

Editor's note; Reconsideration denied by order dated April 8, 2004

AUDREY BRADBURY

IBLA 2001-228

Decided December 30, 2003

Appeal from a decision of the California State Office, Bureau of Land Management, declaring lode mining claims forfeited by operation of law for failure to timely file evidence of assessment work performed. CAMC 122617 and CAMC 183836.

Affirmed as modified.

1. Mining Claims: Abandonment--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

A claimant who files a small miner waiver certification must perform assessment work for the same assessment year for which that waiver was filed, and then file evidence of assessment work with the proper BLM office on or before Dec. 30 following the end of that assessment year in accordance with annual filing requirements found in sec. 314(a) of FLPMA. This evidence of assessment work is in addition to whatever was filed the previous year to comply with the waiver requirements. Failure to file the required evidence of assessment work will result in abandonment of the mining claim.

APPEARANCES: Audrey Bradbury, Pahrump, Nevada, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Audrey Bradbury has appealed from a March 1, 2001, decision of the California State Office, Bureau of Land Management (BLM), declaring the Bergloit and Moly Zygotite lode mining claims, CAMC 122617 and CAMC 183836, forfeited by operation of law. BLM reasoned that Bradbury, having filed for waiver of maintenance fees for the

1999 assessment year,^{1/} failed to file evidence of assessment work performed “on or before December 30, 1999.”

Bradbury located these claims in 1983 and 1986, respectively. For the assessment years through 1993, she performed and documented assessment work on the claims. For assessment years 1993 and 1994 she paid the rental fees, and for assessment year 1995 she paid the maintenance fees. It is at this point that her situation becomes confused.

Bradbury paid maintenance fees for both claims in August 1995 for the 1996 assessment year. The next year, however, she paid the maintenance fee for the Moly Zygotite claim on August 22, 1996, for the 1997 assessment year, and on August 26, 1996, she filed a small miner waiver certification for the Bergliot claim for the 1997 assessment year, together with an affidavit of labor for the Bergliot claim for the 1996 assessment year. The next year on August 28, 1997, she paid maintenance fees for both claims for the 1998 assessment year. Bradbury filed small miner waiver certifications for both claims on August 24, 1998, for the 1999 assessment year, and affidavits of labor for both claims on October 19, 1998, for the 1998 assessment year. She chose to pay maintenance fees for both claims on August 16, 1999, for the 2000 assessment year, and then filed small miner waiver certifications for both claims on August 18, 2000, for the 2001 assessment year. Finally, Bradbury filed affidavits of labor for both claims on December 15, 2000, for the 2000 assessment year. On March 1, 2001, the BLM declared both claims forfeited for failing to file evidence of assessment work for the 1999 assessment year.

Bradbury’s argument on appeal is that “[a]ll fees have been paid and all copies of assessment work [were] filed [f]rom 1993 to date, but not in the proper order,” and she asserts that BLM has erroneously interpreted the filing requirements. As appellant clearly is confused with respect to the Department’s requirements for a small miner seeking waiver of annual fee obligations, we feel it appropriate here to review those requirements.

Under section 5 of the Mining Law of May 10, 1872, as amended, 30 U.S.C. § 28 (1988), Congress provided that “[o]n each claim located after the 10th of May 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year.”^{2/} Beginning in 1958, Congress defined the period for performing assessment work, or the assessment year, as beginning

^{1/} An assessment year begins on September 1 and ends on the following September 1. Thus, the 1999 assessment year began on September 1, 1998, and ended on September 1, 1999.

^{2/} The statutory language was modified in 1993 as will be discussed later.

at 12 o'clock meridian on the first day of September. Pub. L. No. 85-736, 72 Stat. 829 (Aug. 23, 1958). Prior to the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), evidence that this work was being performed was not required to be filed with Federal agencies. Cf. Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935) (default in assessment work did not subject a mining claim to governmental challenge). In section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (2000), Congress imposed upon the owners of unpatented mining claims a requirement that prior to December 31 of each year the claimant file with BLM evidence of annual assessment work performed during the previous assessment year or a notice of intention to hold the mining claim. Congress stipulated that failure to file the required instrument is "deemed conclusively to constitute an abandonment of the mining claim." 43 U.S.C. § 1744(c) (2000); see United States v. Locke, 471 U.S. 84 (1985).

On October 5, 1992, Congress established further requirements for mining claimants when enacting the Department of the Interior and Related Agencies Appropriations Act, 1993 (Appropriations Act), Pub. L. No. 102-381, 106 Stat. 1374 (1992). Congress required claimants to "pay a claim rental fee of \$100 to the Secretary of the Interior or his designee on or before August 31, 1993," for each unpatented mining claim, mill or tunnel site, in order to hold such claim for the assessment year ending September 1, 1993. 106 Stat. 1378. The Appropriations Act also contained an identical provision imposing rental fees for the assessment year ending on September 1, 1994, requiring payment of this additional \$100 rental fee on or before August 31, 1993. Id. Congress expressly provided that these payments were imposed "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 [FLPMA] (43 U.S.C. 1744 (a) and (c))." Id. Congress, however, provided an exemption from this rental fee, the so-called "small miner exemption," that was available to claimants holding 10 or fewer claims who met certain qualifications.^{3/} But Congress left no doubt that a miner who gained an exemption from the rental fee requirements remained responsible for complying with the assessment work requirements:

Each claimant [qualifying as a small miner] may elect to either pay the claim rental fee * * * or in lieu thereof do assessment work required by the Mining Law of 1872 * * * and meet the filing requirements of FLPMA * * * on such ten or fewer claims and certify the performance of such assessment work to the Secretary.

^{3/} The claimant must (1) be "producing under a valid notice or plan of operations not less than \$1,500 and not more than \$800,000 in gross revenues per year" or performing exploration work, on no more than ten claims, and (2) have "less than ten acres of unreclaimed surface disturbance from such mining activity or such exploration work." 106 Stat. 1378-1379.

106 Stat. 1378-79. On July 15, 1993, the Department promulgated regulations to implement the rental fee. 58 FR 38186. Pertinent to the small miner exemption, 43 CFR 3833.1-6 (1993) expressly charges that “[a] small miner may, under certain conditions described in this section and in §3833.1-7, perform the assessment work required under 30 U.S.C. 28-28e and record it pursuant to section 314(a) of FLPMA and §3833.2 in lieu of paying the rental fee.” See also 43 CFR 3833.1-5(d) (1993).^{4/} Thus, those claims for which a claimant was granted a small miner exemption were properly declared abandoned and void where the claimant failed to file evidence of assessment work with BLM on or before December 30 following the end of the applicable assessment year. See, e.g., Paul F. Swartwout, 142 IBLA 82, 84 (1997); Melvin J. Young, 135 IBLA 336, 338 (1996).

Congress elected to perpetuate the annual fee to hold mining claims following the 1994 assessment year, but not in the exact same form as the rental fee imposed in the Appropriations Act. Under section 10101 of the Omnibus Budget Reconciliation Act of August 10, 1993, Pub. L. No. 103-66, 107 Stat. 405, Congress mandated a claim maintenance fee of \$100 for years 1994 through 1998, while authorizing a waiver for the small miner:

(a) Claim maintenance fee

The holder of each unpatented mining claim, mill or tunnel site located pursuant to the mining laws of the United States, whether located before or after August 10, 1993, shall pay to the Secretary of the Interior, on or before August 31 of each year for years 1994 through 1998, a claim maintenance fee of \$100 per claim. Such claim maintenance fee shall be in lieu of the assessment work requirement contained in the Mining Law of 1872 (30 U.S.C. 28-8e) and the related filing requirements contained in section 1744(a) and (c) of title 43.

* * * * *

(d) Waiver

(1) The claim maintenance fee required under this section may be waived for a claimant who certifies in writing to the Secretary that on the

^{4/} The Department also provided the following reminder for those claiming the small miner exemption: “* * * for the year ending September 1, 1993, the assessment affidavit required by FLPMA continues to be due on December 30, 1993; and for the year ending September 1, 1994, the assessment filing is due on December 30, 1994.” 43 CFR 3833.1-7(d) (1993).

date the payment was due, the claimant and all related parties--

(A) held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands; and

(B) have performed assessment work required under the Mining Law of 1872 (30 U.S.C. 28-28e) to maintain the mining claims held by the claimant and such related parties for the assessment year ending on noon of September 1 of the calendar year in which payment of the claim maintenance fee was due.

30 U.S.C. § 28f(a) and (d) (1994).^{5/} Congress again stipulated that payment of the maintenance fee would be in lieu of the assessment work requirements and that failure to pay this fee would result in a forfeiture of the claim or site “by operation of law,” 30 U.S.C. § 28i (1994). It also amended 30 U.S.C. § 28 to read in pertinent part: “On each claim located after the 10th of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year.” 30 U.S.C. § 28 (1994); see Pub. L. No. 103-66, § 10105(b), 107 Stat. 406 (Aug. 10, 1993). In addition, Congress fashioned the maintenance fee and waiver provisions to require the claimant seeking waiver to certify “in writing” that any assessment work required for the prior assessment year was performed in order to qualify for waiver. 30 U.S.C. § 28f(d)(1)(B) (2000).

In promulgating regulations to implement the maintenance fee, the Department did little to modify the regulations previously in place for rental fee management. See 59 FR 44846 (Aug. 30, 1994). The Department was careful to retain a reminder that the small miner may elect to “perform the assessment work required under 30 U.S.C. 28-28e and record it pursuant to Section 314(a) of FLPMA and §3833.2 in lieu of paying the maintenance fee.” 43 CFR 3833.1-6 (1994) (note that only the word “maintenance” was substituted for “rental”). Indeed, the modified regulations provide: “A small miner may, under the waiver provisions of §§3833.1-6 and 3833.1-7, perform assessment work and file the affidavit of labor pursuant to §3833.2 in lieu of paying the rental or maintenance fee.” 43 CFR 3833.1-5(d) (1994) (emphasis added).

Thus, with the advent of the maintenance fee obligation, a small miner seeking waiver from payment of the fee must certify that he or she has performed that

^{5/} The maintenance fee was further continued for the years 1999 through 2001, 112 Stat. 1570 (Sept. 25, 1998) and 112 Stat. 2681-235 (Oct. 21, 1998), and the years 2002 and 2003, 115 Stat. 418 (Nov. 5, 2001). By the amendment enacted in 1998, the deadline for filing the fee or waiver was changed to “September 1.” 112 Stat. 1570.

assessment work which was required for the assessment year just ending.^{6/} If performance of assessment work was required for the preceding assessment year, the claimant must file, by the following December 30, evidence of the work performed.^{7/} The claimant is further obligated to perform assessment work during the assessment year for which the waiver certification is filed and submit, by the December 30 following the end of that assessment year, appropriate evidence of the assessment work done. The fact that obligations with respect to two different assessment years are imposed upon the small miner has proven confusing to some, as appellant has noted. However, confusion does not excuse the failure to meet these legal obligations.

[1] The cardinal rule is that for each and every assessment year, either (1) maintenance fees must be paid, or (2) a small miner waiver certification must be filed and assessment work performed and documented.^{8/} The fact that maintenance fees are paid, or the small miner waiver certification filed, prior to a particular assessment year, while any required assessment work must be performed during that assessment year and documented no later than December 30 after that assessment year, makes the process somewhat complex, but does not alter the rule.

Bradbury's confusion is obvious. She assumed that in order to file a small miner exemption certification for a particular assessment year she had to file evidence of assessment work for the previous assessment year, whether or not she had paid the maintenance fee for that previous assessment year. She also seems to have assumed that filing evidence of assessment work for the previous assessment year exempted her from filing evidence of assessment work for the assessment year to which the small miner waiver applied. As a result of these misunderstandings, Bradbury both paid the maintenance fee and filed evidence of assessment work for the Bergliot claim for the 1996 assessment year and then failed to file evidence of assessment work for the 1997

^{6/} The performance of assessment work and the filing of evidence of the work performed for the year just ending are not necessary if the claimant has previously paid in advance the maintenance fees for the applicable assessment year, since the maintenance fees were paid in lieu of the assessment work and assessment work would not, therefore, be required. See Cheryl Jong, 142 IBLA 75 (1997).

^{7/} This obligation to file by the December 30 following the filing of the waiver certification does not arise from the fact that the certification was filed but is based upon claimant's responsibility to satisfy the FLPMA annual filing requirements. See 43 CFR 3833.4(a)(1) ("failure to make annual filings required by §§ 3833.2-1 and 3833.2-2 * * * shall conclusively constitute a forfeiture").

^{8/} These requirements may be deferred for certain active duty military personnel, 43 CFR 3833.1-7(e) (2002), and excused with respect to mining claims if mineral entry under a mineral patent application has been allowed, 43 CFR 3833.2-6 (2002).

assessment year. She made the same mistakes for both the Bergliot and Moly Zygote claims for the 1998 and 1999 assessment years and for the 2000 and 2001 assessment years.

Bradbury's proposed construction of these obligations would enable a claimant who qualified for a small miner maintenance fee waiver to avoid performing assessment work during the assessment year for which a waiver was granted simply by paying the maintenance fee for the following assessment year. This would effectively vitiate the assessment work requirement because a small miner could alternate annually between filing for a waiver and paying the maintenance fee, and never perform assessment work. We must, and do, reject that construction. Bradbury's failure to file evidence of assessment work conclusively constituted an abandonment of the subject mining claims pursuant to 43 U.S.C. § 1774(c).^{2/} United States v. Locke, 471 U.S. at 100; Lynn Keith, 53 IBLA 192, 196, 88 I.D. 369, 372 (1981).

However, we must modify BLM's decision with respect to the Bergliot mining claim. In a circumstance not addressed by BLM in its decision, Bradbury failed to file evidence of assessment work for the 1997 assessment year with respect to the Bergliot claim. The statutory filing requirement under section 314 of FLPMA is an absolute requirement that cannot be waived and the consequence for failure to file is self-executing. United States v. Locke, 471 U.S. at 100; Basic Rock & Sand, Inc. (On Reconsideration), 110 IBLA 1, 6 (1989). Thus, the Bergliot claim must be deemed abandoned and void as of that instance. See Rand Mining Co., 142 IBLA 86, 88 (1997) (a claim becomes abandoned and void when the annual filing is not timely made and is not dependent upon BLM's declaration of the fact).

Accordingly, for the Bergliot mining claim, CAMC 122617, we find that the claim became abandoned and void when Bradbury failed to file evidence of assessment work for the 1997 assessment year on or before December 30, 1997. For the Moly Zygote mining claim, CAMC 183836, we affirm BLM's decision to the extent that it declared that this claim became void when Bradbury failed to file evidence of assessment work for the 1999 assessment year on or before December 30, 1999.

^{2/}Although BLM declared the claims forfeited, failure to comply with FLPMA's filing requirements constitutes an abandonment, not a forfeiture, of the claim. 43 U.S.C. § 1744(c) (2000). However, BLM cites 43 CFR 3833.4 as the basis for its action and, within part (a)(2), the "failure to file the documents required by §§3833.1-7(b) through (d) * * * shall be deemed conclusively to constitute a forfeiture (emphasis added)."

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 as modified.

H. Barry Holt
Chief Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge