



JULIE DIMITROV, ET AL.

164 IBLA 278

Decided January 14, 2005

Editors Note: Appeal Filed, No. CV-06-58-BLG-RFC, *rev'd and remanded*, *Demitrov v. Norton*, 479 F. Supp. 2d 1141 (Mar. 14, 2007).



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

JULIE DIMITROV, ET AL.

IBLA 2000-8

Decided January 14, 2005

Appeal from a decision by the Montana State Office, Bureau of Land Management, that declared unpatented mining claims void by operation of law for failure to timely file small miner waiver certifications. MMC 48429, et al.

Affirmed.

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

A document that does not certify that on the date it was due the claimant and all related parties held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands does not meet the requirement of 30 U.S.C. § 28f(d)(1)(A) and 30 CFR 3833.1-6 and 3833.1-7 for a small miner waiver from payment of the annual mining claim maintenance fee. Failure to make this certification cannot be cured.

APPEARANCES: Steven J. Lechner, Esq., and William Perry Pendley, Esq., Lakewood, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Julie Dimitrov, Laura Jean Cole, and others (appellants) ^{1/} have appealed the August 31, 1999, decision of the Montana State Office, Bureau of Land Management

^{1/} The following claim owners are appellants: Julie Dimitrov, Lynda Kogutkiewicz, Laurretta Cole, Laura Jean Cole, Vivienne Prather, Evangline Rudolph, and A.B. Compton (in care of Opal Blair). They are seven members of the family of Kester Counts, the original locator of the claims, to whom ownership was transferred in 1995. (Statement of Reasons at 2.)

(BLM), declaring their mining claims^{2/} forfeited by operation of law because they failed to pay, on or before August 31, 1997, the \$100 per claim maintenance fee required by the Omnibus Budget Reconciliation Act of 1993 and did not qualify for a waiver of the maintenance fees for the 1998 assessment year.

Section 10101(a) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 405, 30 U.S.C. § 28f(a) (2000) (the Act), required the “holder of each unpatented mining claim, mill or tunnel site” to pay, “on or before August 31 of each year, for [the] years 1994 through 1998, a claim maintenance fee of \$100 per claim.” This fee was “in lieu of the assessment work requirement contained in the Mining Law of 1872 (30 U.S.C. 28-28e) and the related filing requirements contained in section 314 (a) and (c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744(a) and (c))” (FLPMA).

Section 10101(d)(1) of the Act, 30 U.S.C. § 28f(d)(1) (2000), 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, 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.

The Department implemented the statutory requirement in section 10101(a) with 43 CFR 3833.1-5 (1994) and in section 10101(d)(1) with 43 CFR 3833.1-6 and 3833.1-7 (1994). 43 CFR 3833.1-6 provided that a “small miner may, under certain conditions described in [that] section and in § 3833.1-7, perform the assessment work required under 30 U.S.C. 28-28(e) 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(a)(1)-(3) listed the three conditions that a small miner who performed the assessment work must meet to qualify for a waiver of the maintenance fee requirements. The first of

^{2/} The 28 mining claims are listed in Appendix A of BLM’s decision.

these, 43 CFR 3833.1-6(a)(1), states that “[t]he claimant and all related parties shall hold no more than 10 mining claims, mill sites, and tunnel sites, or any combination thereof, on Federal lands in the United States on the date the payment is due * * *.”^{3/}

43 CFR 3833.1-6(d)(2) (1994) stated that “the claimant shall file proof of the above conditions for exemption, attested to as a certified statement, pursuant to § 3833.1-7, with the proper BLM office by the August 31 immediately preceding the assessment year for which a waiver is sought.”^{4/}

43 CFR 3833.1-7(d) (1994) provided that each small miner must file

a waiver certification on or before August 31 each year [after August 31, 1994] to hold the claims each assessment year beginning at 12 o’clock noon on September 1 of the calendar year the certification is due, through August 31, 1998. The small miner shall document, as provided in this paragraph (d), the claimed waiver for each assessment year a small miner’s waiver is claimed, certified, and attested to under penalty of 18 U.S.C. 1001. The statement shall contain:

- (1) The mining claim and site names and BLM serial numbers assigned to the mining claims and sites held by the small miner;
- (2) A declaration by the claimant and all related parties that they own no more than 10 mining claims and sites in total nationwide on the date the waiver statement is due;
- (3) A declaration that specifies that the assessment work requirements have been or will be completed by the date the payment is due, which is each August 31, for the assessment year just ending;
- (4) The names and addresses of all owners maintaining an interest in the mining claims and sites; and

^{3/} CFR 3833.1-6(a)(2) provided: “All mining claims and sites held by a claimant and all related parties shall be counted toward the 10 claim and site limit.”

^{4/} 43 CFR 3833.1-6(d)(3) provided that the certified statement would serve as a “notice of intention to hold” as to the claims for which the exemption was sought and that a \$5/claim service charge was due upon filing of the statement.

(5) The signatures of all the owners of the mining claims and sites for which a waiver is claimed.^{5/}

BLM's August 31, 1999, decision stated that the Act and 43 CFR 3833.1-5(b) required payment of the \$100/claim maintenance fee on or before August 31, 1997, to hold a claim for the 1998 assessment year that began on September 1, 1997. BLM noted that the deadline for the 1998 assessment year filing was September 2, 1997, "because August 31 fell on a Sunday, and Monday, September 1, 1997, was a legal holiday." The decision recited the provision of section 10101(d)(1) of the Act that the fee "may be waived for a claimant who certifies in writing that, on the date the payment is due, the claimant and all related parties hold not more than 10 mining claims or sites and the assessment work required under the Mining Law of 1872 has been or will be performed." (Decision at 2.)

The decision then related the following:

On September 5, 1997, in an envelope postmarked September 2, 1997, this office received fees in the amount of \$140 together with the Affidavit of Annual Representation Work for the mining claims listed on Exhibit A. In addition, on September 22, 1997, this office received a facsimile copy of the Maintenance Fee Payment Waiver Certification [form (OMB No. 1004-0114)] signed by Laretta J. Cole, Lynda Kogutkiewicz, and Julie Dimitrov for the Cathy, Copper, Shirley, Montana, Falls, Floyd Counts, and Eagles Nest mining claims. On September 30, 1997, this office received the original signed copy of the aforementioned waiver together with signed Maintenance Fee Payment Waiver Certifications for the remainder of the claims listed on Exhibit A.

Id.

To be timely filed, BLM stated, the maintenance fee waiver certifications should have been contained in an envelope postmarked on or before September 2, 1997, and received by BLM not later than September 17, 1997, referring to 43 CFR 3833.0-5(m).^{6/} Because the certifications were not received until September 30,

^{5/} 43 CFR 3833.1-7(b) provided that the affidavit of assessment work performed by a miner who claimed a maintenance fee waiver "shall be filed in the proper BLM office pursuant to § 3833.2 and shall meet the requirements of § 3833.2-4."

^{6/} 43 CFR 3833.0-5(m) defines "file" or "filed" ["being received and date stamped by (continued...)]

1997, in an envelope postmarked September 29, 1997, the claims were deemed forfeited by operation of law in accordance with 43 CFR 3833.4(a)(2).^{7/} The claims could be relocated in accordance with 43 CFR 3833.1-2, BLM noted, if there were no intervening rights and the lands were open to mineral location.

In their statement of reasons (SOR) for appeal, appellants note that included with the “Affidavit of Annual Representation Work” and check for \$140 that Laura Jean Cole mailed to BLM on September 2, 1997, on behalf of the family was “a document entitled ‘Kester Counts Family Claims’ listing all claims and demonstrating that each claimant held not more than 10 mining claims” and “a document stating individual ownership of each claim and its location.” (SOR at 2; see SOR, Attachment C.) “On September 22, 1997,” appellants continue, “realizing that the documents sent to the [BLM] may have contained some deficiencies, Mrs. Cole supplemented the submission with a facsimile copy of the information not submitted with the September 2, 1997, filing. The original was received by the BLM on September 30, 1997.” (SOR at 2-3.)

Appellants argue that BLM’s decision should be reversed because “BLM regulations do not require use of a particular form to seek coverage by the small miner’s waiver, the filing made by the Family identifies the claims covered by the

^{6/} (...continued)

the proper BLM office”] and states that “a filing or fee required by [any of several sections, including §§ 3833.1-6 and 3833.1-7] is timely if received within the time period prescribed by law, or, if mailed to the proper BLM office, is contained within an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed by law and received by the proper BLM State Office by 15 calendar days subsequent to such period * * * .”

^{7/} The decision did not affect the Eagles Nest claim, MMC 48425, BLM stated, because appellants had submitted \$140 with the affidavit of assessment work, and according to 43 CFR § 3833.1-3(c)(2), in the event of a “failure to submit proper maintenance fees on or before each August 31 (September 2, 1997, this year)[,] the authorized officer will apply the fees received to existing recorded and serialized mining claims and sites in ascending numerical order of serialization, unless otherwise directed by the claimant. Therefore, this office will record the Affidavit of Annual Representation Work for the 1997 assessment year, and record the 1998 maintenance fee payment for the Eagle[s] Nest mining claim as fees were received in an envelope postmarked on September 2, 1997.” (Decision at 3.) BLM retained a \$5.00 service charge for recording the affidavit of assessment work, and refunded the remaining \$35.00 to Laura Jean Cole.

filing, the filing was accompanied by the \$5 per claim fee required to be filed by small miners with a waiver request [see 43 CFR 3833.1-6(d)(3), supra note 4] and the regulations require the BLM to afford the claimants an opportunity to cure errors in all other requirements of the filing.” (SOR at 3.)

The regulation appellants refer to is 43 CFR 3833.4(b) (1994). That regulation provided:

Failure to file the complete information required in * * * 3833.1-7(d)-(f) * * *, when the document is otherwise filed on time, shall not be conclusively deemed to constitute an abandonment or forfeiture of the claim or site, but such information shall be submitted within 30 days of receipt of a notice from the authorized officer calling for such information. Failure to submit the information requested by the decision of the authorized officer shall result in the mining claim, mill site, or tunnel site being deemed abandoned by the owner.

“The regulations expressly provide that claimants cannot cure if they ‘fail[] to list the 10 or fewer mining claims and/or sites for which the fee is requested to be waived,’” appellants observe, citing 43 CFR 3833.4(a)(4). (SOR at 10.)

If the BLM had wanted to include a provision that causes any omission in the filing to result in abandonment, it could have done so. The “silence of the [BLM]” regarding any other incurable defect “give[s] rise to an implication as to the [BLM’s] purpose” to temporarily excuse any other deficiency and, in accordance with 43 C.F.R. § 3833.4(b), allow 30 days to cure,

appellants argue, quoting from 73 Am. Jur. 2d Statutes § 169. Id. The envelope mailed on September 2, 1997, contained

a document entitled “Kester Counts Family Claims” listing all claims and demonstrating that each claimant held not more than 10 mining claims and a document stating individual ownership of each claim and its location. Therefore, the only “essential” requirement of § 3833 was satisfied by the Family’s filing. Any other deficiency could have been cured by the Family within 30 days of the filing. Prior to the expiration of the 30 day period, which was not granted by the BLM, the Family supplemented the filing with a Maintenance Fee Payment Waiver Certification signed by each of the owners.

Id. at 12.

The first page of the document sent to BLM by Laura Jean Cole on September 2, 1997, reads:

AFFIDAVIT OF ANNUAL REPRESENTATION WORK

This will serve as an affidavit for the Annual Representation work required for 1996-1997. Laura Jean Cole, Evangline Rudolph, Vivienne Prather, Julie Dimitrov, Lynda Kogutkiewicz, Laurette Cole and the A.B. Compton Family[,] whose address for the purpose of this filing is: 721 Emerald Bay Drive, Suisun City, CA 94585, has completed the annual representation work for the mining claims described on the second page attached hereto. The value of work performed was over \$5,000.00.

The work listed includes “maintenance”; “road work (Cleared out rocks and trees that [slid] into the road. Repaired places where the road was washed out by highwater in the spring)”; “equipment”; “travel expenses”; and “mining.”

The second page is the list entitled “Kester Counts Family Claims.” It lists 29 claims in five groups. The groups are labelled “A” (seven claims), “B” (two claims), “C” (nine claims), “D” (ten claims), and “E” (one claim). To the right of the name of each claim is a serial number and county recordation book and page number.

A third page states:

These claims belong to the Kester Counts Estate. They are now individually owned by member[s] of this family.

- A. Julie Dimitrov
- A. Lynda Kogutkiewicz
- A. Laurette Cole
- B. Vivienne Prather
- C. Laura Jean Cole
- D. Evangline (Lyn) Rudolph
- E. A.B. Compton

There are eighteen other claims that are in the family that will be filed by Merle Boyes.

[1] Appellants’ argument that this filing constitutes compliance with the requirements of 30 U.S.C. § 28f(d)(1), 43 CFR 3833.1-6, and 3833.1-7 presupposes that the persons listed after the letters above own the claims identified in the groups with the corresponding letters on page 2, e.g., that Laura Jean Cole owns the nine

claims in group “C”. Even accepting this, we cannot accept appellants’ argument. The document is entitled an “Affidavit of Annual Representation Work” and its contents are consistent with that title. Thus, it only purports to comply with the requirement of 30 U.S.C. § 28f(d)(1)(B) that the claimants certify they “have performed assessment work required under the Mining Law of 1872” for the 1996-97 assessment year.^{8/} It does not certify that “on the date the payment was due, the claimant and all related parties * * * held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands,” as required by 30 U.S.C. § 28f(d)(1)(A).^{9/}

Even if no particular form is required, as appellants suggest, the document does not include proof that the first condition for the exemption, “attested to as a certified statement, pursuant to § 3833.1-7[d],” was met on August 31, 1997, as required by 43 CFR 3833.1-6(d)(2). There is no declaration by the claimants, “certified, and attested to under penalty of 18 U.S.C. 1001,” that each of them and all parties related to each of them own no more than 10 mining claims and sites in total nationwide on the date the waiver statement was due, as required by 43 CFR 3833.1-7(d)(2). Accepting, as we have, that the document means that each of the claimants owns the claims listed in each group, there is no statement that those are the only claims they each own. Nor is there any statement that “all related parties” own no claims.^{10/} Certification that on the date the payment of the maintenance fee was due the claimant and all related parties held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands is essential to complying with the statutory requirement, and failure to make it cannot be cured.^{11/}

^{8/} We need not consider whether this filing complies with 43 CFR 3833.2-4, as required by 43 CFR 3833.1-7(b). Nor do we consider whether Laura Jean Cole’s failure to sign the document entails a failure to “certify” its contents.

^{9/} “Related party,” as defined in 30 U.S.C. § 28f(d)(2), means the spouse and dependent children of a claimant, and a person who controls, is controlled by, or is under common control with a claimant.

^{10/} Indeed, the statement that “[t]here are eighteen other claims that are in the family that will be filed by Merle Boyes” may indicate otherwise.

^{11/} Under the circumstances, we need not discuss whether the failure of the document to contain the names and addresses of all owners maintaining an interest in the claims, as required by 43 CFR 3833.1-7(d)(4), or the signatures of all the owners of the claim, as required by § 3833.1-7(d)(5) (or, indeed, any signature at all), would be curable.

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's August 31, 1999, decision is affirmed.

Will A. Irwin
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE ROBERTS DISSENTING:

With the utmost respect, I dissent from this decision.

I will begin with a quote from another dissenting opinion, authored by my colleague Judge Irwin, who stated in Sandra E. Garrand, 152 IBLA 139 (2000): “It is this kind of decision by the Board that prompted the Congress recently to enact the provision requiring BLM to allow a mining claimant to cure a defect in a small miner waiver application or to pay the maintenance fee.” 152 IBLA at 145 (Irwin, J., dissenting), referring to 30 U.S.C. § 28f(d)(3), added by section 101(e), Title I, Omnibus Consolidated Appropriations Act, Pub. L. 105-277, Oct. 21, 1998.^{1/} I would apply Judge Irwin’s language to the decision from which I now dissent.

In Garrand, Judge Irwin would have allowed an appellant to cure a non-existent filing. At least in this case there is something to cure. Judge Irwin’s review of the Board’s cases interpreting 43 CFR 3833.4(b) applies to the instant case. In the following terms, he concluded that Leonard Garrand’s failure to list Sandra Garrand as having a one-half interest in the SIP 1 through 10 mining claims was a curable defect:

We have held in a number of contexts that the failure to provide information that is required by regulation but not by statute is a curable, not a fatal, defect and, absent an opportunity to cure the defect, does not result in a conclusive presumption of abandonment of a

^{1/} The Department’s regulation implementing the 1999 Maintenance Fee Act, promulgated at 43 CFR 3833.4-1, reflects an intent not to elevate form over substance, and focuses on what a reasonably prudent claimant must have intended by his or her filing:

Curing Defective Waivers:

(a) If BLM finds a defect in a waiver request, BLM will send a notice to the claimant by certified mail--return receipt requested, to the address given on the waiver request.

(b) The claimant must cure the defective waiver or pay the annual maintenance fees within 60 days of receiving BLM notification of the defects. Otherwise the claims covered by the defective waiver are forfeited.

See 64 FR 47022 (Aug. 27, 1999).

mining claim. See, e.g., Kathryn Firestone, 148 IBLA 126, 130 (1999); Tom M. Lee, 145 IBLA 272, 276 (1998); Production Industries Corp., 138 IBLA 183, 188 (1997); Thelma C. Satrom, 138 IBLA 180, 181-82 (1997); Leber Mining Co., 131 IBLA 275, 277 (1994). See Topaz Beryllium Co. v. United States, 649 F.2d 775, 778 (10th Cir. 1981).

In Firestone, the appellant failed to include a claim on the certificate of exemption. We held that identifying the claims for which an exemption was sought was “at the heart of the certification process” and that failure to list a claim on the form was a failure to timely file an exemption for that claim under 43 C.F.R. § 3833.1-7(a), as distinct from an unintentional failure to file complete information under § 3833.1-7(d), and could not be cured. 148 IBLA at 130-31. By contrast, in Satrom we held the omission of a date or dates from the form could be cured and in Leber we held the failure to specify the number of the notice or plan of operations was curable. In this case, in addition to providing all the other information required, Leonard Garrand listed himself as an owner and signed the certification form. I do not regard the absence of a co-owner’s name and a second separate signature by Leonard Garrand as agent for Sandra Garrand as an omission that is “at the heart of the certification process.”

Id. at 147.

The instant case does not require that we revisit the Garrand dispute, i.e., whether the absence or omission of a co-owner’s name from a certification document is a curable defect under 43 CFR 3833.4(b), since all the claimants having an interest in the “Kester Counts Family Claims” are identified. Nothing is missing here that lies “at the heart of the certification process” invoked by the majority. The Garrand case is instructive for our purposes, however, since the Board engaged in a debate about whether the failure to even identify a co-owner of a claim is a curable defect under 43 CFR 3833.4(b). There is no such failure herein.

The debate in this case relates to the form of what was filed, rather than the substance of what was filed.

As stated by the majority, Julie Dimitrov, Laura Jean Cole, and others^{2/} (appellants) have appealed from an August 31, 1999, decision of the Montana State Office, Bureau of Land Management (BLM), declaring their mining claims^{3/} forfeited by operation of law because they failed to pay, on or before August 31, 1997, the required \$100 per claim maintenance fee, nor did they qualify for a waiver of the maintenance fees for the 1998 assessment year. In its decision, BLM noted that the deadline for the 1998 assessment year filing was September 2, 1997, “because August 31 fell on a Sunday, and Monday, September 1, 1997, was a legal holiday.” (Decision at 2.) The decision then described the following facts and circumstances:

On September 5, 1997, in an envelope postmarked September 2, 1997, this office received fees in the amount of \$140 together with the Affidavit of Annual Representation Work for the mining claims listed on Exhibit A [of this decision]. In addition, on September 22, 1997, this office received a facsimile copy of the Maintenance Fee Payment Waiver Certification [form (OMB No. 1004-0114)] signed by Laurette J. Cole, Lynda Kogutkiewicz, and Julie Dimitrov for the Cathy, Copper, Shirley, Montana, Falls, Floyd Counts, and Eagles Nest mining claims. On September 30, 1997, this office received the original signed copy of the aforementioned waiver together with signed Maintenance Fee Payment Waiver Certifications for the remainder of the claims listed on Exhibit A. [^{4/}]

Id.

To be timely filed, the decision stated, the maintenance fee waiver certifications should have been contained in an envelope postmarked on or before September 2, 1997, and received by BLM not later than September 17, 1997. BLM determined that proper certification forms were not received until September 30,

^{2/} The following claim owners are appellants herein: Julie Dimitrov, Lynda Kogutkiewicz, Laurette Cole, Laura Jean Cole, Vivienne Rather, Evangline Rudolph, and A.B. Compton (in care of Opal Blair). They are seven descendants of Kester Counts, who was the original locator of the challenged claims. Ownership was transferred to them in 1995. (Statement of Reasons at 2.)

^{3/} The mining claims at issue are listed at Appendix A (attached hereto), as set forth in appellants’ Sept. 5, 1997, filing.

^{4/} Exhibit A of appellants’ certification document received by BLM on Sept. 30, 1997, is replicated at Appendix A of this opinion.

1997, in an envelope postmarked September 29, 1997; therefore, it declared all claims listed by appellants void by operation of law except the Eagles Nest claim. The Eagles Nest claim survived, according to the decision, because appellants had submitted \$140 with the affidavit of assessment work, and according to 43 CFR § 3833.1-3(c)(2), in the event of a

failure to submit proper maintenance fees on or before each August 31 (September 2, 1997, this year)[,] the authorized officer will apply the fees received to existing recorded and serialized mining claims and sites in ascending numerical order of serialization, unless otherwise directed by the claimant. * * * Therefore, this office will record the Affidavit of Annual Representation Work for the 1997 assessment year, and record the 1998 maintenance fee payment for the Eagle[s] Nest mining claim as fees were received in an envelope postmarked on September 2, 1997.

(Decision at 3.) Additionally, BLM retained a \$5.00 service charge for the claim, and refunded the remaining \$35.00 to Laura Jean Cole.

In their statement of reasons (SOR) for appeal, appellants maintain that on September 2, 1997, Laura Jean Cole mailed an envelope to the Montana State Office, BLM, on behalf of all owners, containing the following items: (1) a document entitled "Affidavit of Annual Representation Work"; (2) a check for \$140; (3) a document entitled "Kester Counts Family Claims," listing all claims and demonstrating that each claimant held not more than 10 mining claims; and (4) a document stating individual ownership of each claim and its location. (SOR at 2; see Attachment C.) According to appellants, when they realized that the documents originally mailed to BLM may have contained some deficiencies, Ms. Cole supplemented the earlier mailing with a facsimile copy of the "information not submitted with the September 2, 1997, filing," and followed up by mailing the originals to BLM, which received them on September 30, 1997. (SOR at 3.)

Appellants maintain that BLM's decision should be reversed because: (1) BLM regulations do not require use of a particular form to seek coverage by the small miner's waiver; (2) the filing made by the family identifies the claims covered by the filing; (3) the filing was accompanied by the \$5.00 per claim service charge required to be filed by small miners with a waiver request (see 43 CFR 3833.1-6(d)(3)); and (4) the regulations, specifically 43 CFR 3833.4(b), require BLM to afford the claimants an opportunity to cure errors or deficiencies in all other requirements of the filing. Id.

I agree with appellants on all stated bases for appeal.

The “Affidavit of Annual Representation Work” submitted by appellants stated, in pertinent part, the following:

This will serve as an affidavit for the Annual Representation work required for 1996-1997. Laura Jean Cole, Evangline Rudolph, Vivienne Prather, Julie Dimitrov, Lynda Kogutkiewicz, Lauretta Cole and the A.B. Compton Family whose address for the purpose of this filing is: 721 Emerald Bay Drive, Suisun City, CA 94585, has completed the annual representation work for the mining claims described on the second page attached hereto.

The second page of the Affidavit is a one-page list of 28 claims. The list is entitled “Kester Counts Family Claims.” It contains five groups of claim names listed vertically down the left-hand side of the page. Each group is separated from the others by a dark horizontal line of typed asterisks. To the right of the claim names are their corresponding serial numbers and county recordation book and page number. Further to the right, along the right margin of the page, are the letters “A,” “B,” “C,” “D,” and “E.” It is clear from the face of the document that each group of claims has been assigned one of the five letters--either A, B, C, D, or E. See SOR, Attachment C, replicated as Appendix A of this opinion. A third page is attached to the September 5 submission. That document is an explanatory page which reads, in pertinent part:

These claims belong to the Kester Counts Estate. They are now individually owned by member[s] of this family.

- A. Julie Dimitrov
- A. Linda Kogutkiewicz
- A. Lauretta Cole
- B. Vivienne Prather
- C. Laura Jean Cole
- D. Evangline (Lyn) Rudolph
- E. A.B. Compton

Although not stated, BLM apparently considered these documents to be supporting documents filed with the “Affidavit of Annual Representation Work,” and did not consider them adequate to qualify as a small miner waiver certification. Appellants, on the other hand, contend that the explanatory page supplementing the list of claims identifies the individual owner or owners of each claim,^{5/} and contend

^{5/} This presumes that the letters to the left of each name listed on the explanatory page correspond to the letters listed along the far right margin on the list of claims attached to the “Affidavit of Annual Representation Work.”

that by timely filing these two documents and the check for \$140, they substantially complied with the waiver certification requirements. To the extent they did not comply, appellants argue that the proper procedure was for BLM to grant them an opportunity to cure the filing pursuant to 43 CFR 3833.4(b), and to accept their September 22 and 30 filings as a cure of the September 2 filing. (SOR at 5, 12.)

The majority has set forth the applicable legal framework. Section 10101(d)(1) of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 28f(d)(1) (2000) (the Maintenance Fee Act), 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 he or she holds not more than 10 claims and has performed the requisite annual assessment work. The Department implemented this Act with 43 CFR 3833.1-6(d)(2)(1994), which provides that a waiver may be obtained from payment of the maintenance fee for mining claims if the claimant has filed proof that he or she has met the conditions for exemption, “attested to as a certified statement, pursuant to 43 CFR 3833.1-7, with the proper BLM office by the August 31 immediately preceding the assessment year for which a waiver is sought.”

Departmental regulation 43 CFR 3833.1-7 (d)(1994) provided that “[t]he small miner shall document, as provided in this paragraph (d), the claimed waiver for each assessment year a small miner’s waiver is claimed, certified, and attested to under penalty of 18 U.S.C. § 1001.” That regulation continues by enumerating the following items that the waiver certification must contain:

- (1) The mining claim and site names and BLM serial numbers assigned to the mining claims and sites held by the small miner;
- (2) A declaration by the claimant and all related parties that they own no more than 10 mining claims and sites in total nationwide on the date the waiver statement is due;
- (3) A declaration that specifies that the assessment work requirements have been or will be completed by the date the payment is due, which is each August 31, for the assessment year just ending;
- (4) The names and addresses of all owners maintaining an interest in the mining claims and sites; and
- (5) The signature of all the owners of the mining claims and sites for which a waiver is claimed.

A claimant is disqualified if they fail to identify the 10 or fewer mining claims for which the fee is requested to be waived. See 43 CFR 3833.4; Kathryn Firestone, 148 IBLA at 130-31. Thus, 43 CFR 3833.4(a)(4) states: “Failure to list the 10 or fewer mining claims and/or sites for which the fee is requested to be waived on the applicable certification document filed pursuant to 3833.1-6 or 3833.1-7 will result in the affected mining claims and/or sites being deemed abandoned by the owner or owners thereof.” By contrast, we note that 43 CFR 3833.4(b) (1994), which I deem controlling in the present case, provides for curative action for failure to file the complete information, including that required by 43 CFR 3833.1-7(d)-(f). Such “failure to file the complete information” is curable by the terms of 43 CFR 3833.4(b) (1994), which stated:

(b) Failure to file the complete information required in * * * [43 CFR] 3833.1-7(d) * * * when the document is otherwise filed on time, shall not be conclusively deemed to constitute an abandonment or forfeiture of the claim or site, but such information shall be submitted within 30 days of receipt of a notice from the authorized officer calling for such information. Failure to submit the information requested by the decision of the authorized officer shall result in the mining claim * * * being deemed abandoned by the owner.

The preamble to the final rule adopting this “cure” provision states: “If a small miner certification filing is submitted by the August 31, 1993, deadline, and errors are found in the submission, the authorized officer will allow a grace period of 30 days after receipt of notification from BLM.” 58 FR 38186, 38194 (July 15, 1993).

The premier case interpreting 43 CFR 3833.4(b), which I think controls this matter, is Satrom, *supra*, in which BLM declared a placer mining claim abandoned and void for failure to pay rental fees or provide adequate certification of exemption from payment of rental fees for the 1993 and 1994 assessment years. Although the appellants in Satrom had timely filed a certification form, the form failed to include the assessment year for which the exemption from payment was being sought. BLM cited 43 CFR 3833.1-7(d) in ruling that appellants had to file a separate statement on or before August 31, 1993, supporting the claimed exemption for each assessment year the small miner exemption was claimed.^{6/} The Board noted that “[a]lthough

^{6/} The version of 43 CFR 3833.4(b) (1993) applicable when the Board decided Satrom referred to the “[u]nintentional failure to file the complete information required in * * * [43 CFR] 3833.1-7(d),” whereas the version applicable herein deletes the word “unintentional,” and simply states that the “[f]ailure to file the complete information required in * * * 3833.1-7(d) * * *.” 43 CFR 3833.4(b) (1994).

claimants filed the exemption document on time, they unintentionally failed to file the complete information required in 43 CFR 3833.1-7(d),” *i.e.*, “they failed to specify the assessment year or years that the exemption request was intended to cover.” Satrom, *supra* at 181. The Board ruled that “[u]nder 43 CFR 3833.4(b), BLM should have provided claimants notice calling for such information and allowed 30 days for compliance,” and that “[o]nly after the expiration of that period without compliance could BLM properly issue a decision declaring the claims abandoned and void.” *Id.*

Judge Irwin’s view of his colleagues’ disposition of the Garrand case was quoted as a prologue to my present dissent. The documents timely filed by appellants in this case identified the mining claims by name and BLM serial number, and included the names and addresses for all owners maintaining an interest in the claims, thus satisfying the informational requirements of 43 CFR 3833.1-7(d)(1)-(5). The applicable regulation did not require the filing of an affidavit of assessment work until December 30. All that was required by August 31 was a declaration that the assessment work requirements had been or would be completed by the date the payment is due, August 31, for the assessment year just ending. Appellants thus exceeded the requirements of 43 CFR 3833.1-7(d)(3) by filing the affidavit of assessment work before August 31. They included within that affidavit the information also required to be provided by a small miner seeking a waiver of the maintenance fee requirements under 43 CFR 3833.1-7(d)(1)-(5).

Ms. Cole omitted a reference to the fact that the claimants were seeking a small miner waiver exemption. The appellants should not lose their interest in these claims because Ms. Cole failed to alert BLM to the fact that the document captioned “Affidavit of Annual Representation Work” was also intended to constitute a “certification” document.^{7/}

I agree with the appellants that in this case BLM should have followed the quoted rule by treating the submissions filed with BLM on September 30, 1997, the “Maintenance Fee Payment Waiver Certification,” as curing the deficiencies perceived in the “Affidavit of Annual Representation Work” previously filed with BLM on September 5, 1997. That “Affidavit of Annual Representation Work” omits nothing

^{7/} The individual claimants did not sign the “Affidavit of Annual Assessment Work” at issue in this case. However, we would view such failure as curable under 43 CFR 3833.4(b). *See Production Industries Corp.*, 138 IBLA 183, 189-90 (1997) (BLM could not declare oil shale placer mining claims abandoned and void because an authorized corporate official had failed to sign a required notice of election: “BLM should have treated appellant’s failure to provide a signed notice as a curable defect and afforded appellant notice and an opportunity to submit a properly executed notice.”)

which can reasonably be characterized as “at the heart of the certification process.” Firestone, 148 IBLA 130. I reach this conclusion even though appellants did not initially submit the later-supplied information on the “Maintenance Fee Payment Waiver Certification” form, since, as appellants correctly emphasize, “[t]he regulations do not require the use of a particular form or require identification by using a designated heading or title for the ‘small miner’s waiver,’” and “[t]he regulations only require that the substance of the filing conform to 43 C.F.R. § 3833.1-7(d)(1)-(5).” (SOR at 4-5.)

BLM declared the claims “forfeited by operation of law” because of what might be characterized as a verbal deficiency, *i.e.*, no explicit statement that those were the only claims owned by the appellants, and because they failed to use BLM’s certification form in making their filing. The record shows that the “Affidavit of Annual Representation Work” listed the only claims which the individual claimants owned.

Having timely satisfied “the heart of the certification process” by separately identifying the subject claims by name, as well as having satisfied the other regulatory informational requirements which were included in the early filed “Affidavit of Annual Representation Work,” the appellants’ claims, I would hold, were not abandoned or forfeited for failure to file a timely request for waiver certification. Appellants’ failure to submit the remaining information called for by the regulations was curable pursuant to 43 CFR 3833.4(b) (1994). That regulation requires BLM to afford a mining claimant an opportunity to cure within 30 days of receipt of a notice from the authorized officer calling for such information. However, because appellants submitted the remaining information called for by the regulations before BLM issued its decision in this case, cure has been effected and nothing remains to be accomplished.

I dissent.

James F. Roberts
Administrative Judge

APPENDIX A

KESTER COUNTS FAMILY CLAIMS

CATHY	MMC 48447	Bk. 19	Pg. 129	
COPPER	MMC 48449	Bk. 16	Pg. 170	
SHIRLEY	MMC 48482	Bk. 19	Pg. 125	
MONTANA	MMC 48429	Bk. 18	Pg. 587	A
FALLS	MMC 48455	Bk. 19	Pg. 139	
FLOYD COUNTS	MMC 48458	Bk. 13	Pg. 202	
EAGLES NEST	MMC 48425	Bk. 16	Pg. 240	

ANNIE	MMC 48435	Bk. 19	Pg. 239	B
VIVIENNE	MMC 48485	Bk. 19	Pg. 115	

BLOWOUT	MMC 48443	Bk. 19	Pg. 119	
MYSTERY	MMC 48474	Bk. 9	Pg. 228	
AMBER	MMC 48434	Bk. 19	Pg. 117	
MERLYN	MMC 48472	Bk. 19	Pg. 355	
DAVID	MMC 48452	Bk. 19	Pg. 313	C
ABRASTRA CREEK				
QUARTZ	MMC 48436	Bk. 13	Pg. 203	
CONNECTOR	MMC 48448	Bk. 19	Pg. 137	
PYRITE	MMC 48476	Bk. 9	Pg. 225	
JULIE ELLEN	MMC 48464	Bk. 19	Pg. 353	

JEANNETTE	MMC 48462	Bk. 19	Pg. 121	
BASALT DYKE	MMC 48440	Bk. 19	Pg. 123	
DIXIE	MMC 48453	Bk. 19	Pg. 135	
WHITE DYKE	MMC 48486	Bk. 19	Pg. 159	
DODGE	MMC 48454	Bk. 19	Pg. 161	D
TWILIGHT	MMC 48484	Bk. 9	Pg. 224	
GRIZZLY	MMC 48460	Bk. 19	Pg. 141	
JUNEAU	MMC 48465	Bk. 9	Pg. 227	
ROYALITE	MMC 48479	Bk. 19	Pg. 581	
GALENA QUEEN	MMC 48459	Bk. 9	Pg. 226	

SPRING	MMC 48483	Bk. 16	Pg. 175	E