



REOFORCE, INC.

176 IBLA 319

Decided February 3, 2009



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

REOFORCE, INC.

IBLA 2008-248

Decided February 3, 2009

Appeal from a decision of the California State Office, Bureau of Land Management, denying a request for refund of mining claim rental and maintenance fees. CAMC 264465, *et al.*

Affirmed.

1. Accounts: Refunds--Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Title

Rental and maintenance fees are not returnable or refundable under 43 C.F.R. § 3830.22(b)(2), the current regulation, or under former 43 C.F.R. § 3833.1-1(c), the predecessor regulation, unless BLM has determined that the mining claim or site was void, abandoned by operation of law, or otherwise forfeited, as of the date the fees were submitted. Annual fees paid on mining claims voluntarily relinquished by the claimant are not refundable.

APPEARANCES: Richard M. Stephens, Esq., and John M. Groen, Esq., Bellevue, Washington, for appellant; Kendra Nitta, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Reoforce, Inc. (Reoforce), has appealed from the August 4, 2008, decision of the California State Office, Bureau of Land Management (BLM), denying Reoforce's request for a refund of rental and maintenance fees paid on 92 mining claims during the 1992 to 2007 "timeframe." Reoforce justifies its request on the basis that the "claims were null and void at the time the fees were paid because there was no exposure of a discovery at any time prior to payment of the

fees.” Request for Refund of Fees (Request for Refund) at 1. For the following reasons, we affirm BLM’s decision.

I. LEGAL BACKGROUND

A. Mining Claim Fee Legislation

For the 1992 and 1993 assessment years, Reoforce was required by the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-381, 106 Stat. 1374, 1378-79 (the Rental Fee Act), enacted by Congress on October 5, 1992, to pay a “rental fee” of \$100 per year for each “unpatented mining claim, mill or tunnel site on federally owned lands” in lieu of the assessment work requirement of the Mining Law of 1872, 30 U.S.C. § 28 (2000), and the annual assessment work filing requirements of section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (2000). Under the Rental Fee Act and the implementing regulation, 43 C.F.R. § 3833.1-5 (1993), mining claimants were required to pay the \$100 rental fee per claim per year by August 31, 1993, which would cover both the 1992-1993 and 1993-1994 assessment years. Rental Fee Act at 1378-79.

By enactment of the Omnibus Budget Reconciliation Act of August 10, 1993, Pub. L. No. 103-66, § 10101, 107 Stat. 312, 405-06 (1993), 30 U.S.C. § 28f (2000) (the Maintenance Fee Act), Congress extended the annual fee requirement for 4 years. The Maintenance Fee Act stated that payment of the maintenance fee “shall be in lieu of the assessment work requirement” under the Mining Law, as well as the related annual filing requirements under section 314 of FLPMA. The Maintenance Fee Act also made clear that failure to meet the requirements of the statute will “conclusively constitute” forfeiture of the mining claim “on the date payment is due.” *Id.*, § 10104, 104 Stat. 406 (codified at 30 U.S.C. § 28i). As with the rental fee legislation, the Maintenance Fee Act set forth requirements for satisfying the annual fee obligation. The law required claimants to pay the maintenance fee on or before August 31, which payment would cover the upcoming assessment year.¹

¹ Both the Rental Fee Act and the Maintenance Fee Act authorized a waiver or exemption from the fee for small miners. Failure to pay rental fees or file an exemption certificate resulted in a conclusive presumption of abandonment of the claim. *E.g., Lee H. and Goldie E. Rice*, 128 IBLA 137, 141 (1994). Similarly, failure to pay the maintenance fees or waiver certificates by August 31 preceding subsequent assessment years resulted in a conclusive presumption of abandonment of the claim. *E.g., Harlow Corp.*, 135 IBLA 382, 385 (1996), *aff’d*, *Harlow Corp. v. Norton*, No. 97-0320(RWR) (D.C.C. July 24, 2001). The fee waiver provisions of the Rental Fee Act and the Maintenance Fee Act are not at issue in Reoforce’s appeal.

In 1998, Congress extended the maintenance fee requirement until 2001. Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-235 (1998) (the 1998 Act). *See Beverly D. Glass*, 167 IBLA 388, 389 n.1 (2006). In addition to extending the fee requirement, Congress also amended the maintenance fee payment deadline from on or before August 31, to on or before September 1. Congress continued to extend the maintenance fee requirement through the Department's appropriations acts until 2007, when the fee became permanent. Consolidated Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2101 (2007).

