

WILLIAM R. SMITH
SANDRA L. SMITH

IBLA 97-302

Decided July 22, 1999

Appeal from a decision by the Oregon State Office, Bureau of Land Management, dismissing notices of appeal for decisions declaring Midget Placer mining claim, ORMC 132495 (formerly ORMC 09181), null and void, rejecting mineral patent application, OR 45603, and withdrawing a contest complaint.

Decision vacated, and appeals dismissed.

1. Administrative Procedure: Administrative Review--Appeals: Generally--Rules of Practice: Appeals: Notice of Appeal

A document which challenges an appealable BLM decision should be considered to be a notice of appeal, and it does not matter that the appellant has called it a "protest."

2. Appeals: Jurisdiction--Board of Land Appeals--Rules of Practice: Appeals: Dismissal

The Interior Board of Land Appeals is the sole arbiter of its jurisdiction. Under 43 C.F.R. § 4.411(a), a notice of appeal must be filed in the office of the officer who made the decision within 30 days to give the Board jurisdiction over the decision. The determination regarding whether a filing received within the 10-day grace period provided under 43 C.F.R. § 4.401(a) was transmitted or probably transmitted before lapse of the appeal period is properly made by the Board, not BLM.

3. Appeals: Jurisdiction--Board of Land Appeals--Rules of Practice: Appeals: Dismissal

When a notice of appeal is not transmitted to the office issuing the decision being appealed within the appeal period, the Board does not gain jurisdiction over the subject matter of the appeal, and the Board must dismiss the appeal.

APPEARANCES: Don W. Leach, Esq., Canyonville, Oregon, for William R. and Sandra L. Smith; Marianne King, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

William R. Smith and Sandra L. Smith (the Smiths) appeal a February 21, 1997, decision issued by the Oregon State Office, Bureau of Land Management (BLM), dismissing an appeal of an October 13, 1995, decision issued by the same BLM office because the notices of appeal had not been filed in a timely manner. The October 13, 1995, decision had declared the Midget Placer mining claim, ORMC 132495 (formerly ORMC 09181), null and void and rejected mineral patent application OR 45603. An October 20, 1995, decision issued by that office withdrew a contest complaint against the claim. The Smiths' notices of appeal of these two decisions were received by the Oregon State Office, BLM, on November 30, 1995.

By letter dated February 21, 1997, BLM informed the Smiths that their appeals had been deemed untimely and dismissed. The following explanation was given for this determination:

Our record indicates that on October 23, 1995, you received the [BLM] decision dated October 13, 1995, rejecting the patent application, canceling the First Half Final Certificate, and declaring the Midget Placer Mining Claim Null and Void. The record also shows that on October 23, 1995, you received the BLM decision dated October 20, 1995, withdrawing the contest complaint. The appeal covering these decision must have been received in the Portland office of the BLM, which is the office of the authorized officer, on or before November 23, 1995, or shown to be transmitted before the November 23 due date, and received within the 10 day grace period after the due date, which would have been December 3, 1995.

It is recognized that you made an attempt to file the initial appeal within the time allotted but inadvertently filed the document with the Roseberg District Office. Unfortunately, the Roseberg office is not the office of record and the documents cannot be considered timely filed.

(February 21, 1997, BLM Letter at 1.)

The Smiths filed a "Protest" of the February 21, 1997, decision and a "request for reconsideration" of BLM's position with the BLM State Office on March 24, 1997. They argue that they did not receive sufficient information in the October 13 and 20 decisions to identify the proper BLM office in which to file their appeals, and explain that they filed notices of appeal in the Roseburg District Office, BLM, within the time required

for filing an appeal. By form transmittal memorandum dated April 8, 1997, the State Office forwarded the Smiths' "Protest and request for reconsideration" to this Board, and sent a copy to the Smiths. On April 24, 1997, the Smiths filed a "Motion to Remand with Instructions to Fairly Consider the Issues Raised by Claimants," arguing that BLM had informed them that the February 21, 1997, BLM letter "was not a decision [and] that the proper way to deal with the letter was to write a protest." According to the Smiths, BLM indicated in response to their Attorney's phone call that "[t]he issues raised in that protest letter would be given consideration and * * * BLM would make a 'decision' from which the claimants could appeal." (Motion to Remand at 1.)

In response, BLM characterizes its action as follows:

[The Oregon State Office] reviewed the protest and request for reconsideration and concluded that the protest confirmed that the notices of appeal were untimely filed, as well as that the protest was properly to be treated as an appeal. The [Oregon State Office] transmitted the protest to the Interior Board of Land Appeals (IBLA).

(Answer to Motion to Remand at 2.)

[1] It is apparent that there was some confusion about BLM's February 21, 1997, letter. Departmental regulations governing protests and appeals provide for the filing of a protest "by any person to any action proposed to be taken in any proceeding before the Bureau." 43 C.F.R. § 4.450-2. When BLM renders a decision which "adversely affects" a party to the case, that party "shall have a right to appeal to the Board." 43 C.F.R. § 4.410(a). There is no requirement that a document be labeled a notice of appeal or even use the word "appeal" and the Board has adopted a policy that a document filed objecting to a final decision should be treated as a notice of appeal. See, e.g., Amell Oil Co., 95 IBLA 311, 318 (1987); Goldie Skodras, 72 IBLA 120 (1983). It will be construed as a notice of appeal if it challenges a BLM decision which is adverse to the complaining party. See Thana Conk, 114 IBLA 263, 273 (1990); Buck Wilson, 89 IBLA 143, 145 (1985).

The determination made in BLM's February 21, 1997, letter was a final appealable decision, and if the Smiths' counsel correctly understood BLM's response to his telephone call, BLM incorrectly advised him that the decision was a proposed action for which a protest could be filed pursuant to 43 C.F.R. § 4.450-2. As the Smiths were adversely affected by BLM's dismissal of their appeals of the October 13, 1995, and October 20, 1995, decisions, jurisdiction over their appeal of the February 21, 1997, BLM decision letter inured to the Board pursuant to 43 C.F.R. § 4.410(a).

[2] We note that when BLM issued the February 21, 1997, decision it did not adhere to Departmental procedure with respect to the notices of

appeal filed November 30, 1995. Under the terms of 43 C.F.R. § 4.411(a), a person who desires to

appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service.

However, under 43 C.F.R. § 4.401(a), a delay in filing will be waived if a document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. If a notice of appeal is filed after the 10-day grace period, the notice will not be considered and the case will be closed by the officer from whose decision the appeal is taken. 43 C.F.R. § 4.411(c). But when a notice of appeal is received during the 10-day grace period, there must be a determination made regarding whether the notice was transmitted or probably transmitted before the end of the filing period. The Board is the sole arbiter of its jurisdiction, see Marathon Oil Co., 139 IBLA 347, 353-54 (1997), and the determination associated with 43 C.F.R. § 4.401(a) for those notices of appeal received within the grace period is rendered by the Board, not BLM, as the Board's jurisdiction is at issue. We note that BLM expressly cautions the office receiving an appeal, "IBLA makes the decision when an appeal is received between 31 and 40 days." See BLM Handbook H3870-1.VIID.4. Moreover, 43 C.F.R. § 4.411(c) also provides notice to BLM that "[i]f the notice of appeal is filed during the grace period * * * and the delay in filing is not waived, * * * the appeal will be dismissed by the Board."

The return receipt "green cards," which were returned to BLM and placed in the case file show that the BLM decisions of October 13 and 20, 1995, were received by the Smiths on October 23, 1995. Thus, the period in which to file a notice of appeal expired on November 22, 1995 (a Wednesday). As noted, the Oregon State Office, BLM, received the notices of appeal on November 30, 1995, within the 10-day grace period. BLM should have forwarded those appeals to the Board within 10 days of receipt. See BLM Handbook H3870-1.VIID.5.

[3] It is well established that a notice of appeal must be filed in the office of the officer who made the decision within 30 days to establish Board jurisdiction over a decision. 43 C.F.R. § 4.411(a); Joe B. Fallini, Jr., 136 IBLA 345 (1996); San Juan Coal Co., 83 IBLA 379 (1984). The Smiths assert that the October 13 BLM decision they received had no address for the office making the decision and did not include an appeal form indicating where an appeal should be filed. They further allege that the October 20 decision was just as deficient. The Smiths explain that on November 4, 1995, they received a "Legal Notice" from the Roseburg District Office, BLM, concerning the Midget claim which also included a copy of the

appeal form, Form 1842-1. As this latter form, they state, provided the address for the Roseburg office as the place to file an appeal, that is where they filed all of their appeals.

The record shows that the Smiths' appeals at issue here were filed in the Roseburg District Office, BLM, on November 21, 1995. ^{1/} That office promptly returned the notices the next day with an explanation that they were filed in the wrong office. As noted, the Smiths' notices of appeal were not received by the office issuing the appealed decision, the Oregon State Office, until November 30, 1995.

The language chosen for 43 C.F.R. § 4.411(a) leaves no room to question that the place-of-filing requirement is mandatory and, thus, not subject to waiver. This Board has specifically held that the place-of-filing provision clearly and explicitly states that the notice of appeal must be filed in the office of the officer who rendered the decision. Marc Thomsen, 148 IBLA 263 (1999); Thelma M. Eckert, 120 IBLA 367, 371-72 (1991); San Juan Coal Co., *supra* at 380. Filing elsewhere in the Department, even in a nearby district office of BLM when the state office was the decision-maker, will not meet the requirement. Eklutna, 90 IBLA 196 (1986). Accordingly, the fact that notices were received in the Roseburg District Office of BLM before expiration of the 30-day appeal period did not satisfy the regulatory requirements.

The arguments on appeal present two issues. The first is whether the tardiness of those filings received on November 30 in the Oregon State Office may be waived in accordance with 43 C.F.R. § 4.401. As noted, the 10-day grace period may be invoked where "it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed." 43 C.F.R. § 4.401(a). We find that the record clearly shows that the notices filed with the Oregon State Office, BLM, were sent in an envelope postmarked November 28, 1995. Regardless of the Smiths' allegation that BLM did not apprise them of the proper office for filing, we may not consider any other date in construing when the notices were "transmitted or probably transmitted."

The following language can be found in the October 13 and in the October 20 decision:

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision.

^{1/} The Smiths have also appealed a "Legal Notice" issued by the Roseburg District Office but it is not at issue here.

It would be unfortunate if BLM failed to enclose a Form 1842-1, as was indicated at the bottom of the decision. However, the statement regarding where to file an appeal found in both decisions is clear and free from confusion. ^{2/} The address on the top of the October 20 decision was the Post Office Box address of the Oregon State Office, and the time for filing at that address is clearly stated. The decision also refers to 43 C.F.R. Part 4, and the pertinent regulation, 43 C.F.R. § 4.411(a), unequivocally provides that a notice of appeal must be filed in the office rendering the decision. Therefore, the Smiths must bear the consequences of their error in sending the notices to the wrong office. As the Roseburg District Office promptly returned the notices, we find no merit in their assertion that BLM should somehow be held culpable. The Board of Land Appeals does not have jurisdiction to address the merits of the Smiths' appeal.

We deem it appropriate to note, however, that had we been able to consider the appeals on their merits, we would find that the record supports the BLM determinations. In November 1978, the Smiths filed a 1918 location notice for the Midget claim with BLM, to comply with 43 U.S.C. § 1744 (1994). Following a decision issued to Donald R. Hepler declaring the Midget placer mining claim, located by Paul Parazoo in 1933, abandoned and void, William Smith appealed that decision to this Board. As a result, this Board issued a decision addressing Smith's appeal which contained the following language:

Information from the Roseburg District Office indicated there were two Midget placer mining claims: one located December 30, 1918, by J. J. Campbell and G. W. Lynn and recorded at Book 9, page 383, of the mining records of Douglas County; the other located March 27, 1933, by Paul Parazoo and recorded at Book 10, page 460. The claims were for approximately the same land. [3/]

A recordation pursuant to [the Federal Land Policy and Management Act of 1976 (FLPMA)] was made by William R. Smith for the Midget placer mining claim located by Campbell and Lynn, under serial identification OR MC 09181, in November 1978. Subsequent proofs of labor have been timely recorded with BLM. The case record does not disclose the chain of title from Campbell and Lynn to Smith. Indeed, Smith's title to the Midget placer mining claim appears to derive from one Frank M. Hepler by a quitclaim deed executed January 31, 1973. It is noted that the Midget placer mining claim located by Parazoo was sold to Donald, Lee, and George Hepler in 1939.

^{2/} BLM acknowledges that the file copy of the Oct. 13 decision does not contain a letterhead.

^{3/} The Campbell-Lynn claim was for an area 1,320 feet by 640 feet while the Parazoo claim was for an area 1,500 feet by 600 feet. Different locators, having no apparent relationship, were listed on the different location notices.

By decision of May 21, 1981, BLM expunged the Midget placer mining claim located by Paul Parazoo from its final decision of June 12, 1961, closing the proceeding under section 5, Act of July 23, 1955, 30 U.S.C. § 613 (1976), because that Midget placer mining claim had been declared abandoned and void pursuant to FLPMA. [4]

William R. Smith, 59 IBLA 252, 252-53 (1981). Smith had asserted on appeal that the Midget placer mining claim which was the basis for his title was the one located by Paul Parazoo in 1933, and that his recording under ORMC 09181 was that claim. We held that "[t]he record supports the BLM decision that only the Midget placer mining claim located by Campbell and Lynn in 1918 has been properly recorded pursuant to FLPMA." Id. at 253. While the 1933 relocation was accordingly deemed void, we concluded that the validity of the 1918 location was not affected. When Smith petitioned the Board to reconsider, we further explained that the 1933 location was not an amendment of the 1918 location but was necessarily adverse to the prior claim. (Oct. 22, 1982, Order, IBLA 81-746, at 1.)

The situation was revived on July 25, 1989, when the Smiths filed a document titled "Amended Location Notice" for the Midget Placer Mining Claim. The notice advised BLM that, "THIS AMENDED LOCATION is made in conformity with the original location, made by J.J. Campbell and G. W. Lynn recorded December 30, 1918," but stipulated that "if the original location or the certificate thereof is void, then this location shall be an original location and this certificate an original certificate." The Smiths then filed a mineral patent application on November 20, 1989, based on that claim.

On November 23, 1990, the Smiths sought "a new ORMC number [for] the Midget placer claim now under application for patent." Serial number ORMC 132495 was assigned. On October 22, 1991, BLM apprized the Smiths of the progress of their patent application as follows:

The first half of the Final Certificate has been issued for the Midget Placer mining claim (ORMC 132495) embracing the $W\frac{1}{2}W\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$, $SE\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$, $S\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$ of Section 7, T. 30 S., R. 2 W., Willamette Meridian, Douglas County, Oregon. The effective date of the entry as shown on the certificate is October 1, 1991.

On December 12, 1992, a mineral report was completed for this claim. The BLM Geologist remarked:

This report was prepared in response to a patent application (serial number OR 45603) filed by William and Sandra Smith July 18, 1989. This is an amended location for the Midget mining

^{4/} There is no evidence that a copy of the notice executed by Parazoo for his location of the Midget claim was ever recorded with BLM pursuant to FLPMA. See Oct. 22, 1982, Order, IBLA 81-746, at 1.

claim which was originally located in 1918. A clear chain of title does not exist for the 1918 claim and various relocations. The "amended location" filed on July 18, 1989 was considered by the Oregon State Office of the BLM as a New Notice or relocation (p.44). This is in direct conflict with 43 CFR 3833.0-5(q) which states that "A relocation may not be established by the use of an 'amended location notice,' but requires a new original location notice or certificate as prescribed by state law." * * * The Midget claim filed in 1918 was not an association placer and was abandoned sometime before 1928 as essentially the same land was relocated by Oren J. Payne on June 1, 1928 with the same name being given to the claim. A relocation is a new location that is adverse to the original claim.

Essentially the same land was again relocated on March 27, 1933 by Paul Parazoo. It is this claim that was transferred to the Heplers in 1939 and was determined to have surface rights in 1957 under PL 167. This claim was sold by Frank M. Hepler to William Smith on January 23, 1973 (see pgs 59-64). The claim was declared by the Oregon State Office as abandoned and void for failure to file with BLM. Mr. Smith appealed this decision but it was affirmed by [IBLA] as the documents in the file indicated that Mr. Smith filed for the Midget claim originally located in 1918 (see pgs 51-53).

(Mineral Report OR 45603 at 2.) BLM met with the Smiths in March 1995 to discuss problems with the record and how they affected the mineral patent application. On May 30, 1995, the Smiths filed an affidavit executed by William Smith stating that he bought the Midget claim from Hepler, the rights therein derived from Parazoo, and Parazoo's claim was an amendment of the one located by Campbell and Lynn. He asserted therein that the 1989 and 1991 documents filed with BLM were amendments of the 1918 location and therefore it is the proper starting point for the patent application. Cf. Mascot Mining, Inc., 95 IBLA 328 (1987).

On October 13, 1995, the Oregon State Office, BLM, issued a decision declaring the Midget placer mining claim (the Campbell-Lynn location as depicted by both ORMC 09181 and ORMC 132495) null and void because the record does not support the chain of title asserted by the Smiths to the 1918 Campbell-Lynn location. BLM further rejected the patent application, OR 45603, and canceled the First Half Mineral Entry Certificate. As a result of the claim being declared null and void, BLM withdrew by decision issued October 20, 1995, a mineral contest against the Midget claim initiated by BLM on October 28, 1993.

The Smiths acquired title to the Midget claim from the Heplers, who had acquired title to the location made by Parazoo in 1933. As noted, the mining claim based on that location was deemed abandoned and void for failure to comply with the FLPMA filing requirements. Accordingly, they could not file an amended notice of location based on that location. The documents filed by the Smiths as "amended notices" in support of their mineral

patent application were, as they have attested, based on the 1918 Campbell-Lynn location. We presume that, based on the mineral examiner's report, the 1918 location was abandoned. Two different claimants located new claims on the subject land within the following two decades. The Smiths have not demonstrated the rights to the 1918 location were perpetuated and eventually conveyed to them. BLM properly concluded that the Smiths' location notices, without a clear chain of title, could not amend that location and correctly deemed the claim null and void. In the absence of a valid claim, BLM properly rejected the patent application and dismissed the contest proceedings.

The case file is less than clear on whether the land at issue is presently available to mineral entry. If it is not, then the obligation for a claimant to document a chain of title to a location made when the land was available cannot be understated. As the Smiths have not presented the necessary evidence, they must either do so, assuming that they have continued to maintain the claim with respect to the various obligations placed on mining claimants locating on Federal land, or proceed on the basis of a new location, provided the land is available for mineral entry and no other impediments exist.

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 BLM decision of February 21, 1997, is vacated and the appeals from the decisions of October 13 and 20, 1995, are dismissed.

R.W. Mullen
Administrative Judge

I concur.

Will A. Irwin
Administrative Judge

