

LEBER MINING CO.

IBLA 94-74

Decided November 28, 1994

Appeal from decisions of the Montana State Office, Bureau of Land Management, declaring mining claims abandoned and void. MMC 34980 et al.

Decisions set aside and remanded.

1. Mining Claims: Plan of Operations--Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

Under 43 CFR 3833.1-7(d), a claimant seeking a small miner exemption must provide BLM with information concerning notices or plans of operations; when required information is unintentionally omitted from a timely filed certification of exemption from payment of rental, BLM shall notify the claimant of the deficiency and allow him 30 days to file the requested information, pursuant to 43 CFR 3833.4(b).

APPEARANCES: James E. Leber, President, Leber Mining Company, Elizabethtown, Pennsylvania.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Leber Mining Company has appealed from a group of eight decisions of the Chief, Solid Minerals Adjudication Section, Montana State Office, Bureau of Land Management (BLM), dated October 5 and 6, 1993, declaring mining claims abandoned and void for failure to satisfy filing requirements set by 43 CFR 3833.1-7(d) for exemption from payment of rental fees for the 1993 and 1994 assessment years (see Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), P.L. 102-381, 106 Stat. 1378-79 (1992)). The claims at issue were located between 1972 and 1992, and are situated in Jefferson County, Montana, for the most part within the Deerlodge and Helena National Forests.

BLM concluded the claims were null and void because certificates of exemption from payment of the rental fee that were filed on August 25, 1993, did not show there had been compliance with a provision of the Act that there be "a valid notice or plan of operations" in effect for the claims not later than August 31, 1993. The certificates at issue were submitted by Matthew Leber (MMC 34988, MMC 34989, MMC 34995 - MMC 34999, and MMC 44584 - MMC 44586), Ralph Weirich, Jr. (MMC 35001, MMC 35002, MMC 35004, MMC 35011, MMC 35013, MMC 35014, and MMC 44587 - MMC 44590),

Patrick Leber (MMC 44591 - MMC 44599 and MTMMC 179336), Clifford Leber (MMC 157339 - MMC 157345, MMC 157347, MMC 157348, and MMC 157350), Joseph Oless, Jr. (MMC 123029, MMC 123036, MMC 127121 - MMC 127123, and MMC 147143 - MMC 147147), Michael Leber (MMC 123017, MMC 123018, MMC 127113, MMC 127124, MMC 127125, MMC 127128, MMC 156358, MMC 156359, MMC 157352, and MMC 157354), Valerie Leber (MMC 34980, MMC 34981, MMC 34987, MMC 35003, MMC 35007, MMC 35009, MMC 35010, MMC 35012, MMC 35015, and MMC 35016), and Jerry Leber (MMC 157346, MMC 157349, and MTMMC 192659 - MTMMC 192665). On each certificate submitted appears the statement that a notice of mining operations is "[i]n process with BLM Butte Office." A BLM staff inquiry prompted by this notation led the BLM decisionmaker to conclude that "nothing has been received by either [the Butte BLM Office or U.S. Forest Service Ranger District Office] from you in regard to a notice or plan of operation." Based on this belief, BLM found the claims to be "abandoned and void [f]or failure to meet the requirement of having your mining claims covered under a Notice or approved Plan of Operation by August 31, 1993." (Emphasis in original.)

In a statement of reasons filed in support of appeal, the mining company (the operator of the claims at issue who made the filings here under review), asserts that required notices and plans were timely filed by the company with BLM and encloses "copies of Notices and Plans of Operations dated July 29th and August 20th, 1993 as were submitted by the operator to the BLM Butte field office." There is a copy of a notice for each of the eight claimants. The notices state they are offered under "36 CFR 228.4 Plan of Operation - Notice of Intent" and "43 CFR 3809: Disturbance of Five Acres or Less." It is argued that the certificates were made in compliance with the rules governing such filings, that notices of operations have been provided as required, and that the "long-term diligence with which we have pursued exploration" demonstrates the company's intent to conform to mining laws.

The exemption applications were apparently rejected because the operator failed to identify a specific notice or plan of operations on the certificates provided to BLM. The requirement that there be a plan or notice is statutory, the Act providing that fee exemption may be allowed only for a claimant

(i) that is producing under a valid notice or plan of operation not less than \$1500 and not more than \$800,000 in gross revenues per year as certified by the claimant from ten or fewer claims; or --(ii) that is performing exploration work to disclose, expose, or otherwise make known possible valuable mineralization on ten or fewer claims under a valid notice or plan of operation[.]

106 Stat. 1378-79.

A determination whether there were valid notices or plans is complicated by the fact that the mining claims in question are situated on both BLM and Forest Service lands. The Forest Service generally requires notice of mining operations to allow it to determine the likelihood of harm to surface resources and to regulate activities to minimize such harm. Under

Forest Service regulations, an operator must submit a notice of intention to operate if the activities "might cause disturbance of surface resources." 36 CFR 228.4(a). The Forest Service then has 15 days to determine if the operations are likely to "cause significant disturbance"; if it is so determined, the operator must submit a proposed plan of operations. *Id.* When a plan is required, the operator must await approval and thereafter conduct operations in accordance with the approved plan. 36 CFR 228.5. A notice of intent is not needed for prospecting or sampling activities that will not cause significant disturbance, or for operations not involving mechanized earthmoving equipment. 36 CFR 228.4(a)(1).

[1] BLM operating regulations recognize three levels of mining activity: casual use; mining activities causing surface disturbance of 5 acres or less; and mining activities disturbing more than 5 acres. 43 CFR 3809.1. For the first category of use, there is no requirement to contact BLM. 43 CFR 3809.1-2. If an operator disturbs less than 5 acres, notice must be submitted at least 15 days before starting work, but approval is not generally required. 43 CFR 3809.1-3. An approved plan of operations is required when more than 5 acres are disturbed, or in instances involving certain environmentally sensitive areas. 43 CFR 3809.1-4. In order to determine if the requirement that there be a valid notice or mining plan was satisfied by the documents the company filed, further inquiry is needed; the plans submitted to BLM must be evaluated.

BLM regulations require that plan serial numbers be included in a rental fee exemption certificate so that they can be identified and evaluated. 43 CFR 3833.1-7(d)(1). The certificates of exemption filed in this case with the State Office of BLM did not include such numbers. Nonetheless, failure to provide serial numbers was not fatal to the applications. Departmental regulation 43 CFR 3833.4(b) provides that an unintentional failure to file information required by 43 CFR 3833.1-7(d) in a document otherwise timely filed does not result in conclusive abandonment. The claimants complied with the statutory requirement that they certify their operations were conducted under a valid plan or notice. To verify that the information provided by them was correct, BLM regulations establish procedures for giving notice to claimants of deficiencies in such filings (such as omission of serial numbers) so as to allow them an opportunity to supply omitted information, providing in part that

such information shall be filed within 30 days of receipt of a notice from the authorized officer calling for such information. Failure to file the information requested by the decision of the authorized officer shall result in the mining claim, mill site, or tunnel site being deemed conclusively to be abandoned and it shall be void.

43 CFR 3833.4(b). BLM should have followed the quoted rule in this case. Each certificate submitted contained a statement that notices of mine operations required by the Act had been given to BLM, but did not identify the notices or plans to which reference was made. We therefore remand the case files provided on appeal to permit BLM to comply with its regulations by

giving the claimants and their operator notice and an opportunity to cure incomplete entries on their certificates by providing plan serial numbers and any other needed information concerning operations on the claims at issue within 30 days following receipt of BLM's request for information.

Concerning the scope of review on remand, BLM should take note that in a letter dated November 10, 1993 (received after this appeal was filed), the Helena District Ranger reported that "on or about July 20, 1993, BLM geologist Bill Weatherly (Butte District Office) forwarded a photocopy of what is apparently a BLM Notice form to the Helena Forest geologist, Bill Staley. Mr. Leber [the president of Leber Mining Company] had apparently submitted this Notice to the Butte District Office of the BLM." The Forest Service Ranger states that he informed Leber that "he needed to submit a Notice of Intent or Plan of Operation to the Forest Service." An undated letter from BLM to James Leber states that the notice was being reviewed "for completeness." The effect of this notice should also be considered when the validity of the other notices filed by the company is decided.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the case files are remanded for appropriate action by BLM.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge