



DEBRA SMITH (ON RECONSIDERATION)

180 IBLA 107

Decided October 19, 2010



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

DEBRA SMITH (ON RECONSIDERATION)

IBLA 2010-93-1

Decided October 19, 2010

Petition for Reconsideration from the Bureau of Land Management of the decision in *Debra Smith*, 179 IBLA 220 (2010), vacating and remanding the March 4, 2010, decision by the Bureau of Land Management, Oregon State Office, declaring two unpatented mining claims forfeited for failure to file an affidavit of assessment work on or before December 30, 2009. ORMC 152877, ORMC 152878.

Reconsideration denied.

1. Rules of Practice: Reconsideration

Although the Board has recognized that an error in the premise underlying a Board decision may constitute an extraordinary circumstance, allegations that the Board interpreted applicable statutes and regulations in a manner that is inconsistent with Board precedent and BLM procedures provide no basis for reconsideration, when those allegations are not borne out.

2. Rules of Practice: Standing to Appeal

The Board may presume a family relationship between an appellant and the owner of a mining claim, qualifying appellant to practice before the Department, if there is sufficient evidence in the record.

3. Federal Land Policy and Management Act: Service Charges--Mining Claims: Abandonment--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold

The failure to include the proper service charge with a timely-filed affidavit of assessment work is a curable regulatory defect, and BLM must provide claimants with notice and an opportunity to cure before declaring

unpatented mining claims forfeited for a failure to file an affidavit of assessment work.

APPEARANCES: Karen S. Hawbecker, Esq., Kendra Nitta, Esq., Washington, D.C., for the Bureau of Land Management; Debra Smith, La Grande, Oregon, *pro se*.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

The Bureau of Land Management (BLM) has petitioned the Board to reconsider its June 2, 2010, decision in *Debra Smith*, 179 IBLA 220, that vacated and remanded a decision of the Oregon State Office, BLM, that declared two unpatented mining claims forfeited for failure to timely file an affidavit of assessment work on or before December 30, 2009, for the 2009 assessment year when the claimants failed to include the required processing fees. Because we found that the failure to submit a processing fee is a curable defect, we vacated BLM's decision and remanded the matter for further action.

Standards for Reconsideration

[1] “The Board may reconsider a decision in extraordinary circumstances for sufficient reason.” 43 C.F.R. § 4.403. The Department has explained that this regulatory language is intended to reinforce the Board's expectation that “parties will make complete submissions in a timely manner during the appeal, not afterward on reconsideration,” and that, “[i]n general, the Board does not give favorable consideration to a petition for reconsideration which merely restates arguments made previously or which contains new material with no explanation for the petitioner's failure to submit such material while the appeal was pending.” 52 Fed. Reg. 21307 (June 5, 1987); *Dona Jeanette Ong (On Reconsideration)*, 166 IBLA 65, 66 (2005). Although the Board has recognized that an error in the premise upon which our decision was issued may constitute an extraordinary circumstance for which reconsideration may be warranted, *see Ulf T. Teigen (On Reconsideration)*, 159 IBLA 142, 144 (2003), that circumstance is not presented here. Although BLM asserts in its 22-page petition that our ruling is inconsistent with prior Board precedent and the regulations, it does not specifically address the rationale for our ruling set forth in our 7-page decision. Because we find that BLM has failed to establish extraordinary circumstances with respect to this matter, we deny its petition for reconsideration.

*Issues Raised on Reconsideration**Qualification to Practice*

[2] As its first ground for reconsideration, BLM raises a procedural issue. It argues that the appeal should have been dismissed for lack of standing because Debra Smith has no ownership interest in the claims, a point we expressly acknowledged, *see* 179 IBLA at 221 n.1, but we concluded that Smith was entitled to represent the claimants under 43 C.F.R. § 1.3(b)(3)(i) because she was related to them. Although BLM argues that Smith failed to identify herself as acting in that capacity, the Board has made similar presumptions of family relationships in other cases. *See, e.g., Ronald A. Pene*, 147 IBLA 153, 154 n.1 (1999); *Richard R. Goergen*, 144 IBLA 293, 294 n.1 (1998).¹ The Board has also stated: “The Board has held that an appeal is properly dismissed when the person filing an appeal fails to demonstrate that he or she is qualified under 43 C.F.R. § 1.3 to practice before the Department, and the record does not otherwise establish the necessary qualification.” *Umpqua Watersheds, Inc.*, 158 IBLA 62, 66 (2002), and cases cited. BLM could have raised this issue during the original appeal. However, since we concluded that the record established Smith’s qualifications to practice, we would not have granted a motion to dismiss by BLM, even if it had been presented during the appeal. BLM’s procedural claim is not a valid basis for reconsideration.

Statutory Versus Regulatory Defects

We turn now to BLM’s substantive objections to our decision. BLM asserts that the Board erred in concluding that failure to include a processing fee with an affidavit of labor is a curable defect because we interpreted “the applicable statutes and regulations in a manner that is inconsistent with Board precedent and would require a significant departure from BLM’s current procedures when adjudicating affidavits of

¹ In *Goergen*, we noted that Richard L. Goergen filed the appeal on his own behalf and on behalf of individuals with “the same last name and [a] shared address.” 144 IBLA at 294. In this case, Debra Smith shares the same last name with all three claimants, as well as a common address with one of the claimants, Larry R. Smith. In addition, the signature on the certified mail return receipt card for the copy of BLM’s decision sent to Larry R. Smith is “D Smith.” A comparison of that signature with the signature on the notice of appeal in this case indicates that Debra Smith signed the return receipt card. While we correctly concluded that Debra Smith was qualified to represent the claimants, arguably we should have styled the case in the name of the claimants, since she could not have been appealing on her own behalf because she was not an owner of the claims.

annual assessment work, as well as other documents for which a filing fee is required.” Petition at 2.

[3] Departmental regulation 43 C.F.R. § 3830.93(a) provides that a defect in compliance with a *statutory* requirement is incurable unless the statute gives the Secretary authority to permit exceptions. Subsection (b) provides: “If there is a defect in your compliance with a *regulatory, but not statutory*, requirement, the defect is curable. You may correct curable defects when BLM gives you notice. If you fail to cure the defect within the time BLM allows, you will forfeit your mining claims or sites.” (Emphasis added.)

Congress has required mining claimants to file with BLM notices of location as well as annual affidavits of assessment work or notices of intention to hold claims. 43 U.S.C. § 1744 (2006). Congress has enacted a statutory \$25 location fee for filing notices of location of mining claims. 30 U.S.C. § 28g (2006).² It has not done so for filing affidavits of assessment work or notices of intention to hold a claim; the \$10 filing fee for those documents is required only by regulation. See 43 C.F.R. §§ 3000.12, 3830.21(e), 3835.32(c). It necessarily follows that BLM cannot declare a claim forfeited for failing to include a processing fee with an affidavit of assessment work that is filed with BLM on or before the statutory deadline without first providing an opportunity to cure that defect.³

Nevertheless, BLM argues: “Currently, if BLM receives an affidavit of assessment work (or any document for which a processing fee is required) without the accompanying processing fees, the agency returns the documents without processing them pursuant to BLM’s regulations at 43 C.F.R. § 3000.10.” Petition at 21. While the Oregon State Office may not have engaged in “processing” the affidavit of assessment work in this case, it clearly did not return it. The case file contains the original affidavit of labor, date stamped received by BLM on December 21, 2009. Moreover, contrary to BLM’s assertion, no language in 43 C.F.R. § 3000.10 directs BLM to return the document. That regulation, at subsection (b), merely states that “BLM will not accept a document that you submit without the proper filing or processing fee amounts except for documents where BLM sets the fee on a case-by-

² That section makes no provision for forfeiture of a claim for failing to submit that fee, but 30 U.S.C. § 28i (2006) does. Although 43 U.S.C. § 1744 (2006) requires the filing of a copy of a notice of location and provides for the abandonment of a claim for failure to do so, that provision contains no requirement for a filing fee.

³ We note that the general regulations in 43 C.F.R. Part 3000 relating to minerals management provide that “[a]ll necessary documents shall be filed in the proper BLM office. A document shall be considered filed when it is received in the proper BLM office during regular business hours (see § 1821.2 of this title).” 43 C.F.R. § 3000.6.

case basis.” In addition, it is clear that despite this asserted policy, other BLM state offices have followed a different procedure. We review mining claim forfeiture decisions from all BLM state offices, and we have affirmed decisions in which BLM declared claims forfeited only *after* the claimants had failed to respond to a 30-day notice to pay the processing fee that was not included with an affidavit of assessment work. *E.g.*, *Jeffrey D. Moffett*, IBLA 2009-91, Order dated April 15, 2009.

More importantly, BLM simply ignores the fact that because § 3000.10 is merely a regulation, it cannot supersede BLM’s own recognition in § 3830.93 that a requirement must be *statutory* before it can be cited as a basis for declaring a claim forfeited without providing an opportunity to cure. While § 3000.10 addresses the filing of documents and related processing fees associated with minerals management in general, § 3830.93 specifically involves requirements that can lead to forfeiture of a mining claim. Established rules of statutory and regulatory construction require BLM to give controlling effect to this specific provision over the general one. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1213 (10th Cir. 2005). Thus, if a defect is curable because no statute authorizes forfeiture as the result of the defect, it necessarily follows that BLM cannot make a curable defect incurable simply by amending a regulation; amendment of the statute itself would be necessary.

While BLM considers our decision in *Smith* to be erroneous, it ignores the fact that our analysis was driven by the position of the *Secretary of the Interior* as identified by the United States Court of Appeals in *Topaz Beryllium Co. v. United States*, 649 F.2d 775, 778 (10th Cir. 1981). BLM fails to acknowledge, let alone discuss, that case. Instead, BLM argues that our decision is inconsistent with prior mining claim processing fee cases decided by the Board from 1982 through 1998. *See* Petition at 7-14. However, none of those cases involves 43 C.F.R. § 3830.93(a), which was not promulgated until 2003. Moreover, to the extent those cases may have ignored or distinguished the Court of Appeals’ ruling in *Topaz Beryllium*, they do not constitute valid precedent for continuing to do so under the present regulatory scheme.

In *Topaz Beryllium*, the plaintiffs⁴ sought declaratory and injunctive relief from BLM’s regulations by “attack[ing] almost every provision in the regulations that does not precisely mirror 43 U.S.C. § 1744,” including the provision for a \$5.00 per claim service fee for recordation of each mining claim. *Topaz Beryllium Co. v. United States*, 479 F. Supp. 309, 314 (D. Utah 1979). When the District Court denied relief, the plaintiffs appealed. The Court of Appeals affirmed the District Court on the basis of the following understanding of the *Secretary’s* position:

⁴ The plaintiffs included Topaz Beryllium and seven mining associations.

We conclude that the Secretary has not ignored § 1744(c) *which assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833 and not by the statute are not made.* This is also the Secretary's view: failure to file the supplemental information is treated by the Secretary as a curable defect.

649 F.2d at 778 (emphasis added.) Because the Secretary has agreed that a defective filing places the Department "on notice of a claim," BLM, as a subordinate of the Secretary, cannot deem it abandoned. BLM has failed to explain how the timely receipt by BLM of an affidavit of assessment work for a claim on or before the required statutory deadline does not put it "on notice" if it is not accompanied by a service fee. The record shows that BLM was "on notice" in the present case, having received the affidavit of assessment work in question on December 21, 2009, before the statutory deadline for filing.

Following *Topaz Beryllium*, and arguably even before, when the Board "could find no statutory replication of a regulatory requirement," it "treated a failure to comply with the regulatory requirement as a curable defect." *Harvey A. Clifton*, 60 IBLA 29, 39 (1981) (A.J. Burski, concurring). The notable exception to that rule was the mining claim recordation service fee, which, despite the fact that it was not required by statute, resulted in abandonment decisions by BLM, when it was not included with the recordation filing. The Board upheld those decisions based on the rationale that "absent submission of the filing fee, there is no recordation." *Id.* at 39 n.1.

Within a year of the issuance of the Court of Appeals' opinion, BLM explicitly relied on that opinion in proposing a rule to "clarify the effect of a claimant's failure to file the information called for by regulation." 47 Fed. Reg. 19298 (May 4, 1982). BLM explained:

Consistent with instructions issued to the Bureau of Land Management, failure to file such information, including sufficient recordation fees, shall be treated as a curable defect. The authorized officer shall call for the information or fees by decision allowing a reasonable time, usually not less than 30 days, in which to cure the filing. Failure to cure the filing shall be grounds for rejecting the filing by an appealable decision. Upon final affirmance of such a rejection the claim or site will be deemed abandoned and void. *See Topaz Beryllium v. United States*, 649 F. 2d 775 (1981).

Id. at 19299.

In the final rulemaking, BLM stated:

It is the policy of the Department of the Interior to accept for recordation mining claims or sites that are accompanied by insufficient recordation fees, subject to the claimant presenting the proper amount for recording the claim within thirty calendar days of receiving notification of a deficiency from the Bureau of Land Management.

47 Fed. Reg. 56300, 56303 (Dec. 15, 1982).⁵

Thereafter, in 1986, the General Accounting Office issued a report entitled *Public Lands-Interior Should Recover Costs of Recording Mining Claims*, GAO/RCED-86-217, September 1986, in which it criticized BLM for not charging a mining claim recordation fee large enough to recover the BLM's cost of administering the program. *See* 53 Fed. Reg. 23720 (June 23, 1988). The Bureau proposed that it would treat the failure to include service fees as curable only for a limited period, after which such filings would be rejected. *Id.* at 23721. The final rule, 43 C.F.R. § 3833.1-4(b), provided that beginning January 1, 1991, filings that were not accompanied by the proper service charges would not be accepted but would be returned without further action. 53 Fed. Reg. 48876, 48881 (Dec. 2, 1988).

BLM asserts that the Board “subsequently upheld BLM decisions voiding mining claims after a filing was rejected under 43 C.F.R. § 3833.1-4 because it was not accompanied by the proper processing fee, and not subsequently timely submitted by the deadline.” Petition at 10. In support of this assertion, BLM cites four Board decisions, *Bokan Mining Co.*, 143 IBLA 359 (1998); *Melville P. Springer*, 141 IBLA 34 (1997); *M & A Mining, Inc.*, 130 IBLA 333 (1994); *N. T. M., Inc.*, 128 IBLA 77 (1993). However, only three of those involve the 1988 regulations, and only one of those cases, *Bokan Mining Co.*, directly supports BLM's generalized assertion; the other two, *N. T. M.* and *M & A Mining*, involved the timely submission of annual mining claim filings accompanied by checks covering the \$5 per claim service fee in full. In each case, however, the bank dishonored the check after the

⁵ The final rule provided that a certificate of location not accompanied by the proper recordation fee would be “noted as being recorded on the date received if, upon notification by the authorized officer, the claimant submits the fee within 30 days from the receipt of the certified notification to submit the proper fee. Failure to submit the proper fee shall cause the recordation to be rejected and returned to the owner.” 47 Fed. Reg. at 56305.

statutory filing deadline had passed, and the Board upheld the decision declaring the mining claims abandoned and void.

The other decision cited by BLM, *Melville P. Springer*, 141 IBLA 34 (1997), involved BLM's application of regulations promulgated in 1993, reinstating a cure provision similar to that found in the 1982 regulations. The regulation, 43 C.F.R. § 3833.1-3(b)(2) (1993), provided that an affidavit of assessment work "that was not accompanied by full payment of the service charges . . . shall be curable." It continued: "Such filings shall be noted as being recorded on the date received provided that the claimant submits the proper service charge within 30 days of receipt of a deficiency notice from the authorized officer." Finally, it stated that "[f]ailure to submit the proper service charge shall cause the filing to be rejected and returned to the claimant/owner."⁶

As made clear by BLM's actions in *Springer*, "not accompanied by full payment" included not accompanied by *any* payment. In that case, Springer filed his affidavit of labor for six mining claims with BLM on November 21, 1994, without any service fee payment. On November 23, 1994, BLM, acting in accordance with 43 C.F.R. § 3833.1-3(b)(2), mailed Springer a deficiency notice by certified mail, return receipt requested, granting him 30 days to send in the affidavit with proper payment.⁷ When the appellant did not timely respond to the notice, which was received on November 28, 1994, BLM issued a decision on April 12, 1995, declaring the claims abandoned and void. The Board affirmed.

⁶ The Department revised 43 C.F.R. § 3833.1-3 on Aug. 4, 1994. The language of 43 C.F.R. § 3833.1-3(b)(2) was changed somewhat and relocated to 43 C.F.R. § 3833.1-3(c)(1). It provided that "[f]ailure to provide full payment of service charges" would be curable for mining claim annual filings. It retained the requirement for a "deficiency notice" requiring payment of the "proper service charge" within 30 days of receipt of the notice. It also stated that failure to pay the proper service charges, "as required by this paragraph," *i.e.*, following receipt of the deficiency notice, would result in rejection and return of the filings. The Department added to the section a provision stating that "[i]f a payment is received that partially covers the claims submitted, the payment shall be applied to mining claims and sites in ascending numerical order of serialization." The language of 43 C.F.R. § 3833.1-3(c)(1) remained unchanged until promulgation in 2003 of the regulations controlling in this case.

⁷ Even though the regulation did not provide for return of the filing until after the expiration of the time to respond to the deficiency notice, BLM returned the affidavit of assessment work in this case with the deficiency notice. The Board noted that the case file included a copy of the affidavit stamped with the words "No Action Taken Due to Nonpayment of Fees, Returned 11-23-94." 141 IBLA at 35.

Thus, in *Springer*, BLM interpreted the regulations as requiring the issuance of a deficiency notice when BLM received an annual mining claim filing without any payment of the service fee. BLM makes much of the fact that the regulations from 1994 to 2003 included language that “BLM would reject any document submitted without the processing fee.” Petition at 10. What BLM does not say is that the regulatory language during that time period expressly required that BLM issue a deficiency notice prior to doing so. As pointed out in note 6, *supra*, 43 C.F.R. § 3833.1-3(c)(2) provided that rejection and return of a document would only follow a “[f]ailure to submit the proper service charge as required by this paragraph.” That “paragraph” required BLM to issue a deficiency notice before rejecting and returning a document.

BLM asserts that our *Smith* decision “requires BLM to disregard” 43 C.F.R. § 3000.10(b) by requiring it to “accept a document submitted before the deadline that is not accompanied by the required processing fee” and consider the document “timely filed.” Petition at 14. BLM is mistaken.

BLM asserts that 43 C.F.R. § 3000.10(b) applies to all documents for which fees are required and that our decision not to apply it to affidavits of assessment work is “a decision not to follow the cost recovery rule” and is tantamount to an amendment or revocation of a regulation that is beyond this Board’s authority to make. To the contrary, our interpretation of 43 C.F.R. § 3000.10(b) is consistent with Departmental policy as established in *Topaz Beryllium* and harmonizes both with 43 C.F.R. § 3000.6 and with 43 C.F.R. § 3830.93.⁸

We have often stated that the Board is bound by duly promulgated regulations, so that in construing and applying them, we are obliged to do so in harmony with the enabling legislation rather than to construe or apply them in a manner that would create an invalidating conflict. In *Topaz Beryllium*, the Secretary, and the Court of Appeals, recognized that the statutory forfeiture provision in 43 U.S.C. § 1744 (2006) could not be applied when there is no statutory requirement for which the statute provides for a forfeiture. The very fact that BLM over the years has modified the service fee requirements for documents filed under 43 U.S.C. § 1744 when Congress has not amended that provision to include such a requirement further evidences BLM’s consistent acknowledgment that the service fee requirements are of a regulatory and not a statutory nature. By advocating a construction of 43 C.F.R. § 3000.10 that overrides *Topaz Beryllium* and 43 C.F.R. § 3830.93, it is BLM, not this Board, that would exceed its authority.

⁸ And, as discussed *supra*, on page 4, our interpretation reflects procedures currently followed by other BLM state offices.

“BLM submits that any conflict [between 43 C.F.R. § 3000.10 and Subpart 3830] must be resolved in favor of the cost recovery rule. . . . Under the cost recovery rule, *BLM cannot accept documents without the proper processing fee.*” Petition at 19 (emphasis added). Under this overly expansive view of 43 C.F.R. § 3000.10, much of 43 C.F.R. Subpart E (§§ 3830.90 – 3830.97) would be invalid. The distinction in 43 C.F.R. § 3830.93 between incurable statutory defects and curable regulatory defects would necessarily be a dead letter, and the service fee underpayment provisions of §§ 3830.94, 3830.95, 3830.96, and 3830.97 could never be applied, because an underpayment clearly is no more a “*proper filing or processing fee amount*[],” under the cost recovery rule than is no payment.⁹ See 43 C.F.R. § 3000.10(b) (emphasis added). We find BLM’s interpretation simply unreasonable.¹⁰ In addition, the preamble to the cost recovery rule clearly states that “[t]he final rule does not represent a government action capable of interfering with constitutionally protected property rights. The rule has no bearing on property rights,^[11] but only concerns recovery of government processing costs.” 70 Fed. Reg. at 58870. By asserting the use of the cost recovery rule to effect a regulatory forfeiture of a mining claim because of an “incurable” failure to pay a processing fee,

⁹ As one example, if a claimant timely files an affidavit of assessment work on 10 mining claims but only submits \$10 as a processing fee, rather than the \$10 per claim for a total of \$100, Subpart E provides that BLM would apply the \$10 fee to the claim with the lowest serial number, and notify the claimant of a 30-day period to pay the total remaining processing fee of \$90. See 43 C.F.R. § 3830.96(a), (c); see also, e.g., *Joel Carothers*, 179 IBLA 244, 247 (2010). Under BLM’s interpretation of the cost recovery rule, the affidavit could be accepted only with respect to the first claim, for which the fee was paid. With respect to the remaining 9 claims, they would have been submitted with no processing fee, requiring BLM to reject the filing with respect to those 9 claims and necessarily invalidating the relevant portions of 43 C.F.R. § 3830.96.

¹⁰ Ironically, the Assistant Secretary, Land and Minerals Management (the same Assistant Secretariat that promulgated the Subpart 3000 cost recovery rule), also promulgated in 2005, mining claim maintenance and location fee adjustment rules (43 C.F.R. Part 3834) that specifically reference portions of the Subpart E rules. See 70 Fed. Reg. 52028 (Sept. 1, 2005) (Part 3834); 70 Fed. Reg. 58854 (Oct. 7, 2005) (Part 3000). It is unlikely that the Assistant Secretary would have referenced the Subpart E rules in the earlier publication if he intended to effect a repeal of portions of those same rules by his signing of the cost recovery rule a mere two weeks later on Sept. 15, 2005, as BLM’s argument suggests. See 70 Fed. Reg. at 58872.

¹¹ Unpatented mining claims are property protected against uncompensated takings. See *Forbes v. Gracey*, 94 U.S. 762, 767 (1876); *U.S. v. Shumway*, 199 F.3d 1093, 1105 (9th Cir. 1999).

BLM appears to be promoting an interpretation and policy specifically disclaimed by the Assistant Secretary in the cost recovery rule itself.¹²

Conclusion

We simply cannot accept BLM's proffered interpretation of the cost recovery rule. While we can appreciate BLM's concern about the administrative burden of issuing notices to cure defects in submissions, the Secretary in *Topaz Beryllium* accepted this burden as a price for sustaining those regulatory requirements that went beyond the requirements stated in the applicable statute. Moreover, the Board's interpretation places no more burden on BLM than that imposed from 1993 to 2003 by 43 C.F.R. § 3833.1-3(c)(2), which required that an annual mining claim filing received by BLM without full payment of service fees (including, as recognized in *Springer*, 141 IBLA at 35, no payment) should be retained by BLM until issuance of a deficiency notice allowing the claimant to cure. If proper payment was timely tendered in response to the notice, BLM accepted the filing and noted it as "recorded on the date initially received."¹³ Failure to timely comply with the notice resulted in the document being "rejected and returned to the claimant/owner."

Finally, BLM asks that if we do not vacate or amend our holding, we clarify our holding with respect to other filings to which service fees apply. To summarize our holding in *Debra Smith* and the analysis above, BLM may collect the fees required by regulation, but BLM cannot enforce that requirement by declaring a claim forfeited without providing an opportunity for cure unless that requirement appears in a statutory provision that provides for the forfeiture or abandonment of a claim.

¹² The Assistant Secretary was well aware of this issue, even in the context of a statutorily-mandated fee subject to regulatory adjustment. In the promulgation of the mining claim maintenance and location fee adjustment rules cited above, the preamble states: "This rule will avoid any *takings liability that would otherwise arise by not making an underpayment curable*. This rule does not substantially change BLM policy." 70 Fed. Reg. at 52029 (emphasis added).

¹³ Under the present regulations, an annual mining claim document is considered filed, under 43 C.F.R. § 3000.6, when that document is received by BLM during regular business hours. If the document is filed without the proper fee (a regulatory requirement), it is curable under 43 C.F.R. Part 3830, Subpart E. If the claimant timely responds to the notice of deficiency by paying the proper amount, BLM accepts the filing as of the original date of filing. If the claimant fails to respond timely to the notice, the document can be considered to have been filed without the proper fees, and not accepted under 43 C.F.R. § 3000.10(b).

Accordingly, we conclude that BLM has not presented extraordinary circumstances warranting reconsideration of our decision in *Debra Smith*.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the petition for reconsideration is denied.

_____/s/_____
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/_____
Bruce R. Harris
Deputy Chief Administrative Judge