



JACK C. SCALES

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Decided April 19, 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

JACK C. SCALES

IBLA 2012-19

Decided April 19, 2012

Appeal from a decision of the Eastern States Office, Bureau of Land Management, declaring the TMR No. 1 (ESMC 11926), TMR II No. 1 (ESMC 11927), and TMR II No. 2 (ESMC 11930) unpatented mining claims forfeited by operation of law for failure to pay a \$140 per claim maintenance fee on or before September 1, 2011, for the 2012 assessment year.

Reversed and remanded; request for stay denied as moot.

1. Mining Claims: Claim Maintenance Fees: Generally

During the year that BLM increases mining claim maintenance and location fees, if a claimant timely pays the fees in effect immediately prior to the increase, then BLM must accept the underpayment and notify the claimant of the additional amount owed to satisfy the maintenance fee requirement for that assessment year, providing a 30-day period for the claimant to pay the additional amount.

2. Mining Claims: Claim Maintenance Fees: Generally

Generally, if a claimant makes a partial payment of annual mining claim maintenance fees, then absent other instructions from the claimant, BLM will accept the partial payment and apply it to the claims in serial number order until the money runs out. For any claims for which there are insufficient funds to pay the total maintenance fees, those claims are forfeited unless the claimant submits the additional funds necessary to complete the full payment by the due date.

3. Estoppel: Generally

Estoppel is an extraordinary remedy that must be based upon some form of affirmative misconduct by the agency, including misrepresentation or concealment of material facts. It cannot be based on an oral misstatement, but must result from a misstatement in an official written decision. Estoppel cannot be successfully invoked if its effect would be to grant an interest not authorized by law.

APPEARANCES: Jack C. Scales, *pro se*, Longwood, Florida.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Jack C. Scales¹ has appealed from and requested a stay of an October 4, 2011, decision of the Eastern States Office, Bureau of Land Management (BLM), declaring the TMR No. 1 (ESMC 11926), TMR II No. 1 (ESMC 11927), and TMR II No. 2 (ESMC 11930) unpatented mining claim forfeited by operation of law for failure to pay the \$140 per claim maintenance fee on or before September 1, 2011, for the 2012 assessment year, because appellants paid only \$125 per claim on August 24, 2009. We reverse BLM's decision and remand the matter for further action, and deny the request for stay as moot.

Under 30 U.S.C. § 28f(a) (2006), 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.² 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 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. See 30 U.S.C. § 28f(a) and (b) (2006); 43 C.F.R. § 3834.11(a). As originally enacted, the claim maintenance fee was

¹ Scales is identified in the record as the agent for the two mining associations that own the claims involved in this appeal. However, because he also is identified as a member of each of those associations, he may appeal BLM's decision on his own behalf and likely on behalf of the associations. See 43 C.F.R. § 1.3(b)(3).

² The Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2101 (2007), has made the Sept. 1 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).

established at \$100 per mining claim or site. 30 U.S.C. § 28f(a) (2006). The Secretary of the Interior was authorized, however, to adjust the claim maintenance fee, and certain other fees, from time to time to reflect changes in the Consumer Price Index published by the Bureau of Labor Statistics of the Department of Labor. 30 U.S.C. § 28j(c) (2006). BLM adjusted the claim maintenance fee in 2004, increasing it to \$125 per mining claim or site for the 2005 assessment year. 69 Fed. Reg. 40294 (July 1, 2004). More recently, BLM adjusted the fee again, increasing it to \$140 per mining claim or site for the 2010 assessment year, beginning September 1, 2009. 74 Fed. Reg. 30959 (June 29, 2009).

The failure to pay 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), 3835.92(a).

FACTS AND LAW

This case presents a confusing coil of errors, which must first be unwound before it can be remedied. So, initially we will review the history of what appellant did to maintain his mining claims, and the legal consequences of those actions.

Appellant’s claims were located in 1993, and appellant has sought to maintain the claims for the subsequent years by paying maintenance fees. As mentioned above, those fees initially were set at \$100 per claim for every assessment year, and appellant consistently sent annual maintenance fee payments to BLM of \$300 for the three claims. On July 1, 2004, BLM published a rule in the Federal Register adjusting various fees, including the annual maintenance fee, which was adjusted upward to \$125 per claim, effective with the payment due on or before September 1, 2004, for the 2005 assessment year. 69 Fed. Reg. 40294, 40296 (July 1, 2004). That rule also contained a provision that in any year in which BLM adjusts the maintenance or certain other fees, if a claimant paid the adjusted fees on or before the due date of September 1 that year but paid the previous amount of the fee, then BLM will send the claimant a notice and give the claimant 30 days to pay the additional amount. If that additional amount is not paid within the 30 day period, then the claimant will forfeit the affected claims. *Id.* (codified at that time at 43 C.F.R. § 3834.23(c) (2004), currently found at 43 C.F.R. § 3834.23(d), *see* 70 Fed. Reg. 52028, 52030 (Sept. 1, 2005)).³

³ A curious aspect of this first adjustment was that after BLM made the adjustment, and after the 2005 assessment year maintenance fees were due, Congress mandated that, effective Dec. 8, 2005, the maintenance fee was reduced to \$100 per claim, the amount in effect immediately prior to the adjustment, until the Department complied
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Notwithstanding the increase in maintenance fees for the 2005 assessment year, on August 12, 2004, appellant submitted to BLM only \$300 for his three claims for the 2005 assessment year, a partial payment, instead of the required \$375. At that point, because appellant made his partial payment during the year in which the fee was adjusted, appellant was entitled to notice of his partial payment and a 30-day opportunity to pay the additional amount required. However, BLM merely accepted appellant's partial payment, and appellant received no notice at that time. Because appellant was entitled to notice from BLM, the status of his claims was not affected by his partial payment.

Appellant began paying the adjusted maintenance fee in the amount of \$125 per claim beginning with the 2006 assessment year, and continued thereafter. Several years later, in 2009, BLM once again adjusted the maintenance fees upward, with the new \$140 maintenance fees to be paid beginning with the 2010 assessment year. 74 Fed. Reg. 30959, 30962 (June 29, 2009).⁴ Appellant, however, only made a partial payment of \$375 for his three claims (\$125 per claim) for the 2010 assessment year, instead of paying the newly-adjusted fee of \$140 per claim. Again, because appellant made his partial payment during the year in which the fee was adjusted, he was entitled to notice of his partial payment and a 30-day opportunity to pay the additional amount required. 43 C.F.R. § 3834.23(d). However, BLM merely accepted appellant's partial payment, and appellant received no notice at that time. Because appellant was entitled to notice from BLM, the status of his claims was not affected by his partial payment.

The following year, appellant again made a partial payment of maintenance fees, \$125 per claim for a total of \$375, for the 2011 assessment year, rather than the required \$420 (\$140 per claim). Because the partial payment *was not* made during the year the maintenance fee was adjusted, appellant *was not* entitled to notice and an opportunity to pay the additional amount required.⁵ The partial payment should

³ (...continued)

with certain reporting and permit tracking obligations. *See* Interior and Related Agencies Appropriations Act for fiscal year 2005, Division E, Title I, § 120, Pub. L. No. 108-447, 118 Stat. 2809, 3065-66 (2004). Those conditions were met on June 30, 2005, so the maintenance fees due after that date (for the 2006 assessment year and beyond) returned to the adjusted \$125 per claim. 70 Fed. Reg. at 52028.

⁴ In the preamble to that rule, BLM reminded mining claimants that "mining claimants who have already submitted maintenance fees for the 2010 maintenance [assessment] year will be given an opportunity to pay the additional amount without penalty upon notice from BLM." 74 Fed. Reg. at 30960.

⁵ Appellant could, of course, have submitted additional funds necessary to complete
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have been accepted and applied to the claims in serial number order (lowest to highest). Since the payment was only sufficient to cover assessment fees for two of appellant's claims, the third claim was forfeited. 43 C.F.R. § 3830.96(a), (b).

For the 2012 assessment year, appellant again paid \$375. At that time, however, because appellant only retained two mining claims, the \$375 was, in fact, an overpayment of the maintenance fees required.

BLM'S ACTIONS

We will now review what BLM did with respect to appellant's maintenance fee payments for the 2005, 2010, 2011, and 2012 assessment years. First, BLM sent appellant a letter dated November 3, 2010, notifying him that he owed an additional \$45 in maintenance fees for his three claims for the 2010 assessment year and \$45 in maintenance fees for the 2011 assessment year. The letter provided appellant a 30-day period in which to submit these additional funds, which appellant promptly did. Shortly thereafter, BLM finally noticed appellant's underpayment for the 2005 assessment year, and sent him a letter dated December 2, 2010, notifying him that he owed an additional \$75 in maintenance fees for his three claims for the 2005 assessment year and that he had 30 days to submit the payment. Appellant promptly paid.

When appellant again submitted \$375 in maintenance fees for the 2012 assessment year, BLM changed its response. By letter dated August 29, 2011, BLM rejected his payment and returned his check for \$375. That letter also requested that appellant "[p]lease submit a new check for the correct amount of \$420," with no due date specified. Appellant submitted a check for \$420 on September 26, 2011. BLM then issued its decision, declaring all three of the claims forfeited because appellant had failed to submit maintenance fees on or before September 1, 2011. Appellant appealed, arguing that "partial payments have been accepted in the past with opportunity to make full payments after the September 1st deadline. We are also given the right to make up the deficient payment and later that right was taken away." Request for Stay at 1. "There was no indication that this [opportunity to make up partial payments] was a one time courtesy." Notice of Appeal at 2.

⁵ (...continued)

the full payment by the due date, Sept. 1, 2010. 43 C.F.R. § 3830.96(b). However, appellant made no such additional payment.

*ANALYSIS**Payment of Maintenance Fees for the 2005, 2010, and 2011 Assessment Years*

[1] BLM made a series of errors in its handling of appellant's maintenance fee payments over the years. As stated above, BLM regulations promulgated in 2004, and still in effect today, provide that during the year that BLM increases mining claim maintenance and location fees, if a claimant timely pays the fees in effect immediately prior to the increase, then BLM will accept the underpayment and notify the claimant of the additional amount owed to satisfy the maintenance fee requirement for that assessment year, providing a 30-day period for the claimant to pay the additional amount. 43 C.F.R. § 3834.23(c) (2004); 43 C.F.R. § 3834.23(d) (2010). BLM's first error was in accepting appellant's \$300 partial payment of the required \$375 maintenance fees due on or before September 1, 2004, for the 2005 assessment year, without immediately providing him with notice and an opportunity to pay the additional amount owed. But, because appellant was entitled to that notice and opportunity, despite his partial payment of the maintenance fees, BLM's failure to notify him immediately resulted in no change in the legal status of appellant's claims. More than six years later, on December 2, 2010, BLM finally rectified its error, notifying appellant that he had underpaid the maintenance fees for the 2005 assessment year and providing him with a 30-day period within which to pay the additional \$75 owed, consistent with the regulations. Within that period, appellant paid the \$75 and completed his maintenance fee payment obligations for the 2005 assessment year.

BLM's actions with respect to appellant's partial payment of the maintenance fees for the 2010 assessment year were less dilatory, and appellant's timely payment of the additional amount owed satisfied his obligations for the 2010 assessment year. However, BLM's actions with respect to the partial payment of maintenance fees for the 2011 assessment were problematic and, indeed, wrong. If a mining claimant makes a partial payment of maintenance fees, then that claimant is entitled to notice of the underpayment and a 30-day period to pay the additional fees owed *only* if the partial payment is during a year in which BLM has adjusted the fees *and* if the partial payment is the amount that was in effect immediately before the adjustment. As for appellant's partial payment for the 2011 assessment year, although the amount appellant paid, \$375 for 3 claims, was the amount in effect immediately before the most recent adjustment, the underpayment was made in the year *after* the year in which BLM adjusted the fees. As a result, appellant was *not* entitled to notice and an opportunity to pay the additional amount owed for the 2011 assessment year, in this case \$45 for 3 claims. That part of BLM's November 3, 2010, letter was simply incorrect.

[2] BLM's regulations are quite clear as to what BLM should have done upon its receipt of appellant's partial payment of the maintenance fees for the 2011 assessment year. "If you pay only part of the . . . annual maintenance fees . . . , 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). In this case, BLM should have applied the first \$140 of appellant's \$375 payment to the TMR No. 1 (ESMC 11926) claim, and the next \$140 to the TMR II No. 1 (ESMC 11927) claim. That would have left \$95 remaining from appellant's total payment of \$375. "For any claims . . . for which there are no funds in your partial payment to pay the [total] maintenance fees . . . , you will forfeit the mining claims . . . not covered by your partial payment unless you submit the additional funds necessary to complete the full payment by the due date." 43 C.F.R. § 3830.96(b). Because the remaining \$95 was not sufficient to pay the \$140 maintenance fee for the TMR II No. 2 (ESMC 11930) claim, and appellant did not submit \$45 to complete full payment on or before September 1, 2010, the TMR II No. 2 claim was forfeited, and appellant is entitled to a refund of the \$95 remaining from his \$375 payment.

Estoppel

[3] Appellant's recounting of BLM's past practice of notice of partial payment and a 30-day period to complete payment of maintenance fees raises the specter of estoppel. In fact, with respect to appellant's partial payment of the maintenance fees for the 2011 assessment year, BLM's subsequent incorrect actions come perilously close to effecting an estoppel against the agency. This Board subscribes to the rule that "estoppel is an extraordinary remedy, especially as it relates to the public lands." *Glen and Marie Teague*, 179 IBLA 324, 339 (2010) (citing *Wolfram Jack Mining Corp.*, 176 IBLA 183, 190 (2008)). For estoppel to apply,

it must be shown that BLM deliberately misled the appellants and that they were ignorant of the [facts] and had relied on BLM's assurance to their detriment. *See Darrell Ceciliani*, 166 IBLA 316, 326 (2006) (quoting the necessary elements for an estoppel established by the Ninth Circuit Court of Appeals in *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (1970), and *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (1960)).

Id. The agency action must be based upon some form of affirmative misconduct, including misrepresentation or concealment of material facts. It cannot be based on an oral misstatement, but must result from a misstatement in an official written decision. Estoppel also cannot be successfully invoked if its effect would be to grant an interest not authorized by law. *Ron Coleman Mining, Inc.*, 172 IBLA 387, 391 (2007).

BLM's crucial misstatement here was to incorrectly inform appellant, in an official written notice, that he was entitled to pay the additional maintenance fees owed for the 2011 assessment year within a 30-day period after his receipt of the notice. If that misstatement had been made prior to September 1, 2010, when the full amount of maintenance fees for the 2011 assessment year were due and appellant still was entitled to make full payment and maintain all his claims, then BLM's misstatement that he could pay the additional funds within 30 days, notwithstanding the due date of September 1, 2010, could have enticed appellant to relinquish part of his interest in his claims because of his reliance on the misstatement, and a claim of estoppel might be successful. *See, e.g., Rudy S. Sutlovich*, 139 IBLA 79, 82-83 (1997). However, BLM's misstatement was made on November 3, 2010, after the full amount of maintenance fees was due, and appellant no longer was entitled, by law, to make full payment. So we decline to find estoppel in this instance.

Payment of Maintenance Fees for the 2012 Assessment Year

Appellant paid \$375 in maintenance fees for his three claims for the 2012 assessment year. BLM considered this a partial payment, with \$45 still owed. Rather than notify appellant of his partial payment and provide a 30-day period in which to complete payment, as it had done in the past, this time BLM rejected appellant's payment and by letter dated August 29, 2011, sent back his check to him, telling him he should submit a new check in the amount of \$420. BLM gave appellant no deadline by which he should submit the new check. Those actions by BLM were simply wrong,⁶ and contrary to its own regulations. As discussed above, if a claimant pays only part of the maintenance fees due, then BLM is *not* to reject the payment, but is to apply the partial payment to the claims in serial number order until the money runs out. 43 C.F.R. § 3830.96(a). In this case, however, appellant's TMR II No. 2 claim had already been forfeited when appellant made a partial payment of maintenance fees for the 2011 assessment year. As a result, appellant's payment of \$375 for the 2012 assessment was, in fact, an *overpayment*, since at that time he owed maintenance fees of \$140 each for two claims, or a total of \$280. BLM should have accepted appellant's payment of \$375 and then refunded the \$95 amount of the overpayment.

⁶ Those actions also could have raised the issue of estoppel, because appellant was misled by BLM's written decision telling him that he could submit a substitute check in complete payment of the maintenance fees owed, without setting a deadline, at a time when appellant arguably still could have paid the complete fees.

CONCLUSION

This is not the only time in the recent past that the Board has addressed BLM's failure to follow its regulations with respect to the partial payment of maintenance fees. *See, e.g., Gerald R. Stuart*, 180 IBLA 20 (2010). However, this time we have had to address an abundance of BLM mistakes made with respect to the same mining claims. Because of these errors by BLM, we must reverse its decision and remand the matter so that BLM can (1) apply appellant's payment of maintenance fees for the 2011 assessment year to his three claims in serial number order, (2) presumably declare appellant's TMR II No. 2 (ESMC 11930) claim forfeited as of September 1, 2010, for failure to pay maintenance fees, (3) refund appellant his \$95 overpayment of maintenance fees for the 2011 assessment year, and (4) reinstate appellant's TMR No. 1 (ESMC 11926) and TMR II No. 1 (ESMC 11927) mining claims, and then provide appellant the opportunity to resubmit payment of maintenance fees for those two claims for the 2012 assessment year.

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 decision appealed from is reversed and the matter remanded to BLM for appropriate action, and the request for stay is denied as moot.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge