INTERIOR BOARD OF LAND APPEALS

Pilot Plant, Inc.

68 IBLA 201 (March 16, 2006)

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PILOT PLANT, INC.

IBLA 2005-173 Decided March 16, 2006

Appeal from a notice of noncompliance issued by the Las Vegas, Nevada, Field Office, Bureau of Land Management, finding that the use and occupancy of the Becki M millsite do not meet the requirements of 43 CFR Subpart 3715 and establishing a schedule for the removal of various items from the millsite. N-71982.

Affirmed in part; set aside in part.

1. Millsites: Generally--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." To justify occupancy of the public lands, the regulations at 43 CFR Subpart 3715 require that the activities be reasonably incident to mining, milling, or processing operations; constitute substantially regular work; be reasonably calculated to lead to the extraction and beneficiation of minerals; involve observable on-the-ground activity that BLM may verify by inspection; and use appropriate equipment that is presently operable. 43 CFR 3715.2. The regulations also mandate that occupancy must involve either protecting exposed, concentrated or otherwise accessible minerals from loss or theft; protecting appropriate, regularly used, and not readily portable operable equipment from theft or loss; protecting the public from such equipment which, if unattended, creates a hazard to public safety; protecting the public from surface uses, workings, or improvements which, if left unattended, create a hazard to public safety; or 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. 43 CFR 3715.2-1.

2. Millsites: Generally--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

A BLM notice of noncompliance finding that occupancy of a mill site does not meet the requirements of 43 CFR Subpart 3715 will be affirmed where the operator has not shown that the current level of occupancy is commensurate with the magnitude of mining and milling operations occurring on the site or that the schedule for the removal of various items is unreasonable or otherwise erroneous.

3. Millsites: Generally--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

In addition to meeting the criteria for an occupancy prescribed in 43 CFR 3715.2 and 3715.2-1, a claimant who asserts the need for a caretaker or watchman must show that the need is reasonably incident and continual and that occupancy by a caretaker or watchman is needed whenever the operation is not active or whenever the claimant or the claimant's workers are not present on site. 43 CFR 3715.2-2. In the absence of a need to protect exposed valuable minerals from theft or loss; to protect operable equipment that is not readily portable from theft or loss; to avoid creating a hazard to the public from unattended equipment, surface uses, workings, or improvements; or a location in an isolated or physically inaccessible area, a caretaker or watchman cannot be justified under the regulations.

APPEARANCES: K. Ian Matheson, Henderson, Nevada, for appellant; Juan Palma, Field Office Manager, Las Vegas Field Office, Bureau of Land Management, Las Vegas, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Pilot Plant, Inc. (Pilot), through K. Ian Matheson, has appealed the April 7, 2005, Notice of Noncompliance (NON) issued by the Las Vegas (Nevada) Field Office (LVFO), Bureau of Land Management (BLM), finding that activities on the Becki M [1/]

[1/] Although the NON and other documents in the case file refer to the millsite as the (continued...)

millsite did not meet the requirements of the surface use and occupancy regulations found at 43 CFR Subpart 3715 and establishing a schedule for the removal of various portable items from the millsite. [2/] By order dated August 9, 2005, the Board denied Matheson's request for a stay of BLM's decision pending appeal.

The Becki M millsite (NMC293456) was located on December 14, 1983, by Vincent and others, [3/] and embraces 5 acres of land within the S½S½ of lot 3 (S½SW¼NW¼NE¼), sec. 14, T. 23 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada. The millsite is now owned by Pilot and operated by PMI, the previous claimant of record for the millsite. The millsite is dependent on unpatented placer claims owned by Pilot and associated companies.

On December 29, 1983, Vincent submitted a plan of operations for the Becki M and other millsites (N56-84-06P) which indicated that a mill building, mobile homes, a septic tank, and fencing as needed would be placed on the millsites. BLM closed the case file for that notice in September 1986 when its letter to Vincent inquiring whether he intended to conduct operations or whether those operations

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[1/] (...continued)
"Becky M" millsite, the location notice identifies the millsite as the "Becki M." We will use the location notice's spelling of the millsite's name in this decision.

[2/] Matheson is president of Pass Minerals, Inc. (PMI). In a communication dated July 17, 1997, Matheson notified BLM that the "Becky M" millsite, among other transfers, had been conveyed from Arby J. Vincent and others to Pilot, and from Pilot to PMI by quitclaim deeds. The record also contains a letter from Matheson to Mark R. Chatterton, Assistant Field Manager for Nonrenewable Resources, LVFO, dated Feb. 13, 2003, informing BLM that the "new owner" of the millsite is Pilot, while confirming that Pilot was also the "previous owner." In the Feb. 13 letter, Matheson avers that PMI is the operator, and that he is "no longer an officer, director or signing officer of this company," and that he has "never been a shareholder of Pilot Plant Inc." (Letter at 1.) He further avers that "[n]one of the corporations I am affiliated with have an ownership position in the Becky M millsite." (Letter at 2.)

The record contains nothing that clearly demonstrates that Matheson or PMI can practice before the Department or represent Pilot. See 43 CFR 1.3. Nonetheless, we note that the shareholders of PMI are Pilot, Kiminco, Inc., and a defunct company called Pure Air. The shareholders of Kiminco are Matheson, his wife, Debra Matheson, and Pilot. The shareholders of Pilot are Debra Matheson's three children. See United States v. Pass Minerals, Inc., 168 IBLA 115, 118 n.1 (2006).

[3/] The other locators were Becki M. Vincent, Rick J. Vincent, Virginia Vincent, William F. Vincent, Luther O. Hendrickson, Thomas Abadie, Jr., and Thelma I. McKinney. (Mineral Report, Surface Use Determination and Validity Determination for The Becki M Millsite Claim, serial number 293456 (Mineral Report), at 6.)

had begun was returned undelivered. During a field inspection in October 1991, however, BLM discovered that the Becki M millsite was occupied, and on September 30, 1992, Vincent submitted a mining notice for operations on the Becki M millsite (NV-054-93-001N). According to this notice, operations on the Becki M were to include a mill building containing a complete reduction and processing plant, a mobile home to serve as an office and living quarters for a watchman, a well, a septic system, and electric service to the buildings.

BLM inspected the Becki M millsite more than 30 times between October 1991 and March 2005. In the first Nevada 3809 Compliance Inspection Report (Inspection Report), [4/] prepared on October 23, 1991, BLM noted that the site contained a double-wide house trailer, automobiles with and without license plates, a metal shed plant, a dump truck, a semi-trailer, numerous drums, miscellaneous equipment, a locked gate, and scattered debris and trash, and that the millsite needed to be cleaned up. Although some clean-up was performed, subsequent inspections through September 1995 revealed that the site still required clean-up, that additional equipment and materials, including barrels, had been brought to the site, and that little, if any, milling activities had been occurring on the site.

Matheson became involved with the millsite in 1990 and had replaced Vincent as operator of the millsite by September 1995. See Sept. 7, 1995, Inspection Report; see also Sept. 11, 1995, note to the file (indicating that Matheson was responsible for the millsite and had agreed to clean up the site). BLM inspected the millsite several more times between 1997 and 2000, both with and without representatives from the Nevada Department of Conservation and Natural Resources Division of Environmental Protection (NDEP). Those inspections uncovered possible unpermitted chemical usage and storage, non-mining related vehicle repair, improper liquid discharge, and nominal or no processing operations, among other things. BLM did not observe any mining or milling operations other than limited testing during any of those inspections, nor did it find any mining or milling equipment maintenance during those inspections. See Mar. 16, 2005, Inspection Report at 5.

BLM inspected the Becki M millsite on January 10, 2000, with a follow-up inspection on February 4, 2000, as part of a surface use determination for the millsite. These inspections disclosed the following items on the millsite: A double wide mobile home used as a watchman's quarters and office; a laboratory building attached to the northwest corner of the mobile home; a large mill building located on

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[4/] The denomination "3809" refers to 43 CFR Subpart 3809, which addresses the surface management of operations authorized under the mining laws. Other inspection reports in the case file are denominated "3715," which refers to the 43 CFR Subpart 3715 regulations governing use and occupancy under the mining laws, hence the nomenclature "3715/3809" reports.

the north side of the site, serviced by electricity and housing numerous bags and barrels of chemicals, unused separator tanks fed by an unused outside hopper, a small furnace, a shaker table, a tower concentrator, and various parts and other items; septic tanks; a water well; a cargo trailer used as storage for tools and as an impromptu machine shop; a mobile trailer belonging to the company's geologist; an old partially stripped cable dozer which had been sitting on the southwest corner of the site since at least 1991; empty tanks; a portable screen used for bulk sampling; several furnaces not hooked up to power; a small ball mill on the south side of the mill building; a trommel and bag house not hooked up; a number of other items; and a stock pile of mineral materials. (Mar. 16, 2005, Inspection Report at 5-6.) [5/]

BLM also interviewed Matheson and an associate, Gene Phebus, during the inspections. Matheson informed BLM that, among other things, between 1990 and 1994, over 1,000 samples had been processed at the millsite to develop concentration and extraction methods for the "Mijo ore body," [6/] using a number of pieces of equipment fabricated by Phebus; that Matheson had a problem using water from the well because the iron in the water allegedly interfered with processing the "ore;" that Phebus had developed an electrolytic cell to take the iron out of the water; that Matheson had made a deal with one CSR to use a five acre site in Las Vegas, Nevada, and would be able to use CSR's water for processing; and that Matheson had spent years trying to figure out how to process the "ore" because of its complexity, but now felt he had a grasp of it. (Mineral Report [7/] at 14; Mar. 16, 2005, Inspection Report at 6.) In a separate discussion after Matheson had left the site, Phebus told BLM that testing on the site had been completed by 1993, although he still did prepare some small samples for laboratory analysis; that he had built the tower concentrator which could concentrate 1500 lbs. of ore per hour; that some of the items stored on the site were junk and unnecessary; and that there had been no processing beyond small

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[5/] The Mar. 16, 2005, Inspection Report notes that the original reports for the January and February 2000 inspections, which are not part of the case file for this appeal, were included in contest file N-66382, which apparently was the file for the deferred millsite contest. See text infra.

[6/] This is a reference to the Mijo placer mining group (specifically the Mijo 16 and Mijo 17 association placer mining claims) and Matheson's conviction that the claims contain a valuable new kind of placer deposit that occurs at the nanometer scale (a *nanometer* is one-billionth of a meter in length) in the form of coated particles of precious metals. In United States v. Pass Minerals, Inc., 168 IBLA 115, the Board affirmed a contest decision declaring the Mijo 16 and 17 mining claims invalid for lack of a discovery of a valuable mineral deposit.

[7/] The Mineral Report was prepared on Feb. 9 and 10, 2000, technically approved on Mar. 30, 2000, and acknowledged by management on Apr. 10, 2000.

samples and no production on the site. (Mineral Report at 14; Mar. 16, 2005, Inspection Report at 6.)

In the Mineral Report prepared for the surface use determination and validity examination for the Becki M millsite, BLM concluded that, in light of these and previous inspections, the activities on the Becki M millsite did not meet the requirements of 43 CFR Subpart 3715, specifically 43 CFR 3715.2, 3715.2-1, and 3715.5. (Mineral Report at 3.) The report recommended that BLM issue a contest complaint charging, *inter alia*, that the Becki M millsite was not being occupied for uses reasonably incident to or necessary for prospecting, mining, or processing operations under the mining laws. Id. at 5. BLM did not initiate the recommended contest, however, because of the pending contest of the Mijo 16 and 17 mining claims owned by Matheson. See Apr. 28, 2000, memorandum from Mark R. Chatterton, Assistant Field Manager for Nonrenewable Resources, LVFO, BLM, to Nevada State Director, BLM. [8/]

BLM continued to inspect the millsite. In an October 30, 2000, [9/] inspection conducted with NDEP personnel, BLM found the site covered with an excessive number of inoperable, unused vehicles and equipment. Those conditions had not changed to any appreciable degree when BLM reinspected the site on January 22, 2002. An inspection conducted by the NDEP on April 24, 2002, revealed that Matheson had moved a great deal of processing equipment and a full laboratory with chemicals onto the site, including a lot of unconnected equipment in the mill building, as well as evidence that Matheson was conducting various testing without authorization or permits. BLM inspected the site on July 25, 2002, learned from Phebus that they were running very small 2.5 gram samples on the site and sending them out for further assay, and ascertained that, although the site was much cleaner, it was still out of compliance with the regulations because it contained a lot of unmoved and unused equipment and scrap. Another inspection, conducted on October 22, 2002, showed that the site was being used to supply water and power to the adjacent Mijo 16 mining claim and that Phebus was still engaged in laboratory testing. In a January 29, 2003, inspection, BLM observed a dry barrel test being run in the mill building and, again, a great number of unused items. No activity was apparent nor were materials being processed when BLM inspected the site on October 23, 2003. BLM's September 22, 2004, inspection uncovered an excessive number of unused items littering the yard and stored in the building, despite the

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[8/] See also n.6 ante.

[9/] Although the report states that the inspection occurred on Nov. 30, 2000, BLM asserts that the report was misdated and that the inspection actually took place on Oct. 30, 2000, an assertion supported by the Nov. 13, 2000, review date on the report. See Mar. 16, 2005, Inspection Report at 6.

clean-up of some items on the site. BLM inspected the site again on both October 22 and December 9, 2004, finding that many unused items, chemicals, and barrels containing hazardous materials remained on the site, and that no milling or processing was occurring.

BLM inspected the site once again on March 16, 2005. At that time, the site still was not being put to a level of use commensurate with the occupancy, but was being used for storage and as a junk yard. BLM reported that Phebus had stated that they were refurbishing the furnaces for testing. Photographs comparing the condition of the site at that time with earlier inspection photographs documented the lack of activity and the level of junk and equipment storage on the site and indicated that the site was not being put to active use and was being used and occupied in a slovenly manner. See Mar. 16, 2005, Inspection Report at 7. BLM characterized the operations on the millsite as sporadic testing and occupancy by a watchman, noting that only minor amounts of testing and no processing or treatment of mineralized material had occurred since Matheson took over the millsite in 1993. Id. at 9.

BLM pointed out that the materials from the Mijo 16 mining claim were not being processed on the Becki M millsite, but were concentrated on the mining claim and then shipped out of state for further processing, and that none of the other mining claims on which the Becki M was dependent was in production or would otherwise need the use of a millsite to support operations. BLM further observed that the only processing system on the millsite was a small cascading tank, which needed considerable work to be of any production benefit, and that the other items which might be reasonably incident to a potential operation were consistent only with small scale testing. BLM added that it had seen no equipment in operation beginning with its 1999 field visit. BLM noted that if the millsite were in a "shutdown" phase awaiting renewed production, the equipment attached to the ground was already safely stored within the fenced compound and the other items could be removed and stored off site, thus eliminating the need for a caretaker or watchman to reside at the site, especially since the remaining equipment and personal property were either inoperable or inappropriate and not reasonably incident to prospecting, mining, or processing operations. (Mar. 16, 2005, Inspection Report at 9.)

BLM concluded that the primary use of the millsite was for occupancy and that the storage of inoperable or inappropriate equipment and personal property, coupled with the occupancy, constituted unnecessary and undue degradation of the public lands. BLM also averred that the site did not meet the occupancy requirements of 43 CFR 3715.2, 3715.2-1, or 3715.5, and was not being used or occupied for mining, milling, processing, or beneficiation within the meaning of 30 U.S.C. § 612(a) (2000) and 43 CFR 3712.1. (Mar. 16, 2005, Inspection Report at 9.)

In its April 7, 2005, NON, BLM cited the March 16, 2005, inspection, the previous inspections of the site, and the finding in the Mineral Report that the occupancy of the Becki M millsite was not reasonably incident and was causing unnecessary and undue degradation of public land, and concluded that the activities on the millsite did not meet the requirements of 43 CFR 3715.2, 3715.2-1, or 3715.5. Specifically, BLM found:

> 1) No milling or mining operations are taking place on the millsite that would require the level of occupancy which is taking place.
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> 2) Activities on the site do not constitute substantially regular work as defined by 3715.
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> 3) Activities and equipment on the site can not be reasonably calculated to lead to the extraction and beneficiation of minerals.
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> 4) Operations do not involve observable on-the-ground activities that BLM may verify under Sec. 3715.7.
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> 5) The primary use of the millsite is not for mining or milling purposes. The equipment present that could be reasonably incident to a theoretical operation is inoperable, appears to be inappropriate to the purposes to which the millsite is actually put, and would not likely *** be adapted for actual mineral production or mining operations. There are no mining operations beyond small scale testing taking place on the site.
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> 6) The occupancy is not needed to protect from theft or loss appropriate, operable equipment which is regularly used and cannot be protected by means other than occupancy. The equipment which is attached to foundations or the ground is secured within a fenced compound. All other items could be removed and stored off-site.
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> 7) The occupancy is not needed to protect the public from appropriate, operable equipment which is regularly used, and if left unattended, creates a hazard to public safety.
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> 8) The occupancy is not needed to protect the public from surface uses, workings, or improvements which, if left unattended, create a hazard to public safety. The occupancy and storage of inappropriate or inoperable equipment and non-mining related items or junk creates a hazard to the public. Removal of the occupancy, inappropriate or

inoperable equipment and non-mining related items and junk would eliminate any perceived need for the occupancy.

9) The site is not located in an area so isolated or lacking in physical access as to require the mining claimant, operator or workers to remain on site in order to work a full shift of a usual and customary length. The site is within a short travel distance of the Las Vegas, Nevada[,] metropolitan area and Boulder City, Nevada.

10) Having equipment, machinery and other personal property on site that is inoperable or inappropriate for the purposes to which the millsite is actually put, and because these inoperable or inappropriate items could not be adapted for actual mineral production or mining operations, causes unnecessary and undue degradation of the public lands and resources.

(NON at 1-2.)

The NON concluded that the occupancy did not comply with the requirements of 43 CFR Subpart 3715, and enclosed a schedule for removing all portable items, including scrap metal, processing equipment, vehicles, trailers, motor homes, storage boxes, portable laboratories, mining equipment, tanks, laboratory equipment, chemicals, and personal items as follows:

Removal Plan for the Beckey M mill site for BLM Notice of Noncompliance (NON)		
Type of Item	**Location (if applicable)**	**Removal Date**
Scrap metal, old bulldozer, trash, old pipe, junk, empty barrels, etc.	SW corner and throughout site	30 days from end of appeal period
Motor home, vehicles*, trailers	Motor home is parked in front of mill building, vehicles are in many locations, various trailers, loaded and empty are in many locations.	60 days from end of appeal period
Portable lab**	Trailer behind mobile home.	90 days from end of appeal period

Removal Plan for the Beckey M mill site for BLM Notice of Noncompliance (NON)		
Tanks (fiberglass and metal)	Most of the tanks are north of mill building and others are inside.	120 days from end of appeal period
Portable mining and lab equipment***	In yard and inside of building.	180 days from end of appeal period
All personal items and equipment except for specific mining related equipment that may be put to use during and beyond the 220 days	Inside of mill building.	220 days from end of appeal period

* Each resident of the millsite may have one registered vehicle. One small haul trailer may be kept on site. All unregistered vehicles and vehicles not registered to a resident must be removed.

