

JERRY L. FABRIZIO

IBLA 94-40 Decided February 4, 1997

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring mining claims abandoned and void. AA-54907, AA-54908, AA-73161.

Affirmed.

1. Mining Claims: Abandonment–Mining Claims: Rental or Claim Maintenance Fees: Generally–Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

A claimant seeking a small miner exemption from payment of the annual claim rental fee required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1374, 1378-79 (1992), must file a certified statement supporting the claimed exemption on or before Aug. 31, 1993. Where a claimant fails to file the certification of entitlement to the exemption on or before the due date for such filing and does not pay the rental fee for the claims at issue, BLM properly deems the claims abandoned and void.

APPEARANCES: Bruce A. Butcher, Esq., Seattle, Washington, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Jerry L. Fabrizio has appealed from a September 24, 1993, decision of the Alaska State Office, Bureau of Land Management (BLM), deeming three unpatented placer mining claims situated in secs. 27 and 28, T. 28 S., R. 54 E., Copper River Meridian, Alaska, abandoned and void. By order dated December 8, 1993, the Board stayed the effectiveness of BLM's decision pending resolution of this appeal.

Fabrizio filed the mining claim location notices for the J.D.S. #2 placer mining claim (AA-54907) and the J.D.S. #3 placer mining claim (AA-54908) with BLM on December 3, 1984, as required by section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1994). He filed the mining claim location notice for the J.D.S. #4 placer claim (AA-73161) with BLM on May 15, 1990.

On September 13, 1993, Fabrizio filed a certification of exemption from the payment of the rental fees imposed by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), P.L. 102-381, 106 Stat. 1374, 1378-79 (1992), for the three claims along with affidavits of annual assessment work for both the assessment year ending at noon on September 1, 1993 (the 1993 assessment year), and the assessment year ending at noon on September 1, 1994 (the 1994 assessment year).

BLM deemed the claims abandoned and void in its September 24, 1993, decision. BLM explained that the Act and the regulations in 43 CFR 3833 (1993) required a claimant to pay a claim rental fee of \$100 per claim or site for each of the 1993 and 1994 assessment years or file a certificate of exemption for those years with BLM on or before August 31, 1993. Failure to pay the rental fees or file the certificate of exemption as required, BLM stated, conclusively constituted abandonment of the mining claim or site which was void. After noting that Fabrizio had filed his certificate of exemption for the claims on September 13, 1993, BLM held that because neither the certificate nor the rental fees were filed before August 31, 1993, the claims were deemed abandoned and void.

On appeal, Fabrizio challenges the constitutionality of the Act and the implementing regulations, contending that both the Act and the regulations provided inadequate notice that his claims could be lost and thus constitute an unconstitutional taking and a denial of due process (Notice of Appeal and Petition for Stay (Notice of Appeal) at 5). The regulations providing that, unless a small miner exemption certification is filed by August 31, 1993, the failure to pay the \$100 per claim rental fee by that date results in the loss of the claim even if the claimant is entitled to the exemption are also invalid, Fabrizio maintains, because they contravene the Act, which does not provide that a claim is abandoned and void if it is eligible for exemption but no certification is timely filed. *Id.* at 3-5. He asserts that the certification required by the Act to be filed by August 31, 1993, is a certification of the performance of annual assessment work, not a certification of the claimant's entitlement to the exemption, and that the Act provides no penalty for a miner's delinquency in submitting the assessment work certification. *Id.* at 3. The regulations' failure to accommodate miners who had performed the assessment work for the 1993 assessment year before the passage of the Act also nullifies BLM's decision, Fabrizio avers, because it ignores the Act's prospective nature. *Id.* at 5.

Fabrizio submits that the regulations are void and unenforceable because the Department failed to comply with the required promulgation procedures. Specifically, he disputes the Department's conclusions that no environmental impact statement was necessary under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1994), that the regulations were not a major rule under Exec. Order No. (EO) 12291, that the rules would not have a substantial economic effect on small entities under the Regulatory Flexibility Act, 5 U.S.C. § 601 (1994), and that the rules would not cause a taking and would have no

effect on private property rights under EO 12630 (Notice of Appeal at 5-6). He contends that BLM interpreted the Act in the most restrictive manner possible in promulgating the certification regulations by adding extensive and burdensome details to the assessment work certification and by mandating loss of a claim despite the Act's lack of any penalty for failure to timely file the assessment work certification. Id. at 6. Because thousands of claims and millions of dollars in effort are at stake, Fabrizio asserts that the regulations have a significant impact on the human environment and small business. He reiterates the lack of adequate notice and the absence of any provision addressing the period of the 1993 assessment year prior to passage of the Act constitute a taking affecting private property rights. Id.

Even assuming the validity of the challenged regulations, Fabrizio argues that his affidavit of annual assessment work for the 1992 assessment year filed on November 17, 1992, as supplemented by the September 1993 affidavit, satisfied the Act's certification of assessment work requirement since it stated that work was performed on the claims through September 1, 1992, beyond the end of the 1992 assessment year at noon on that date, and that the prospective nature of the work satisfied the certification for the 1994 assessment year (Notice of Appeal at 2). He further asserts that the annual placer mining application filed on January 4, 1993, which outlined the extensive work previously completed on the claims and described the work to be accomplished through October 8, 1993, satisfied the assessment work requirements for both the 1993 and 1994 assessment years and constituted adequate certification under the Act. Id. Finally, Fabrizio contends that BLM should have accepted his September 13, 1993, filing as a supplemental filing authorized by 43 CFR 3833.4(b) (1993) which provides that the unintentional failure to file all the required information will not constitute conclusive abandonment of the claim if the missing information is submitted within 30 days after notice of the deficiency as long as the document is otherwise timely filed, averring that his affidavit of annual assessment work for the 1992 assessment year and annual placer mining application should have been construed as the required timely filed document since they were sufficient to put BLM on notice that he would be eligible for the exemption. Id. at 2-3.

[1] On October 5, 1992, Congress enacted the Act, which provides in part:

[F]or 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: Provided further, That for fiscal year 1993,

each claimant - (i) that is producing under a valid notice or plan of operation not less than \$1,500 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; and that has less than ten acres of unreclaimed surface disturbance from such mining activity or exploration work, may elect to either pay the claim rental fee for such year or in lieu thereof do assessment work required by the Mining Law of 1872 (30 U.S.C. 28-28e) and meet the filing requirements of FLPMA (43 U.S.C. 1744 (a) and (c)) on such ten or fewer claims and certify the performance of such assessment work to the Secretary by August 31, 1993 * * *.

106 Stat. 1378. The Act also contains the identical provisions governing rental fees and exemptions for the assessment year ending at noon on September 1, 1994, requiring payment of the \$100 rental fee or certification of the small miner exemption on or before August 31, 1993. 106 Stat. 1378-79. The Act directs "[t]hat failure 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.

Implementing Departmental regulations require a claimant to pay, on or before August 31, 1993, a nonrefundable rental fee of \$100 for each mining claim, mill site, or tunnel site located on or before October 5, 1992, for each of the assessment years beginning on September 1, 1992, and September 1, 1993, or a combined rental of \$200 per claim. 43 CFR 3833.1-5(b) (1993). The only exemption provided from the rental requirement is the small miner exemption which is available to claimants holding 10 or fewer mining claims on Federal land who meet all the conditions set forth in 43 CFR 3833.1-6 (1993), which essentially tracks the statutory criteria. Pursuant to 43 CFR 3833.1-7(d) (1993), a claimant pursuing a small miner exemption must file a certification of exemption on or before August 31, 1993, supporting the claimed exemption for each assessment year the claimant seeks the exemption. See Washburn Mining Co., 133 IBLA 294, 296 (1995). The regulations further direct that failure to pay the required rental fee or to timely file the required rental fee exemption documents "shall be deemed conclusively to constitute an abandonment of the mining claim, mill site, or tunnel site, which shall be void." 43 CFR 3833.4(a)(2) (1993); see William B. Wray, 129 IBLA 173, 175 (1994); Lee H. & Goldie E. Rice, 128 IBLA 137, 141 (1994).

Although Fabrizio challenges the constitutionality of the Act and regulations on due process and takings grounds, the Board has no authority to declare an act of Congress or a duly promulgated regulation unconstitutional. See Chester Wittwer, 136 IBLA 96, 100 (1996); Amerada Hess Corp., 128 IBLA 94, 98 (1993), and cases cited. In any event, the Act's constitutionality has been upheld in court against a Fifth Amendment takings challenge. Kunkes v. United States, 32 Fed. Cl. 249 (Ct. Fed. Cl.

1994), *aff'd*, 78 F.3d 1549 (Fed. Cir. 1996). See also Chester Wittwer, *supra* at 100-101. Similarly, with respect to the adequacy of notice, the Board has found that the Act as implemented by the regulations fully complies with constitutional requirements. Chester Wittwer, *supra* at 99-100; Dee W. Alexander Estate, 131 IBLA 39, 43 (1994). Not only are all persons dealing with the Government presumed to have knowledge of relevant statutes and regulations, see Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Lester W. Pullen, 131 IBLA 271, 273 (1994), but BLM also published notice of the Act's rental fee payment requirements in the Federal Register, as well as subsequent notices of proposed and final rulemaking. 57 FR 54102 (Nov. 16, 1992); 58 FR 12878 (Mar. 5, 1993); 58 FR 38186 (July 15, 1993). Since sufficient notice of the statutory and regulatory requirements was provided, Fabrizio's arguments must be rejected.

Fabrizio also disputes the validity of the regulations implementing the small miner exemption provisions of the Act. Duly promulgated regulations have the force and effect of law and are binding on the Department. Arthur Farthing, 136 IBLA 70, 74 (1996); Alamo Ranch Co., 135 IBLA 61, 69 (1996); Ruth Tausta-White, 127 IBLA 101, 103 (1993), and cases cited. The Board does have the authority, however, to determine in the context of deciding an appeal whether or not a regulation as applied to an appellant is duly promulgated and consistent with its statutory basis. Alamo Ranch Co., *supra* at 71. Based on our review of the language of the Act, its legislative history, the preambles to both the proposed and final regulations, and the regulations themselves, we find that the regulations embody a reasonable interpretation of the Act and do not conflict with the Act's express provisions or goals. That Fabrizio would have preferred that BLM adopt a less restrictive interpretation of the Act's small miner exemption provisions does not undermine the legitimacy of the policy choices implicit in the adopted regulations. See Alamo Ranch Co., *supra*.

Nor do we find Fabrizio's objections to various procedural aspects of the promulgation of the rules persuasive. BLM addressed each of the issues raised by Fabrizio in the preamble to the final regulations and explained the rationale for its conclusions. See 58 FR 38195 (July 15, 1993). ^{1/} Although Fabrizio disagrees with BLM's conclusions, he has not shown that BLM's determinations are erroneous. Accordingly, we find that the regulations implementing the small miner exemption provisions of the Act were duly promulgated and therefore have the force and effect of law and are binding on the Department.

^{1/} The preamble to the final regulations also discusses the situation identified by Fabrizio in which a claimant had performed the annual assessment work for the 1993 assessment prior to the passage of the Act and explains the rationale for not allowing an exemption from the rental fee requirement under those circumstances, including Congressional comments stating that it was not the intent of Congress to allow such an exemption. 58 FR 38190-91 (July 15, 1993).

Fabrizio maintains that he satisfied the filing requirements for the small miner exemption set out in 43 CFR 3833.1-7(d) (1993) by submitting his affidavit of annual assessment for the 1992 assessment year and his 1993 annual placer mining application and that BLM should have accepted his September 13, 1993, filing as a supplemental filing authorized by 43 CFR 3833.4(b) (1993). Although the annual placer mining application fulfills the requirement that the claims be operated under a valid notice or plan of operations, the affidavit of annual assessment work for the 1992 assessment year, which was filed pursuant to section 314 of FLPMA, 43 U.S.C. § 1744 (1994), not the Act, contains none of the other information required by the regulation except for the claim names and BLM serial numbers for the mining claims listed in the affidavit. These documents, therefore, clearly are not equivalent to the certified statement delineated in 43 CFR 3833.1-7(d) (1993). Their deficiencies reflect more than just an unintentional failure to file the complete information required by that regulation curable by the filing of supplemental information in accordance with 43 CFR 3833.4(b) (1993) since the documents were not submitted in an attempt to comply with exemption certification requirements which Fabrizio admittedly was unaware of until a few days after September 1, 1993. See Notice of Appeal at 7.

Fabrizio filed a certification for the small miner exemption on September 13, 1993. The regulations require that the certified statement supporting the claimed exemption be filed on or before August 31, 1993, see 43 CFR 3833.1-7(d) (1993), and provide that the failure to timely file the certification "shall be deemed conclusively to constitute an abandonment of the mining claim * * * which shall be void." 43 CFR 3833.4(a)(2) (1993). Thus Fabrizio's failure to qualify for the small miner exemption or to pay the claim rental fee on or before August 31, 1993, resulted in the extinguishment of his claims by operation of law. Nannie Edwards, 130 IBLA 59, 60 (1994); see Lee H. & Goldie E. Rice, supra.

To the extent not specifically addressed herein, Fabrizio's additional 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.

Will A. Irwin
Administrative Judge

I concur.

James L. Byrnes
Chief Administrative Judge

