



F.W.A. HOLDINGS, INC.
F.W. AGGREGATES, INC.

167 IBLA 93

Decided September 30, 2005

Editors Note: Appeal Filed, No. CV F 06-0175 AWI LJO (E.D. Cal), *aff'd* F.W.A. Holdings, Inc v. U.S. Dept. of the Interior, 2007 WL 1174540 (April 19, 2007).



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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Arlington, VA 22203

F.W.A. HOLDINGS, INC.
F.W. AGGREGATES, INC.

IBLA 2003-90

Decided September 30, 2005

Appeal from a decision of the California State Office, Bureau of Land Management, declaring 19 unpatented mining claims (CAMC - 37436 through CAMC - 37452, CAMC - 113973, and CAMC - 228239) forfeited and null and void.

Affirmed.

1. Mining Claims: Rental or Claim Maintenance Fees: Postmark Rule

A mining claimant is required to pay a maintenance fee annually, on or before September 1. In accordance with 43 CFR 3833.0-5(m) (2002), a maintenance fee payment will be deemed timely if it is received within the time period prescribed by law or, if mailed, is clearly postmarked by a bona fide mail delivery service on or before the due date, and is received by the "proper BLM State Office," by 15 calendar days after the due date. BLM properly declares mining claims forfeited and null and void for failure to timely file the claim maintenance fee where the record clearly establishes that the proper BLM State Office did not receive the payment by 15 calendar days after the due date.

2. Administrative Authority: Estoppel--Estoppel

A necessary element of estoppel against the Federal Government in matters concerning the public lands is the existence of affirmative misconduct on the part of the Federal Government. We will not find affirmative misconduct where appellant has failed to prove that BLM has affirmatively misrepresented or

concealed a material fact regarding the proper address of the BLM office for filing mining claim maintenance fee payments and, in any event, where appellant is deemed to have knowledge of the proper address by virtue of 43 CFR 1821.10(a) (2002).

APPEARANCES: Matthew L. Emrick, Esq., Sacramento, California, for appellants; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

F.W.A. Holdings, Inc. and F.W. Aggregates, Inc. (referred to collectively as appellants or FWA) appeal from a November 1, 2002, decision (Decision) of the California State Office, Bureau of Land Management (BLM), Sacramento, declaring appellants' 19 unpatented mining claims forfeited and null and void by operation of law for failure to pay timely the \$100 per claim maintenance fee or submit a maintenance fee waiver certification for the 2003 assessment year, on or before September 1, 2002.^{1/} 30 U.S.C. §§ 28f and 28i (2000), as amended; 43 CFR 3833.1-5 and 3833.1-7 (2002).^{2/} BLM stated that it had received the maintenance fee payment on October 1, 2002, and considered it "untimely" as it was not received in the office or postmarked by September 3, 2002.^{3/} (Decision at 2.)

^{1/} The unpatented mining claims are located near Keeler, Inyo County, California, and are identified by serial numbers CAMC 37436-37452, 113973, and 228239.

^{2/} The Maintenance Fee Act has been further amended by the Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241, 1245 (Nov. 10, 2003), which extends its provisions through 2008. See 30 U.S.C.A. § 28f(a) (West Supp. 2004). The regulations have been re-organized and are located at 43 CFR 3830.21 (2004) (maintenance fee amount) and 43 CFR 3834.11(a)(2) (2004) (filing date deadline). Since the decision on appeal predates the regulatory changes, citations are to the 2002 regulations.

^{3/} Sept. 1, 2002, fell on a Sunday and the next day was Labor Day. The regulations at 43 CFR 1821.2-2(e) (2002) provided that if a due date fell on a day the office is officially closed, the document to be filed by that due date is deemed timely filed if received in the proper office on the next day the office is open to the public. Therefore, the 2003 maintenance fee due date was Tuesday, Sept. 3, 2002.

Appellants filed a timely appeal and also petitioned for a stay of the Decision. By order dated January 22, 2003, the Board granted appellants' petition for stay, noting that, absent a stay, FWA's claims would be forfeited. The Board also explained that, while appellants need not demonstrate conclusively that they would prevail on the merits, the estoppel question they raised in this case is sufficiently "serious, difficult and doubtful" as to make the issue "fair ground for litigation and thus for more deliberate investigation," citing Sierra Club, 108 IBLA 381, 385 (1989).

Appellants assert that, on or about August 26, 2002, they mailed a check in the amount of \$1,900 (as payment for maintenance fees for the 19 claims) from their corporate office in Woodstock, Ontario, Canada, to BLM's California State Office, and that they incorrectly addressed the envelope to 2135 Butano Drive, Sacramento, California, 95825. ^{4/} Appellants allege that the envelope was returned on or about September 11, 2002, and that, on an unspecified date, appellants resent the fees to the same incorrect Butano Drive address. Appellants do not explain whether they reused the same envelope with the incorrect address or misaddressed a second envelope. FWA further alleges that, on an unspecified date, the envelope, marked "Attempted, Not Known," was returned. Finally, appellants assert that, on September 28, 2002, they sent BLM "yet another letter" and a check for the 2003 fees. However, without explanation, appellants allege that this time they sent the claim maintenance fees by courier to the *correct* BLM State Office address - 2800 Cottage Way, Sacramento, California. ^{5/} On October 1, 2002, BLM sent

^{4/} The record indicates that in May 1996 BLM temporarily relocated its California State Office from its offices in the Federal Building at 2800 Cottage Way, Sacramento to 2135 Butano Drive, Sacramento. BLM returned to 2800 Cottage Way in May 1999.

^{5/} We note that appellants, after describing the second attempt to deliver the filing to the wrong address, direct our attention to "[a] copy of the envelope attached hereto as Exhibit D." Exhibit D appears to be a photocopy of an envelope with a clear address window. The photocopy of the possible window envelope bears a postmark from Woodstock, Ontario, and a return address, but there is no evidence of the mailing address and no postmark date of Aug. 26, 2002, or of any date prior to or including Sept. 3, 2002. It does, however, bear what appears to be a postmark date of "02 09 12". Appellants have provided no evidence to support their claim that they mailed their 2003 maintenance fees for the 19 claims to BLM's California State Office - whether to the correct or incorrect address - on or before Sept. 3, 2002.

appellants a Notice of Return of Remittance, indicating that appellants' filing was untimely.^{6/} (Notice of Appeal (NOA) at 4.)

Appellants contend that BLM is estopped from denying that their 2003 maintenance fees were timely filed with the proper BLM office, since, they allege, appellants mailed the fees prior to September 1, 2002, and BLM's California State Office would have received the filing within the 15-calendar day period prescribed under the "postmark rule" set forth at 43 CFR 3833.0-5(m) (2002) but for BLM's misconduct and misinformation. (NOA at 6.) Appellants assert that in August 2002 BLM knowingly furnished an incorrect California State Office address in an insert to one of its publications, and that BLM failed to maintain a forwarding address with the U.S. Postal Service. *Id.* at 3. Appellants allege that, in this publication entitled "Mining Claims and Sites on Federal Lands," they found a sheet of paper stating simply:

BUREAU OF LAND MANAGEMENT
CALIFORNIA STATE OFFICE
2135 Butano Drive
Sacramento, CA 95825

Id.; NOA, Exhibit A.

Appellants assert they also were misled by BLM's receipt and acceptance of appellants' 2002 maintenance fees, which allegedly also were mistakenly sent to BLM's former Butano Drive address, but were received in BLM's California State Office, within the time period for timely receipt. Appellants allege that BLM's previous acceptance or, alternatively, BLM's failure to ensure that the U.S. Postal Service would retain a forwarding address three years after BLM returned to Cottage Way, further estop BLM "from denying that the maintenance fee was filed in the proper BLM State Office within the time permitted by law and regulations * * * ." (NOA at 6.) Finally, FWA asserts that BLM's regulations "provide misleading and confusing information regarding the correct BLM office in California in which to file yearly maintenance fees, and this alone is sufficient reason to overturn the BLM's decision in this matter." (Supplemental Statement of Reasons (Supp. SOR), filed

^{6/} The record indicates that appellants initially appealed BLM's Oct. 1, 2002, Notice of Return of Remittance. BLM responded arguing that the Oct. 1, 2002, notice was not an appealable decision. By order, dated Dec. 4, 2002, the Board determined that FWA's appeal of the notice was premature, and granted BLM's motion to dismiss.

December 26, 2002, at 2.) Appellants conclude that the foregoing litany constitutes BLM misconduct and that this alleged misconduct led FWA to believe that the proper address for filing claim maintenance fees for 2003 was the Butano Drive address.

In response, BLM denies that it misled appellants and avers that the agency proactively provided appellants correct address information when, the week of June 3, 2002, the BLM Mining Adjudication Branch mailed them filing instructions for the 2003 maintenance fee filings. (Response to Supp. SOR, filed January 23, 2003, at 4 (Response); Declaration of Debra Marsh at ¶¶ 11-12 and Attachment A.) Those instructions, entitled “Mining Claims/Sites Filing Instructions for 2003,” clearly state that payments should be mailed to “the Bureau of Land Management, California State Office, 2800 Cottage Way, Rm. W-1834, Sacramento, CA 95825,” and, in capital letters states, “Be alert! Filing requirements are subject to change!” It continues:

As an owner of mining claims, YOU ARE RESPONSIBLE for keeping yourself informed of the changes in the filing requirements and the mining laws. * * * It is suggested that you contact our office periodically to stay up to date. You may write us at the above address, call our customer service representatives * * * or visit our website * * *.

(Marsh Declaration, Attachment A.)

Regarding the pamphlet appellants claim to have received, BLM notes that the pamphlet is available on request, includes general information on mining claims, and does not instruct readers to send annual maintenance fees to any particular office, though it does, in fact, include the correct California State Office address. (Response at 9; Marsh Declaration, Attachment B at 17.) BLM disputes appellants’ allegation that a sheet of paper was inserted in the pamphlet bearing only the imprint of an address stamp of the Butano Drive address, and argues that appellants could not have reasonably relied on an alleged insert when they were in possession of correct information from numerous other sources.²⁷ In addition, the agency asserts that

²⁷ BLM indicates that it ceased distribution of the pamphlet and insert identifying the temporary Butano Drive address in May 1999, when the State Office returned to its Cottage Way address and any remaining copies of the insert were destroyed. See Affidavit of Gary C. Catledge, Jan. 21, 2003, at 2. Further, BLM states that the insert provided by appellants differs in appearance from the insert BLM distributed during
(continued...)

appellants consistently mischaracterize the facts by referring to the alleged paper insert as “misinformation” in an “official BLM decision,” characterizing the regulations as “misleading and ambiguous” and accusing BLM of “misconduct” in accepting appellants’ allegedly misaddressed but timely filed 2002 fees.

BLM concludes that appellants’ injury was caused by appellants’ own failure to follow both the explicit instructions BLM provided and the regulations and disputes appellants’ reliance on an out-of-date address on a paper purportedly inserted in a pamphlet BLM allegedly sent appellants in 2002.^{8/}

On February 14, 2003, appellants submitted a request for hearing regarding “all factual matters put at issue by this Appeal, and by BLM’s Response and Motion for Summary Judgment.” (Request for Hearing at 1). BLM opposes that request. We find there are no material issues of fact which, if proven, would alter the disposition of the appeal and which cannot be resolved on the present record. El Rancho Pistachio, 152 IBLA 87, 96 (2000); Natec Minerals, Inc., 143 IBLA 362 (1998). We find no basis for an evidentiary hearing pursuant to 43 CFR 4.415 and, accordingly, we deny appellants’ request for a hearing.

[1] The first issue in this case is whether BLM properly declared appellants’ 19 mining claims at issue null and void for failure to timely file the claim maintenance fees pursuant to 43 CFR Subpart 3833, notwithstanding appellants’ claim that they delivered custody of the envelope to a bona fide delivery system in advance of the filing deadline, where the record clearly establishes that the proper BLM state office did not receive the filing until October 1, 2002. The regulation defining “file or filed,” sometimes known as the “postmark rule,” provides that fees are timely filed if:

^{7/} (...continued)

its temporary relocation to Butano Drive. Id. at 2-3; Response at 11-12.

^{8/} BLM points out that appellants apparently were aware of BLM’s correct address in 2000 when, according to BLM’s records, appellants addressed their 2001 filing to the Cottage Way address. Missing from BLM’s files, however, is the envelope appellants used to transmit their 2002 fees. As a result, BLM was unable to confirm appellants’ claim that the envelope which BLM received within the prescribed period was originally misaddressed to Butano Drive. See Marsh Declaration at 3.

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 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) (2002).

To invoke the postmark rule, an appellant must show that it mailed its maintenance fee payment by the due date *and* that payment was received by the proper BLM office no later than 15 days after the due date. Bellmetal Enterprises, Inc., 140 IBLA 76, 79 (1997). Here, it is unclear whether appellants have satisfied the first prong of the test. However, even with the requisite postmark evidence, appellants would be unable to take advantage of the postmark rule, since the record shows indisputably that “the proper BLM State Office” received appellants’ 2003 filing on October 1, 2002 - almost 30 days after the due date. Therefore, appellants have failed to demonstrate the timely filing of their 2003 maintenance fee payment pursuant to 43 CFR Subpart 3833.

Congress, at 30 U.S.C. § 28i (2000), provided that failure to file claim maintenance fees “shall conclusively constitute 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.” Howard J. Hunt, 147 IBLA 384 (1999); Paul W. Tobeler, 131 IBLA 245, 249 (1994). Appellants invoke the doctrine of estoppel in an attempt to get around this automatic forfeiture.

[2] Appellants argue that BLM’s conduct constituted affirmative misconduct which caused appellants to fail to submit payment of the 2003 maintenance fees either by September 3, 2002, or by 15 days after that prescribed due date.

The Board has well-established rules governing consideration of estoppel questions. First, we have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970):

Four elements must be present to establish the defense of estoppel: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a

right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See State of Alaska, 46 IBLA 12, 21 (1980); Harry E. Reeves, 31 IBLA 242, 267 (1997). Second, we have adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 361 (1982); State of Alaska, supra. Third, estoppel against the government in matters concerning the public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D.F. Colson, 63 IBLA 121 (1982); Arpee Jones, 61 IBLA 149 (1982).

Ptarmigan Co., Inc., 91 IBLA 113, 117 (1986).

A review of the record reveals that appellants cannot establish the basis necessary for the operation of estoppel in the instant appeal.

First, appellants argue they were ignorant of the true facts because the regulations do not correctly identify the proper BLM Office for the purpose of filing mining claim maintenance fees. (Supp. SOR at 8.) Yet, appellants "fully acknowledge that many BLM publications, instructions, and forms specify the 2800 Cottage Way address as indicated in the BLM's Response. Even FWA's own maintenance fee form specified the Cottage Way address." Id. at 11.

Second, appellants assert that the regulations identifying the "proper BLM Office" are misleading in that 43 CFR 3833.0-5(g) (2002) fails to designate the proper BLM office for filing maintenance fees. Appellants further assert that the Butano Drive address was the last address listed in 43 CFR 1821.2-1(d) as the proper BLM Office for filing fees before that section was repealed.

We note that, while it is true that the regulations in effect at the time of appellants' 2003 filing, 43 CFR 3833.0-5(g) (2002), directed readers to 43 CFR 1821.2-1(d), which no longer existed, 43 CFR 1821.10(a) (2002), entitled "Where are BLM offices located?," clearly and correctly identified the California State Office

as located at 2800 Cottage Way, Sacramento, California, since 2001. 66 Fed. Reg. 28672 (May 24, 2001); see also 43 CFR 1821.10(a) (2002).

Appellants inappropriately rely upon our decision in James M. Colantino, 143 IBLA 234 (1998), to support their argument that the regulatory reference to 43 CFR 1821.2-1(d) entitles appellants to a finding that their 2003 filing was timely. In Colantino we found that where the appellant had timely mailed his filing to the state office address listed in 43 CFR 1821.2-1(d), but BLM had failed to amend 43 CFR 1821.2-1(d) to reflect the new address for that state office, the filing would be considered timely. In this appeal, unlike in Colantino, the regulations at 43 CFR 1821.10(a), in effect at the time appellants' 2003 fees were due, correctly identify the Cottage Way address as the location of the California State Office. In addition, appellants are deemed to have constructive knowledge of pertinent publications in the Federal Register, 44 U.S.C. § 1507 (2000), and of information set forth in duly promulgated regulations of the Department. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Coastal Oil & Gas Corp., 140 IBLA 200, 204 (1997); James D. Buerge, 88 IBLA 168, 170 (1985).

Third, appellants assert that affirmative misconduct on the part of BLM caused them to send their 2003 maintenance fees to the wrong address. However, the record does not support such a finding, which appears premised on appellants' mischaracterization of certain facts - both disputed and undisputed - as "affirmative misconduct."

Appellants argue that they relied on BLM's alleged 2002 mailing of a pamphlet allegedly enclosing an insert noting the incorrect address, and that this reliance caused the incorrect and ultimately untimely mailing. (Supp. SOR at 9.) However, appellants have not proven that BLM mailed the pamphlet to them, included an insert incorrectly identifying the address of BLM's California State Office, or, in any way, engaged in conduct intended to lead appellants to rely and act on misinformation. Moreover, appellants disregard receipt of correct address information from BLM, the existence of duly promulgated regulations identifying the correct address, and their own constructive knowledge of those regulations. Therefore, appellants have failed to prove that BLM misinformed them, that BLM intended appellants to rely on misinformation, and that appellants were unaware of the truth and relied on alleged misinformation from BLM.

Similarly, BLM's acceptance of appellants' 2002 fees, allegedly misaddressed to the Butano Drive address, does not constitute affirmative misconduct through

misrepresentation or concealment that operates to estop BLM from finding appellants' filing untimely. In previous cases, where we have found that misrepresentations by BLM rose to the level of affirmative misconduct, BLM provided inaccurate or misleading information to mining claimants. See Rudy S. Sutlovich, 139 IBLA 79 (1997); Leitmotif Mining Co., 124 IBLA 344 (1992). In this case, appellants attempt to hold BLM responsible for their untimely 2003 filing because of BLM's alleged failure to notify them of their own mistake in using the incorrect address for the California State Office when mailing their payment the previous year. However, BLM's proper acceptance of appellants' timely 2002 filing does not amount to affirmative misrepresentation or concealment and provides no support for appellants' claim of estoppel.

We find that BLM properly determined that appellants' 2003 mining claim maintenance fees were not timely filed. Accordingly, by operation of law, appellants' claims are forfeited and null and void. To the extent appellants have raised other issues not specifically addressed herein, those issues have been carefully reviewed and found to be without merit.

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.

Christina S. Kalavritinos
Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge