



ART ANDERSON (ON RECONSIDERATION)

182 IBLA 27

Decided January 31, 2012



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

ART ANDERSON (ON RECONSIDERATION)

IBLA 2011-171-1

Decided January 31, 2012

Petition for Reconsideration and Request for Stay of the decision in *Art Anderson*, 181 IBLA 270 (2011), affirming as modified a decision of the Idaho State Office, Bureau of Land Management, declaring unpatented mining claims forfeited for failure to pay the claim maintenance fee or to file a maintenance fee payment waiver certification for the 2011 assessment year. IMC 17188, IMC 17197.

Request for consideration *en banc* denied; reconsideration granted; decision in *Art Anderson*, 181 IBLA 270 (2011) vacated; decision appealed from set aside and case remanded; request for stay denied as moot.

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

Mining claim maintenance fees or waiver certificates filed during BLM's regular business hours on September 1 are timely under 30 U.S.C. § 28f(a).

2. Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

The failure to include in a request for a waiver of claim maintenance fees the original signatures of all of the claim owners of record or their authorized agent constitutes a defect in the waiver request that must be cured within 60 days of receipt of notice of the defect from BLM.

3. Evidence: Presumptions--Evidence: Sufficiency--Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

Ordinarily, an uncorroborated statement that an additional document was included with a filing is

insufficient to overcome the presumption that BLM would have taken proper notice of the document in issue, had it been received. That presumption may be rebutted by evidence on appeal that the documents were tendered and received by BLM timely and inadvertently returned without date stamping and retention in the files.

APPEARANCES: Kendra Nitta, Esq., and Harvey Blank, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

The Bureau of Land Management (BLM) has filed a petition for reconsideration and request for stay (Petition) of our decision in *Art Anderson*, 181 IBLA 270 (2011), in which we affirmed, on a modified basis, a decision of BLM's Idaho State Office declaring mining claims¹ forfeited for failure to pay the claim maintenance fee or to file an effective Waiver Certification for the 2011 assessment year. BLM asserts error in the Board's reasons for modifying the basis on which the claims were forfeited, and seeks affirmation of the State Office decision for the reasons stated therein.

I. LEGAL 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." 30 U.S.C. § 28f(a) (2006); *see* 43 C.F.R. § 3834.11(a)(2).² 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). The Secretary has discretion to waive the fee for a claimant who has certified in writing (Waiver Certification) that on the date the

¹ BLM's decision involved seven claims, but the Board limited its decision to two claims, the Black Daisy #3 (IMC 17188) and Cloud Burst (IMC 17197) claims, because Anderson was not eligible to appeal decisions with respect to the other five claims. *Art Anderson*, 181 IBLA at 271 n.1.

² Payment of the claim maintenance fee is in lieu of the assessment work requirements of the Mining 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 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).

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 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 Audrey Bradbury*, 160 IBLA 269, 273-74 (2003). BLM implemented this statute with a regulation that requires a claimant to file “BLM’s waiver certification form on or before September 1 of each assessment year for which you are seeking a waiver.” 43 C.F.R. § 3835.10(a). Finding that Anderson filed no Waiver Certification for the claims on or before September 1, BLM declared them forfeited.

II. ANDERSON’S APPEAL AND THE BOARD’S DECISION

In his appeal from BLM’s decision, Anderson stated that he had turned in his affidavit of assessment work and his Waiver Certification at BLM’s office on September 1, but BLM would not accept the waiver because it lacked the signature of a co-claimant.³ Assuming that Anderson’s description of his effort to file the Waiver Certification was accurate, we agreed that it clearly was defective, but stated that if his defective Waiver Certification was timely, BLM was required to provide him with notice of the defect by certified mail–return receipt requested, and allow him 60 days from receipt of the notice to cure the defect, with forfeiture resulting if he failed to cure the defect within that 60-day period. 181 IBLA at 272, citing 43 C.F.R. § 3835.93(a), (c).

Nevertheless, we concluded that we must still affirm BLM’s decision, but on the modified ground that Anderson’s Waiver Certification would have been untimely if he had submitted it on September 1. 181 IBLA at 273-75. We pointed out that 30 U.S.C. § 28f(b) is captioned “time of payment” and, at the time we issued our decision, the subsection’s first sentence specified that the maintenance fee “shall be paid before the commencement of the assessment year.” During the pendency of BLM’s Petition, however, Congress deleted that quoted phrase from the statute.⁴ Prior to 2007, the assessment year began “at 12 o’clock meridian on the 1st day of September,” or at 12:00 noon each September 1. *See* 30 U.S.C. § 28 (2006). The

³ The Waiver Certification must include, among other things, “original signatures of the claimants of the mining claims or sites who are requesting the waiver.” 43 C.F.R. § 3835.10(b)(2).

⁴ On December 23, 2011, Congress enacted the Consolidated Appropriations Act of 2012, which amended 30 U.S.C. § 28f(b) by “striking the first sentence” and inserting language pertaining to payment of the fee for the year in which the location is made. Pub. L. No. 112-74, Div. E, § 430, 125 Stat. 786, 1047 (2011).

2008 Appropriations Act, however, altered the time of the beginning of the assessment year by stating that it “shall commence at 12:01 ante meridian on the first day of September.” 121 Stat. 2101. We noted at the time that Anderson’s affidavit of assessment work bore a BLM stamp showing its receipt at 11:43 a.m. on September 1, 2010, and if Anderson submitted his Waiver Certification at the same time, it would have been untimely because it was submitted *after* 12:01 a.m. on September 1. 181 IBLA at 275.

III. BLM’S PETITION FOR RECONSIDERATION

BLM essentially argues that our decision is premised on three erroneous assumptions: (1) that appellant submitted a Waiver Certification; (2) that the missing signature of a co-owner is a curable defect; and (3) that the Waiver Certification was nevertheless untimely because it was submitted on September 1. BLM argues that a Waiver Certification can be timely filed on September 1, that a missing signature is not a curable defect, but that we erred making our contrary rulings. Asserting that a waiver form was never filed, BLM considers our rulings to be dicta. BLM contends that we should vacate our prior decision and affirm its decision for the reasons stated.

Under 43 C.F.R. § 4.403(b), the Board may grant a request for reconsideration in “extraordinary circumstances.” *See, e.g., Ulf T. Teigen (On Reconsideration)*, 159 IBLA 142, 144 (2003). While we are generally “reluctant to grant a petition for reconsideration on the basis of new information submitted with the petition and unaccompanied by an explanation as to why it was not provided prior to the decision which the party seeks to have reconsidered,” we have granted petitions for reconsideration where the party requesting reconsideration provides information that invalidates the premise upon which the Board’s original decision was based. *See Teigen*, 159 IBLA at 144; *Gary L. Carter (On Reconsideration)*, 132 IBLA 46, 48 (1995). Because we agree with BLM that timely maintenance fee filings can be made on September 1 for reasons stated below, we grant BLM’s Petition and vacate our decision.⁵ However, because the record is not sufficient to support a finding that appellant made no attempt to file his Waiver Certification when he visited BLM on September 1, we remand the case to BLM to develop evidence on this issue. *See*

⁵ BLM has requested that the Board consider its Petition *en banc*, citing our opinion in *Powderhorn Coal Co. v. OSM (On Reconsideration)*, 132 IBLA 36, 40-41 (1995). In that case, the opinion stated that because of the result of the Board’s circulation procedures, reconsideration *en banc* was not required. It is more accurate to state that the Board does not consider requests from a party for *en banc* consideration, because the Board’s circulation procedures make such requests unnecessary. Those procedures are outlined in III IBLA Manual Chapters 5 – 7, readily available through the website of the Office of Hearings and Appeals, www.oha.doi.gov. Accordingly, we deny BLM’s request for *en banc* consideration.

James Milton Cann, 16 IBLA 374, 377 (1974); *see also Canadian Mining of Arizona, Inc.*, 177 IBLA 368, 370-71 (2009); *Darrell Palmer*, 156 IBLA 360, 362-64 (2002); *L.E. Garrison*, 52 IBLA 131, 133 (1981); *Lucille M. Frederick*, 10 IBLA 85, 86 (1972).

IV. THE DEADLINE FOR FILING MAINTENANCE FEES

In considering the deadline for filing maintenance fees under 30 U.S.C. § 28f, BLM's Petition directs our attention to the conflict between subsections (a) and (b) that existed at the time of our decision. Subsection (a) provides that the fees must be paid "on or before September 1." Subsection (b) required the payment to be made "before the commencement of the assessment year." When Congress amended 30 U.S.C. § 28 in 2008 to provide that the assessment year commenced at 12:01 a.m. on September 1, a payment on September 1 that would be timely under subsection (a) would have been untimely under subsection (b). At the same time that Congress amended 30 U.S.C. § 28 to make 12:01 a.m. on September 1 the commencement of the assessment year, it also modified 30 U.S.C. § 28f(a) but did not delete the words "on or" in the phrase "on or before September 1." The words "on or" should not be regarded as surplusage, and BLM argues that we did not give meaning and effect to every word and provision of a statute when we held that payments made on September 1 were untimely. *See* Petition at 15. We agree.⁶

[1] BLM reminds us that the prior conflict between subsections (a) and (b) did not result from the 2008 revision of the commencement of the assessment year but had always been there.⁷ Subsection (b) had always provided that maintenance

⁶ We must endeavor to give meaning and effect to every word and provision of a statute, and not construe words surplusage. *See Carcieri v. Salazar*, 555 U.S. 379, 392 (2009); *Bennett v. Spear*, 520 U.S. 154, 173 (1997); *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1167 (9th Cir. 2008); *Wilderness Society v. Morton*, 479 F.2d 842, 856 (D.C. Cir. 1973); *Statoil Gulf of Mexico LLC*, 42 OHA 261, 307 n.50 (2011). This is true even "when statutory provisions are in certain respects inconsistent" in order to "implement[] to the fullest extent possible the directives of each" and to "avoid[] unnecessary hardship or surprise to affected parties." *Citizens to Save Spencer County v. U.S. Env'tl. Prot. Agency*, 600 F.2d 844, 870-71 (D.C. Cir. 1979).

⁷ BLM refers to the legislative history of the Maintenance Fee Act and related legislation to explain how the conflict between subsections (a) and (b) arose. BLM observes that when the Maintenance Fee Act was initially proposed, subsection (a) did not state the date on which the fee must be paid and subsection (b) required payment before the commencement of the assessment year. However, as finally enacted, subsection (a) required payments to be made "on or before August 31." Petition at 7-8. Congress, however, did not delete subsection (b). *Id.* In *Cass v.*

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fees were payable “before the commencement of the assessment year” which previously began at noon on September 1. When first enacted in 1994, subsection (a) of the Maintenance Fee Act established a deadline of “on or before August 31,” even though the assessment year did not begin until noon the next day. From that point forward, BLM’s regulations and this Board’s decisions have consistently identified subsection (a) as establishing the payment deadline, not subsection (b). *See, e.g.*, 43 C.F.R. §§ 3834.11(a)(2), 3835.10(a); 64 Fed. Reg. 47018 (Aug. 27, 1999); 59 Fed. Reg. 44846, 44860 (Aug. 30, 1994); *Harlow Corp.*, 135 IBLA 382 (1996), *aff’d*, *Harlow Corp. v. Norton*, No. 97-0320(RWR) (D.D.C. July 24, 2001), *aff’d*, 56 Fed. Appx. 513 (D.C. Cir.), *cert. denied*, 539 U.S. 959 (2003). Accordingly, we vacate our decision holding that a waiver filed on September 1 was untimely because it was filed after 12:01 a.m.⁸ We agree that maintenance fees or Waiver Certifications filed during BLM’s regular business hours on September 1 have been and continue to be timely under 30 U.S.C. § 28f(a), even though at the time of our decision subsection (b) required the payment to be made “before the commencement of the assessment year,” which now begins at 12:01 a.m. on September 1.

⁷ (...continued)

United States, 417 U.S. 72, 83 (1974), the Court observed: “In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process.” *Accord Citizens to Save Spencer County v. U.S. Env’tl. Prot. Agency*, 600 F.2d at 871-72.

⁸ BLM characterizes our holding as dictum because, in its view, no Waiver Certification was filed. However, BLM fails to recognize that a disputed issue of fact arises when someone states that he appeared at a BLM office and discussed a document with a BLM employee who returned the document to him without making a record of its tender. *See, e.g.*, *Darrell Palmer*, 156 IBLA at 362-64; *James Milton Cann*, 16 IBLA at 377; *Lucille M. Frederick*, 10 IBLA at 86. Under 43 C.F.R. § 4.415, the Board may order a hearing to resolve disputed issues of fact, but before doing so, it will first examine the legal principles which govern its consideration of an appeal on the basis of facts that are not in dispute because such an examination often provides an alternative basis for resolving an appeal without a hearing. *E.g.*, *Vanderbilt Gold Corp.*, 126 IBLA 72, 77 (1993); *Ben Cohen (On Judicial Remand)*, 103 IBLA 316, 320-21, *aff’d sub nom. Sahni v. Watt*, Civ. No. S-83-96-HDM (D. Nev. Jan. 17, 1990), *aff’d* (Jan. 14, 1991), *aff’d*, 961 F.2d 217 (Table) (9th Cir. 1992); *KernCo Drilling Co.*, 71 IBLA 53, 56 (1983). Thus, our disposition of Anderson’s appeal was not based on dictum; it was an alternative holding that avoided the need to resolve a disputed issue of fact. “Alternative rationales such as this, providing as they do further grounds for . . . disposition, ordinarily cannot be written off as dicta.” *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008); *see Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010); *Bimbo Bakeries v. Botticella*, 613 F.3d 102, 116 (3d. Cir. 2010).

V. A CO-CLAIMANT'S MISSING SIGNATURE IS A CURABLE DEFECT

BLM next attacks our conclusion that the missing signature of Anderson's co-claimant on the waiver form was a curable defect. Petition at 28. Although our ruling that the Waiver Certification would have been untimely may have made it unnecessary to address that issue in our decision, the issue now becomes critical to the resolution of this appeal. If the defect were not curable, it would not matter if BLM had refused to accept the defective filing; the claim would be forfeited in any event. However, the Maintenance Fee Act provides: "If a small miner waiver application is determined to be defective for any reason, the claimant shall have a period of 60 days after receipt of written notification of the defect or defects by the Bureau of Land Management to: (A) cure such defect or defects, or (B) pay the . . . maintenance fee due for such period." 30 U.S.C. § 28f(d)(3) (2006); *see* 43 C.F.R. § 3833.93.

[2] In arguing that a co-claimant's missing signature is not curable, BLM refers to our statement in *Thomas L. Carufel*, 155 IBLA 340, 345 (2001), that the signature is at "the heart of the certification process." In that case, the waiver document did not bear the original signature of any claimant, but was a photocopy of a document that certified compliance in prior years, *not* the current year. Less than a month after we issued *Carufel*, we considered a case in which the appellant had filled out and timely filed his Waiver Certification form but failed to provide his signature. *L.R. Church*, 155 IBLA 367 (2001). We concluded that the claims were not properly deemed forfeited in the absence of notice and an opportunity to provide the omitted signature. *Id.* at 372. Citing *Carufel*, we stated:

We think [the *Church*] case is properly distinguished from [*Carufel*] in which no contemporaneous certification of compliance with the regulatory requirements for a waiver as of the date payment was due was timely filed with BLM by August 31 of the year in which payment was otherwise due.

Id. More recent decisions have recognized that the failure to include in a Waiver Certification the original signatures of all of the claim owners of record or their authorized agent constitutes a defect that must be cured within 60 days of receipt of notice of the defect from BLM. *See Melvin Peterson*, 180 IBLA 152, 154-56 (2010); *Donald Super*, 179 IBLA 34, 36 (2010), *Samual B. Fretwell*, 154 IBLA 201, 205-06 (2001).⁹

⁹ As we noted in *Debra Smith (On Reconsideration)*, 180 IBLA 107, 111 (2010), the Board reviews mining claim forfeiture decisions from all BLM state offices. In this

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VI. WHETHER ANDERSON TENDERED THE WAIVER CERTIFICATION

[3] According to BLM, “no filing of any kind was made with BLM on or before September 1” and “[a]ppellant provided no evidence to support his assertions that he attempted to make the required filing.” Petition at 27. Actually, appellant provided evidence that he filed an affidavit of assessment work on September 1. The issue is whether he tendered his Waiver Certification with it. Ordinarily, an uncorroborated statement that an additional document was included with a filing is insufficient to overcome the presumption that BLM would have taken proper notice of the document in issue, had it been received. See *Red Top Mercury Mines, Inc. v. United States*, 887 F.2d 198, 202-03 (9th Cir. 1989); *Wilson v. Hodel*, 758 F.2d 1369, 1374 (10th Cir. 1985); *Metro Energy, Inc.*, 52 IBLA 369, 371 (1981). That presumption, however, may be rebutted by evidence on appeal that the documents were tendered and received by BLM timely and inadvertently returned without date stamping and retention in the files. *Darrell Palmer*, 156 IBLA at 362-64.

In *Palmer*, we distinguished evidence of placing a document in the mail or other circumstances where the absence of the document is not likely to have been noticed from a case in which an appellant alleges that her tender of a document had been acknowledged by a BLM employee. In *Palmer*, BLM declared claims forfeited for failure to pay maintenance fees or file a Waiver Certification, but the appellant alleged in her statement of reasons that she had personally hand-delivered her Waiver Certification and assessment work documents and conversed with a BLM employee who referred to them. *Id.* at 361. In that case, we referred to our decision in *L.E. Garrison*, 52 IBLA 131 (1981), where the wife of a mining claimant indicated that she talked by telephone to a BLM employee who had appellant’s letter on his desk and who opened it while talking to her and confirmed that all of the necessary documents were in order and received. On that basis, we stated: “[I]t would be reasonable to assume that . . . BLM would have informed [the claimant] if she had not included in her folder a waiver certification for her other claims.” 156 IBLA at 363.

In *Lucille M. Frederick*, 6 IBLA 47, 48 (1972), an applicant for a headquarters site alleged that she had visited the BLM office in person to file the application, but the BLM decision rejecting her application stated that the office had no record of appellant’s filing of the document or payment of the filing fee required. We referred the case for a hearing, after which an administrative law judge found that “the evidence presented by the BLM did not foreclose the possibility that the events occurred as related by the appellant,” which “lends plausibility and credence to her

⁹ (...continued)

case, as in *Smith*, a BLM state office has sought reconsideration of a Board decision to sustain a practice that differs from practices of other BLM offices.

testimony.” *Lucille M. Frederick*, 10 IBLA 85, 101 (1972). We adopted the judge’s findings and reversed BLM. *Id.* Later, in a similar case, we remanded the case to BLM to consider the applicant’s evidence that the form was filed, noting that appellant would be afforded a hearing before an administrative law judge if BLM found his evidence insufficient. *James Milton Cann*, 16 IBLA at 377; accord *Edwin William Seiler (On Reconsideration)*, 20 IBLA 221 (1975). Adherence to the *Cann* and *Seiler* precedents requires similar action here.¹⁰

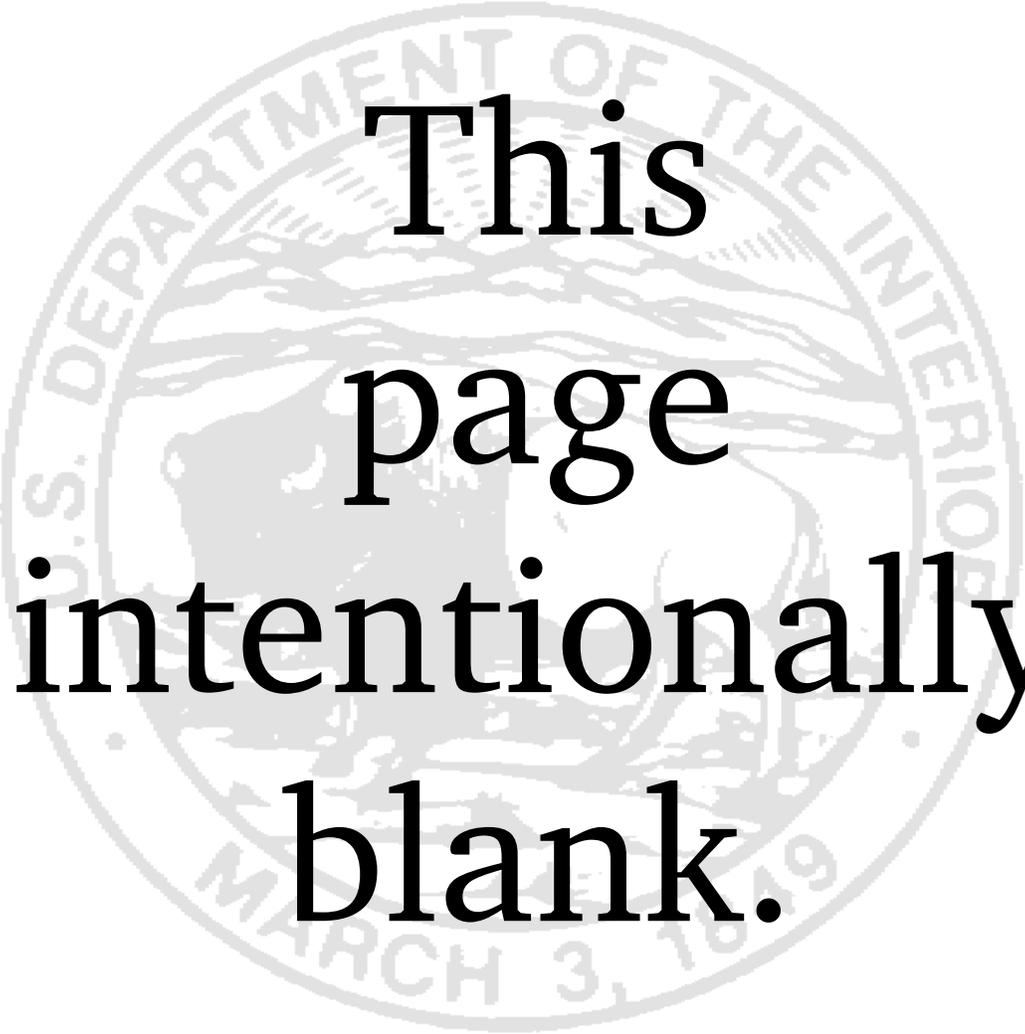
Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM’s request for consideration *en banc* is denied, it’s petition for reconsideration is granted, our decision in *Art Anderson*, 181 IBLA 270 (2011), is vacated, the BLM decision appealed from is set aside and the case remanded for further action consistent with this opinion, and BLM’s request for stay is denied as moot.

_____/s/
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge

¹⁰ In *Palmer* and *Garrison*, BLM filed no answers to appellants’ statements of reasons, and we reversed BLM’s decisions. In *Burnetta M. Long*, 139 IBLA 157 (1997), BLM responded to a similar allegation by filing an Answer that included declarations of BLM employees familiar with the transaction at issue. See also *Lucille M. Frederick*, 10 IBLA at 85, 97-100 (summarizing testimony of BLM personnel). By contrast, BLM filed no Answer in the instant appeal, nor did it provide supporting documents similar to those provided in *Long* with its petition for reconsideration together with an explanation why they were not provided in an earlier Answer. See 43 C.F.R. § 4.403(c)(2), (e). However, Anderson’s allegations are less specific than those in *Palmer* and *Garrison*, so rather than reverse BLM outright, we provide BLM an opportunity to develop its own evidence concerning Anderson’s visit to the office and to notify Anderson and provide an opportunity for him to submit any additional declaration or other evidence concerning his visit. If BLM determines that there is sufficient evidence to support his assertion that he tendered the Waiver Certification on September 1, 2010, then BLM shall issue a notice to cure the defect under 43 C.F.R. § 3835.93(a), (c).



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