

MESA SAND AND ROCK, INC.

IBLA 94-75          Decided March 2, 1994

Appeal from a letter issued by the Supervisor, Public Service Sections, Arizona State Office, Bureau of Land Management, informing Mesa Sand and Rock, Inc., that the rental fees for mining claim MC 82269 had been submitted untimely and returning the affidavit of labor for the claim and the check tendered in payment of the fees.

Appeal dismissed.

1. Appeals: Generally--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Board of Land Appeals

Under 43 CFR 4.410(a), the first prerequisite for an appeal to the Board of Land Appeals is that there be a written "decision" by BLM. However, the written form used by BLM in announcing its actions is not controlling on whether or not the Board will consider it to be a "decision" for purposes of entertaining an appeal.

2. Rules of Practice: Appeals--Mining Claims: Rental or Claim Fees: Generally--Mining Claims: Rental or Claim Fees: Small Miner Exemption

A conclusive presumption is one in which proof of basic fact renders the existence of the presumed fact conclusive and irrebuttable. Thus, the conclusive presumption of abandonment which attends the failure to pay timely the rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), and 43 CFR 3833.1-5 (58 FR 38199 (July 15, 1993)), does not arise until BLM has concluded by adjudication that proof of the basic fact exists, *i.e.* that the claimant has failed to qualify for the exemption or failed to pay the rental fee timely in accordance with the Act and regulations, and the claimant has exhausted its administrative appeal rights.

APPEARANCES: James P. Watts, Esq., Phoenix, Arizona, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE FRAZIER

On October 8, 1993, Mesa Sand and Rock, Inc. (Mesa), filed with the Arizona State Office, Bureau of Land Management (BLM) an affidavit of labor for mining claim A MC 82269 and a check for \$235. By letter dated October 12, 1993, the Supervisor, Public Services Section, Arizona State Office, BLM, returned the affidavit and the check, explaining that the rental fee was received untimely. In the letter, the Supervisor summarized the applicable provisions of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1378-79 (Oct. 2, 1992) (Act), and the implementing regulations requiring, on or before August 31, 1993, payment of rental fees, 43 CFR 3833.1-5 (58 FR 38199 (July 15, 1993)), or the submission of a request for an exemption from payment of the fees, 43 CFR 3833.1-6 and 43 CFR 3833.1-7 (58 FR 38199-38200 (July 15, 1993)). <sup>1/</sup> He further stated:

The BLM is powerless to accept claim rental fees for the assessment year beginning September 1, 1992 and for assessment year beginning September 1, 1993 after 11:59pm August 31, 1993.

Since you have not paid the rental fee or filed for the small miner's exemption on or before August 31, 1993, as required by the Act of October 5, 1992 and the enclosed regulations, you may wish to relocate your claims.

The letter did not include any appeals information. Nevertheless, on November 9, 1993, Mesa filed a notice of appeal.

On December 10, 1993, Mesa filed two documents with the Board, a "Motion for Order Remanding Proceedings or Motion for Extension of Time to File Statement of Reasons" and a "Petition for Stay" of the decision.

<sup>1/</sup> The Act provides in relevant part that

"for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e), and the filing requirements contained in section 314(a) and (c) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of \$100 to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993 \* \* \*."

106 Stat. 1378. The Act also contained a provision governing rental fees for the assessment year ending at noon on Sept. 1, 1994, requiring payment of an additional \$100 rental fee on or before Aug. 31, 1993. 106 Stat. 1378-79. The Act further provided, under certain conditions, for an exemption from the payment of the rental fees for claimants holding 10 or fewer mining claims, mill sites, or tunnel sites, the so-called small miner exemption. Id; see Lee H. & Goldie E. Rice, 128 IBLA 137 (1994).

In the motion for remand, appellant states that its notice of appeal is premature because BLM has not rendered a final decision in this case. Appellant states that BLM confirmed its belief that the October 12, 1993, letter was merely a form letter generated to accompany returned filings and that BLM represented that "no final decision has been made" regarding the claim in question (Motion for Remand at 2). Accordingly, appellant requests that the case be remanded to BLM for further proceedings. Appellant maintains that no stay is necessary because there has been no decision. Nevertheless, it asserts that it felt compelled to file a petition and set forth reasons for a stay "in the highly unlikely event that the Board determines that a stay order is necessary" (Petition at 2). 2/

BLM has not responded to the motion or the petition.

[1] Under Departmental regulation 43 CFR 4.410(a), a party to a case has a right of appeal to this Board should it be "adversely affected by a decision of an officer of [BLM]." Under that regulation, the first prerequisite for an appeal to this Board is that there be a written "decision." However, the written form used by BLM in announcing its actions is not controlling on whether or not the Board will consider it to be a "decision" for purposes of entertaining an appeal. The Board has construed letters issued by BLM to be decisions subject to appeal. See e.g. Robert E. Oriskovich, 128 IBLA 69 (1993); Keith Rush d/b/a Rush's Lakeview Ranch, 125 IBLA 346 (1993). In addition, whether BLM has included the appeals information is not dispositive because the Board has stated that failure to include the appeals paragraph will not deprive a party of its right of appeal. Texas Oil & Gas Corp., 58 IBLA 175, 88 I.D. 879 (1981). Likewise, BLM's inclusion of the appeals paragraph will not create an appeal right where none exists. Phelps Dodge Corp., 72 IBLA 226 (1983).

In this case, BLM sent appellant a form letter which stated that BLM was returning the check and affidavit because the rental fee was untimely. Although the letter states that failure to pay the fees or file for an exemption on or before August 31, 1993, "provides conclusive proof of abandonment of the mining claim or site," that letter was not an adjudication of the facts in the case, and BLM did not specifically make a finding regarding the status of the mining claim.

We stated in Rice, supra at 141:

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2/ It should be noted that under 43 CFR 4.21(a)(2), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal, unless a petition for stay pending appeal is filed together with a timely notice of appeal. In this case, the petition for stay was not filed at the same time as the notice of appeal. Nor was it received during the appeal period. Thus, the petition for stay was not filed together with the notice of appeal within the meaning of 43 CFR 4.21(a)(2). See Robert E. Oriskovich, 128 IBLA 69, 70 (1993).

We must assume that Congress was aware of the interpretation that this Department and the courts had given to section 314 of FLPMA [the recordation and annual filing provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c)(1988)] and that it intended the present language under consideration to be given the same construction. [3/] Thus, there is no reason to deviate from this interpretation in this case. Accordingly, where a mining claimant fails to qualify for a small miner exemption from the rental fee requirement, failure to pay that fee in accordance with the Act and regulations results in a conclusive presumption of abandonment.

[2] "A conclusive presumption is one in which proof of basic fact renders the existence of the presumed fact conclusive and irrebuttable" Black's Law Dictionary 1067 (5th ed. 1979). Thus, the conclusive presumption mentioned in Rice does not arise until BLM has concluded by adjudication that proof of the basic fact exists, *i.e.* that the claimant has failed to qualify for the exemption or failed to pay the rental fee timely in accordance with the Act and regulations, and the claimant has exhausted its administrative appeal rights. At that time, the presumption becomes effective and it relates back to the date payment was due.

While it appears clear at this time what BLM's decision will be in this case, we do not have that decision before us, and under the circumstances, we find that no appealable decision has been issued. The reason for this finding is that the letter in question is apparently a form letter sent to numerous claimants, many of whom may not have counsel as sophisticated as appellant's or who may not have counsel at all. To construe such a letter as a decision would mean that, despite the absence of notice of any appeal rights in the letter, following the passage of 30 days from receipt of the letter, any claims or sites involved would be deemed abandoned and void, without any further right of appeal. 4/ In addition, although we have

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3/ The pertinent language of the Act is: "[F]ailure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant" (106 Stat. 1379); *see* 43 CFR 3833.4(a)(2), 58 FR 38201 (July 15, 1993).

4/ The Board has held that even in the absence of a final decision by BLM, we will entertain a "protest" to a preliminary decision by BLM "when to do so would serve no useful purpose and where initial consideration of the matter at the Board level would expedite ultimate resolution thereof." Kenneth W. Bosley, 102 IBLA 235, 236 (1988), and cases cited therein. We

do not believe that accepting the appeal in this case would serve a useful purpose because, even though it might expedite ultimate resolution of this case, it would set an unacceptable precedent for considering all such letters as appealable decisions, thereby potentially jeopardizing the rights of some mining claimants.

stated many times regarding recordation and annual filing requirements and in the Rice case with regard to the rental fee requirement, that failure to pay timely results in a conclusive presumption of abandonment, we have also required a finding, through final adjudication, that the facts exist which support the presumption. 5/ There has been no adjudication in this case.

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

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Gail M. Frazier  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge

5/ In Rice, BLM did not declare the claims abandoned and void; however, it did adjudicate the Rices' request for exemption. On appeal of that determination, the Board found that the record showed that the appellants were not entitled to an exemption and that there was no evidence of payment of the rental fee. Thus, based on the Board's affirmation of BLM's adjudication of the underlying facts, it was proper for the Board to conclude that the presumption was applicable and that the claims were abandoned and void.

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

43 CFR 4.410 grants a right of appeal to "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management [BLM] \* \* \*." (Emphasis supplied.) The regulation does not say "final decision."

The right to appeal does not turn on what BLM considers to be its final act in a given matter or circumstance. Rather it turns on whether the appellant is a party to the case and whether the appellant has been adversely affected by a BLM decision which is sufficiently ripe for administrative review. Determination of those issues turns on the nature of the decision being appealed.

Animal Protection Institute of America, 79 IBLA 94, 100, 91 I.D. 115, 119 (1984).

In this case BLM stamped "cancelled" on appellant's affidavit of performance of annual work and returned it along with the check for the FY 1992 and 1993 filing fees. BLM's October 12, 1993, letter stated it could not accept the fees after August 31, 1993. It explained that "[f]ailure to pay the rental fees or file the certified statement for the small miners' exemption on or before August 31, 1993, as required by [P.L. 102-381], provides conclusive proof of abandonment of the mining claim \* \* \*." It concluded: "Since you have not paid the rental fee or filed for the small miner's exemption on or before August 31, 1993, as required by the Act of October 5, 1992 and the enclosed regulations, you may wish to relocate you[r] claims." It requested appellant to check to determine whether the lands were open to mineral entry before relocating and advised that the fee for filing location notices after September 1, 1993, was \$135 per claim.

BLM determined the essential fact that neither the fee nor the statement of exemption had been received before August 31, 1993, announced the legal conclusion resulting from that fact, i.e., that the claim was abandoned, and suggested what appellant could do if it wanted to relocate the claim. BLM's October 12, 1993, letter is a decision that is adverse to appellant and that is sufficiently ripe for administrative review.

Here, as in Texas Oil & Gas Corp., 58 IBLA 175, 88 I.D. 879 (1981), "it is specious to assert that BLM made no 'decision' \* \* \*." In that case "BLM [was] asserting that the rental for this lease [was] \$182, and that because that amount was not paid on or before the anniversary date, the lease automatically terminated." 58 IBLA at 180, 88 I.D. at 882. In this case BLM is asserting that the rental for this claim was late, and that because that amount was not paid or or before the deadline, the claim is abandoned. There is nothing more BLM needs to do or say.

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Will A. Irwin  
Administrative Judge