

GOLDIE JAMES
M.B.M. MINING CORP.

IBLA 95-208

Decided April 9, 1998

Appeal from a decision of the Colorado State Office, Bureau of Land Management, declaring three unpatented lode mining claims forfeited by operation of law. CMC-160298, CMC-160299, CMC-163248.

Affirmed.

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

Section 10101(d) of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 28f(d) (1994), granted the Secretary broad discretionary authority to provide for the waiver of required mining claim maintenance fees for claimants holding 10 or fewer claims. Pursuant to this authority, the Department adopted 43 C.F.R. § 3833.1-7(d) (1994), which required that any small miner seeking a waiver of the maintenance fees for the assessment year commencing at noon on Sept. 1, 1994, file a waiver certification on or before Aug. 31, 1994. Where a mining claimant failed either to file a timely waiver certification for certain mining claims or submit the required maintenance fees for the claims, those mining claims are properly deemed conclusively to be forfeited.

2. Equitable Adjudication: Substantial Compliance—Mining Claims: Rental or Claim Maintenance Fees: Generally—Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

Equitable adjudication is not available to excuse failure to timely file, in accordance with section 10101 of the Omnibus Budget Reconciliation Act of Aug. 10, 1993, 30 U.S.C. § 28f(a) (1994), and its implementing regulations, maintenance fees or a waiver certification, because failure to timely file is, ipso facto, a failure to substantially comply with the law.

3. Constitutional Law: Generally--Mining Claims: Abandonment--Mining Claims:
Rental or Claim Maintenance Fees: Generally

The conclusive presumption of abandonment for failure to pay the \$100 per claim annual fee does not result in an unconstitutional taking of private property in violation of the Fifth Amendment.

APPEARANCES: Richard O. Austerman, Esq., Denver, Colorado, for Appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Goldie James and M.B.M. Mining Corporation have appealed from a December 8, 1994, Decision of the Colorado State Office, Bureau of Land Management (BLM), declaring the Leland North, the Leland No. 2, and the Leland No. 3 unpatented lode mining claims (CMC-160298, CMC-160299, and CMC-163248) forfeited by operation of law because no \$100 per claim maintenance fee or waiver certification was filed for the claims on or before August 31, 1994, as required by section 10101 of the Omnibus Budget Reconciliation Act of August 10, 1993 (the Maintenance Fee Act), 30 U.S.C. § 28f(a) (1994), and 43 C.F.R. §§ 3833.1-5, 3833.1-6, and 3833.1-7. The BLM received Appellants' maintenance fees on September 19, 1994, in an envelope bearing a September 16 postmark. No waiver certification was ever filed.

Under 30 U.S.C. § 28f(a) (1994), the holder of an unpatented mining claim, mill site, or tunnel site is required to pay a claim maintenance fee of \$100 per claim on or before August 31 of each year for the years 1994 through 1998. Under 30 U.S.C. § 28i (1994), failure to pay the claim maintenance fee "shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law." The statute gives the Secretary discretion to waive the fee for a small miner who holds not more than 10 mining claims, mill sites, or tunnel sites, or combination thereof, on public lands and has performed assessment work required under the Mining Law of 1872. 30 U.S.C. § 28f(d)(1) (1994). The BLM has implemented this statute with a regulation that requires a claimant to file "proof of the * * * conditions for exemption * * * with the proper BLM office by the August 31 immediately preceding the assessment year for which the waiver is sought." 43 C.F.R. § 3833.1-7(d)(2).

Departmental regulation 43 C.F.R. § 3833.0-5(m) provides that a maintenance fee payment will be considered timely if it is received within the time period prescribed by law, or, if mailed to the proper BLM office, is contained in an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed by law and received by the proper BLM

office within 15 calendar days after such period. The envelope containing Appellants' maintenance fees was postmarked September 16, 1996, which is not within the period prescribed by law. In the absence of a postmark bearing a date within that time period, maintenance fees received after August 31 are not timely. See Paul W. Tobeler, 131 IBLA 245, 248 (1994).

Appellants assert that they have substantially complied with the statutory maintenance fee requirements and that the automatic forfeiture of their claims is not required. They further assert that they have complied with the statutory requirements for a small miner waiver and that they have substantially complied with 43 C.F.R. § 3833.1-7(d)(2), even though they never submitted the small miner waiver certificate required by that regulation. Appellants assert that any deficiencies in their compliance with that regulation are curable.

Appellants further contend that to the extent that they complied with statutory requirements but failed to comply with applicable regulations, the regulations were beyond the scope of the Secretary's rulemaking authority. They assert that application of those regulations to them would be arbitrary and capricious, and that the invalidation of their claims constitutes an unlawful taking.

The BLM responds that the law clearly requires that the fees had to be paid before the assessment year beginning at noon on September 1, 1994, or the claims would be forfeited. It notes that Appellants attempted to pay the fees in lieu of performing assessment work, and asserts that having made that choice, they are precluded from proceeding in a different manner. The BLM disagrees with Appellants' arguments that the regulations are contrary to the statute and that applying for a small miner waiver is unnecessary.

Appellants recognize that BLM has interpreted the Maintenance Fee Act to make untimely payment a "non-curable defect" and that this interpretation is consistent with interpretations of the filing requirements of section 314 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1744 (1994), and Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Rental Fee Act), Pub. L. No. 102-381, 106 Stat. 1374, 1378-79 (1992). (Statement of Reasons (SOR) at 4.) See United States v. Locke, 471 U.S. 84 (1985); Lee H. and Goldie E. Rice, 128 IBLA 137, 141 (1994). Nevertheless, they advance several arguments why such an interpretation is in error.

We are not persuaded. In Harlow Corp., 135 IBLA 382, 387 (1996), we compared the Maintenance Fee Act with the Rental Fee Act and concluded that

although the language of the statutes varied in some particulars, they were sufficiently similar that they should be construed in reference to each other. ^{1/}

Although Appellants filed no small miner waiver certification on or before August 31, 1994, as required by Departmental regulation 43 C.F.R. § 3833.1-7(d), they state that they satisfied all of the statutory requirements to qualify for the small miner waiver provided for in 30 U.S.C. § 28f(d)(1) (1994), which states that

[t]he claim maintenance fee may be waived for a claimant who certifies * * * that on the date payment was due, the claimant and all related parties—(A) held not more than 10 mining claims, mill sites, or tunnel sites, or combination thereof, on public lands; and (B) have performed assessment work required under the Mining Law of 1872.

The implementing regulation requires that "[i]n order to hold mining claims or sites for the assessment year beginning at 12 o'clock noon on September 1, 1994, each small miner shall file a waiver certification on or before August 31, 1994." 43 C.F.R. § 3833.1-7(d). Appellants did not submit a timely waiver.

Appellants note that the statute does not actually require the small miner to request a waiver nor does it require certification to be submitted by a particular date. They assert compliance with other requirements of BLM's regulations, but to the extent that they did not comply with all requirements, they assert that the regulations were beyond the scope of the Secretary's rulemaking authority. Citing portions of the legislative history of the Maintenance Fee Act, Appellants contend that automatic forfeiture is not necessary to comply with legislative intent, to accomplish the purposes of the Act, or to avoid unmanageable administrative burdens, and that automatic forfeiture is at odds with the program established by the Maintenance Fee Act. (SOR at 5-7.)

[1] In Alamo Ranch Co., *supra*, at 62-63, we recognized that the maintenance fee regulations imposed more specific requirements than those which appeared in the Maintenance Fee Act, and that the terms of the statute itself did not expressly require a forfeiture of the claim for failure to file waiver documents by the deadline. After giving detailed consideration to the legislative history of the Maintenance Fee Act, we nevertheless concluded:

^{1/} In Alamo Ranch Co., 135 IBLA 61, 73 (1996), we recognized one important difference between the Rental Fee Act and the Maintenance Fee Act, i.e., that while an exemption from rental fees for small miners was established by statute, the Maintenance Fee Act made the small miner waiver a matter of discretion with the Secretary. The significance of this distinction is discussed infra.

It is absolutely clear * * * that Congress knowingly chose to grant the Secretary of the Interior the discretionary authority to provide for the waiver of required maintenance fees for those holding 10 or fewer claims if he deemed such a waiver desirable. In doing so, Congress necessarily vested in the Secretary broad authority to fashion rules implementing such a waiver system. The Secretary's discretionary authority to develop such rules is not constrained by any former procedures used to implement the Rental Fee legislation but rather is only constrained by such express limitations as are inherent in the legislative grant of authority. * * * Since Congress left it to the Secretary to determine if any waiver of the maintenance fee for small miners was to be allowed, the Secretary clearly has the authority to require, as a precondition for granting a waiver, that certification of qualifications for a waiver be filed as of a date certain, failing in which no waiver will be granted. This is essentially what 43 CFR 3833.1-7(d) provides. As this regulation has been promulgated pursuant to lawful authority, * * * this Board is required to enforce it according to its plain terms.

Id. at 75; see Harlow Corp., supra, at 385 (footnotes omitted).

[2] Appellants allege substantial compliance with the requirements of the Maintenance Fee Act, and contend that automatic forfeiture is inconsistent with the provisions of 43 U.S.C. §§ 1161, 1164 (1994), which authorize equitable adjudication of certain cases. See 43 C.F.R. § 1871.1-1. In Basic Rock & Sand, Inc. (On Reconsideration), 110 IBLA 1, 6 (1989), the Board held that equitable adjudication is not applicable to annual filings made pursuant to the requirements of section 314 of FLPMA, 43 U.S.C. § 1744 (1994). In a concurring opinion, Judge Burski explained:

Equitable adjudication * * * is a process by which the Department may adjudicate various entries and land claims under principles of equity and justice. Under the Department's regulations, the sine qua non for equitable adjudication is "substantial compliance" with the law. See 43 CFR 1871.1-1. Far from supporting appellant's position, the decision of the Supreme Court in United States v. Locke, 471 U.S. 84 (1985), makes it abundantly clear that equitable adjudication is not available to cure a failure to timely file the required documents under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA).

Thus, the claimants in Locke, who had hand-delivered the annual filings one day late, argued, inter alia, that they had substantially complied with the requirements of section 314(a) of FLPMA. In rejecting this contention, the Court expressly held that "[a] filing deadline cannot be complied with, substantially or otherwise, by filing late – even by one day."

471 U.S. at 101. Inasmuch as equitable adjudication requires, as a prerequisite, a finding of substantial compliance, it is impossible to grant equitable adjudication to a mining claim conclusively deemed abandoned and void under section 314 for the failure to timely file the annual assessment work, since a failure to timely file is, ipso facto, a failure to substantially comply.

Basic Rock & Sand, Inc., *supra*, at 8-9.

The same rationale is applicable to the Maintenance Fee Act and its implementing regulations. Thus, equitable adjudication is not available to excuse failure to timely file maintenance fees or a small miner waiver under the Maintenance Fee Act, because failure to timely file is, ipso facto, a failure to substantially comply with the law.

[3] Although Appellants contend that unpatented mining claims are property rights and that the forfeiture of their claims violates the Due Process and Takings clauses of the Fifth and Fourteenth Amendments of the Constitution, we have often observed that the Board is not an appropriate forum to consider the constitutionality of Federal legislation. See Idaho Mining & Development Co., 132 IBLA 29, 33 (1995); Amerada Hess Corp., 128 IBLA 94, 98 (1993). Appellants should note, however, that in United States v. Locke, *supra*, the Supreme Court upheld the constitutionality of a similar forfeiture provision, 43 U.S.C. § 1744(c) (1994), and held that a claim for which timely filings were not made was extinguished by operation of law, notwithstanding the claimant's intent to hold the claim. In that case, a required filing was 1 day late.

More recently, a constitutional challenge to the Rental Fee Act was rejected by the United States Court of Appeals for the Federal Circuit in Kunkes v. United States, 78 F.3d 1549, *cert. denied*, 117 S. Ct. 74 (1996). Citing the Supreme Court's decision in Locke, *supra*, the Federal Circuit acknowledged that unpatented mining claims are a "unique form of property," but found that "claimholders take their claims with the knowledge that the Government, as owner of the underlying fee title, maintains broad regulatory powers over the use of the public lands on which unpatented mining claims are located." Kunkes, *supra*, at 1553. We have adhered to the ruling in Kunkes in cases involving maintenance fees. E.g., Harlow Corp., *supra*, at 385-87.

Thus, the failure to make timely payment of the annual claim maintenance fee or file a timely waiver certification with BLM creates a conclusive presumption of forfeiture. 43 C.F.R. § 3833.4(a)(2); Harlow Corp., *supra*. Neither BLM nor this Board has the authority to excuse lack of compliance with the maintenance fee requirement, to extend the time for compliance, or to afford any relief from the statutory consequences, and the Board may not consider special facts or provide relief in view of mitigating circumstances. See Lee H. and Goldie E. Rice, *supra*.

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 Decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

T. Britt Price
Administrative Judge

