

ANDY D. DELCOMTE

IBLA 2005-92

Decided April 21, 2005

Appeal from a decision of the Idaho State Office, Bureau of Land Management, providing for a refund of the \$5 per claim service charge submitted with affidavits of assessment work for mining claims listed on the Bureau's records as closed.
IMC-11125 et al.

Reversed in part and case remanded; petition for stay denied as moot.

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

When a maintenance fee waiver certification contains a handwritten statement that the claimant intends to relinquish any interest in any mining claim he might have, BLM erroneously relies on such a statement to close the files for claims included in the certification when other evidence shows that the statement was intended to relate only to any interest the claimant may have held in any claims other than those listed. In order to have a valid relinquishment of a mining claim, and thus an abandonment thereof, it must be demonstrated that the claimant actually intended to abandon the claim on or before the filing of his certification.

APPEARANCES: Andy D. Delcomte, Meridian, Idaho, pro se; Jimmie Buxton, Chief, Branch of Lands, Minerals and Water Rights, Idaho State Office, Bureau of Land Management, Boise, Idaho, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Andy D. Delcomte has appealed from and petitioned for a stay of the effect of a January 24, 2005, decision of the Idaho State Office, Bureau of Land Management

(BLM). That decision provided, in accordance with 43 CFR 3830.22(a),^{1/} for a refund of the \$5 per claim service charge submitted with various affidavits of assessment work for 12 mining claims listed on BLM's records as closed, including 9 claims owned by Delcomte: Golden Eagle No. 17 (IMC-11125) Golden Eagle Nos. 4, 7, and 18 (IMC-175122 through IMC-175124), Golden Eagle No. 21F (IMC-175126), and Mineral Zone Nos. 1, 2, 6, and 10 (IMC-175153 through IMC-175156).

BLM's decision was actually issued to Elvin Joe Swisher of Idaho Mining & Development in Cottonwood, Idaho, and concerned affidavits of assessment work, for the 2004 assessment year, filed December 28 and 30, 2004, with respect to numerous mining claims, including the nine at issue. Among those filings were three affidavits covering the nine claims, all signed by Barbara Swisher, acting as Delcomte's agent.

This case stems from a "Maintenance Fee Waiver Certification" (Form 3830-2 (January 2004)) filed with BLM on August 30, 2004, in satisfaction of 30 U.S.C. § 28f(d)(1) (2000) and 43 CFR 3835.10(a). The waiver certification stated, in pre-printed language with the underlined numbers handwritten: "This small miner waiver is filed for the assessment year beginning at noon on September 1, 2004 and ending at noon on September 1, 2005." It also stated: "The undersigned and all related parties owned ten or fewer mining claims, mill, or tunnel sites located and maintained on Federal lands in the United States of America on September 1, 2004." In addition, the certification contained pre-printed language attesting to various other requirements.

The waiver certification then required the listing of the claim or site names, as well as the BLM recordation serial numbers. Listed by name and corresponding BLM serial number, in handwriting, were the nine mining claims at issue and the Golden Eagle No. 22F claim, identified as IMC-175127. Immediately below the columns were the pre-printed words: "The owner(s) (claimants) of the above mining claims or sites are[]," below which was the handprinted name "Andy D. Delcomte," identified as the "Owner's Name."

To the right of Delcomte's handprinted name was the line labeled "Owner's Signature" on which appeared Delcomte's original signature. Immediately below his signature was the following handwritten sentence: "I hereby relinquish any interest in any mining claims I might have, as of August 30, 2004."

^{1/} Regulatory citations are to the regulations in 43 CFR Parts 3830, 3834, and 3835 revised and reorganized effective Nov. 24, 2003. See 68 FR 61064, 61069, 61073 (Oct. 24, 2003).

Under 30 U.S.C. § 28f(a) (2000), as amended,^{2/} the holder of an unpatented mining claim, mill site, or tunnel site is required to pay a claim maintenance fee for each claim or site on or before September 1 of each year for the years 2004 through 2008. See 43 CFR 3830.21 and 3834.11(a). Failure to pay the claim maintenance fee “shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law.” 30 U.S.C. § 28i (2000); see 43 CFR 3830.91(a).

Congress, however, provided the Secretary of the Interior with discretion to waive the fee for a claimant who certified in writing 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 had performed assessment work required under the Mining Law of 1872, for the assessment year ending at noon on September 1 of the calendar year in which payment of the claim maintenance fee was due. 30 U.S.C. § 28f(d)(1) (2000); see 43 CFR 3835.1. BLM implemented this statute with a regulation that provides:

You must submit BLM’s waiver certification form on or before September 1 of each assessment year for which you are seeking a waiver. You must submit your waiver on or before September 1 for BLM to exempt your claims or sites from the annual maintenance fee requirement that is due on the same date. [Emphasis added.]

43 CFR 3835.10(a). Thus, where a claimant desired to exempt his claims or sites from the annual maintenance fee requirement for the assessment year which began at noon on September 1, 2004, and ended at noon on September 1, 2005 (the 2005 assessment year), he was required to file his small miner waiver certification on or before September 1, 2004. Failure to pay the claim maintenance fees or file the waiver certification timely results in forfeiture of the affected claims. 43 CFR 3835.92(a).

Delcomte does not assert, and we find no evidence, that claim maintenance fees were paid by him or on his behalf with respect to the mining claims at issue, for the 2005 assessment year, on or before September 1, 2004. Rather, Delcomte filed his small miner waiver certification for the 2005 assessment year on August 30, 2004, before the September 1 deadline. The certification listed 10 mining claims,

^{2/} 30 U.S.C. § 28f(a) (2000) has been amended twice by Congress, specifically by the Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 414, 418-19 (2001), and the Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241, 1245 (2003).

and attested to the fact that Delcomte and all related parties owned 10 or fewer mining claims, mill sites, or tunnel sites, or any combination thereof, on September 1, 2004.

Delcomte's small miner waiver certification also stated that he "relinquish[ed] any interest in any mining claims I might have, as of August 30, 2004." (Emphasis added.) The 10 mining claims listed on the certification were clearly claims in which he asserted an ownership interest as of the August 30, 2004, date of filing the certification. In its January 24, 2005, decision, BLM accepted that statement at face value and considered nine of those claims to have been relinquished.^{3/}

However, concluding that Delcomte had relinquished the claims is at odds with the fact that he was, by filing the certification, seeking to preserve the claims, by avoiding the forfeiture of claims that would otherwise occur, absent compliance with the statutory and regulatory requirements. Thus, on its face, the statement on the certification conflicted with the certification itself.

Further, Delcomte states, on appeal, that the relinquishment statement was in error because the person who he had asked to prepare the statement failed to follow his instructions:

I asked my niece, Barbara Swisher, to add a note to my 2004 Waiver Form stating that I was relinquishing any interest I might have in any mining claims not listed above as of August 30, 2004. Unfortunately, a mistake was made and the three words, "not listed above[,]" were omitted. I did not then, nor do I at present, wish to give up my mining claims.

(Notice of Appeal/Statement of Reason (NA/SOR) at 1-2.)

Delcomte argues that the "mistake" on his waiver certification was "curable," and that BLM erred by not affording him notice and an opportunity to correct the mistake. (NA/SOR at 2.) He asserts that, in not doing so, BLM "violated" its own policy, expressed in an April 1, 2003, letter from the Assistant Director, Minerals, Realty, and Resource Protection, BLM, to the State Director, Idaho, BLM (Assistant Director's Letter), a copy of which he attached to his NA/SOR as Exhibit 2. *Id.* That letter provides that "alteration of official government forms is not permissible" and that "added statements of the mining claimant are not binding upon or recognized by the Bureau," and, where the form otherwise conforms with the statutory filing

^{3/} For some reason, possibly inadvertence, BLM did not list the Golden Eagle No. 22F claim (IMC-175127) as closed in its Jan. 24, 2005, decision.

requirement, such alterations will be treated as curable defects. (Assistant Director's Letter at 1.) It further explains that "[t]he claimant is to be sent an interlocutory decision * * * and given 60 days * * * to either file an unaltered and proper waiver form(s)" or pay the proper fee. *Id.* Delcomte notes that, had he been provided an opportunity, he would have corrected the mistake on his certification.

In response to Delcomte's appeal, BLM reports that it is "not uncommon" to receive relinquishments of mining claims or mill or tunnel sites on waiver certification forms, especially since "no specific form" is required by statute or regulation for a relinquishment: "[O]ur office has regularly accepted relinquishments in many different formats such as: statements on Maintenance Fee Waiver Certification[s], Proof of Labor/Affidavit of Assessment Work documents, or a letter of relinquishment." (Memorandum to Board from Chief, Branch of Lands, Minerals and Water Rights, Idaho State Office, BLM, dated Mar. 9, 2005 (March 9 Memorandum), at 1.)

We do not find it unusual that small miner waiver certification forms are used to express a claimant's intention to relinquish mining claims or mill or tunnel sites, since in order to have a valid waiver, and thus avoid the requirement to pay claim maintenance fees, the claimant is required to own a total of no more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof. 30 U.S.C. § 28f(d)(1) (2000); 43 CFR 3835.1(b). In fact, BLM notes, in responding to the appeal, that a prior form used in connection with waiver certifications, "Maintenance Fee Payment Waiver Certification" (Form 3830-2 (July 1994)), had a "box that could be checked to relinquish mining claims or sites." (March 9 Memorandum at 1.) The record contains a copy of that form, which bears the instruction, next to a box, "Please check this box if the following statement applies to you," followed by the words: "*I/We relinquish my/our claims and/or sites not listed below.*" Below this language are the columns and lines for listing the claim names and corresponding BLM serial numbers for the claims for which a waiver is sought. The record also contains a copy of a later form, "Maintenance Fee Waiver Certification" (Form 3830-2 (January 2000)). On that form, immediately below the line for the "Owner's Signature," in the same position as the handwritten notation on Delcomte's form filed on August 30, 2004, are the pre-printed words: "I hereby relinquish all mining claims not listed above. Without prejudice." Both certification forms were evidently prepared in response to BLM's earlier determination that a claimant could not effect an "automatic relinquishment" of claims by simply not listing them on a certification, but must affirmatively state, on a certification or elsewhere, the specific intention to relinquish claims. See *Burbank Gold, Ltd.*, 138 IBLA 17, 19 (1997). Thus, it has been permissible, as a matter of BLM policy, for a claimant to express an intent to relinquish claims or sites at the time of filing a small miner waiver (previously

exemption) certification, in order to bring the total claim and/or site ownership down to or below 10. See id.

[1] However, while it is certainly conceivable that a claimant may use a small miner waiver certification to express his intent to relinquish mining claims, BLM was, and now the Board is, required to determine whether Delcomte did, in fact, relinquish all the claims listed on his waiver certification, on or before the filing of his certification with BLM. In order for there to be a valid relinquishment, and thus an abandonment, of a mining claim, it must be demonstrated that the claimant actually intended to abandon the claim on or before the filing of the certification. Burbank Gold, Ltd., 138 IBLA at 20; The Big Blue Sapphire Company, Inc., 138 IBLA 1, 4-5 (1997).^{4/} The overriding importance of an actual intent to abandon is, as explained by the Board in Blue Sapphire, derived from the common law of abandonment regarding mining claims:

Abandonment, as we have noted in the past, “is a concept well known to mining law, but its basis is the traditional law of abandonment--relinquishment of possession together with the subjective intent to abandon.” Department of the Navy, 108 IBLA 334, 338 (1989) quoting Oregon Portland Cement Co., 66 IBLA 204, 207 (1982)[, rev'd on other grounds, Oregon Portland Cement Co. v. U.S. Department of Interior, 590 F. Supp. 52 (D. Alaska 1984)].

138 IBLA at 4-5; see Interstate Mining and Development Properties, Inc., 141 IBLA 369, 371 (1997). Thus, we held in Blue Sapphire that whether relinquishment of a mining claim can be said to have occurred by the time of certification depends on whether the claimant had, on or before the filing of his certification, relinquished possession of the claim with the actual intent to abandon, “regardless of the point in time at which these facts are communicated to BLM.” 138 IBLA at 5.

It is clear that no intent to abandon existed in this case. The written relinquishment was inherently ambiguous because it was at odds with appellant's intention to maintain the claims under 30 U.S.C. § 28f(d)(1) (2000), inherent in his

^{4/} In Burbank and Blue Sapphire, we held that a claimant was entitled to an exemption from the fee requirement, where it listed 10 or fewer claims and/or sites on the exemption form, thereby evidencing an intention to abandon any other claims owned by it, and other evidence in the record confirmed that intention. See also Little Bear Mining & Exploration, Inc., 138 IBLA 304, 305-06 (1997); William J. Montgomery, 138 IBLA 31, 33-35 (1997). In Burbank, that evidence consisted of the filing of an affidavit of assessment work listing only the same 10 claims as included on the exemption form. See 138 IBLA at 18, 20.

timely filing of the certification. Indeed, the mere filing of the form indicated that the claimant intended to avoid the forfeiture which would otherwise occur by operation of 30 U.S.C. § 28i (2000). Further, on December 28, and 30, 2004, before BLM issued its January 2005 decision, affidavits of assessment work for the 2004 assessment year were filed with BLM for the claims in question.^{5/} All this contradicted BLM's conclusion that the claims at issue had been relinquished.

Upon receiving the waiver certification form on August 30, 2004, BLM should have inquired of Delcomte regarding the meaning of his stated relinquishment, and whether it truly conformed with his intent. See, e.g., Leo J. Kottas, 73 I.D. 123, 129-31 (1966) (Department charged with determining whether relinquishment of mining claim was voluntary and intentional). If it had done so, and Delcomte had explained the mistake, as he has done on appeal, the claims should not have been listed in the January 24, 2005, decision as closed.^{6/}

Having determined that Delcomte had no intention of relinquishing the claims in question, we hold that it was error for BLM to include those claims in its January 2005 decision as being closed. Its decision is reversed to that extent and the case will be remanded for BLM to give effect to the waiver certification for the 2005 assessment year, all else being regular.

^{5/} The three affidavits were signed by Swisher on behalf of Delcomte, and BLM states in its March 9 Memorandum, at page 2, that it could not recognize Swisher's authority to "supersede Mr. Delcomte's instructions," presumably to relinquish the claims. BLM stated that its records "do not contain a notarized designation of agent or other legal documentation" supporting such authorization. We are only concerned with whether the affidavits were properly filed on behalf of Delcomte, and find no reason to conclude that this was not the case. Having been properly filed, the affidavits, by their nature, gave rise to a legitimate question of whether Delcomte had, in fact, earlier intended to relinquish the claims, regardless of whether or not Swisher had specific authorization to "supersede" his earlier relinquishment.

^{6/} We need not decide whether the Assistant Director's Letter is binding in this case. BLM explains that it was issued in response to an inquiry regarding the filing of a number of 2003 waiver certifications (including Delcomte's) on which line 6 of the standard form (relating to acknowledgment of criminal penalties for making false statements) had been stricken. However, its language clearly goes beyond that limited situation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's January 2005 decision is reversed in part and the case is remanded for action consistent with this order. The petition for stay is denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge