



JOEL CAROTHERS

179 IBLA 244

Decided June 22, 2010



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

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IBLA 2010-95

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Appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring unpatented mining claims and mill sites forfeited for failure to timely file affidavits of assessment work on or before December 30, 2009, for the 2009 assessment year when required processing fees were not included and claimants failed to cure this defect within 30 days after their receipt of notice. NMC 912528, *et al.*

Vacated in part and remanded.

1. Administrative Procedure: Generally--Notice: Constructive Notice

When BLM sends a notice or other communication to any person entitled to such communication, it must be sent to that person's last address of record. The last address of record is the address included on the initial document formally submitted by the person to BLM, unless that person submits a later document expressly indicating an intention to change the address of record.

2. Mining Claims: Defective Filing

In addressing a defective mining claim filing, BLM must provide notice to the mining claimant whose rights and interests are in jeopardy. If BLM fails to provide notice to the claimant at his last address of record, then the failure to timely cure the deficiency cannot affect the claimant's rights and interests in his claims. A subsequent BLM decision declaring the claims forfeited for failure to cure a defective filing will be vacated.

APPEARANCES: Joel Carothers, Terra Bella, California, *pro se.*

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Joel Carothers¹ has appealed from a February 9, 2010, decision of the Nevada State Office, Bureau of Land Management (BLM), declaring a number of unpatented mining claims and mill sites forfeited for failure to timely file affidavits of assessment work on or before December 30, 2009, for the 2009 assessment year, because the affidavits were submitted without all of the required processing fees² and the claimants failed to cure the defective filings. Because we find that BLM failed to provide Carothers with appropriate notice and opportunity to cure the defective filings, we vacate BLM's decision with respect to Carother's mining claims and mill site and remand the matter for further action.³

Legal and Factual Background

The holder of an unpatented mining claim, mill site, or tunnel site is required to pay a maintenance fee for each claim or site on or before September 1 of each year.⁴ 30 U.S.C. § 28f(a) (2006); *see* 43 C.F.R. § 3834.11(a)(2). Payment of the claim maintenance fee is in lieu of the assessment work requirements of the Mining

¹ There are significant discrepancies with respect to the spelling of Carother's last name. The mining claim location notices contained in the administrative record display his last name as "Carothers" (as does his Notice of Appeal), but other documents in the record that were submitted to BLM show his name as "Cruthers," "Crouthers," and "Crothers," with different spellings sometimes appearing on the same document. BLM's records reflect this same confusion. BLM may wish to inquire of Carothers which is the correct, or preferred, spelling.

² BLM's regulations describe this and similar fees variously as "processing fees," "filing fees," "filing or processing fees," "fees," or "service charges." *See, e.g.*, 43 C.F.R. §§ 3000.10, 3000.12, 3830.5, 3830.20, 3830.21, 3830.22, 3830.23, 3830.95, 3830.96, 3830.97. Because the regulation specific to recording an annual FLPMA filing, such as an affidavit of assessment work, refers to the fees as "processing fees," we will use that terminology here. *See* 43 C.F.R. § 3830.21.

³ BLM's decision declared forfeited a total of 7 claims and sites owned by 2 different claimants, including Carothers. Of the 7 claims and sites, Carothers owned the O.L. 7 (NMC 912528) and O.L. 8 (NMC 996803) mining claims, and the O.L. Millsite (NMC 996804), and those claims and site are the subject of this appeal.

⁴ The Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2101 (2007), has made the September 1st maintenance fee requirement permanent by removing the date range previously imposed by Pub. L. No. 108-108, 117 Stat. 1241, 1245 (2003) (years 2004 through 2008).

Law of 1872, 30 U.S.C. §§ 28-28e (2006), and the related filing requirements of section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (2006), for the upcoming assessment year that begins at noon on September 1 of the year payment is due. 30 U.S.C. § 28f(a) and (b) (2006); *see* 43 C.F.R. § 3834.11(a).

The failure to timely submit 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 (2006); *see* 43 C.F.R. §§ 3830.91(a)(3), 3835.92(a). Congress, however, has provided the Secretary with discretion to waive the fee for a claimant who has certified in writing (Waiver Certification) 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 has performed assessment work required under the Mining law of 1872 with respect to the mining claims, for the preceding assessment year ending at noon on September 1 of the calendar year in which payment of the claim maintenance fee is due. 30 U.S.C. § 28f(d)(1) (2006); *see* 43 C.F.R. § 3835.10(a); *Audrey Bradbury*, 160 IBLA 269, 273-74 (2003).

The fee waiver is for the upcoming assessment year commencing at noon on September 1 of the calendar year in which the payment is due. Thus, a claimant who has filed a Waiver Certification is required to (1) perform assessment work during that upcoming assessment year for which the waiver is granted, and (2) file an affidavit of the assessment work, as required by FLPMA, on or before December 30 of the calendar year in which the assessment year ends. 43 U.S.C. § 1744(a)(1) (2006); 43 C.F.R. §§ 3835.12, 3835.15, 3835.31(a);⁵ *see John J. Trautner*, 165 IBLA 265, 267 (2005); *Earl Riggs*, 165 IBLA 36, 39 (2005). Congress has stipulated that the failure to timely file an affidavit of assessment work performed when required under the mining laws “shall be deemed conclusively to constitute an abandonment of the mining claim . . . by the owner,” thereby rendering the claim void. 43 U.S.C. § 1744(c) (2006); *United States v. Locke*, 471 U.S. 84, 97-100 (1985).⁶

⁵ The regulation at 43 C.F.R. § 3835.12 is titled: “What are my obligations once I receive a waiver?” It states that, “[i]f BLM allows you the waiver, you must then perform annual assessment work on time and file annual FLPMA documents.” 43 C.F.R. § 3835.31(a) is titled: “When do I file an annual FLPMA document?” It states that “you must file your annual FLPMA documents with BLM on or before the December 30th of the calendar year in which the assessment year ends.”

⁶ The Department defines these consequences as a “forfeiture” of the claim. The regulations at 43 C.F.R. § 3830.5 define “[f]orfeit or forfeiture” to mean “the

(continued...)

In this case, Carothers located 7 mining claims, O.L. #1– #7 (NMC 912522 – NMC 912528) on September 1, 2005, and 1 additional mining claim, O.L. #8 (NMC 996803), and the O.L. Millsite (NMC 996804) on June 1, 2008. Carothers submitted timely Waiver Certifications through the 2008 assessment year and Affidavits of Assessment Work through the 2007 assessment year for the O.L. #1 – #7 claims. On August 27, 2008 (after the location of the O.L. #8 claim and the O.L. Millsite), Carothers filed a Waiver Certification for the O.L. #1 – #8 claims and the O.L. Millsite for the 2009 assessment year. On December 23, 2008, Affidavits of Assessment Work for the 2008 assessment year were filed for all of those claims and the mill site by Bruce Young, as “agent” for Carothers.⁷ Carothers filed a Waiver Certification for the 2010 assessment year on August 27, 2009, but Young, again as “agent” for Carothers, filed affidavits of assessment work on December 28, 2009, for the 2009 assessment year for Carothers’ 8 mining claims and mill site.

At the time Young filed affidavits of assessment work for the 2009 assessment year for Carothers’ 8 claims and site, Young also filed affidavits of assessment work for 9 other claims and mill sites on behalf of several other mining claimants. Accompanying all of these affidavits was a payment to BLM of \$90 for required processing fees, which was insufficient for payment of all of the fees.⁸ BLM first determined that 2 of the mining claims for which Young submitted affidavits were no longer active claims, leaving 16 claims and sites for which processing fees were due. BLM accordingly applied the \$90 payment to 9 of the claims in \$10 amounts in serial number order, leaving 7 of the claims and sites without processing fees. BLM then sent a Notice of Recording Deficiency to Young,⁹ providing him 30 days to submit payment of the remaining processing fees. The Notice was returned to BLM by the U.S. Postal Service as unclaimed, and BLM then issued its February 9, 2010, decision declaring the 7 claims and sites lacking processing fees, which included 2 of Carothers’ claims and his mill site, as forfeited.

⁶ (...continued)

voidance or invalidation of an unpatented mining claim or site,” adding that “[t]he terms ‘abandoned and void,’ ‘null and void,’ ‘void ab initio,’ and ‘forfeited’ have the same effect in these regulations.” 43 C.F.R. §§ 3830.91(a)(7), 3835.91.

⁷ No assessment work is required to be performed for mill sites and no corresponding affidavit is required to be filed, but a notice of intent to hold is required to be filed for mill sites on or before December 30 of each year. 43 C.F.R. § 3835.31(a), (d).

⁸ The required processing fee for making a FLPMA filing (including affidavits of assessment work and notices of intention to hold) is \$10 per claim. 43 C.F.R. § 3000.12. The fee was increased from \$5 per claim in 2005. *See* 70 Fed. Reg. 58854, 58857 (Oct. 7, 2005).

⁹ This Notice and the address to which it was sent are discussed below.

Analysis

In this case, Young submitted, on behalf of several claimants, affidavits covering 16 active claims and sites together with processing fees that he apparently intended to be applied to all of the claims and sites. As the processing fees were insufficient for that many claims and sites, BLM applied the fees to the claims and sites in serial number order, lowest to highest, consistent with the relevant regulations. See 43 C.F.R. § 3830.96(a).¹⁰ After this, affidavits for 7 of the claims and sites could not be processed because there was no more money to pay the processing fees. Accordingly, BLM sent out its Notice of Recording Deficiency allowing for 30 days to cure the defective filing by submitting the required \$70 processing fees for the remaining claims and sites. 43 C.F.R. §§ 3830.96(c),¹¹ 3830.94(a). When BLM received no response to its Notice, it issued its decision declaring the 7 claims and sites forfeited. See 43 C.F.R. § 3830.94(d). That leads us to the crux of the issue.

Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations . . . , that person will be deemed to have received the communication *if it was delivered to his last address of record* in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him.

43 C.F.R. § 1810.2(b) (emphasis added).

[1] The Board has discussed the “last address of record” issue on a number of occasions. Its clearest statement on the matter involved oil and gas leases in *Arthur M. Solander*, 79 IBLA 70 (1984).

¹⁰ “If you pay only part of the service charges due for any document filings . . . absent other instructions from you, BLM will apply the partial payment in serial number order until the money runs out.” 43 C.F.R. § 3830.96(a). This regulation does not address, however, the more difficult issue of whether BLM should follow this procedure when there is only one check submitted for multiple groups of claims owned by different claimants, particularly when that check is submitted by the purported agent of the claimants who is acting without formal designation by those claimants. That specific issue, however, is not before us.

¹¹ “For any claims or sites for which there are no funds in your partial payment to pay the service charges, BLM will send a notice to you that you must pay the outstanding service charges” 43 C.F.R. § 3830.96(c).

[The last address of record] is, in essence, that place where the party to receive documents has declared he will receive such delivery. It is an “address of record” because it is supplied with the intent that it be utilized whenever documents are to be sent. The most recent, or last, address provided for such receipt is that to which BLM is obligated to deliver. Generally, with oil and gas leases, it is the address appearing on the lease offer form or, in this case, the approved lease assignment form. A departure from use of such address should occur only after the lessees have expressly indicated an intention to change the address of record. This is because lessees may have more than one business office or more than one residence, or may be corresponding from a temporary address, or still be using checks imprinted with a former address, etc.

79 IBLA at 73. The Board has also held that the “last address of record” is the address on an application for a geothermal lease, *Victor M. Onet, Jr.*, 81 IBLA 144, 146 (1984), the address on an application for assignment of a coal lease, *5M, Inc.*, 109 IBLA 334, 336 (1989), and the address on a mining claim location notice, *Gerhard W. Befeld*, 123 IBLA 118, 120 (1993), *Robert D. McGoldrick*, 115 IBLA 242, 246 & n.5 (1990), unless the person submitting the document later formally indicated otherwise. One compelling rationale for these holdings is that initial submissions to BLM of applications and other documents usually are required to include a current mailing address of the person submitting the document, thereby ensuring that BLM will have on record the address at which the person submitting the document wishes to receive correspondence related to the document. *See, e.g., Robert D. McGoldrick*, 115 IBLA at 246 n.5. Accordingly, we find that the “last address of record” for purposes of notices or other communications from BLM is the address included on the initial document formally submitted to BLM, unless the person submitting the document expressly indicates an intention to change the address of record.

In this case, Young’s submission of affidavits of assessment work and the \$90 payment of processing fees related to claims owned by a number of claimants, including Carothers. However, BLM sent the Notice of Recording Deficiency to Young Trucking (presumably to Young’s attention) at an address in Goldfield, Nevada, but not to Carothers or any of the other claimants of whom we are aware. Young Trucking and the address used by BLM do not appear in the administrative record before us, except on the Notice of Recording Deficiency. Carothers, however, included his address in Terra Bella, California, on the location notices for his claims, and the administrative record contains no express statement from Carothers that he

intended to change his address of record. Clearly the address for Young Trucking used by BLM is not the last address of record for Carothers.¹²

It appears, in fact, that the issuance of the Notice of Recording Deficiency was handled by BLM merely as a clerical action, because the administrative record contains a document entitled Receipt Number 2060084 that includes notations of the claim serial numbers, recognition that “Customer [Young] sent in only \$90.00,” and states that “[s]ent deficiency notice to remitter dated 1/05/2010.”¹³ It seems that Young may have sent in the \$90 payment for processing fees in an envelope with a return address at Young Trucking, or perhaps the check to BLM was written on a Young Trucking account and included its address,¹⁴ and BLM directed the Notice of Recording Deficiency to that address.

The Board has found that BLM’s use of a return address on an envelope and on a payment check did not satisfy its regulatory requirements for providing notice, when there was a different address on the initial document submitted to BLM and no document in the record indicating an express intent to change the original address. *Arthur M. Solander*, 79 IBLA at 73.

It is particularly ironic here that BLM sent the Notice of Recording Deficiency *not* to Carothers, the owner of the claims in jeopardy, but to Young Trucking at an address that seems to have no association with Carothers, in spite of BLM’s own records acknowledging that Young had not formally been designated agent for Carothers, and yet the February 9, 2010, decision declaring claims forfeited *was* sent to Carothers at his last address of record.

[2] We find that under these circumstances BLM must provide notice to the claimants whose rights and interests are in jeopardy,¹⁵ not merely to any other party that happens to submit documents or payment. In this case, BLM’s notice of the deficiency in the filing of his affidavits of assessment work was intended by BLM to trigger Carothers’ only opportunity to cure that deficiency and avoid forfeiture of his

¹² The Young Trucking address was not even the last address of record for Young, at least according to the administrative record before us.

¹³ This Receipt document also includes a statement “[n]o Power of Attorney on file authorizing Bruce Young as agent.”

¹⁴ The administrative record does not contain a copy of the \$90 check or the envelope in which it was sent to BLM.

¹⁵ Of course, BLM may instead provide notice to a properly designated agent of a claimant, and in no way do we discourage BLM from sending *copies* of notices to interested parties, like Young, who clearly are involved with the affected claims.

claims and site. But, because BLM failed to mail the Notice of Recording Deficiency to Carothers' last address of record, that notice was not effective in providing him the opportunity to cure the deficiency and the failure to timely cure the deficiency cannot affect his rights and interests in his claims and site. *See Lanny Perry*, 131 IBLA 1, 5 (1994). Accordingly, we must vacate BLM's decision as to Carothers' claims and site and remand the matter to BLM for issuance of the required notice to Carothers at his last address of record.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's decision is vacated as to Carothers' claims and site, and the matter remanded to BLM for appropriate action.

H. Barry Holt
Chief Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge