

HOWARD J. HUNT

IBLA 96-161, 96-207

Decided March 5, 1999

Appeals from two decisions of the Alaska State Office, Bureau of Land Management, declaring a total of 10 unpatented mining claims abandoned and void for failure to pay maintenance fees. AA-27456 et al.

Affirmed as modified.

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

Sec. 10101(d) of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 281(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. That authority is constrained by such express limitations as are inherent in the Act. 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 on Sept. 1, 1994, file a certification of entitlement on or before Aug. 31, 1994. Where a claimant has failed to timely file such a certification for certain mining claims and has also failed to timely submit the required maintenance fees for the claims, those mining claims are properly deemed conclusively to be forfeited.

APPEARANCES: Joseph J. Perkins, Jr., Esq., Anchorage, Alaska, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

Howard J. Hunt has appealed from two decisions 1/ of the Alaska State Office, Bureau of Land Management (BLM), declaring a total of 10 unpatented

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1/ In a decision issued to Hunt and Glenn R. Heatherly dated Jan. 23, 1996, BLM declared the Karen #1 (AA-27456), Karen #4 (AA-27457), Karen #5

mining claims abandoned and void because no \$100 per claim maintenance fee or waiver certification was filed for the claims on or before August 31, 1995, 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. BLM did not receive the small miner waiver certification until January 29, 1996, when the notice of appeal in IBLA 96-161 was filed. Because no maintenance fees had been paid or filings made by the August 31 deadline, BLM issued the decisions from which these appeals were taken.

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). 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. § 3833.1-6(d)(2).

In his notice of appeal, Hunt states that he neglected to file the maintenance fee waiver certificate, but asserts that the assessment work was performed for the claims and the filing fees paid for 1995. Hunt intends to continue work on the claims and requests that BLM accept a late maintenance fee waiver.

In his statement of reasons, Hunt points out that there is nothing in the Maintenance Fee Act which requires that the certification be filed at any particular time. He asserts that a precise reading of the plain language of the statute would suggest that a claimant could not truthfully certify to the Secretary anything about the required facts until on or after August 31. Therefore, according to Hunt, a filing after August 31 must have been contemplated by Congress. Hunt contends that the requirement set forth in 43 C.F.R. § 3833.1-7(d) to file a certification on or before August 31 of each year containing statements as to what the facts

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fn. 1 (continued)

(AA-27458), and Karen #14 (AA-27459) mining claims abandoned and void. Hunt's appeal from that decision was assigned docket number IBLA 96-161. In a decision issued to Hunt and Heatherly dated Feb. 12, 1996, BLM declared the KAREN 2 (AA-33588), KAREN #3 (AA-33589), Karen #6 (AA-33590), Karen #7 (AA-33591), Karen #8 (AA-33592), and Karen #11 (AA-33595) mining claims abandoned and void. Hunt's appeal from that decision was assigned docket number IBLA 96-207.

are or will be on August 31 may be a legitimate exercise of regulatory authority, but that the regulation is not a restatement of what the statute says.

Hunt submits that the law must allow the mandatory certification to be given at any time up to and including the 30th day after receipt from BLM of a notice indicating that said certification was not received. According to Hunt, only then should BLM be permitted to declare the claims void simply for failure to file the certificate. Appellant refers to Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981), in which the court held that BLM cannot deem a claim abandoned merely because the supplemental filings required by 43 C.F.R. § 3833, and not by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1994), are not made. The court stated that failure to file the supplemental information must be treated as a curable defect and that a claimant who fails to file the supplemental information must be notified and given 30 days in which to cure the defect. Appellant contends that because the failure to comply timely with a filing requirement imposed solely under 43 C.F.R. Part 3833 and not by a statute is a curable defect, the waiver certification must be permitted to be filed no later than the 30th day after receipt from BLM of a notice indicating that said certification was not received. In further support of his contention, appellant cites Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981), holding that failure to file a notice of intent to hold a mill site in a timely manner is a curable defect that becomes fatal only after a subsequent failure to comply with a notice of deficiency.

The issue of the lack of a statutory deadline for filing waiver certifications under the Act was examined by the Board in Alamo Ranch Co., Inc., 135 IBLA 61 (1996). Therein, we stated that the Act did not provide for a statutory exception to the maintenance fee requirement. Instead, Congress provided that "[t]he claim maintenance fee required under this section may be waived for a claimant who certifies in writing to the Secretary that on the date the payment was due" certain statutory requirements for a waiver were met. 30 U.S.C. § 28f(d)(1) (1994) (emphasis supplied). We concluded that under the Act a waiver of the maintenance fee requirements was discretionary with the Secretary. We further held:

It is absolutely clear from the foregoing 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 only constrained by such express limitations as are inherent in the legislative grant of authority.

135 IBLA at 75 (emphasis added; footnotes omitted).

In this case, forfeiture arises from failure to comply with the Maintenance Fee Act's requirement to pay the maintenance fee for each mining claim on or before August 31 for each of the years 1994 through 1998. The Secretary established by regulation that the only way to escape the payment of the fee and prevent a claim from being forfeited was to file on or before August 31 of those years, a small miner waiver. And, as noted above, while the statute specified no deadline for the filing of the application for a small miner exemption, the Secretary's authority to allow the filing of a waiver after the date required for payment of the Maintenance Fee is necessarily constrained by the plain text of the statute requiring the payment of the \$100 fee by August 31.<sup>2/</sup> Therefore, when a claimant fails to file a waiver timely, as in this case, and no payment has been made, as in this case, forfeiture results from the statutory requirement to pay by a date certain. See 30 U.S.C. § 28i (1994). Since Hunt failed to either pay the claim maintenance fee or file a waiver certification by August 31 as required by 43 C.F.R. § 3833.1-7(d), the claims are conclusively deemed to be forfeited and null and void. 43 C.F.R. § 3833.4(a)(2). See Harlow Corp., 135 IBLA 382, 385 (1996); Joe Bob Hall, 135 IBLA 284, 286 (1996).

The Topaz case cited by appellant does not control the disposition of this appeal. In Topaz, the court stated that the Secretary had correctly established by regulation that a claim would not be deemed abandoned merely because the filings required only by regulation and not by section 314 of FLPMA, 43 U.S.C. § 1744 (1994), were not made. However, the court indicated that there must have been compliance with FLPMA.

Although we sympathize with appellant in the loss of his claims, the provisions of the statute are self-executing, and even where extenuating circumstances are asserted, BLM and this Board are without authority to excuse lack of compliance with the maintenance fee requirement of the Act, to extend the time for compliance, or to afford any relief from the statutory consequences. Richard W. Cahoon Family Limited Partnership, 139 IBLA 323, 326 (1997); Paul W. Tobeler, 131 IBLA 245, 249 (1994).

We note that the decisions from which the appeal is taken declared the claims abandoned and void, but the Maintenance Fee Act provides that 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." BLM's decision is modified accordingly.

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<sup>2/</sup> The agency noted a variety of practical, policy, and legal reasons for selecting the date of Aug. 31. The regulations were promulgated on Aug. 30, 1994, the day before the initial waiver certification was to be submitted. The Aug. 31 date replicated the requirements of the Rental Fee Act and its implementing regulations. Aug. 31 is the day before the beginning of a mining claim assessment year. See 59 FR 44846, 44846-50.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed as modified.

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James L. Bynes  
Chief Administrative Judge

I concur.

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Bruce R. Harris  
Deputy Chief Administrative Judge