B. Fee Refund Regulations

On July 15, 1993, BLM published in the Federal Register a final rule to implement the new "rental" fee requirement. 58 Fed. Reg. 38,186 (1993). That rule stated that annual fees were "not returnable unless the mining claim or site has been determined, as of the date the fees were paid, to be null and void ab initio or abandoned and void by operation of law." 43 C.F.R. § 3833.0-5(v) (1993). The preamble to the final rule specifically rejected comments suggesting that the annual fee should be refundable, stating:

[I]f a claimant pays the fee and receives the benefit expected from the government (in this case that the claim is held for the period covered by the fee) then the fee is non-refundable. The government cannot be responsible for factors beyond its control, such as if for some reason during the assessment year the claimant no longer finds it advantageous to hold the claim. Additionally, refunds would cause an excessive paperwork burden. The decision to pay the fee and hold a claim for the assessment year is one that the claimant must make without relying on the government to expend scarce resources to compensate the claimant for any business planning adjustments that he or she may have made during the year.

58 Fed. Reg. at 38,189.

On May 31, 1994, BLM published in the Federal Register a proposed rule to amend the annual fee—now known as the "maintenance fee"—regulations. 59 Fed. Reg. 24,572 (1994). The 1994 rulemaking created a separate section for refunds, and stated that the new section would "allow for refunds of duplicate payments, and *allow for refunds in any other situation in which payment is made for a mining claim that was void by operation of law at the time the payment was made. Also added is a provision that voluntary actions are not considered a reason for a refund.*" *Id.* at 24,573-74 (emphasis added).

On August 30, 1994, the final rule was published in the Federal Register. 59 Fed. Reg. 44,846 (1994). The new refund regulation appeared at 43 C.F.R. § 3833.1-1, with only minor changes from the proposed rule unrelated to refund eligibility. The pertinent parts of the new regulation, which remained in force from August 30, 1994, to November 24, 2003, stated:

(c) Maintenance and location fees are not returnable or refundable unless the mining claim or site has been determined, as of the date the fees were submitted, to be null and void, abandoned by operation of law, or otherwise forfeited.

(d) Maintenance fees, location fees, or service charges made in duplicate for the same claim or site or otherwise overpaid are returnable or refundable. The money will be returned or refunded to the party who submitted it. The authorized officer may apply the fee to a future year if so instructed by the payor.

43 C.F.R. § 3833.1-1 (1995).

On August 27, 1999, BLM published in the Federal Register a proposed rule to respond to provisions of the 1998 Act regarding the small miner waiver, and to “streamline the regulations by consolidating provisions on location, recording, and maintenance of mining claims or sites in one CFR part, clarifying conflicting language, eliminating duplication, and removing obsolete provisions.” 64 Fed. Reg. 47,023 (1999). BLM stated that the “revisions are part of BLM’s overall effort to rewrite regulations in plain language to make them easier for the public to use and understand.” *Id.* BLM further stated that the “organizational changes in this proposed rule are not intended to make a significant change in the meaning of the regulations in any way. BLM wants to make the regulations easier for the public to use and understand.” *Id.* at 47,026. The proposed rule renumbered the refund regulation and condensed the language somewhat.

BLM published the final rule on October 24, 2003. 68 Fed. Reg. 61,046. BLM did not receive any comments on the section of the rule pertaining to eligibility for a maintenance fee refund. *See id.* at 61,051. The maintenance fee refund regulation, as amended by the 2003 rulemaking, now provides:

(b) BLM will refund maintenance fee location fees if:

(1) At the time you or your predecessor in interest located the mining claim or site, the location was on land not open to mineral entry or otherwise not available for mining claim or site location; or

(2) At the time you paid the fees, the mining claim or site was void.

43 C.F.R. § 3830.22(b) (2008).

II. *FACTUAL BACKGROUND*

According to BLM's Answer, Reoforce or its predecessors-in-interest located 52 lode mining claims in 1992. Reoforce paid annual rental fees to maintain these 52 claims for the 1992-1993 and the 1993-1994 filing periods. However, Reoforce failed to pay maintenance fees for these 52 claims for the 1994-1995 maintenance year by the August 31, 1994, deadline. By decision dated June 30, 1995, BLM declared the 52 claims void by operation of law as of August 31, 1994, for failure to pay the claim maintenance fee. BLM's June 30, 1995, decision was not appealed and the case file was closed.²

Reoforce also owned 23 other mining claims that were located in 1983 and 1985. Reoforce paid annual rental fees on these 23 claims for the 1992-1993 and 1993-1994 filing years. However Reoforce failed to pay maintenance fees for the 1994-1995 maintenance year by the August 31, 1994, deadline. Reoforce nevertheless filed a patent application dated September 21, 1994, certifying that all the requirements for patenting as stated in 30 U.S.C. § 29 (2000), including a discovery of a valuable mineral deposit had been met for these 23 mining claims. On January 12, 1995, BLM issued a decision closing the case files for these 23 mining claims and the associated patent application because the claims were void as of

² The record submitted by BLM does not include location notices or any other documentation regarding these 52 claims, so we are unable to identify the claims by name, BLM serial number, or type of claim. Nor is the June 30, 1995, decision provided. In its memorandum transmitting the record to this Board, BLM stated that “[m]ining claim files CAMC 138660-664, CAMC 138667-680, CAMC 164096, and CAMC 252643-694, are also appealed”; that “the files were closed and shipped to the Federal Records Center in 1997”; and that it would forward the files to the Board upon request. Aug. 23, 2008, Memorandum to the Board. We surmise that the 52 claims referred to by BLM may be among those for which the files were closed. We further surmise that these claims may be among those included on Reoforce's May 29, 2008, Request for Refund as claims on which “[f]ees . . . were paid during the 1992 to 1995 timeframe[.]” In its Reply, Reoforce asserts that, with regard to BLM's Answer, it “has little disagreement” and does not otherwise question BLM's factual assertions regarding these 52 claims. Given our disposition of Reoforce's appeal, additional information, such as claim names and serial numbers, is not required.

August 31, 1994. BLM's decision regarding these 23 mining claims and the related patent application was not appealed to this Board and BLM closed the case file.³

On September 26, 1994, Reoforce relocated the original 23 mining claims as 23 new placer mining claims.⁴ Reoforce recorded the 23 relocated mining claims with BLM on November 14, 1994. Reoforce paid maintenance fees for these 23 relocated claims for each maintenance year starting with the 1994-1995 maintenance year (which were due at the time of recordation with BLM), through the 2007-2008 maintenance year (which were due on September 1, 2007).

On October 31, 1994, Congress enacted the California Desert Protection Act (CDPA), Pub. L. No. 103-433, 108 Stat. 4471 (2000). Section 701 of the CDPA directed BLM to transfer certain lands, including the lands within Reoforce's 23 relocated mining claims, to the State of California for inclusion in Red Rock Canyon State Park. 16 U.S.C. § 410aaa-71 (2000). On May 18, 1995, BLM published in the Federal Register a notice of proposed withdrawal of lands that included the lands within Reoforce's 23 relocated claims. 60 Fed. Reg. 26,736 (1995). The notice segregated the lands from mineral entry for 2 years, subject to valid existing rights. By Public Land Order No. 7260, published in the Federal Register on May 13, 1997, BLM permanently withdrew the lands from location, subject to valid existing rights. 62 Fed. Reg. 26,324.

In 2003, BLM conducted a mineral examination of Reoforce's 23 relocated mining claims to confirm that Reoforce had valid existing rights. BLM determined that all 23 relocated mining claims were not valid and issued a contest complaint in 2007. The contest alleged that no discovery had been made as of May 15, 1995, the date that BLM published notice of the CDPA segregation in the Federal Register. Reoforce answered the contest charges, denying that the relocated claims were null and void and denying BLM's other bases for the contest allegations. In May 2008, BLM and Reoforce entered into a settlement agreement with respect to the contest proceeding. BLM's Answer, Ex. A. Reoforce agreed to "relinquish . . . all of its rights, title and interest in . . . twenty (20) [of the] El Paso mining claims," and would be

³ Similarly, the record submitted by BLM provides no documentation regarding these 23 claims. We cannot determine with certainty whether they are subject to Reoforce's Request for Refund. Again, however, our ruling does not require such documentation.

⁴ The record submitted by BLM includes the location notices for these 23 placer mining claims, as well as two related mill site claims. The 23 placer claims were named El Paso # 1A through El Paso #23A, serialized by BLM as CAMC 264465 through CAMC 264487. The two mill site claims were named El Paso # 1 and El Paso # 2 and were serialized by BLM as CAMC 264463 and CAMC 264464.

allowed to “proceed under its approved Plan of Operations to mine the El Paso 6A, El Paso 7A, and El Paso 22A placer mining claims,” subject to certain conditions. The settlement agreement was silent as to any refund of maintenance fees paid on any of the claims.

By letter dated May 29, 2008, Reoforce sought a refund of maintenance fees paid between 1994 and 2007 for 20 of the relocated placer mining claims that were relinquished under the settlement agreement in 2008, and for the 52 lode mining claims forfeited in 1994. Citing 43 C.F.R. § 3830.22(b)(2), Reoforce offered as its rationale for receiving a refund that “[e]ach of the [listed] claims were null and void at the time the fees were paid because there was no exposure of a discovery at any time prior to payment of the fees.” Request for Refund at 1.

BLM responded by letter dated June 5, 2008, stating: “It has been determined that your request does not meet the criteria of 43 C.F.R. § 3830.22(b)(2). Additionally, a review of the Settlement Agreement does not show a provision for nor does it support your contention of a refund. Therefore, the fees will not be refunded.”

By letter dated June 10, 2008, counsel for Reoforce requested that BLM provide an explanation of “what criteria of the code provision . . . Reoforce, Inc.’s request does not meet.”

On July 2, 2008, BLM responded to Reoforce’s counsel, stating that “[t]he fact that there was not an exposure or a discovery at any time prior to payment of the fee does not render the claims null and void.” July 2, 2008, Letter to BLM at 1. BLM explained that in promulgating the final rule at 43 C.F.R. § 3832.11, it responded to a comment concerning the requirement for discovery, stating as follows:

One comment stated that the law does not require discovery before location and that our regulations need to reflect this. We have amended this section to recognize that claimants may locate mining claims before discovering a valuable mineral deposit. However, we have added a provision that states that the location is not valid until the claimant has discovered a valuable mineral deposit. As the U.S. Supreme Court has recognized:

[I]t has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after

location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened.

Union Oil Co. v. Smith, 249 U.S. 337, 347 (1919).

68 Fed. Reg. 61,046, 61,052 (Oct. 24, 2003). Moreover, regarding the requirements at current 43 C.F.R. § 3832.21 for locating a mining claim or site, BLM explained:

Some comments raised the issue of discovery, that is, whether the miner needs to discover a valuable mineral deposit before locating a claim. We moved the discovery reference to a separate paragraph that states that your lode claim is not valid until you discover a valuable mineral deposit. In this way, the discovery requirement is not among the location requirements but the regulation nevertheless makes clear that the location is not a valid mining claim until you make a discovery.

68 Fed. Reg. at 61053. BLM concludes its letter to Reoforce by stating that 43 C.F.R. § 3832.11(b) now provides: “Your lode or placer claim is not valid until you make a discovery within the boundaries of the claim.”

By letter dated July 2, 2008, Reoforce sought State Director Review (SDR) of BLM’s June 5, 2005, letter, asserting: “Reoforce, Inc. believes that a refund of maintenance fees is appropriate under [43 C.F.R. § 3830.22(b)(2)] because at the time it paid the fees, these mining claims were void. The reason they were void was that there was no exposure of mineral to support a discovery.”

In its SDR request, Reoforce relied upon the Board’s decision in *Recon Mining Company, Inc. (Recon Mining)*, 167 IBLA 103, 107 (2005), in arguing that a refund is required. Reoforce interprets *Recon Mining* as “highlight[ing] the language in the regulation about the need for a determination of invalidity prior to fee payment.” SDR Request at 2. Reoforce states that the language in 43 C.F.R. § 3833.1-1(c) (1995), quoted *supra*, requiring a “determination” regarding the claims’ validity, was deleted when the regulation was amended in 2003, and argues that current 43 C.F.R. § 3830.22(b) “does not require any ‘determination’ regarding the claims’ validity before a refund must be given.” SDR Request at 2. According to Reoforce, “[t]he only requirement now is that the claims be void at the time the fees were paid.” SDR Request at 2. The crux of Reoforce’s argument is as follows: “The law is clear that a claim without a physical exposure of the mineral has no discovery and a claim without a discovery is void. *United States v. Ramsher Mining and Engineering Co., Inc.*, 13 IBLA 268, 272 (1973). All of the claims listed in Exhibit B do not have a physical exposure of the mineral for which the claims were made.” *Id.*

III. THE CHALLENGED DECISION

By decision dated August 4, 2008, the Deputy State Director for the California State Office, BLM, denied Reoforce's request for a refund of mining claim rental and maintenance fees. The Deputy State Director rejected Reoforce's argument "that a refund is appropriate under 43 CFR § 3830.22(b)(2) even in the absence of a determination voiding the claims," again referring to the 2003 changes to the regulations governing mining claim location:

BLM updated its regulations in 2003 to streamline and consolidate the provisions pertaining to mining claim location, recordation, and maintenance, and to rewrite the regulations into plain language. 68 FR 61046 (2003). The preamble to the final rule does not contain any indication that BLM intended to make a substantive change in the criteria for issuing a refund. Therefore, as stated in BLM's June 5, 2008, letter, BLM has determined that Reoforce has not met the criteria for a refund under 43 CFR § 3830.22(b)(2). Accordingly, the request for refund is denied.

Decision at 2. The Deputy State Director also denied Reoforce's request for SDR under 43 C.F.R. Subpart 3809 on the basis that BLM's decision denying Reoforce's refund request was issued under 43 C.F.R. Part 3830. *Id.*⁵

IV. ARGUMENTS OF THE PARTIES

In its statement of reasons (SOR) for appeal, Reoforce maintains that it is entitled to a refund of maintenance fees because when it paid them the mining claims were void, *i.e.*, "there was no exposure of a potentially valuable mineral deposit to support a discovery." SOR at 3. It states "that the claims have been void throughout the period the fees were paid . . ." *Id.*

Reoforce again argues that the Board's ruling in *Recon Mining* makes clear that under former 43 C.F.R. § 3833.1-1(c) (1995 – 2003), "there must be a determination of invalidity before a refund can be given." SOR at 3. According to Reoforce, since the language requiring a determination of invalidity was removed from the regulation when it was amended in 2003, no such determination is now required. Reoforce contends that the "most reliable method of determining the meaning of a regulation or statute is by reviewing the plain language of the words chosen," rejecting BLM's reliance upon the preamble to the proposed rule that was promulgated as the current 43 C.F.R. § 3833.1-1(b) in October 2003. Reoforce argues that while the prior

⁵ As noted by BLM, Reoforce does not raise BLM's denial of SDR as a basis for appeal to this Board.

regulation did require a Departmental determination of invalidity as a prerequisite for a refund, the removal of that requirement must “reflect an intent to change the meaning.” *Id.* at 6. Reoforce infers that a determination of invalidity is not required under the current regulation. Reoforce concludes that “[j]ust as a discovery relates back to the date of location, the ultimate failure to make a discovery does as well,” and that “Reoforce’s claims were void at the time the fees were paid because there was never an exposure of a potentially valuable mineral deposit and no exposure was ever developed prior to the segregation and withdrawal.” *Id.* at 7.⁶

In its Answer, BLM asserts that Reoforce’s “refund request can be divided into two categories.” Answer at 13. The first category is Reoforce’s request for a refund of annual fees paid in 1993 for its 52 lode mining claims and 20 of its other mining claims, all of which Reoforce forfeited in 1994 for failure to pay the claim maintenance fee. BLM states:

Fifteen years after paying the fees and 14 years after relinquishment, Appellant seeks a refund based only on the assertion by Reoforce’s chief executive that there was no discovery on any of these claims at the time the fees were paid in 1993 – including the 20 mining claims for which a patent application was pending and which were promptly relocated three weeks later.

Id.

BLM includes in the second category Reoforce’s request for a refund of maintenance fees paid from 1994 through 2007 for 20 of the placer mining claims Reoforce relocated as lode claims after failing to comply with the maintenance fee deadline in 1994, and which Reoforce relinquished in 2008 as part of settlement of the contest proceeding. Again, BLM emphasizes that Reoforce’s “refund request is based only on Appellant’s own assertion that the mining claims never satisfied the requirements for discovery under the Mining Law.” *Id.* at 13-14.

⁶ In support of its argument that the claims for which it seeks a refund were void when the fees were paid, Reoforce submits the Declaration of Theodore Simonson (Simonson Declaration), Reoforce’s Chief Executive Officer, in which he states that when he located all of the claims subject to its Request for Refund he “believed that the valuable pumicite mineral deposit exists on all of those claims,” but that he has learned “[s]ince then . . . that under the mining law [his] claims are void unless there is a physical exposure of the mineral deposit even though there is no doubt among geologists that the mineral is there.” Simonson Declaration, Ex. D to Ex. 4 to SOR.

BLM asserts that Reoforce's request for a refund of fees paid in 1993 for the 72 mining claims forfeited in 1994 would be governed by the regulation in place at the time the fees were paid, *i.e.*, 43 C.F.R. § 3833.0-5(v) (1993), which, as noted, provided that annual fees were "not returnable unless the mining claim or site has been determined, as of the date the fees were paid, to be null and void ab initio or abandoned and void by operation of law." Observing that Reoforce "has essentially admitted that no refund would be due under a regulation requiring a 'determination' that the mining claims were void at the time the annual fees were paid," BLM states that Reoforce "has not provided any evidence (nor does any exist) that a determination of invalidity was made by BLM or any other tribunal regarding these 72 mining claims." Answer at 14. Citing *Recon Mining*, BLM argues that it correctly denied Reoforce's request for a refund of annual fees paid in 1993 for these 72 mining claims based on the regulation in place when the annual fees were paid.

Similarly, BLM argues that the regulations governing Reoforce's request for a refund of fees paid for the 20 relocated placer mining claims between 1994 through August 31, 2003, *i.e.*, before the current regulation went into effect, would be the predecessor regulation at 43 C.F.R. § 3833.1-1 (2003). Again, BLM argues that there has been no determination of invalidity by BLM or any other tribunal regarding these 20 relocated claims during the time the predecessor regulation was in effect. Thus, BLM reasons that the Deputy State Director's decision denying Reoforce's request for a refund for fees paid from 1994 through 2003 should be affirmed.

BLM acknowledges that the word "determined" does not appear in the current regulation at 43 C.F.R. § 3830.22(b)(2) (effective November 24, 2003), which provides that BLM will refund maintenance fees if "[a]t the time you paid the fees, the mining claim or site was void." "Nevertheless," argues BLM, "the claimant has no statutory or administrative authority to make a determination on behalf of the BLM regarding the validity of an unpatented mining claim on the public lands." Answer at 15, *citing Cameron v. United States*, 252 U.S. 450, 459 (1920). According to BLM, "only the Secretary of the Interior has the power to determine that the mining claims were in fact void," and "[t]he Secretary has made no such determination with regard to the claims at issue for the time periods that preceded Appellant's failure to pay the maintenance fees or Appellant's relinquishment of the 20 relocated claims." Answer at 16.

BLM asserts that "nothing in the history of this regulation or the maintenance fee statute itself supports interpreting 43 CFR 3830.22(b) to allow a refund whenever a mining claimant finds it in his or her own interest to simply pronounce a mining claim to be void as of a certain historical date." *Id.* BLM states that when it proposed revisions to the refund regulation, in 1999, it made clear that "[t]he organizational changes in this proposed rule are not intended to make a significant change in the meaning of the regulations in any way. BLM wants to make the regulations easier for

the public to use and understand.” 64 Fed. Reg. 47,023, 47,027 (1999). BLM maintains that “[b]ecause there is no indication that the 2003 change was meant to be substantive, the Board should look to the preambles to the predecessor refund regulations to determine whether BLM intended to give refunds in this circumstance.” Answer at 17. BLM states that “[t]hose preambles made it clear that maintenance fees were never meant to be retroactively refundable at the mining claimant’s whim, particularly when the claimant had already received the benefit of paying the fee: securing the claim as against rival claimants.” *Id.*, citing 59 Fed. Reg. 24,572 (1994) and 58 Fed. Reg. 38,186, 38,189 (1993) (“The government cannot be responsible for factors beyond its control, such as if for some reason during the assessment year the claimant no longer finds it advantageous to hold the claim.”).

BLM argues that “to accept Appellant’s argument and read 43 CFR 3830.22(b)(2) to require a refund whenever a mining claimant *sua sponte* declares that he or she never met the discovery requirements at location would effectively nullify the maintenance fee requirement.” Answer at 17. Such an interpretation, BLM asserts, “would negate any of the useful purposes that the maintenance fee legislation was meant to accomplish – and has accomplished – by removing any certainty about the status of public lands while creating an excessive paperwork burden from processing all the refund requests.” *Id.* at 18-19. BLM concludes its argument with the following analysis:

Congress simply could not have intended such a result and Appellant – or any other claimant – should not be allowed the benefit of holding the lands in this manner while also avoiding compliance with the maintenance fee statute. As stated in the preamble to the original regulation, “if a claimant pays the fee and receives the benefit expected from the government (in this case that the claim is held for the period covered by the fee) then the fee is non-refundable.” 58 Fed. Reg. at 38,189. If, as the Supreme Court has stated, “the federal mining law surely was not intended to be a general real estate law,” *Andrus v. Charleston Stone Prods. Co.*, 436 U.S. 604, 611 (1978), then the maintenance fee surely was not intended to be a refundable security deposit. Interpreting 43 CFR 3830.2(b)(2) as Appellant suggests, would make the maintenance fee just that.

Id. at 19.

In its Response to BLM’s Answer, Reoforce disputes BLM’s assertion that the fees on the claims declared forfeited in 1994 “would be governed by the regulation in place at the time the annual fees were paid.” Reply at 4, quoting Answer at 14. Reoforce invokes the “generally accepted principle that ‘new procedural regulations may be promulgated with retroactive effect.’” Response at 5, quoting *Sun Oil Co. v.*

Federal Power Commission, 256 F.2d 233 (9th Cir. 1958), *cert. denied*, 358 U.S. 872 (1958). Reoforce argues that the regulation does not state “that it would not apply to fees paid on claims which were void prior to the amendment.” Response at 5.

Further, Reoforce reiterates that BLM’s deletion in the current regulation of the requirement that there be a “determination” of the claims’ invalidity clearly signifies that such a determination is not a prerequisite for a refund of mining claim fees. In Reoforce’s view, “[t]he most that could be said is that the new language clarifies by removing any question that this Board’s decision in *Recon Mining* is correct.” *Id.* at 6. Reoforce questions BLM’s reliance upon the preamble to the regulation prior to amendment, arguing that “[w]hile [a preamble] may (or may not) add insight into the meaning of a regulation where it is ambiguous, there is nothing ambiguous about the regulation at issue here.” *Id.* at 7, *citing Independent Tanker Owners Comm. v. Skinner*, 884 F.2d 587, 596 (D.C. Cir. 1989), *discussed in Peyton v. OSM*, 158 IBLA 335, 346 (2003).

Reoforce argues that “[w]hat gets lost in BLM’s Answer on this point is the fact that the land on which these claims were located was segregated in 1995 and withdrawn in 1997.” Reply at 8. Reoforce asserts that “the law is clear that a discovery cannot be made on segregated or withdrawn lands after the segregation or withdrawal.” *Id.* According to Reoforce, it “paid fees on claims in which there was nothing that could be done to create a discovery after the segregation and withdrawal dates,” and “[a]t a minimum, Reoforce is entitled to a refund of fees paid in 1995 through 2007, for claims that could never obtain a discovery because of the withdrawal.” *Id.* Citing the Simonson Declaration, Reoforce argues that it submitted the only evidence regarding the validity of the claims, and that BLM did not contradict that evidence. Reoforce concludes that “a fact finding hearing should be held to determine whether Reoforce’s claims were valid at the time the fees were paid.” *Id.* at 9.

V. ANALYSIS

In arguing that it is eligible for a refund of annual fees filed on mining claims voluntarily relinquished, as part of an agreement in settlement of the Government’s contest against those claims, Reoforce fails to recognize that it is possible, under the mining laws, to locate a mining claim that does not ultimately prove to be valid, *i.e.*, there is no discovery of a valuable mineral deposit on the claim. As previously noted, in its 2003 promulgation of 43 C.F.R. §§ 3832.11 and 3832.21, the Department made clear that while “claimants may locate mining claims before discovering a valuable mineral deposit . . . the location is not valid until the claimant has discovered a valuable mineral deposit.” 68 Fed. Reg. at 61,052-53. By properly locating a mining claim, a claimant establishes the right to possess the claim, as against other mining claimants, as the Board clearly recognized in *Recon Mining*, 167 IBLA at 109. Upon

properly locating a mining claim, the claimant may proceed to conduct operations on the claim in accordance with the regulations at 43 C.F.R. Subpart 3809. Whether the claim is ultimately deemed to be valid depends upon whether there is a discovery of a valuable mineral deposit on the claim. As the Board recognized in *Richard C. Swainback*, 141 IBLA 37, 44 (1997), “a final determination that a claim is invalid for lack of discovery can be made only after a contest proceeding,” and furthermore, “the mere location of a claim does not presumptively make it valid” See also *United States v. O’Leary*, 63 I.D. 341 (1956).

The Board’s decision in *Recon Mining* provides no basis for interpreting either the former or current fee refund regulation as Reoforce argues. In *Recon Mining*, the Board construed 43 C.F.R. § 3833.1-1(c), the former regulation governing refunds of claim maintenance fees. The Board stated that whether Recon Mining was entitled to a refund of claim payments submitted from 1990 through 2003 “turn[ed] on the interpretation of the clause ‘unless the mining claim or site has been determined, as of the date the fees were submitted, to be null and void, abandoned by law, or otherwise forfeited.’” 167 IBLA at 108, quoting 43 C.F.R. 3833.1-1(c) (2003). Recon Mining based its claim for a refund upon *Recon Mining Company, Inc. v. Prichard*, CV92-01403, Second Judicial District Court, State of Nevada (Judgment Quieting Title July 28, 1995), in which the Nevada court quieted title to the claims in favor of Recon Mining’s rival mining claimant, divesting Recon Mining of title to the mining claims. The Board reversed BLM’s denial of Recon Mining’s request for a refund of the fees paid after July 28, 1995, the date on which the Nevada court declared Recon Mining’s claims null and void. The Board stated that “[t]he validity of Recon’s claims depended on whether it or Prichard had the right to possess their respective claims.” 167 IBLA at 109. As of the date of the Nevada court’s ruling, Recon Mining was without the right to possess the claims, and so was entitled to a refund from that date. However, with regard to the fees paid between 1990 and 1995, the Board viewed the refundability as more “problematic,” and remanded the matter to BLM for further review in light of BLM’s inconsistent positions on the question of whether a refund is appropriate for payments made on claims that were void by operation of law at the time the payment is made but before a determination finding the claims invalid was issued. *Id.* at 109-10.

The Board’s statement that “[t]he validity of Recon’s claims turned on whether it or Prichard had the right to possess their respective claims” gets at the heart of the analysis required to decide this appeal. As noted, in promulgating the final rule at 43 C.F.R. § 3833.0-5(v) (1993), the Department specifically rejected comments suggesting that the rental fee ordinarily should be refundable, stating that “if a claimant pays the fee and receives the benefit expected from the government (in this case that the claim is held for the period covered by the fee) then the fee is non-refundable.” 58 Fed. Reg. at 38,189. In *Swainback*, the Board affirmed a BLM decision denying a request for an exemption from the payment of rental and

maintenance fees, declaring mining claims abandoned, and denying a request for a refund of rental and maintenance fees paid. Swainback had sought an exemption from payment on claims located in Denali National Park on the ground that the National Park Service (NPS) had denied access to the claims. Swainback argued that the NPS did not consider his claims to be valid, having concluded in a Mineral Report that there was no discovery of a valuable mineral deposit on the claims and having recommended that a contest be initiated. Swainback argued that therefore it would have been futile for him to submit a plan of operations for the claims, a prerequisite for issuance of an access permit. See 109 IBLA at 42. The Board posed the central question as “whether a claimant can be eligible for the exemption on the basis of the denial of access without actually seeking access.” *Id.* at 44. In answering that question, the Board made the following statement regarding the purpose and intent of the regulations implementing the rental fee and maintenance fee legislation:

To accept Swainback’s construction of the NPS regulations as *per se* constituting a “legal impediment” to the performance of assessment work in the absence of an application by each claimant would be to create a general exemption for virtually every claim in a National Park, without regard to whether the individual claimants have any desire or intention to perform the assessment work. See 36 C.F.R. § 9.7(b)(2). Such a broad construction of the NPS regulations would perpetuate the speculative holding of claims and thwart a principal purpose of the rental fee legislation, “to eliminate stale or worthless claims as encumbrances on public land.” See *Kunkes v. United States*, 78 F.3d 1549, 1552 (Fed. Cir. 1996). Clearly when BLM promulgated regulations implementing the rental fee legislation, a blanket exemption for claims in National Parks was not contemplated nor intended.

141 IBLA at 43-44. The Board ruled that “an exemption from the claim maintenance and rental fees for unpatented claims . . . on the ground of denial of access at a minimum must be supported by a showing that access actually was sought, and that it was formally denied.” *Id.* at 45-46. The Board then denied Swainback’s request for a refund of the fees paid on the claims, stating:

Appellant’s request for a refund of the fees paid for 25 claims would have pertinence only if we had reversed BLM’s denial of an exemption for those claims. Because the claims were not exempt, collection of the fees was proper. In denying Appellant’s request for a refund, BLM referred to 43 C.F.R. § 3833.0-5(v)(2) (1993), which provided that rental fees are not returnable unless the mining claim or site has been determined, as of the date the fees were paid, to be null and void ab initio, or abandoned and void by operation of law. Because Appellant’s claims were not deemed to be null and void ab initio or

abandoned and void at the time the fees were paid, the request for a refund is properly denied. *See Richard A. Magovich*, 133 IBLA 114 (1995).

141 IBLA at 46.

The logic of the Board's analysis in *Swainback* applies to Reoforce's request for a refund, whether the previous or current version of the refund regulation is applicable. We have seen that 43 C.F.R. § 3833.1-1(c) (1995-2003) provides for a refund when the claim is "determined, as of the date the fees were submitted, to be null and void, abandoned by operation of law, or otherwise forfeited," and that the current regulation at 43 C.F.R. § 3830.22 (b)(1) and (2) provides for a refund if "[a]t the time you . . . located the mining claim or site, the location was on land not open to mineral entry or otherwise not available for mining claim or site location[,] or [a]t the time you paid the fees, the mining claim or site was void." While Reoforce makes much of the fact that the word "determined" was dropped from the current regulation, we disagree with Reoforce's theory that the omission of that word was intended to substantively change the meaning of the rule or that it has that effect.

Nothing in the rulemaking history implies or indicates that BLM intended to effectively transfer to the claimant the power to unilaterally determine, long after the fact, that a claim was void when the payments were made. Nor is there any indication that BLM intended to eliminate the established principle that a BLM determination that a claim was void or abandoned was a prerequisite to a refund of fees. We believe that the current rule implies that BLM must make the determination that one of the stated conditions for a refund is met.

Further, contrary to Reoforce's argument (Response at 5), a claimant's assertion or affidavit that a claim was void or invalid for lack of a discovery does not shift the burden to BLM to investigate and compile evidence to rebut the claimant's assertion at the peril of having to grant the refund if it does not do so. To hold otherwise would effectively require BLM to grant refunds in all but the relative handful of cases that it has the personnel and resources to investigate. Again, nothing in the rulemaking history evinces any intent on BLM's part to change the established principles in the manner Reoforce suggests.

To vest a claimant with the ability to determine that a claim, for which the maintenance fee was paid in lieu of assessment work or active mining, was void from the outset would, as BLM observes, effectively turn the maintenance fee into the equivalent of a refundable security deposit in many cases. BLM is correct in observing that Reoforce's reading would allow claimants to hold their claims for decades, while excluding others, and still obtain a refund of maintenance fees by later disavowing the validity of the claim. *See Answer at 17*. We agree with BLM that

Reoforce's interpretation of the rental and maintenance fee refund regulations is contrary to their purpose and intent.

That Reoforce agreed to relinquish mining claims asserted by BLM to be invalid for lack of a discovery does not qualify Reoforce for a refund of fees paid on those claims under either the former or current regulations. As Reoforce recognizes, pursuant to the CDPA, the land within the claims was segregated from mineral entry in 1995 and permanently withdrawn from location, subject to valid existing rights, in 1997. 62 Fed. Reg. 26,324 (1997). BLM brought a contest action alleging that no discovery had been made as of May 15, 1995, the date BLM published notice of the CDPA segregation in the Federal Register. It is theoretically possible for Reoforce to have prevailed in that matter. That Reoforce agreed to relinquish its claims does not render them void when they were located or when the fees were paid within the meaning of the fee refund regulations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision is affirmed.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
Geoffrey Heath
Administrative Judge