

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting annual filings and declaring abandoned and void certain unpatented mining claims. M MC 151953-74 (SD), M MC 151976-77 (SD), M MC 151979-81 (SD), and M MC 151983-88 (SD).

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold

Where a mining claimant makes a timely filing of an affidavit of assessment work during the filing year, but the check accompanying that affidavit, tendered in payment of the service charges, is correctly returned after the filing deadline as uncollectible by the bank upon which it is drawn, the filing must be considered untimely and the mining claims declared abandoned and void. However, by initially processing the timely filing, BLM earned the service charges and a subsequent payment will be retained and not returned to the claimant.

APPEARANCES: John J. Morris, President, M & A Mining, Inc., Rapid City, South Dakota.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Joseph J. Morris, President of M & A Mining, Inc., has filed an appeal from a decision of the Montana State Office, Bureau of Land Management (BLM), dated February 7, 1992, declaring the above-listed mining claims abandoned and void because the service charges required by 43 CFR 3833.1-3 did not accompany the affidavit of assessment work in that the check tendered in payment of those charges was dishonored by the bank.

BLM explained in its decision that the affidavit of assessment work for these claims was received on January 2, 1992, in an envelope bearing a postmark of December 30, 1991, and that a check for \$165 in payment of the service charges for the filings accompanied that affidavit. BLM stated, however, that on January 14, 1992, the check was returned with the notation "RETURNED NOT PAID NSF." (Capitals in original.)

On appeal, Morris explains that the check was not issued on the corporate account, but that it was inadvertently drawn on a personal account upon which other checks were drawn. He states that there was no intent to issue a check without sufficient funds; it was simple error. He contends that when he became aware of the error, he contacted BLM and was informed to send a money order to replace the check and that "this in no way would jeopardize any claims and/or filings of ours on said mining claims." He asserts that in accordance with that instruction, he forwarded a money order to BLM in the amount of \$165. He states that upon receipt of BLM's decision, he contacted the BLM State Office and was instructed that he could relocate the claims, which he states he has done, and that the \$165 would not be refunded but "would be kept by the Bureau of Land Management for the mail room and the individua[l] who typed the decision and letter to us."

Pursuant to section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1988), and Departmental regulation 43 CFR 3833.2-2, a claimant is required to file with the proper office of BLM either evidence of assessment work performed or notice of intention to hold a mining claim on or before December 30, of each calendar year following the calendar year of location. Such filing must be made within each calendar year, *i.e.*, on or after January 1 and on or before December 30. Ronald Willden, 97 IBLA 40 (1987); Robert C. LeFaivre, 95 IBLA 26 (1986). Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the mining claim. 43 U.S.C. § 1744(c) (1988); 43 CFR 3833.4.

The applicable regulation regarding this appeal is 43 CFR 3833.1-3, which provides that annual filings "shall be accompanied by a nonrefundable service charge of \$5 for each mining claim, millsite, or tunnel site." Further, beginning January 1, 1991, "[f]ilings that are not accompanied by the proper service charges set forth in §3833.1-3 of this title shall not be accepted and will be returned to the claimant/owner without further action." 43 CFR 3833.1-4(b). Based on those regulations, it is clear that there can be no timely annual filing without the accompanying service charge. Norman Filip, 124 IBLA 122 (1992); *cf.* Park City Chief Mining Co., 57 IBLA 346 (1981) (recording of a mining claim required to be accompanied by a service fee and there could be no recording without payment of the fee). Moreover, if the annual filing deadline passes without the filing of the service charge, BLM may properly declare the mining claims abandoned and void. *Id.*

We have held that where a mining claimant makes a timely annual filing during the filing year, but the check accompanying that filing, tendered in payment of the service charges, is correctly returned, after the filing deadline as uncollectible by the bank upon which it is drawn, subsequent payment of the service fee could not cure what had become, because of the dishonored check, an untimely filing. N.T.M., Inc., 128 IBLA 77, 80 (1993).

The 1991 affidavits of assessment work for the claims were timely filed in accordance with 43 CFR 3833.0-5(m). However, upon return of the check for insufficient funds, BLM returned the filings to Morris and issued

the decision under appeal. Morris has not alleged that he timely submitted the service charges; nor has he shown that the bank committed an error in dishonoring the check. Thus, the filing deadline passed without the payment of the service charges, and BLM properly deemed the claims abandoned and void.

Responsibility for complying with the recordation requirements of FLPMA rests with the owner of the unpatented mining claim as Congress mandated that failure to file the proper documents in the proper offices within the time periods prescribed in section 314 of FLPMA will, in and of itself, cause the claim to be lost. The Supreme Court has upheld the constitutionality of the statute, expressing that a claim for which timely filings are not made is extinguished by operation of law notwithstanding the claimant's intent to hold the claim. See United States v. Locke, 471 U.S. 84 (1985).

Assuming a BLM employee did inform Morris that if he tendered payment in replacement of the check that the claims would not be determined abandoned and void, that advice was erroneous. The Board has held that reliance on erroneous advice of a BLM employee cannot operate to vest any right not authorized by law. Silver Buckle Mines, Inc., 84 IBLA 306, 309 (1985); 43 CFR 1810.3(c). In this case, the claims were extinguished by operation of law when the filing deadline passed without payment of the necessary service charges, and since the claims were extinguished by operation of law, the subsequent submission of the \$165 money order could not have operated to save the claims.

The regulations at 43 CFR 3833.1-3(c) state that the annual filings submitted pursuant to 43 CFR 3833.2 are required to be accompanied by a nonrefundable service charge of \$5 per claim. In this case, appellant timely tendered his annual filings and a check to cover the necessary service charges. BLM, therefore, processed his documents making the necessary notations to the official records. However, following receipt of notice of the returned check, BLM returned the filings to Morris and retained copies in the file marked with the notation:

DATE STAMP CANCELLED
DUE TO NONPAYMENT
OF SERVICE FEES
DOCUMENT RETURNED

[Capitals in original.]

[1] The BLM Manual provides, regarding refunds of service charges or fees in the Mining Claim Recordation program, that "[f]ees should be earned and not refunded if any type of processing is done on a document" (BLM Manual 3833.53). In this case, Morris made a timely annual filing, but the check accompanying his filing, tendered in payment of the service charges, was correctly returned, after the filing deadline, as uncollectible by the bank upon which it was drawn. Thus, BLM had processed his filing and upon receipt of notice of the dishonored check, it undertook further actions by returning his documents and retaining copies bearing the above-quoted notation. In such a situation, the fees are earned and

when Morris subsequently submitted another check, BLM properly retained it. 1/ He is not entitled to a refund.

The fact that assessment work was done or that timely filings have been made in other years has no effect on the conclusive presumption of abandonment embodied in the statute. Since the statute is self-operative, a claim must be deemed abandoned when an annual filing is not timely received. Ptarmigan Co., 91 IBLA 113, 118 (1986), aff'd, Bolt v. United States, 994 F.2d 603 (9th Cir. 1991). As Congress did not provide for waiver of this requirement, the Department is without authority to excuse lack of compliance, to extend the time for compliance, or to afford any relief from the statutory consequences. Lynn Keith, 53 IBLA 192, 196, 88 I.D. 369, 372 (1981). Where an annual filing is not timely received, for whatever reason, the consequences must be borne by the claimant.

Accordingly, 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.

Bruce R. Harris
Deputy Chief Administrative Judge

1/ BLM's decision in this case stated:

"PLEASE NOTE that the \$165 service fee is a debt established for services rendered. Until this debt is paid in full, any future collectible remittance received from you can be applied towards this debt." (Capitals in original.)

CHIEF ADMINISTRATIVE JUDGE BYRNES CONCURRING:

While I agree that it is within Bureau of Land Management's (BLM) authority to keep the fees in question in this appeal, I believe that the correct course was for BLM to either issue an abandoned and void decision or allow the applicant a period of time to cure the defect and accept the filing. See BLM Instruction Memorandum 92-57, Nov. 27, 1991, BLM Manual § 1372.28 K; N.T.M., Inc., 128 IBLA 77 (1993) (CAJ Byrnes concurring).

I also note that BLM refunds service charges submitted with annual filings when the claims have been deemed abandoned and void by operation of law in a prior year, but a decision was not issued by BLM. See BLM Manual § 3833.53 D 2. Those annual filings have been processed to the same extent as the filing in question here, where the fees are not being refunded.

In this case, BLM collected the fees while all along intending to declare the claims abandoned and void. At best, this action was high-handed and, at worst, fundamentally unfair.

James L. Byrnes
Chief Administrative Judge