

BENNIE SINERIUS

IBLA 90-269

Decided August 7, 1990

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting for recordation affidavits of annual representation, subject to cure. M MC 49890 through M MC 49929.

Appeal dismissed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Federal Land Policy and Management Act of 1976: Service Charges--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--Rules of Practice: Appeals: Notice of Appeal

If a mining claimant files an affidavit of assessment work or notice of intention to hold without sufficient service charges as required by 43 CFR 3833.1-3, regulation 43 CFR 3833.1-4 provides for a 30-day compliance period during which this deficiency may be corrected prior to rejection. Because rejection of annual filings does not occur, if at all, until expiration of the compliance period pursuant to 43 CFR 3833.1-4, a decision notifying the claimant of the deficiency is interlocutory, *i.e.*, not final for purposes of appeal. A notice of appeal filed by the claimant during the compliance period may be dismissed as premature and, in such case, the substance of the "appeal" should be treated as a protest.

APPEARANCES: Bennie Sinerius, Dearlodge, Montana, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Bennie Sinerius has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated February 26, 1990, inform-ing him that he had enclosed insufficient filing fees when submitting affidavits of "annual representation" for 41 claims to the State Office

for filing. 1/ BLM's decision stated that these "affidavits * * * are, therefore, rejected for recordation subject to this office receiving the required filing fees in the amount of \$200 within 30 days from your receipt of the decision." Enclosed with appellant's affidavits had been a single \$5 payment.

During the 30-day (compliance) period following receipt of BLM's decision, Fred Sinerius wrote to BLM stating that the Ramshorn Special claim (M MC 92157) should be removed from the list of 41 mining claims, as it was "no part of the rest of the claims" and situated in a different county. Enclosed with his letter was a check for \$15. 2/

By letter dated March 13, 1990, BLM notified Fred Sinerius that the affidavit of assessment work was processed for the Ramshorn Special, and that \$5 of the check he submitted was applied to cure the filing fee deficiency for the Ramshorn Special claim. BLM stated the additional \$10 would be returned. On the same day, BLM wrote Bennie Sinerius and included a copy of Fred Sinerius' letter and its reply thereto. In its letter, BLM informed appellant that a deficiency of \$195 existed to process the annual filing for the 40 claims filed December 29, 1989, and reminded him that the 30-day compliance period would expire March 29, 1990. (BLM miscalculated; the compliance period ended on March 30, 1990.)

In response, appellant wrote BLM the following letter, dated March 19, 1990:

I have your letter of Mar. 13, 1990. My records show you have taken \$20.00 for one mining claim M MC 92157.

You have harassed my partners for filing fees; you accepted my money, that makes twenty dollars for one mining claim and that has caused friction between me and my partners. If you can show me that you are over and above the United States Supreme Court and can hand down a decision that overrides the court your credential will have to be presented to me. Until then we wait for the court decision.

No additional moneys accompanied appellant's letter.

1/ These affidavits appear to have been prepared to satisfy the requirements of section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2-2. BLM's decision summarized these requirements in stating that the owner of an unpatented mining claim must file evidence of assessment work performed or notice of intention to hold that claim with BLM on or before December 30 of each calendar year following the calendar year in which the claim was recorded.

2/ A review of the case file for the Ramshorn Special (M MC 92157) shows that the record title holders are Bennie Sinerius, Fred H. Sinerius, Merrill D. Buchfinck, and Calvin Simenson. The case file for the other claims listed in the BLM decision of Feb. 25, 1990, shows Bennie Sinerius to be the owner of record.

BLM construed appellant's letter as a notice of appeal and forwarded the case file to the Board. This action reflects a misunderstanding by BLM of 43 CFR 3833.1-4(a), infra, and causes us to dismiss this appeal as premature.

BLM's decision of February 26, 1990, cited to 43 CFR 3833.1-3 when it informed appellant that his affidavits of annual representation must be accompanied by a nonrefundable service fee of \$5 per claim. This regulation provides at subsection (c): "Annual filings submitted pursuant to § 3833.2 of this title shall be accompanied by a nonrefundable service charge of \$5 for each mining claim."

[1] When BLM received appellant's affidavits accompanied by a single \$5 fee, the status of these affidavits was established by 43 CFR 3833.1-4(a), which provides:

(a) Prior to January 1, 1991. Filings that are not accompanied by the service charges set forth in § 3833.1-3 of this title 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 such deficiency notice by the authorized officer. Failure to submit the proper service charge shall cause the filing to be rejected and returned to the claimant/owner. [Emphasis added.]

Thus, by the terms of this regulation, rejection of appellant's affidavits could occur, at the earliest, 30 days after appellant received BLM's February 26, 1990, deficiency notice, i.e., on March 30, 1990, in the instant case.

In Herbert M. Cole, 115 IBLA 272 (1990), we noted that 43 CFR 3833.1-4(a) authorized a 30-day compliance period commencing with appellant's receipt of BLM's deficiency notice. Because rejection under the regulation does not occur, if at all, until expiration of the compliance period, we found in Cole that BLM's deficiency notice, which incorporated the terms of the regulation, was an interlocutory decision. An interlocutory decision, we noted, was not subject to appeal because it was not final. ^{3/}

In the present case, when BLM received appellant's letter of March 19, 1990, it should have regarded it as an objection to an action proposed to

^{3/} That BLM viewed the Sinerius decision of Feb. 26, 1990, as interlocutory is evident from the following quotation at page 2 of this decision: "This decision does not become final until 30 days from the day you receive this decision, and only if you fail to furnish the filing fees. * * * Once this decision is final, you have 30 days within which to appeal."

Instruction Memorandum No. 89-222 (Jan. 18, 1989) refers to BLM's notice of deficiency as an "interlocutory decision." It states: "For deficient fee situations, your interlocutory decision calling for the remaining fees must state clearly that we will apply the submitted fees to cover the claims/sites listed IN THE ORDER THAT THE OWNER LISTED THEM ON HIS/HER DOCUMENT(S)." (Capitals in original.)

be taken (rejection having not yet occurred under 43 CFR 3833.1-4(a)) and addressed it as a protest under 43 CFR 4.450-2. BLM's act in forwarding this letter to the Board as a notice of appeal suggests some confusion as to the nature of its February 26 decision. ^{4/}

In Robert C. LeFaivre, 95 IBLA 26, 28 (1986), the Board stated that an "appeal" filed during the compliance period may be dismissed as pre-mature and remanded to BLM for its consideration of the issues raised. ^{5/} Where, as here, the appeal raises an issue that could remove the need to make annual filings and BLM's decision makes no reference to applicable policy (see Instruction Memorandum No. 89-222, supra at note 3), remand to the agency for a final decision is appropriate.

It is not clear from appellant's letter of March 19 whether he challenges BLM's decision that he submit payment of a service fee for each claim or whether he challenges that he has an obligation to make annual filings. Our review of the case file and affidavits submitted for 1988 and 1989 suggests that BLM may have regarded these affidavits as notices of intention to hold the claims, because no allegations of assessment work performed appear on these form affidavits. Accompanying appellant's 1989 affidavit is a list of the 40 claims at issue by name and serial number, on which is typed: "On Hold till Court Settled -- Mining Claim Annual Recordation Requirements (43 CFR 3833.2) -- The Golden Anchor Min-ing Claims." Also, on his 1988 and 1989 affidavit forms, Sinerius has made the following notations in the blanks calling for a description of assessment work: "Court action filed by U.S. Forest Service appealed to U.S. Supreme Court, Washington, D.C."; "mine operation tied up in Court"; and "in Ninth Circuit Court of Appeals."

Appellant has not identified the court action which he references, and the case file contains no mention of ongoing litigation involving these claims. In its final decision, BLM should look into this issue and determine whether it affects appellant's obligation to make annual filings. In J.L. Block, 98 IBLA 209 (1987), the Board noted that the owner of a mining

^{4/} The interlocutory nature of BLM's Feb. 26 decision is belied by the caption of the decision ("Recordation Rejected - Mining Claims Declared Abandoned and Void") and by the following quotation therefrom at page 2:

"The affidavits for the mining claims identified above are, therefore, rejected for recordation subject to this office receiving the required filing fees. * * * The aforementioned mining claims are, therefore, declared abandoned and void, without further notice, should you fail to submit the proper filing fees." (Emphasis added.)

Regulation 43 CFR 3833.1-4(a) makes clear that rejection for recordation occurs, if at all, only upon expiration of the compliance period. BLM's use of the present tense ("are * * * rejected for recordation") is error and should be modified in future decisions. See John R. Anderson, 71 IBLA 172, 176 (1983).

^{5/} Our preliminary research indicates that regulation 43 CFR 3833.1-3(c), quoted supra, and its preamble leave little doubt that BLM's new \$5 service charge is to be levied for each claim, rather than for each document, filed with the Bureau. 53 FR 48878 (Dec. 2, 1988).

claim was not obliged to make annual filings during the period he sought judicial review of a Departmental decision holding the claim to be null and void for want of discovery. See also 2 Am. L. of Mining § 45.07(3)(a) (2d ed. 1984).

We note that pursuant to Instruction Memorandum No. 89-222 the \$5 submitted by appellant can be applied to process one of appellant's annual filings. BLM's final decision should reflect the application of the Instruction Memorandum.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed as prematurely filed and the case file returned to BLM for issuance of a final decision consistent with the discussion above.

Gail M. Frazier
Administrative Judge

I concur:

John H. Kelly
Administrative Judge