** The portable lab on the east side of the mill building may remain on the site beyond 220 days from the end of the appeal period, if substantial regular use occurs prior to the 220 day cleanup period and substantial regular use of the lab continues. If this portable lab trailer is not put to substantial regular use within 220 days from the appeal period, then it must be removed by 220 days from end of appeal period.

*** Two working furnaces may be kept beyond 220 days from the end of the appeal period, however they must be kept in working condition and put to substantial regular use prior to the end of the 220 day cleanup period. These furnaces must be identified to the BLM within 180 days from the end of the appeal period or all furnaces must be removed. All other furnaces must be removed within 180 days from the end of the appeal period.

(NON, Enclosure.)

On appeal, Pilot objects both to the language in the Mineral Report finding that the occupancy was not reasonably incident [10/] and was causing unnecessary and undue degradation of public land, and to the removal plan for the millsite. (Notice of Appeal and Statement of Reasons (SOR) at 1.) Pilot disputes BLM's assertions that no mining or milling operations requiring the existing level of occupancy are occurring on the millsite, that the activities on the site do not constitute substantially regular work and are not reasonably calculated to lead to the extraction and beneficiation of minerals, that the operations do not involve observable on the ground activities, and that the primary use of the millsite is not for mining or milling purposes. Appellant claims that more original work on nano-scale precious metals has been done on the Becki M millsite than at any other research center, university, or mining company in the world. (SOR at 3.) Pilot asserts that over 3,000 leaches of 1,000 lbs of mineral material were processed through the Becki M millsite in the mid 1980s, with gold extracted from the pregnant leach solution by using zinc, which demonstrated that "precious metals existed in the Eldorado in a state that could not be seen by a microscopy (at this time) nor could they be fire assayed, at that time." (SOR at 4.)

Appellant itemizes the original research performed at the Becki M on nanometer-sized minerals, including: the use of the Hydro Met pressurized system; the development of an electrolytic system to clean the native water; the testing of concentrating bowels; the purchase and construction of concentrating tables; the construction of a screening plant with a test magnetic separator, a fusion furnace to collect pyro thermal vapors, a furnace to convert pregnant solution to metals, wave concentration tables, and concentrating towers; the performance of grinding studies to obtain information about grinding nano minerals; the construction of hydration and dehydration chambers and the testing of nano-scale precious minerals under various conditions; and the testing of furnaces to conclusively prove that they were assaying different results on the same sample. (SOR at 4.) According to Pilot, this research has led to the key discovery that a fire assay does not determine what nanometer-scale precious metals are in the "ore." (SOR at 5.) In short, Pilot contends that research, scientific analysis, and experimental testing continues today at the millsite on a 24-hour basis, as some leaches require this extended time to remove the coatings from the precious metal particles. Id. at 6.

Appellant also challenges BLM's conclusions that the occupancy is not needed to protect the site from theft and the public from a public hazard and that the site is not located in an isolated area. Pilot avers that the millsite is in an isolated area without street lights and had been broken into an average of once a month before full time occupancy of the site began about 14 years ago, adding that both its neighbors

[10/] We note that the NON's recitation of this statement was not part of its analysis or conclusions, but simply a statement that the Mineral Report had made that finding.

have round-the-clock security to prevent vandalism. Id. Pilot further contends that, because some of the chemicals used in testing and research on the Becki M millsite are restricted by the Department of Homeland Security, after September 11, 2001, it installed an alarm that is triggered when someone enters through the gate and that it now requires the millsite's usual occupants to arrange for security coverage if they are going to be away. According to appellant, without such security the site could easily be broken into, which, given the danger posed by the chemicals and the fact that the site is 10 miles from Boulder Dam, makes leaving the site unoccupied completely irresponsible under the provisions of the Homeland Security Act. (SOR at 6-7.)

As to the removal plan for the Becki M millsite, appellant asserts that the scrap pipe, trash, excess vehicles, and most personal items have already been removed from the site and requests an extra 90 days to cut up the bulldozer. However, Pilot objects to the removal of the motor home, which it alleges will be used in the testing program at Searchlight, Nevada, for first aid, and as an office, and to the elimination of the portable laboratory, which it maintains is used in regular testing at the millsite. (SOR at 8.) Pilot further contests BLM's decision to allow only two working furnaces to remain on site, pointing out that its scientific tests have shown that different furnaces produce different values because nano precious metals with their mineral coatings do not have the same chemical and physical properties as bulk metals. (SOR at 8.) Pilot submits that BLM should not micro-manage the research at the millsite. (SOR at 9.)

In its Answer, BLM points out that the NON allows several components of the occupancy to remain, including the residential mobile home where the resident caretaker resides; the large mill building set on a concrete foundation; the portable laboratory situated in front of the mill building as long as it is being put to the requisite substantial regular use; one registered motor vehicle per resident and one small haul trailer; and two working furnaces maintained in working condition. (Answer at 1-2.) BLM explains that it will re-evaluate the occupancy after all items not being put to regular substantial use have been removed. According to BLM, no irreparable harm would befall the operator since the major structures and residential occupancy would not be affected, and, if the operator submitted a plan of operations increasing the future level of activity, specific portable items could be authorized and brought onto the site for use in those operations. (Answer at 2.)

BLM notes that the significant processing Pilot cites occurred in the mid-1980s when it was not the operator of the Becki M millsite and points out that the inspection record shows that appellant has not maintained that level of activity in the years it has operated the site. BLM asserts that Pilot has never held a water pollution control permit from NDEP which would allow substantial processing to occur at the site and that, since 1992, BLM inspectors have observed only the processing of very small quantities of material by means of a barrel roll test and the limited sample

testing of small quantities in the Becki M laboratory, observations which led to the conclusion that the items marked for removal in the NON were not reasonably incident to the level of activity occurring. (Answer at 2.)

BLM stresses that the NON does not remove the caretaker, the fencing, or the gate, but retains the status quo as far as site security is concerned, thus mooting appellant's discussion of the need for site security. In any event, BLM submits that the small laboratory quantities of chemicals stored at the site create little risk of harm to the operator or threat to the public should they be stolen, and that Pilot could alleviate its security concerns by renting private secure storage elsewhere and bringing both the laboratory and chemicals to the site only when actually using them. Id.

BLM responds to Pilot's objections to the removal plan, agreeing to an additional 90 days to remove the bulldozer, as long as the removal is completed within that additional 90-day period. BLM rejects appellant's request that the motor home be allowed to remain, pointing out that the motor home was not authorized for long-term occupancy, although it could be used for short-term (14 days) camping and/or for day use; that the motor home is not currently used regularly nor is it part of the existing notice; and that long-term storage of the motor home at the millsite does not comport with 43 CFR Subpart 3715. BLM notes that the laboratory located in front of the mill building would be designated for removal only if it were not put to substantial, regular use within the 220-day period and such regular, substantial use thereafter continued. (Answer at 3; Removal Plan, n. 2.)

BLM contends that, appellant's statement to the contrary notwithstanding, many unused items remain stored in the mill building and reiterates its position that all personal items and equipment, except for specific mining-related equipment actively and regularly used by the operator during and beyond the 220 days must be removed on or before the expiration of 220 days from the end of the appeal period. BLM adds that Pilot has not identified any specific equipment in use nor, given that the testing takes place in the portable laboratory, has it shown that substantial or regular work is occurring inside the mill building. Id. As far as the furnaces are concerned, BLM avers that, based on the mining notice describing operations on the Becki M millsite and standard industry practice, two furnaces should suffice for a pilot testing program such as the one occurring at the Becki M, and that logic dictates that the two furnaces giving the highest values would be kept. Id. BLM concludes that the NON should be affirmed.

[1] 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). In addition, a mining claimant may occupy certain public lands for "mining or milling purposes." 30 U.S.C. § 42 (2000).

Occupancy of the surface of public lands for mining and other purposes under the mining laws is governed in part by section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000), which 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." On July 16, 1996, BLM adopted 43 CFR Subpart 3715, which implements this statutory provision by addressing the unlawful use and occupancy of unpatented mining claims for non-mining purposes. See 61 FR 37115, 37117 (July 16, 1996).

These regulations restrict the use and occupancy of public lands administered by BLM open to the operation of the mining laws, limiting such use and occupancy to those involving prospecting or exploration, mining, or processing operations and reasonably incident uses. They also establish procedures for beginning occupancy, standards for reasonably incident use or occupancy, prohibited acts, and procedures for inspection and enforcement and for managing existing uses and occupancies. 61 FR 37116 (July 16, 1996); see Marietta Corp, 164 IBLA 360, 361 (2005); Dan Solecki, 162 IBLA 178, 179 (2004); Firestone Mining Industries, Inc., 150 IBLA 104, 109 (1999). Additionally, the regulations clarify that unauthorized uses and occupancies on public lands are illegal uses that ipso facto constitute unnecessary or undue degradation of public lands, which the Secretary of the Interior is mandated by law to take any action necessary to prevent. 61 FR 37117-18 (July 16, 1996); [11/] see 43 U.S.C. § 1732(b) (2000); Marietta Corp., 164 IBLA at 361; Wilbur L. Hulse, 153 IBLA 362, 367 (2000); Firestone Mining Industries, Inc., 150 IBLA at 109.

The term "occupancy" is defined broadly under 43 CFR 3715.0-5 and includes not only full or part-time residence on the public lands, but also activities involving residence; the construction, presence, or maintenance of temporary or permanent structures such as barriers to access, fences, tents, motor homes, trailers, cabins, houses, buildings, and storage of equipment or supplies; and the use of a watchman or caretaker. Actual residential use is not required; instead, occupancy encompasses the construction, presence, or maintenance of temporary or permanent structures, regardless of whether they are actually used as a residence. Las Vegas Mining Facility, Inc., 166 IBLA 306, 311 (2005); Donna Friedman, 165 IBLA 313, 321 (2005); Terry Hankins, 162 IBLA 198, 213 (2004); Robert W. Gately, 160 IBLA 192,

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[11/] The preamble explains that the unnecessary or undue degradation controlled by these rules includes uses not authorized by law, specifically those activities which are not reasonably incident to mining or milling activities and are not authorized under any other applicable law or regulation, while uses that are reasonably incident to such activity and do not involve occupancy are governed by the surface management requirements of 43 CFR Part 3800. 61 FR 37118 (July 16, 1996).

204 n.17 (2003); see Marietta Corp., 164 IBLA at 362. Pilot does not dispute that it occupies the Becki M millsite.

The activities justifying an occupancy of a mining claim or millsite for more than 14 calendar days in any 90-day period must (a) be "reasonably incident" to mining related activity; (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 verifiable by BLM; and (e) use appropriate equipment that is presentably operable. 43 CFR 3715.2. To be permissible under 43 CFR 3715.2, the occupancy must meet all five of those requirements. Las Vegas Mining Facility, Inc., 166 IBLA at 312-13; Betty Dungey, 165 IBLA 1, 8 (2005); Terry Hankins, 162 IBLA at 213; Robert W. Gately, 160 IBLA at 208-09; James R. McColl, 159 IBLA 167, 178 (2003). Additionally, the occupancy must also involve one or more of the elements set forth in 43 CFR 3715.2-1(a) though (e): (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; and/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. See Robert W. Gately, 160 IBLA at 208 n.21; Thomas E. Smigel, 156 IBLA 320, 324 n.3 (2002); Wilbur L. Hulse, 153 IBLA at 368; David E. Pierce, 153 IBLA 348, 358 (2000).

[2] The regulations define "reasonably incident" as being a shortened version of the statutory standard "prospecting, mining, or processing operations and uses reasonably incident thereto" and "includes those actions or expenditures of labor or and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit * * * and reasonably related activities." 43 CFR 3715.0-5. Any occupancy proposed by a mining claimant therefore 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. Karen V. Clausen, 161 IBLA 168, 177 (2004); Thomas E. Smigel, 156 IBLA at 324. When the claim is a millsite, the extent of permissible occupancy is directly related to the extent of processing activity conducted on the millsite claim and the structures and equipment on the site must be related to and commensurate with the operations. Las Vegas Mining Facility, Inc., 166 IBLA at 314; Jay H. Friel, 159 IBLA 150, 159 (2003); Thomas E. Smigel, 156 IBLA at 324; see David E. Pierce, 153 IBLA at 358; Bradshaw Industries, 152 IBLA 57, 63 (2000). In addition to being reasonably incident, an occupancy must also prevent or avoid

unnecessary or undue degradation of the public lands and resources. 43 CFR 3715.5(a).

The appellant bears the burden of proving that its occupancy is reasonably incident to prospecting, mining, or processing operations and justified under 43 CFR Subpart 3715 and that BLM's decision is erroneous. See Leadville Corp., 166 IBLA 249, 255 (2005); Precious Metals Recovery, Inc., 163 IBLA 332, 339 (2004); Thomas E. Swenson, 156 IBLA 299, 310 (2002). Pilot has failed to meet that burden.

Relying on what was revealed by its inspections over the years, BLM determined that the quantum of activity taking place on the Becki M millsite did not warrant the existing level of occupancy. On that basis, BLM directed the removal of the property that was not commensurate with the level of activity. [12/]

Appellant does not seriously challenge BLM's conclusion. Although it asserts that significant processing occurred on the Becki M millsite in the mid-1980s, it does not suggest that processing has continued at that level since it took over as operator of the site, and it is clear that the record would not support such a finding. In fact, appellant concedes that the activities currently being pursued on the site consist primarily of testing and research into nanometer-scale precious metals, with the ultimate goal of recovering those minerals. The development of new technology in general may fall within the term "reasonably incident," provided that development constitutes a "good faith effort to improve the methods of prospecting or exploration, mining, or processing locatable minerals," and is "active and continuing." 61 FR 37120 (July 16, 1996), discussing 43 CFR 3715.2; see Bradshaw Industries,

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[12/] The NON specifically found as follows:
"Based on the observations of the most recent and past inspections[,] you are in noncompliance with 43 CFR 3715 and must take action to remedy the noncompliance. Rather than causing you immediate and irreparable harm by ordering the immediate suspension of all occupancy and removal of all property within 90 days (sec. 3715.5-1), BLM is providing you with a plan for the removal of all portable items, including all personal property, all scrap metal and junk from the site based on a schedule that will encompass the next 220 days. When you complete the removal of all of the items in this removal plan, the BLM will re-evaluate the occupancy." (NON at 2, emphasis supplied.)

Given the NON's unmistakable factual determinations and the overwhelming support for those determinations in the record, it is not clear whether the emphasized language should be interpreted as BLM's conclusion that no occupancy is justified. We find the NON to be ambiguous with respect to the anticipated status of the occupancy at the expiration of the 220-day period, an issue to be distinguished from that of managing and implementing a removal effort in stages, which we do not here question.

152 IBLA at 63-64 n.3; but see Las Vegas Mining Facility, Inc., 166 IBLA at 314 n.5 (site used as a research facility was not reasonably incident to any processing operations). That the testing being conducted on the Becki M millsite may be reasonably incident, [13] however, does not mean that the testing requires the level of occupancy currently taking place on the site, a conclusion Pilot apparently accepts, at least to some extent, since it has already removed some of the unused personal property and equipment from the site.

Although appellant does not contend that all the items on the site are reasonably incident to its operations, it does object to the removal of the motor home, one of its three furnaces, and the portable laboratory. We find none of these specific objections to the removal plan to be persuasive. Pilot has not shown that the motor home on the site is regularly used, is included in the existing mining notice for the Becki M millsite, is authorized for long-term occupancy, or is otherwise reasonably incident to and commensurate with its operations on the Becki M millsite. Absent authorization, Pilot's future plan to use the motor home in the testing program for its project does not justify allowing the motor home to remain on the site.

Pilot also has not demonstrated that the extent of its testing program necessitates three working furnaces rather than the two BLM has allowed to remain, or that the retention of the two furnaces that produce the highest values would frustrate or defeat its research.

Similarly, as to the portable laboratories, BLM points out that only the unused portable laboratory behind the mobile home is designated for removal, while the portable laboratory on the east side of the mill building may remain as long as substantial, regular use continues. Pilot has not shown that its testing program warrants two portable laboratories or that both laboratories are being substantially and regularly used. Finally, appellant has not even identified, much less demonstrated, the use of or need for the equipment and personal property still stored in the mill building and at other places on the site. We therefore conclude that Pilot has not shown that occupancy beyond that allowed by BLM is reasonably incident to and commensurate with the limited testing operations being conducted on the Becki M millsite.

[3] BLM's response to Pilot's arguments on appeal forces us to return to the specific findings of the NON and the removal plan it established. In its Answer, BLM indicates that the gated fence will remain on the mill site during the 220-day period permitted by the removal plan. The first footnote to the portion of the removal plan

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[13] Although the NON (findings 1 through 5) and the underlying record would support a conclusion that it is not, we do not at this time decide the question of whether the limited, small-scale testing is reasonably incident.

that relates to a motor home, vehicles, and trailers states: "Each resident of the millsite may have one registered vehicle." On appeal, BLM acknowledges that it will allow at least one person to continue occupancy as a caretaker or watchman, as well as the gated fence. (Answer at 2.)

In addition to meeting the criteria for an occupancy prescribed in 43 CFR 3715.2 and 3715.2-1, a claimant who asserts the need for a caretaker or watchman to occupy public lands to protect valuable or hazardous property, equipment, or workings must show that the need is reasonably incident and continual, and that a caretaker or watchman is required to be present whenever the operation is not active or whenever the claimant or the claimant's workers are not on site. 43 CFR 3715.2-2. The record, the findings of the NON, and BLM's statements on appeal clearly appear to foreclose any possible basis set forth in 43 CFR 3715.2 and 3715.2-1 upon which Pilot could show the need for a caretaker or watchman under 3715.2-2. Thus, in the absence of a need to protect exposed valuable minerals from theft or loss; to protect operable equipment that is not readily portable from theft or loss; to avoid creating a hazard to the public from unattended equipment, surface uses, workings, or improvements; or a location in an isolated or physically inaccessible area, a caretaker or watchman cannot be justified under the regulations. [14/] BLM's statement that the gated fence will adequately protect Pilot's property and the public appears to underscore that conclusion. [15/] Under the circumstances, we simply do not perceive any basis under the regulations or the findings of the NON for allowing a caretaker or watchman, or their vehicles, to maintain an occupancy on the mill site.

Accordingly, the NON is affirmed in part, to the extent it ordered removal of the items enumerated in the enclosed removal plan, for the reasons stated in the NON.

The NON is set aside in part to the extent the removal plan allows a caretaker or watchman to occupy the mill site, and the matter is remanded to BLM for further

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[14/] BLM explains that the small laboratory quantities of chemicals stored on the mill site, if stolen, would pose no threat to the public, and further suggests that if Pilot is concerned about security, it should rent secure storage elsewhere and bring the portable laboratory and chemicals to the mill site when needed. (Answer at 2.) Pilot has not shown or suggested that this alternative is not feasible or practical.

[15/] Given the NON's specific factual findings about the whole occupancy, with the possible exception of finding 6, the basis for allowing the fence and gate is also doubtful. The fence is mentioned only in finding 6, which alludes to the security of equipment that is "attached to foundations or the ground" within a "fenced compound." (NON, finding 6.) As discussed, all portable property and equipment are to be removed within the 220-day period set by the NON.

consideration in light of the facts of record and the requirements of Subpart 3715, as discussed in this opinion.

To the extent not specifically addressed herein, Pilot's other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside in part and remanded to BLM for further consideration.

T. Britt Price
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge