

**Editor's Note: Reconsideration denied by Order dated Sept. 8, 1998**

GAIL SCHMARDEBECK

IBLA 95-100

Decided January 14, 1998

Appeal from Decisions issued by the Nevada State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. NMC 27291 et al.

Stay vacated; appeals dismissed; Decision affirmed.

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

A claim of exemption from payment of mining claim rental fees sent by facsimile transmission and received by BLM on Sept. 1, 1993, was properly rejected as untimely filed.

APPEARANCES: Gail Schmardebeck, Salt Lake City, Utah, Vice President of Gold & Blue, Inc., for Appellants Gold & Blue, Inc., Geneale Schmardebeck, and LaRae, Brad, Craig, Lisa Lynn, Sherrie, and Russell Jones.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Gail Schmardebeck has appealed from eight Decisions issued on September 20, 1994, by the Nevada State Office, Bureau of Land Management (BLM), that declared unpatented mining claims abandoned and void for failure to pay annual rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), 106 Stat. 1378-79 (1992) or seek timely exemption from payment of such fees pursuant to 43 C.F.R. §§ 3833.0-5(m) and 3833.1-5. The case file shows the eight claimants named in the BLM Decisions here under review filed certifications of exemption from fee payment for the assessment years ending in September 1993 and 1994. Finding certifications filed on September 1, 1993, were not timely filed, BLM rejected the applications for exemption and declared the claims abandoned and void.

On November 2, 1994, Schmardebeck filed a notice of appeal as "implied agent" on behalf of Brad Jones (NMC 27291, NMC 27292), LaRae Jones (NMC 464385, NMC 464394), Gold & Blue, Inc. (Gold & Blue), (NMC 31404, NMC 31406, NMC 31407, NMC 390128 through NMC 390133, and NMC 390135), Geneale

Schmardebeck (NMC 464375 through NMC 464384), Russell Jones (NMC 31408, NMC 31409, NMC 31412, NMC 390134, NMC 464394, and NMC 464396 through NMC 464399), Lisa Jones (NMC 27291, NMC 27292, NMC 31404, NMC 31406 through NMC 31409, and NMC 31412), Sherrie Jones (NMC 31404 and NMC 31406 through NMC 31409), and Craig Jones (NMC 27291, NMC 27292). A stay of BLM's Decisions pending appeal was issued on December 5, 1994, because this case appeared to raise issues similar to those raised in Kathleen K. Rawlings, 137 IBLA 368 (1997), also an appeal involving late-filed payment of rental fees. The Order staying the eight Decisions here under review requested that Schmardebeck explain his appearance on behalf of the other persons listed in his notice of appeal because an implied agent is not included in the list of persons provided at 43 C.F.R. § 1.3, under the heading "who may practice" before the Department. Since Schmardebeck is an officer of Gold & Blue, there is no question that he is qualified to represent the corporation in his capacity as vice president. See 43 C.F.R. § 1.3(b)(3)(iii) (a corporate officer may represent the corporation in proceedings before the Department).

On January 12, 1995, in response to our inquiry into his authority to appear on behalf of the other individual claimants, Schmardebeck filed a statement signed by the persons listed above, among others, and dated January 3, 1995, reciting as follows:

To: The Department of the Interior, Forest Service, the IBLA, the U.S. Bureau of Land Management, Agencies, Mining companies, Mining people and other qualified interest agencies (States, Countries).

Submitted: That Wayne Jones and Gail Schmardebeck act as "Implied Agents" to submit the "Affidavit of and for Notice of Appeal" and "Follow-up-Reasons" to the U.S. Bureau of Land Management and further to authorize Wayne Jones and Gail Schmardebeck to act as "Implied Agents" for the future as in the past for mining purposes, also to negotiate vilable [sic] contracts with qualified mining people/buyers.

Claimants acknowledge receipt of the "Affidavit."

This document appears to be a form of letter-of-attorney or power-of-attorney appointing Schmardebeck an attorney-in-fact for the listed individuals for the limited purpose of prosecuting an appeal before this Board and otherwise taking action to preserve the interest of the associated owners of the mining claims at issue. Schmardebeck has been appointed an attorney-in-fact, in this particular matter, for other individuals listed in the notice of appeal, although he is not an attorney-at-law or otherwise qualified to practice before the Department. His position cannot, therefore, be distinguished from that occupied by the appellant B.S. Johnson in Henry H. Ledger, 13 IBLA 356, 357 (1973), wherein the Board dismissed an attempt by an attorney-in-fact to represent another person before the Department, unless it could be shown he was otherwise qualified to practice

before the Department under 43 C.F.R. § 1.3. No such showing having been made, the appeals filed on behalf of the individual Appellants must be dismissed. Accord, Building and Construction Trades Council of Northern Nevada, 139 IBLA 115, 118 (1997). Only the appeal filed by Schmardebeck on behalf of Gold & Blue remains, therefore, to be considered.

The Decision addressed to Gold & Blue was received by Wayne Jones on behalf of Gold & Blue on September 27, 1994; under Departmental rules, in order to be timely filed, a notice of appeal should have been received by BLM not more than 30 days later, or by October 27, 1994. See 43 C.F.R. § 4.411(a). It was not received until November 2, 1994. A grace period of 10 days is allowed for such filings, provided that it can be shown that the notice was transmitted before the end of the allotted 30-day filing period. 43 C.F.R. § 4.401(a). It appears, however, that BLM did not retain the envelope in which the notice of appeal was delivered, so that it cannot be said that the Gold & Blue notice was not timely filed. See Howard G. Williston, 114 IBLA 323, 325 (1990), and cases cited therein. Under the circumstances, we consider the merits of the Gold & Blue appeal.

The Act applied in this case by BLM requires claim rental fees to be paid "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. A similar provision establishing rental fees for the 1994 assessment year requires payment of a \$100 rental fee on or before August 31, 1993. 106 Stat. 1378-79. The Act further provides for exemption from payment of rental fees for claimants holding 10 or fewer claims and 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." 106 Stat. 1379.

Departmental regulations implementing the rental fee provisions of the Act require a claimant to pay, on or before August 31, 1993, a rental fee of \$100 for each mining claim located on or before October 5, 1992, for the assessment years ending in 1993 and 1994. 43 C.F.R. § 3833.1-5(b) (1993). Filing requirements for those seeking exemption from fee payment appear at 43 C.F.R. § 3833.1-7 (1993). Failure to pay the required rental fee or to timely file 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 C.F.R. § 3833.4(a)(2) (1993).

In a statement of reasons (SOR) filed in support of his notice of appeal, Schmardebeck contends that a certificate of exemption on behalf of Gold & Blue was sent to BLM on August 31, 1993, by facsimile transmission. Agreeing with BLM that the exemption certificates were due at BLM's office not later than August 31, 1993, Schmardebeck relates that

[a]ll documents, 10 Claim Exemptions, were faxed the Bureau of Land Management on August 31st, 1993. Inclosed with this letter see exhibit "A" the facsimiled transmission fax cover sheet sent the Bureau of Land Management; the date, the fax # of the Bureau,

and the Office that sent documents. Exhibit "B" is a copy of the receipt issued Gail Schmardebeck for cost of faxing 32 sheets to the Bureau of Land Management on August 31st, 1993. Exhibit "C" is the Thirty-Two sheets faxed the Bureau.

(SOR at 4-4.)

[1] This argument assumes that facsimile transmission coincides with receipt of the documents transmitted, and that proof that documents were sent establishes that they were simultaneously received; this assumption is without foundation in the record. Receipt of the Gold & Blue exemption certificate on September 1, 1993, is acknowledged by BLM. The fact that a fax transmission was made does not establish when documents sent thereby were received by the addressee; nor does any regulation impute constructive notice to a facsimile transmission so as to establish the date of receipt. See Animal Protection Institute of America, 124 IBLA 231, 233 (1992) (a case where BLM was unable to establish that a facsimile transmission to an interested party was received on the day the document was faxed). Every document sent by Schmardebeck bears a code showing "Sep 01, 93," with times from 10:02 to 10:26; regardless when he delivered the documents for transmission, receipt did not occur until September 1, 1993.

By showing that he faxed documents to BLM, Schmardebeck has not shown, as he must do in order to prevail, that the documents at issue were filed with BLM not later than August 31, 1993. There being no grace period allowed in such cases as these, the exemption application of Gold & Blue was properly rejected by BLM when it was received a day after the deadline for filing had passed. See Kathleen K. Rawlings, supra; Bart Cannon, 138 IBLA 242, 244 (1997).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the stay of the eight BLM Decisions here under review is vacated; the appeals taken from BLM's Decisions addressed to Geneale Schmardebeck and Sherrie, Lisa Lynn, Brad, Craig, LaRae, and Russell Jones are dismissed; and the Decision addressed to Gold & Blue, Inc., is affirmed.

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Franklin D. Amess  
Administrative Judge

I concur.

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James L. Burski  
Administrative Judge

