United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
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May 19, 2015

IBLA 2015-142 & 2015-143	)	OR6832201 & OR68322
	)	
GEORGE E. BACKES & RICK BARCLAY	)	3715 & 3809 Noncompliance
	)	
	)	Appeals Consolidated;
	)	Petitions for Stay Granted

ORDER

George E. Backes and Rick Barclay (collectively, appellants), the current owners of the six lode mining claims at issue,[1] have appealed from and petitioned for a stay[2] of two March 18, 2015, decisions, each styled a "Notice of Noncompliance," of the Field Manager, Grants Pass (Oregon) Resource Area, Medford District, Bureau of Land Management (BLM). On January 28, 2015, BLM inspected the Claims, observing activities it deemed violative of 43 C.F.R. §§ 3715.6 and 3809.605. BLM then issued the two subject decisions. In the first decision (hereinafter, 3809 Decision),[3] BLM notified the claimants that they had committed prohibited acts under 43 C.F.R. § 3809.605 by engaging in mining operations and other uses reasonably incident thereto on their Claims without submitting the required notice or obtaining BLM's approval of a Plan of Operations (POp). In the second decision (hereinafter, 3715 Decision),[4] BLM notified the claimants that by engaging in the occupancy of

[1] The six claims are the Sugar Pine, Sugar Pine Extension, Black Jack, Black Jack #3, Oregonian, and Golden Cycle, ORMC-20078 through ORMC-20083 (hereinafter, Claims). They were located, respectively, on Feb. 9, 1846, Mar. 27, 1975, July 17, 1900, Aug. 21, 1900, Jan. 1, 1908, and Nov. 23, 1920. Appellants states that the Claims "hav[e] historically produced gold." Petition at 2.

[2] Since the stay petitions are identical, we will cite only to the Petition for Stay (Petition).

[3] Appellants' appeal of the 3809 Decision was docketed by the Board as IBLA 2015-142.

[4] Appellants' appeal of the 3715 Decision was docketed by the Board as IBLA 2015-143.

their Claims without BLM's concurrence, they had committed prohibited acts under 43 C.F.R. § 3715.6.[5]

The Claims were originally located by various claimants well before the October 21, 1976, enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1785 (2006). The Claims comprise approximately 123.96 acres of public land situated in sec. 33, T. 34 S., R. 8 W., and secs. 3 and 4, T. 35 S., R. 8 W., Willamette Meridian, Josephine County, Oregon, along the Rogue River. All of the Claims were filed for recordation with BLM on September 17, 1979, pursuant to section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (2006).[6] The Claims are all currently held by Backes and Barclay. *See* Petition at 2 ("Appellants have owned and worked the claims since 2013").

The 3715 Decision

Upon inspection of the claims, BLM observed "two camp trailers and a watchman on site," adding:

> Also present were two non-BLM gates, multiple "no trespassing" signs and warning signs claiming exclusive surface use, a recently constructed cabin, a milling facility placed on a recently poured concrete slab, several small crushers and a small ball mill, a small saw mill, storage of equipment (small bulldozer, mini[-]excavator, two ATVs [all-terrain vehicle], several trailers), and storage of supplies (fuel tank, lumber, various supplies, and tools).

3715 Decision at 1. BLM determined that such uses constituted "occupancy" of the public lands, as defined by 43 C.F.R. § 3715.0-5, requiring the filing of an application for occupancy and BLM's concurrence with the application.[7]

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[5] Because the two appeals arise from similar facts and raise related questions of fact and law, we consolidate them for purposes of our review. *See* 43 C.F.R. § 4.404.

[6] Nowhere do we find any allegation that the Claims have not been properly maintained, since Oct. 21, 1976, by the filing of affidavits of assessment work or notices of intention to hold and/or by the payment of claim rental or maintenance fees or the filing of exemption or waiver certifications.

[7] "*Occupancy*" is broadly defined by 43 C.F.R. § 3715.0-5 to mean "full or part-time residence on the public lands," as well as

> activities that involve residence: the construction, presence, or maintenance of temporary or permanent structures that may be used for such purposes; or *the use of a watchman or caretaker for the purpose*

(continued ...)

BLM concluded that appellants had committed prohibited acts under 43 C.F.R. § 3715.6 by engaging in occupancy of the public lands. BLM noted first that appellants had done so by placing, constructing, maintaining, or using residences or other structures for occupancy not meeting standards for occupancy in 43 C.F.R. § 3715.5, in violation of 43 C.F.R. § 3715.6(a); by beginning occupancy before filing and obtaining BLM's approval of a POp, as required by 43 C.F.R. Subpart 3809, in violation of 43 C.F.R. § 3715.6(b); by beginning occupancy before consulting with BLM, as required by 43 C.F.R. § 3715.3, in violation of 43 C.F.R. § 3715.6(c); by preventing or obstructing free passage or transit over or through the public lands by force, threats, or intimidation, in violation of 43 C.F.R. § 3715.6(f); and by placing, constructing, or maintaining gates, fences, and signs intended to exclude the general public, without BLM's concurrence, in violation of 43 C.F.R. § 3715.6(g).

BLM required appellants to (1) submit the information required by 43 C.F.R. § 3715.3-2 within 30 days of receipt of the decision; (2) begin to remove all non-permanent structures and equipment constituting "occupancy" within 14 days of receipt of the decision and not reside on the Claims beyond the 14 days allowed by 43 C.F.R. § 3715.2; (3) immediately cease any efforts to prevent or obstruct free passage or transit over or through the public lands; (4) immediately begin to remove all gates, fences, and signs intended to exclude the general public; (5) complete all removal actions within 60 days of receipt of the decision; and (6) not resume any "occupancy" until BLM has concurred with such occupancy. Should appellants decide not to pursue BLM concurrence with their occupancy of the Claims, the Field Manager stated that appellants might remove all items constituting "occupancy," within 30 days of receipt of the decision.

BLM concluded, in its 3715 Decision, that appellants' failure to abide by the requirements of the decision might result in BLM taking further action pursuant to 43 C.F.R. § 3715.7-2, which provides for a civil action seeking an injunction or order to prevent occupancy, and 43 C.F.R. § 3715.8, which provides for criminal penalties.

The 3809 Decision

BLM also observed "the presence of mechanized earth-moving equipment (a small bulldozer and a mini-excavator) which has been used recently to bury and

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(...continued)

> *of monitoring activities*. Residence or structures include, but are not limited to, *barriers to access, fences*, tents, motor homes, *trailers, cabins*, houses, buildings, *and storage of equipment or supplies*. [Emphasis added.]

install a water pipe system, improve roads, clear adit entrances, and level areas for structures and work areas." 3809 Decision at 1. BLM determined that such activities exceeded what might be considered "casual use," as defined by 43 C.F.R. § 3809.5, and that the claimants were required to file and obtain BLM's concurrence with a notice of operations (Notice), or to file and obtain BLM's approval of a POp. BLM did not determine whether appellants were required to file a Notice or a POp. However, BLM noted that appellants had not filed either a Notice or a POp, or obtained BLM concurrence or approval.

BLM concluded that appellants had committed prohibited acts by engaging in mining operations and uses reasonably incident thereto greater than "casual use" without an approved Notice or POp, in violation of 43 C.F.R. § 3809.605(a), and without a financial guarantee, in violation of 43 C.F.R. § 3809.605(d). *See* 3809 Decision at 2.

BLM thus required appellants to (1) submit a complete Notice or POp, in accordance with 43 C.F.R. § 3809.301 or 3809.401, within 30 days of receipt of the decision; (2) submit an acceptable financial guarantee, in accordance with 43 C.F.R. § 3809.551, within 30 days of either BLM's concurrence with a Notice or BLM's approval of a POp; (3) immediately cease any activities other than "casual use" or reclamation, until BLM has either concurred in a Notice or approved a POp (and accepted a financial guarantee); (4) obtain BLM's concurrence with a Notice or BLM's approval of a POp, together with acceptance of a financial guarantee, within 60 days of receipt of the decision; and (5) restrict any mining and reasonably incident uses to "casual use," absent BLM's concurrence with a Notice or approval of a POp. Should appellants decide not to pursue BLM concurrence with a Notice or approval of a POp, BLM stated that appellants might remove all mechanized earth-moving equipment from and reclaim all existing surface disturbances caused by the equipment to the claimed lands, within 30 days of receipt of the decision.

BLM concluded, in its 3809 Decision, that appellants' failure to abide by the requirements of the decision might result in BLM issuing a "Suspension Order," pursuant to 43 C.F.R. § 3809.601(b). BLM noted that it could also take further action pursuant to 43 C.F.R. § 3809.604, which provides for a civil action seeking an injunction or order to prevent operations and damages, and 43 C.F.R. § 3809.700, which provides for criminal penalties.

Appellants filed timely appeals from each of the Field Manager's March 2015 decisions.[8] They also request the Board to stay the effect of the 3715 and 3809

[8] Appellants had the option, under 43 C.F.R. § 3809.800, of challenging the 3809 Decision before the State Director, Oregon, BLM, or the Board. They opted to appeal to the Board.

Decisions. *See* Petition at 8 ("The Decisions should be stayed during the pendency of appeal"). Clearly, appellants seek to stay BLM's determination to require them, in light of their noncompliance with the requirements for obtaining BLM's concurrence with a Notice or approval of a POp, and BLM's concurrence with occupancy, to cease their use and occupancy of the Claims, and, especially, to cease any residency on the Claims longer than 14 days, cease any mining activities other than "casual use," and immediately begin and complete removal of all non-permanent structures, equipment, and other property, by fixed deadlines. *See, e.g.*, Petition at 3-4.

Appellants desire through a stay "'to preserve the status quo,'" thus allowing them, during the pendency of the appeals, "to continue to pursue exploration and mine development, recognizing that the[] [appellants'] activities could implicate obtaining notices of intent or plans of operation as may be available pursuant to 43 CFR [Subpart] 3809." Petition at 3 (quoting *Oregon Natural Desert Association*, 135 IBLA 389, 393 (1996)). They further state: "The Decisions under appeal would require Appellants to abandon the progress they have made to develop their mining claims and, practically, abandon occupancy of the claims to the extent that it is customary and appropriate." *Id.* at 7.

Appellants do not dispute BLM's reports of their use and occupancy of the Claims, detected during the January 28, 2015, inspection. *See* Petition at 2 ("Appellants have devoted substantial resources toward development of the claims. They have restored several tunnels and open cuts, as well as restored access. They have assembled on site much of the equipment necessary to commence mining." (citing Affidavit (Aff.) of Rick Barclay, dated Apr. 23, 2015, ¶¶ 5, 8, at 2)).[9] Appellants have constructed a small cabin on the Black Jack claim, used for housing "miners and caretakers" and providing necessary security for the mine and associated equipment. Barclay Aff., ¶ 6, at 2.

Appellants contend, on the merits of their appeals, that BLM lacks the necessary authority to hold them in violation of any "agency regulations," whether 43 C.F.R. Subpart 3715 or Subpart 3809, since BLM erred, in its March 2015 decisions, in concluding that "the surface resources [encompassed by the Claims] were owned and controlled by the United States." Petition at 2. They argue that the question of whether the rights to the surface resources are owned and controlled by the United States or the claimants is determined by whether BLM "properly severed" such rights "pursuant to the Multiple Surface Use Act of 1955" (properly known as the Surface Resources Act or Multiple Use Mining Act, Pub. L. No. 167, 69 Stat. 367),

[9] The equipment includes a bulldozer, front end loader, sawmill, excavator, ball mill, and two stamp mills, together with tools and supplies, all valued at over $50,000. *See* Barclay Aff., ¶ 5, at 2.

such that, if severed, the rights are owned and controlled by the United States, and, if not severed, the rights are owned and controlled by the claimants. *Id.* Appellants conclude that, since the surface rights were not severed, they are owned and controlled by the claimants. *See* Barclay Aff., ¶ 9, at 2 ("Based on information we have been able to determine, it does not appear the BLM properly severed the surface estate for our mining claims and *we assert ownership of all surface rights.*" (Emphasis added)).[10]

On May 1, 2015, BLM filed a Non-Opposition to Petition for Stay, stating that, while it does not concede that appellants have satisfied the four stay criteria, it does not oppose a stay of the effect of the Field Manager's March 2015 decisions. It notes that its non-opposition derives from two factors: (1) BLM retains the authority, even despite the appeal, to regulate mining claim occupancy and operations apart from that addressed in the two decisions; and (2) appellants' statement on appeal that they do not intend to take action during the pendency of the appeals inconsistent with the requirements of 43 C.F.R. Subpart 3809, and, presumably, also 43 C.F.R. Subpart 3715. BLM specifically states: "Should further steps be required by BLM to address any new resource damage or unauthorized mining or occupancy activity, BLM intends to act in accordance with its regulations in issuing any new notices, orders, and/or decisions." Non-Opposition to Petition for Stay at 2.

In view of BLM's expression of non-opposition and since it accords with the public interest, we will grant appellants' petitions to stay the effect of the Field Manager's decisions.

[10] Appellants' appeal centers on the contention that, absent the Department's compliance with the requirements of section 5 of the Surface Resources Act, 69 Stat. at 369-71, for rendering the mining claims at issue subject to the Department's right to manage surface resources, in accordance with section 4 of the Act, 69 Stat. at 368, 369, BLM is now barred from imposing the restrictions on surface occupancy and operations of 43 C.F.R. Subparts 3715 and 3809. Separate from whether and to what extent the 3715 and 3809 regulations operate apart from the statutory underpinnings of section 4 of the Act, we note that the more basic question of whether the Department complied with section 5 of the Act is not clearly addressed by the current record. We advise BLM to address that question.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the petitions for a stay are granted.

James F. Roberts
Administrative Judge