F.R. § 3809.10. Exploration causing surface disturbance of 5 acres or less constitutes “notice-level operations.” 43 C.F.R. § 3809.21(a).

record that BLM acted upon the extension or determined the required bond amount. See 43 C.F.R. § 3809.312(a) (operations may proceed if BLM does not complete review within 15 days). We assume here, *arguendo*, that Gutierrez' request and financial submission, combined with BLM's lack of action, had the effect of extending the notice period for 2 years. (For reasons explained below, we need not affirmatively decide that question to resolve this appeal.)

Nothing more occurred with respect to Gutierrez's notice and extension request. The 2-year extension period ended on January 16, 2005. BLM received no further extension requests under 43 C.F.R. § 3809.333 for notice NM 96548.

B. *BLM's Inspections and the Notice of Noncompliance*

On October 21, 2006, Kurtis Schmidt, a BLM Ranger with the Las Cruces District Office, visited the claim and took several photographs. In an e-mail message to several colleagues dated October 22, 2006, with the photographs attached, he said that he "found no sign of activity or equipment that comes close to anything that would be incidental to mining."

On January 17, 2007, Ranger Schmidt, along with BLM Surface Compliance Specialist John Besse and BLM Geologist Adam Merrill, inspected the Mammoth Apex claim. They took numerous photographs and wrote a Compliance Inspection Report dated January 23, 2007. It notes:

The site appeared almost identical to the pictures in the 1997 Surface Use Determination. Additional refuse and scrap as well as broken appliances have been added to the site since the 1997 photos. Mr. Gutierrez resides at the site and claims ownership to much of the property at the site.

Compliance Inspection Report at unpaginated 1. The inspecting officials found no evidence of mining activity, but did observe two old buildings in dilapidated and uninhabitable condition, broken equipment, assorted refuse, scrap metal, household appliances, two inoperable vehicles, and a travel trailer that Gutierrez used as a residence. They observed (and the photographic evidence confirms) that "[m]aintenance of the equipment and structures has been severely neglected." *Id.* at 2. The report concludes (*id.*):

Mr. Gutierrez' occupancy appears to have been in a state of "Non-Concurrence" since 1997. His notice is expired and he has no authorization to occupy the site. There is no evidence of activity that is reasonably incident to mining at the date of the inspection nor since the 1997 surface use determination.

Based on the conditions found on the Mammoth Apex claim during the January 17 inspection, BLM issued NON NMNM 117952 on April 19, 2007, under the provisions of 43 C.F.R. § 3715.7-1(c)(1).⁶ The NON apprised Gutierrez that his notice authorizing him to conduct operations under 43 C.F.R. Subpart 3809 had expired in January 2003 and that his occupancy did not meet any of the criteria enumerated in 43 C.F.R. § 3715.2 (discussed below). BLM further cited 43 C.F.R. § 3715.5-1, which requires the operator to remove all personal property and equipment within 90 days.⁷ Citing 43 C.F.R. § 3715.5(a), BLM reminded Gutierrez that use and occupancy of a mining claim must be reasonably incident to mining and prevent unnecessary and undue degradation to the public lands. BLM further noted that Gutierrez' use did not conform to the performance standards prescribed in 43 C.F.R. § 3809.420. BLM ordered Gutierrez to start corrective actions within 30 days and complete all corrective actions within 90 days, including: (1) cease residence and remove the travel trailer, (2) remove all personal property, (3) secure any hazards, and (4) leave the site in a clean and orderly state. Recognizing that the owners of neighboring private property had imposed access restrictions, BLM also explained to Gutierrez that it had arranged access so that he could perform the required actions, with instructions to contact BLM to coordinate such access.

C. *Gutierrez' Appeal*

Gutierrez timely filed a Notice of Appeal and a Petition for Stay, both dated May 21, 2007. BLM responded to the Petition for Stay on June 26, 2007. In an Order dated August 6, 2007, the Board denied the Petition for Stay on the ground that Gutierrez had not shown a likelihood of success on the merits. The August 6 Order explained:

⁶ Section 3715.7-1(c)(1) provides:

If your use or occupancy is not in compliance with any requirements of this subpart, . . . BLM will issue an order that describes —

- (i) How you are failing or have failed to comply with the requirements of this subpart;
- (ii) The actions that you must take to correct the noncompliance and the time, not to exceed 30 days, within which you must start corrective action; and
- (iii) The time within which you must complete corrective action.

⁷ Specifically, § 3715.5-1 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.

While Gutierrez asserts, on appeal, that he is conducting mining activities, that assertion is not borne out by the case record. Importantly, since expiration of his mining notice in January 2005, he has not had any authority to conduct mining activities on the claim, other than casual use, as described in 43 C.F.R. § 3809.5. . . . At this juncture, Gutierrez has not provided any evidence of prospecting, mining, or processing operations, let alone such operations as would justify year-round residential occupancy of the claim of the type documented in the case record.

Aug. 6, 2007, Order at 2 (footnote omitted).

Gutierrez subsequently filed his SOR on October 1, 2007. Gutierrez' arguments may be summarized as follows:

1. With respect to compliance with the 43 C.F.R. Subpart 3809 surface management regulations, Gutierrez first asserts that BLM acknowledged in its January 24, 2003, letter that Gutierrez attempted to comply with applicable regulations and told him that he would be contacted if any further information were required. He states that there was no such contact, and that if there was a need for more paperwork, BLM should have notified him and given him a chance to comply. Gutierrez argues that BLM's declaration that his authority under his mining notice expired therefore is in error. SOR at 7.

Second, Gutierrez argues that casual use, as defined in 43 C.F.R. § 3809.5, is permitted under the regulations without notice (citing 43 C.F.R. § 3809.11) and can include the use of various kinds of light mining equipment. He contends that BLM's order to remove all equipment therefore exceeds its authority. *Id.*

2. With respect to the activities required to justify use and occupancy under the mining laws at 43 C.F.R. § 3715.2, Gutierrez asserts that he is engaged in activities that allow him to occupy the public lands. First, he argues that his occupancy is reasonably incident to prospecting and exploration activities, as required by 43 C.F.R. § 3715.2(a), under the definitions in 43 C.F.R. § 3715.0-5. Gutierrez asserts that he is engaged in "frequent prospecting and exploration activities," and that his occupancy is not only reasonably incident to these activities, but also arguably is reasonably necessary in view of his age (80). SOR at 8. He asserts that he has identified from his sampling assays four different and potentially valuable veins on the Mammoth Apex. *Id.* at 2.

Second, Gutierrez argues that his work on nearby claims, or in assembly and maintenance of equipment, constitutes "substantially regular work" under 43 C.F.R.

§ 3715.2(b). SOR at 8-9. Gutierrez asserts that he is actively involved in mining activities on the Mammoth Apex and 18 other nearby claims. *Id.* at 1.

Third, Gutierrez maintains that slash from forest thinning and snow obscured some of his observable on-the-ground prospecting and other mining activity. He asserts that he is engaged in observable activity (43 C.F.R. § 3715.2(d)). SOR at 9.

Finally, Gutierrez asserts that he uses appropriate mining equipment and material and has shown it to BLM Geologist Adam Merrill. *Id.* Gutierrez avers that he has equipment on site including mine rail of various sizes and weights, pipe for running air and water lines, electrical wiring, and drilling equipment for rock and core drilling that will be needed for his intended operations. *Id.* at 2.

3. With regard to standards applicable to use and occupancy under 43 C.F.R. § 3715.5, Gutierrez asserts that the claim “is not covered with trash,” although “some remnants of the previous occupants are visible.” SOR at 9. In Gutierrez’ view, this does not constitute “unnecessary or undue degradation” under 43 C.F.R. § 3715.5(a) and he should not be expected to take any legal risk or obligation for that which is not his. He contends that BLM has options for removal of “disputed” materials other than to “evict” him and all of his mining equipment. *Id.* at 9-10.

4. With respect to additional required characteristics of occupancy (43 C.F.R. § 3715.2-1), Gutierrez argues that he needs to live on the claim to protect his equipment and operations. He asserts that he has suffered vandalism in the past and needs to protect the public from certain hazards, including BLM-authorized contamination. *Id.* at 10.

BLM has not responded to Gutierrez’ SOR but did briefly address the merits in its June 26, 2007, Response to Petition for Stay (BLM Response). BLM first notes that Gutierrez is not authorized to conduct mining operations under the 43 C.F.R. Subpart 3809 rules because his prior notice has expired. BLM Response at 4-5. BLM further contends that in inspecting the claim site it found no evidence of mining activities other than casual use; none of the mining or milling equipment necessary to lead to the extraction and beneficiation of minerals; no observable on-the-ground activity; and no appropriate mining equipment (whether operable or inoperable). *Id.* at 5.

D. *Subsequent BLM Notices and Gutierrez’ Motion for Stay of Confiscation*

On October 5, 2007, approximately 2 months after the Petition for Stay was denied, BLM sent a further notice to Gutierrez requiring him to remove all personal property from the claim within 90 days after the date the Petition was denied (*i.e.*, by

November 4, 2007). Subsequently, on January 25, 2008, BLM sent a “Final Notice to Remove Unauthorized Structure(s)/Property” (“Final Notice”) to Gutierrez. In that notice, BLM said it would post a notice at the claim on February 5, 2008, to remove all remaining personal property within 30 days. BLM further stated that on March 6 it would “take possession of the residential structures and all property located at the claim” and begin reclaiming the site. Final Notice at 2. Any personal property not removed “will be considered abandoned and become the property of the United States Government.” *Id.*

Gutierrez filed what is styled as a “Motion for Stay of Confiscation” on March 6, 2008. Gutierrez argues that BLM’s notices ignore a letter from the Field Solicitor’s Office to Gutierrez’ counsel dated November 5, 2007, by which BLM gave him until December 19 to vacate the claim. Gutierrez asserts that by early December, he had removed “appliances and other property” (Motion at 2) in compliance with the April 2007 NON, and had returned in early December to continue the process. At that time, he “discovered that a new lock and chain had been installed on a gate and he could not access the claim.” *Id.* Three telephone calls to the BLM Las Cruces District Office allegedly went unanswered and unreturned, and calls through his counsel to arrange access allegedly also did not result in BLM contacting Gutierrez. *Id.* The only communication from BLM, Gutierrez states, was the January 25 Final Notice. *Id.* Gutierrez therefore asks that the threatened confiscation be stayed “until a reasonable time for removal has passed after such time as the BLM complies with the April 19, 2007, Notice [of Noncompliance] by arranging for access.” *Id.* at 3.

BLM responded to Gutierrez’ motion on March 25, 2008, by filing a copy of a memorandum from BLM Geologist Merrill to the Field Solicitor in Santa Fe, New Mexico, dated March 24, 2008, with a “subject” line reading: “Motion for Stay of Confiscation: Joe Gutierrez Occupancy” (hereinafter referred to as the “BLM Stay Memo”). BLM asserts that Gutierrez does not need BLM’s consent or permission to access the claim. While the most convenient and direct access is across the adjoining private land, there is an existing 2-track 4-wheel drive accessible road across public land. BLM Stay Memo at 1-2. Nevertheless, in light of the enmity between Gutierrez and the neighboring landowners who control the road across their land and the gate, BLM contacted them to get permission for Gutierrez to cross their property to facilitate resolution of the dispute for Gutierrez’ benefit. The neighboring landowners agreed, on the condition that BLM act as an intermediary. *Id.* at 1. BLM disputes Gutierrez’ characterization in the Motion of the April 2007 NON as “order[ing] him to get BLM permission before accessing his claim to remove his property,” Motion at 2, pointing out that the NON only required Gutierrez to contact BLM before attempting to cross the private property. This, BLM states, originated as a condition from discussions with the private owner. BLM Stay Memo at 2.

BLM further notes that the January 25, 2008, Final Notice post-dates the December 19 extended deadline for removal of personal property by more than a month. *Id.* at 2. Moreover, the March 6 date specified in the Final Notice “was the final day for which property could be removed from the claims **without permission.**” *Id.* (boldface in original). Thus, in BLM’s view, Gutierrez effectively was allowed more than 60 days beyond the December 19 extended deadline before the consequences stated in the notice would become effective. *Id.*

BLM disputes Gutierrez’ account of the attempted telephonic contacts and the alleged messages. BLM indicates that there was no call or message from Gutierrez other than one message left with Besse during the week of December 17, 2007, with no return telephone number. *Id.* at 3. Pursuant to a message from Besse, the neighboring owners opened the gate for a U-Haul truck (driven by people other than Gutierrez) to access the claim. *Id.* at 3 and attached letter from David Vandenberg to Merrill dated Mar. 7, 2008. BLM avers that since the message left on Besse’s voice mail, there has been no communication from either Gutierrez or his counsel. BLM Stay Memo at 3. BLM states in summary that it

has acted in good faith to assist Mr. Gutierrez in acquiring access to his mining claim, when it had no obligation to do so. Appellant is arguing that the BLM has somehow violated its own order by not ensuring open access. BLM has no legal right to the access road on private property and therefore, can only facilitate access for Mr. Gutierrez.

Id. at 4. BLM also asserts that it “is not attempting to confiscate personal property; rather, it is seeking to declare property that i[s] not authorized on public land to be abandoned” under the authority of 43 C.F.R. § 3715.5-2.⁸

Finally, BLM asserts:

For the time being, appellant’s motion is unnecessary. During a field inspection on March 6, 2008, Mr. Gutierrez was given verbal permission to continue to remove any remaining personal property. Also on that day, I [Merrill] personally contacted David Vandenberg and acquired permission for Mr. Gutierrez to access the mining claim across their property. Since that time, BLM’s Law Enforcement Ranger, Kurt Schmidt, has coordinated access for Mr. Gutierrez. Ranger

⁸ That section provides: “Any property you leave on the public lands beyond the 90-day period [after operations end] described in § 3715.5-1 becomes property of the United States and is subject to removal and disposition at BLM’s discretion consistent with applicable laws and regulations.” It further specifies that the claimant is “liable for the costs BLM incurs in removing and disposing of the property.”

Schmidt has reported that Mr. Gutierrez has since accessed the mining claim across the Vandenberg's property several times.

. . . . We will continue to work with Mr. Gutierrez as long as regular and consistent progress is being made. . . .

BLM Stay Memo at 4.

Against this background, resolution of this appeal turns on (1) whether Gutierrez' activities on the claim support his occupancy of the Apex Mammoth claim under the requirements of 43 C.F.R. § 3715.2 (including whether his use and occupancy is reasonably incident to prospecting, mining, or processing operations); (2) whether Gutierrez has satisfied the applicable requirements of 43 C.F.R. Subpart 3809; and (3) if the NON is upheld, whether BLM's action to take possession of Gutierrez' personal property under the January 25, 2008, Final Notice should be stayed.

ANALYSIS

I. *Gutierrez' Occupancy Does Not Comply with the Requirements of 43 C.F.R. § 3715.2.*

The Mining Law of 1872, *as amended*, permits the location of mining claims encompassing valuable mineral deposits on the public lands of the United States. *See generally* 30 U.S.C. §§ 21-47 (2000). Section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000), provides that claims located under the mining laws "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." Departmental regulations at 43 C.F.R. Subpart 3715 implement this statutory provision by addressing the unlawful use and occupancy of unpatented mining claims for non-mining purposes, and restrict use and occupancy of public lands open to operation of the mining laws to prospecting, exploration, mining, or processing operations and uses reasonably incident thereto. *See* 61 Fed. Reg. 37115-37117 (July 16, 1996); *Pilot Plant, Inc.*, 168 IBLA 201, 214 (2006), and cases cited. Further, 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 prevent. *Combined Metals Reduction Co.*, 170 IBLA 56, 72 (2006); *Pilot Plant, Inc.*, 168 IBLA at 214, and cases cited.

Title 43 C.F.R. § 3715.2 provides:

In order to occupy the public lands under the mining laws for more than 14 calendar days in any 90-day period within a 25-mile radius of the initially occupied site, you must be engaged in certain activities. Those activities that are the reason for your occupancy 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 under § 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.

To be permissible, an occupancy must meet all five of those requirements.⁹ *E.g.*, *Pilot Plant, Inc.*, 168 IBLA at 215, and cases cited.

A. *Gutierrez' Occupancy Is Not Reasonably Incident.*

The term “reasonably incident” in section 3715.2(a) is defined in section 3715.0-5 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,

⁹ In addition to meeting the requirements of § 3715.2, a claimant’s occupancy must involve one or more of the elements set forth in 43 C.F.R. § 3715.2-1: (a) protecting exposed, concentrated or otherwise accessible minerals from loss or theft; (b) protecting appropriate, regularly used, and not readily portable operable equipment from theft or loss; (c) protecting the public from such equipment which, if unattended, creates a hazard to public safety; (d) protecting the public from surface uses, workings, or improvements which, if 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 claimant, operator, or workers to remain on the site in order to work a customary full 8-hour shift.

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.

The regulations further define “prospecting” as follows:

Prospecting or exploration means the search for mineral deposits by geological, geophysical, geochemical, or other techniques. It also includes, but is not limited to, sampling, drilling, or developing surface or underground workings to evaluate the type, extent, quantity, or quality of mineral values present.

Any occupancy by a mining claimant must be reasonably related to actual activities on the claims involving prospecting, mining, or processing operations, and the extent of any permissible occupancy directly relates to the magnitude of the mining and related activities conducted on the claim. *See, e.g., Cynthia Balser*, 170 IBLA 269, 276 (2006); *Combined Metals Reduction Co.*, 170 IBLA at 74, and cases cited. Gutierrez bears the burden of proving that his occupancy is reasonably incident to prospecting, mining, or processing operations and that BLM’s decision is erroneous. *See, e.g., Leadville Corp.*, 166 IBLA 249, 255 (2005); *Precious Metals Recovery, Inc.*, 163 IBLA 332, 339 (2004), and cases cited.

[1] After his October 21, 2006, visit to the claim site, BLM Ranger Schmidt reported, as quoted above, that he found “no sign of activity or equipment that comes close to anything that would be incidental to mining.” Similarly, in his report documenting the visit to the claim site on January 17, 2007, BLM Geologist Merrill observed no evidence of any activity as of the date of the inspection or since the September 1997 surface use determination — a period of more than 9 years. The report also observed grossly neglected and deteriorated conditions of the site and structures as well as the abundance of refuse and debris, all of which is confirmed by the photographic evidence in the record. Inspection Report at 1-2. Merrill also remarked that “[t]he site appeared almost identical to the pictures in the 1997 Surface Use Determination” except that “[a]dditional refuse and scrap as well as broken appliances have been added.” *Id.* at 1.

Gutierrez asserts that he is engaged in “frequent prospecting and exploration activities.” SOR at 2. However, he has submitted no evidence other than his own unsubstantiated affidavit accompanying the SOR. Contrary to Gutierrez’ statement, BLM personnel inspecting the site in 1997, 2006, and 2007 saw no evidence of activities evincing a good faith effort to advance the prospecting, mining, or processing of locatable minerals. The several photographs of the claim site in the record are completely consistent with those observations. Gutierrez’ bare assertion does not overcome the contrary observations of the inspecting personnel and the

supporting photographic evidence. Thus, Gutierrez has not shown that his occupancy is reasonably incident to prospecting, exploration, mining, or processing activities.

B. *Gutierrez Has Not Demonstrated Substantially Regular Work.*

The regulations define the “substantially regular work” required under 43 C.F.R. § 3715.2(b) as “work on, or that substantially and directly benefits, a mineral property including nearby properties under your [the mining claimant’s] control.” 43 C.F.R. § 3715.0-5. The term includes “active and continuing exploration” and “assembly or maintenance of equipment.” *Id.*¹⁰

BLM’s on-site observations have yielded no evidence of any mining activity. Gutierrez’s response is that he is “regularly engaged [i]n prospecting or exploration work on his claims, or in assembly and maintenance of equipment.” SOR at 9. However, there is no physical evidence to substantiate his statements. There is no evidence of new exploration cuts, removed overburden, sampling, drilling, or developing surface or underground workings, etc., and no proof that any equipment on the claim has been put into working condition. Simply stated, if Gutierrez has been engaged in substantially regular work, it is of such a nature as to be imperceptible.

C. *Gutierrez Has Not Shown Observable On-the-Ground Activity.*

Section 3715.2(d) requires that the activity justifying occupancy “[i]nvolve observable on-the-ground activity that BLM may verify.” Gutierrez argues that slash placed on the claim from forest thinning and seasonal snow prevented BLM from observing his prospecting and other mining activities at the time of the January 17 inspection. The numerous photographs taken during the January 17 inspection reveal that there was no snow on the ground to obscure any activity. Nor has Gutierrez submitted evidence to show the activity supposedly obscured by the slash.

D. *Gutierrez Has Failed to Show Use of Appropriate Equipment.*

Section 3715.2(e) requires the use of “*appropriate* equipment that is *presently operable*, subject to the need for reasonable assembly, maintenance [or] repair . . .” (emphasis added). This standard involves two criteria. First, the equipment must be appropriate. BLM reports indicate that there is very little equipment that might be related to the purported prospecting and exploration activities. Second, the equipment must be presently operable or in a near-operable condition. Again, BLM

¹⁰ It also includes “a seasonal, but recurring, work program.” *Id.* Work in this category must be recurring and meet the standards in Subpart 3715. *Cynthia Balser*, 170 IBLA at 278-79.

reports that what equipment was seen was not operable or capable of being operable soon. Gutierrez does not offer evidence, again other than unsubstantiated statements, to rebut BLM's observations as to the condition and purpose of the equipment and materials found on the claim.

Gutierrez has failed to meet his burden to show that his occupancy of the Mammoth Apex claim is reasonably incident to prospecting, mining, or processing activities or that he has engaged in activities that meet the other requirements of section 3715.2.¹¹

II. *Gutierrez' Occupancy Does Not Comply with Requirements of 43 C.F.R. Subpart 3809.*

A. *Gutierrez' Prior Notice Has Expired.*

Gutierrez has suggested that when BLM issued the NON there was authority to use and occupy the claim under his notice NM 96548 originally submitted in 1996. He blames BLM for not acting upon the notice extension submitted in January 2003, arguing that he should not be penalized and the notice therefore should be deemed to have not expired. His arguments are misplaced.

As noted previously, we assume *arguendo* that BLM's inaction on Gutierrez' January 16, 2003, extension request had the effect of extending the notice until January 16, 2005. For periods after that date, Gutierrez argues that we should not expect him to act on his own initiative regarding the notice when BLM had not acted. However, the regulations are explicit; an extension of the notice is effective for only 2 years and any ensuing extension must be requested in writing. *See* 43 C.F.R. §§ 3809.300, 3809.332, 3809.333. As we have often stated, citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), persons dealing with the Government are presumed to have knowledge of relevant statutes and regulations. *E.g.*, *Donald Graydon Jolly*, 173 IBLA 201, 212 (2007); *Ron Coleman Mining, Inc.*, 172 IBLA 387, 391-92 (2007), and cases cited. BLM had no obligation to notify Gutierrez in advance that he had to file for another extension. It is clear under any scenario that the notice expired no later than January 16, 2005. BLM's inaction on Gutierrez' January 2003 extension request does not excuse Gutierrez' failure to seek a further extension after expiration of the period covered by the earlier request.

The regulation at 43 C.F.R. § 3809.300(d) explains the result of expiration of a notice of operations: "You may not conduct operations under an expired notice.

¹¹ In view of this holding, it is unnecessary to further determine whether Gutierrez' occupancy meets the standards prescribed at 43 C.F.R. § 3715.5 or involves one or more of the elements required under 43 C.F.R. § 3715.2-1.

You must promptly submit either a new notice under § 3809.301 or a plan of operations under § 3809.401, whichever is applicable, or immediately begin to reclaim your project area. See §§ 3809.11 and 3809.21.” Accordingly, even if Gutierrez were conducting operations that would justify occupancy under Subpart 3715, such operations cannot be conducted under an expired notice.

BLM was correct in citing among its several reasons for issuing the NON that Gutierrez’s authority for mining activities had ceased and he had not removed all personal property within 90 days as required by 43 C.F.R. § 3715.5-1. Gutierrez has not shown error.

B. *“Casual Use” Does Not Justify Gutierrez’ Occupancy.*

Gutierrez also argues that, even without a notice, he can continue to use and occupy the claim because his activities constitute “casual use.” The import of the definition of “casual use” in 43 C.F.R. § 3809.5, together with the provisions of sections 3809.11(a) and 3809.21(a), is that a miner need not notify BLM or obtain its approval of casual use operations. While we agree with Gutierrez that casual use operations do not require a notice, that does not answer the question of whether Gutierrez’ activities justify his occupancy of the claim in this case.

Looking at the relationship between “casual use” and the Subpart 3715 use and occupancy rules in *Dan Solecki*, 162 IBLA 178 (2004), the Board concluded that “the only approach to determining whether an occupancy as defined at 43 C.F.R. § 3715.0-5 is permitted, is to look at the rules governing exactly that question. These are 43 C.F.R. §§ 3715.2 and 3715.2-1. Whether or not a use is casual use, a miner’s activities must meet all the standards of the first rule and at least one standard of the second.” 162 IBLA at 190. BLM applied these rules when it issued the NON. It ordered Gutierrez to cease residence on the claim and remove his personal property because there was no observable activity that was reasonably incident to prospecting, mining, or processing operations, or that met any of the other criteria in 43 C.F.R. § 3715.2. The NON did not otherwise restrict entry and use related to legitimate prospecting or mining activities. While Gutierrez is correct that BLM could not order him to remove appropriate and operable equipment used in actual prospecting or mining activities, BLM’s inspection found no personal property used in such activities and Gutierrez has not shown otherwise. Gutierrez therefore has not shown that the NON is in error for ordering him to remove all of his personal property.

For all of these reasons, we affirm the April 19, 2007, NON.

III. *Gutierrez' Motion for Stay of Confiscation Is Misplaced.*

In the Motion for Stay of Confiscation, Gutierrez asks that “confiscation” under the January 25, 2008, Final Notice (set for March 6) be stayed “until a reasonable time for removal has passed after such time as the BLM complies with the [NON] by arranging for access.” Motion at 3. It is apparent from the factual developments discussed above that Gutierrez has physical access to the claim site for the purpose of complying with the NON and subsequent notices, and that BLM facilitated his access over adjoining private lands. It is also apparent that BLM has not acted to take possession of Gutierrez’ property and that Gutierrez is continuing to remove personal property from the claim site. The “Motion for Stay of Confiscation” is not necessary for Gutierrez to obtain the access he seeks. We therefore deny the motion.

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.

_____/s/_____
Geoffrey Heath
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge