Editor's note: Reconsideration Denied by order of June 7, 2005.

ED SORRELLS

IBLA 2002-259 Decided February 10, 2005

Appeal from a decision of the Arizona State Office, Bureau of Land Management, declaring the Adino lode mining claim forfeited by operation of law because of the failure to timely file either the $100 claim maintenance fee or a fee waiver certification for the 2002 assessment year. AMC 355492.

Affirmed.

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

   In the absence of any evidence in the case file that a mining claim fee waiver certification was received by BLM, the legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them will support a finding that the document was not timely filed. Although the presumption is rebuttable by evidence to the contrary, an assertion that a waiver certification was filed with BLM is insufficient in the absence of a copy of the waiver certification and corroboration that the document was received by BLM.

APPEARANCES: Ed Sorrells, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Ed Sorrells has appealed from a February 11, 2002, decision of the Arizona State Office, Bureau of Land Management (BLM), declaring the Adino lode mining claim, AMC 355492, forfeited by operation of law because neither the $100 claim maintenance fee for the 2002 assessment year nor a fee waiver certification was received for the claim by the deadline of September 1, 2001. In its decision, BLM

noted that the waiver certification submitted for the subject claim was received in an envelope postmarked September 21, 2001.

The BLM decision was based on a finding that the claimant was required to either pay a $100 claim maintenance fee or file a waiver (or small miner exemption) certification for the 2002 assessment year, on or before September 1, 2001, pursuant to section 10101 of the Omnibus Budget Reconciliation Act of 1993 (Omnibus Act), as amended, 30 U.S.C. § 28f (2000), and implementing regulations at 43 CFR 3833.1-5(b) and 3833.1-7(d). Under the Omnibus Act, as amended, a mining claimant is required to "pay to the Secretary of the Interior, on or before September 1 of each year for years 1999 through 2001, a claim maintenance fee of $100 per claim." 30 U.S.C. § 28f(a) (2000). However, the statute also provides that payment of the annual claim maintenance fee "may be waived" when the claimant

> certifies in writing to the Secretary 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; and * * * 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. [Emphasis added.]

30 U.S.C. § 28f(d) (2000). Thus, the Secretary has been afforded 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.

The Department has implemented the waiver provision with a regulation that requires the claimant to file proof of the conditions for exemption with the proper BLM office by September 1 at the beginning of the assessment year for which the waiver is sought. 43 CFR 3833.1-7(d). The regulations further provide that the certification will be deemed timely filed if it is received in the proper BLM office within 15 days of the filing deadline and is contained in "an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed by law." 43 CFR 3833.0-5(m). Compliance with these deadlines is crucial since, absent the timely filing of a waiver certification, failure to pay the claim maintenance fee, "shall conclusively constitute a forfeiture of the unpatented mining claim * * * by the claimant and the claim shall be deemed null and void by operation of law." 30 U.S.C. § 28i (2000); 43 CFR 3833.4(a)(2).

The record shows that the subject mining claim was located on April 24, 2001, and a copy of the notice of location, along with the appropriate fees, was filed with BLM on June 14, 2001. No further filings for this claim appear in the case record before December 17, 2001, when BLM received from Sorrells a hand-written note signed by Sorrells which read: "I only have 1 claim the Adino, AMC #355492 - waiver request." This note received on December 17 bears two dates on its face (September 19 and November 4, 2001) and was accompanied by two envelopes addressed to BLM which had been returned to the sender (Sorrells) by the Post Office marked "return to sender not deliverable as addressed." The earliest postmark appearing on the envelopes is September 21, 2001.

In his statement of reasons for appeal, Sorrells alleges that he sent an electronic message (e-mail) to BLM seeking a waiver and asking whether the e-mail filing "was OK." He avers that he was told it was. Sorrells then explains that when he later sent a paper copy of his waiver certification to BLM it was misdirected because he had employed an old address no longer in use, and therefore it was received late by BLM. He argues that the waiver certification by e-mail was timely and sufficient.

The regulation at 43 CFR 3833.1-7(d) implementing the waiver provision requires 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." [1/] Thus, the statute and regulations require a claimant seeking a waiver to file a written annual contemporaneous certification of his qualifications which is certified under penalty for misrepresentation. A form has been produced by BLM for waiver certification, which, when properly filled out and signed, certifies all of the required information. This form is almost exclusively used by those seeking a waiver. Appellant, however, chose not to use that form. We know of no requirement that a specific form be used so long as a timely waiver certification is filed by the claimant and the required information is provided. See L. R. Church, 155 IBLA 367, 372 (2001). In the Church case, the waiver certification form documenting claimant's qualifications for waiver, although unsigned, was accompanied by an affidavit signed and acknowledged by claimant certifying his waiver qualifications. 155 IBLA at 372.

Although we find no precedent for rejecting a waiver certification simply because it is not filed on the form developed by BLM for this purpose, submission of a waiver certification by e-mail may not comply with regulatory requirements. In the case of an e-mail, no hand-written signature can be applied to the message transmitted. In the absence of a signature, it would be hard to find that the claimant

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[1/] This statute is a criminal statute declaring it a crime to make a material misrepresentation of fact when providing information to the Government.

has certified that he and all related parties held no more than 10 claims on the date payment was due, as required by statute and regulation. 30 U.S.C. § 28f(d)(1); 43 CFR 3833.1-7(d). While unintentional omissions causing a failure to provide complete information may be subject to cure when such information is later provided in response to a request from BLM, 43 CFR 3833.4(b), omissions which affect "the heart of the certification process," such as the failure to identify a claim are not such omissions. Kathryn Firestone, 148 IBLA 126, 130 (1999). The filing of a contemporaneously signed certification of claimant's qualifications executed in support of the specific application for waiver for an assessment year has been held essential to the waiver certification process required by these statutory and regulatory provisions. Thomas L. Carufel, 155 IBLA 340, 345-46 (2001). [2/] Upon the facts of the present appeal, however, we are not in a position to adjudicate whether a waiver certification by e-mail may comply with the requirements.

[1] In this case, reliance by appellant upon an e-mail communication asserted to contain a waiver certification is precluded by the absence from the case file of any e-mail addressing waiver certification prior to the September 1, 2001, deadline. [3/] There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them and, hence, the absence of timely date-stamped documents from the record will support a finding that the documents were not timely filed. Debbie Hosko, 158 IBLA 4, 6 (2002). This presumption may, however, be rebutted by probative evidence to the contrary. Darrell Palmer, 156 IBLA 360, 362 (2002); John and Linda Nelson, 156 IBLA 195, 199 (2002); H. S. Rademacher, 58 IBLA 152, 155, 88 I.D. 873, 875 (1981); see Wilson v. Hodel, 758 F.2d 1369, 1374-75 (10th Cir. 1985). This means that the burden of proof is shifted to the appellant to provide evidence that a filing was timely made and thereby rebut the presumption of administrative regularity. Darrell Palmer, 156 IBLA at 362. Appellant has not provided a copy of this purported e-mail in support of his appeal. Accordingly, appellant's uncorroborated assertion that he timely filed a waiver certification in an e-mail communication must be rejected.

[2/] We note that the Department has provided that certain types of applications can be filed electronically with BLM "if an original signature is not required." 43 CFR 1822.13. When a signature is required, the document must be filed by delivery or mailing. Id.

[3/] The file does contain an e-mail message from appellant dated Apr. 10, 2002, in which he complained to BLM and asserted BLM "granted me a waiver and then denied it." As noted above, no filings are found in the case file between the filing of the notice of location and appellant's waiver request filed Dec. 17, 2001.

On the basis of those documents we do find in the record, i.e., those received by mail in December 2001, we must affirm the BLM decision. By regulation, the Department has defined "filed" to mean "being received and date stamped by the proper BLM office" and has further provided that specified documents for mining claims are:

> 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 * * *.

43 CFR 3833.0-5(m). Appellant's attempted filing is clearly flawed under this regulation. It was received on December 17, 2001, well beyond the 15-day grace period. Moreover, all of his recorded attempts at mailing this certification to BLM were postmarked no earlier than September 21, 2001, well after the filing deadline of September 1. Thus, BLM could not accept this filing as timely.

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.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge