

N.T.M., INC.

IBLA 92-331

Decided December 7, 1993

Appeal from a decision of the Utah State Office, Bureau of Land Management, rejecting annual filings and declaring abandoned and void certain unpatented mining claims. UMC 190542-190551 and UMC 199713-199730.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold

In accordance with 43 CFR 3833.1-3, annual filings for mining claims must be accompanied by a nonrefundable service charge of \$5.00 for each claim. Annual filings received by BLM on or after Jan. 1, 1991, which are not accompanied by the proper service charges are, according to 43 CFR 3833.1-4(b), not to be accepted and are to be returned to the claimant/owner without further action. Thus, there can be no timely annual filing without the accompanying service charge and if the filing deadline passes without proper payment, the claims may be properly declared abandoned and void.

2. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold

Where a mining claimant makes a timely filing of a notice of intention to hold during the filing year, but the check accompanying the notice, tendered in payment of the service charges, is correctly returned, after the filing deadline, as uncollectible by the bank upon which it is drawn, subsequent payment of the service fee could not cure what had become, because of the dishonored check, an untimely filing, and the claims are properly declared abandoned and void.

APPEARANCES: Devon Nish, Secretary-Treasurer, N.T.M., Inc., Salt Lake City, Utah, for appellant.

## OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On December 31, 1991, N.T.M., Inc., through its Secretary-Treasurer, Devon Nish, filed with the Utah State Office, Bureau of Land Management (BLM), a notice of intention to hold 29 unpatented lode mining claims. <sup>1/</sup> The notice was accompanied by a check for \$145.00 to cover the service fees required by 43 CFR 3833.1-3(c). <sup>2/</sup> The notice and the check were received in an envelope bearing a clearly dated postmark of December 30, 1991, affixed by the United States Postal Service. In accordance with 43 CFR 3833.0-5(m), BLM considered the notice and the check to have been timely filed.

The bank upon which the check was drawn returned it to BLM on January 13, 1992, with the notation "NOT PAID REFER TO MAKER." On January 27, 1992, BLM issued two documents and forwarded them to Nish. One was a "REMITTANCE INQUIRY AND/OR ADVICE," which stated that BLM had deposited the check in question and that it was returned as uncollectible. Nish was advised to "replace promptly by cashier's or certified check, bank draft, or money order." The document also explained that "[p]ayment is due with[in] 10 days of receipt of this notice. If payment is not received within 10 days, Mining Claim may be subject to cancelation [sic]." The other document was a "BILL FOR COLLECTION," requiring payment of \$145.00 and containing the same requirement to pay within 10 days of receipt. BLM sent the documents to Nish certified mail, return receipt requested. The return receipt card shows receipt by one C. L. McCaulley on February 4, 1992. On March 4, 1992, BLM issued a decision rejecting the notice of intention to hold and declaring 28 claims abandoned and void because "[a]s of the date of this decision payment has not been replaced."

On appeal, Nish explains that the check did not clear the bank because the president of the company "was out of town and could not be reached in time to send funds to the Salt Lake Office where the mining files are kept." Nish states that he was hospitalized with bronchial pneumonia and was not aware of the January 27 notice. He asserts that no one was in the company offices and that the January 27 notice was signed for by a person in an adjoining office. He cites lack of proper notification of company officials and his illness as reasons for "allowing the claims to stand."

The claims in question were recorded with BLM in 1979. Accordingly, pursuant to section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1988), and Departmental regulation 43 CFR 3833.2-2(b), the claimant was required to file evidence of assessment work performed or a notice of intention to hold the mining claim with

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<sup>1/</sup> While the notice listed 29 claims, one of the claims, the Chloride (UMC 199726), was listed twice. Thus, the notice only related to a total of 28 claims.

<sup>2/</sup> That regulation provides that annual filings "shall be accompanied by a nonrefundable service charge of \$5.00 for each mining claim, millsite, or tunnel site."

the proper BLM office prior to December 31 of each year thereafter. Such filing must be made within each calendar year, *i.e.*, on or after January 1 and on or before December 30. Ronald Willden, 97 IBLA 40 (1987); Robert C. LeFaivre, 95 IBLA 26 (1986). Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the mining claim. 43 U.S.C. § 1744(c) (1988); 43 CFR 3833.4.

Nish timely filed a notice of intention for calendar year 1991 for the 28 claims in issue. The notice was accompanied by a check in payment of the required service charge; however, subsequent to the filing deadline, that check was dishonored by the bank. Nish does not dispute the nonpayment by the bank. The question presented is whether the claimant in such a situation should be afforded the opportunity to cure the filing. A review of the regulations and case law indicate that no opportunity to cure should be allowed.

In applying the statutory and regulatory recordation requirements of FLPMA, the Board has indulged in a bifurcated curable/noncurable approach. Generally, where a requirement is statutory the Board has considered it to be mandatory and not curable, but where the requirement is regulatory only, failure to comply with the regulatory requirement has been considered a curable defect. Harvey Clifton, 60 IBLA 29, 39 (1981) (Administrative Judge Burski, concurring). The notable exception is the recordation fee requirement, which is regulatory only. The basis for concluding the failure to submit the recordation fee is not curable is that absent submission of the filing fee, there is no recordation. *Id.* at n.1, citing Edward J. Szykowski, Jr., 53 IBLA 310 (1981).

In Glen W. Taylor, 67 IBLA 393 (1982), the mining claimant located claims at various times prior to October 21, 1976, and in accordance with the recordation requirements of FLPMA and the applicable regulations, he filed copies of his location notices with BLM on October 18, 1979, prior to the October 22, 1979, recordation deadline, and a check to cover the \$5.00 per claim nonreturnable service fee required by 43 CFR 3833.1-2(d) (1979). <sup>3/</sup> By letter dated November 9, 1979, BLM notified the claimant that his check had been returned as uncollectible and that it should be replaced. On February 13, 1980, the claimant submitted a cashier's check in replacement of the returned check. The Board held that since the bank dishonored the check, the recordation of the claims was not accompanied by the requisite filing fees and that the date BLM received the cashier's check was the effective date of recordation. The Board concluded that BLM properly declared the claims abandoned and void because the deadline for recording claims located prior to October 21, 1976, was October 22, 1979, and recordation in the case was not accomplished until payment of the service fee on February 13, 1980. <sup>4/</sup>

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<sup>3/</sup> The regulations now require the payment of a \$10.00 service charge per claim for recordation. 43 CFR 3833.1-3(b).

<sup>4/</sup> The Board made no comment in that case on the fact that when BLM sent its Nov. 9, 1979, notice to Taylor, the filing deadline of Oct. 22, 1979, had passed.

[1] The regulations provide at 43 CFR 3833.1-4(b) that beginning January 1, 1991, "[f]ilings that are not accompanied by the proper service charges set forth in §3833.1-3 of this title shall not be accepted and will be returned to the claimant/owner without further action." <sup>5/</sup> Thus, as the Board has held, there can be no timely annual filing without the accompanying service charge. Norman Filip, 124 IBLA 122 (1992); cf. Park City Chief Mining Co., 57 IBLA 346 (1981) (recording of a mining claim required to be accompanied by a service fee and there could be no recording without payment of the fee). <sup>6/</sup> Furthermore, if the annual filing deadline passes without the filing of the service charge, BLM may properly declare the mining claims abandoned and void. Id.

[2] The analysis applied in the Taylor case regarding recordation fees is applicable in the context of service charges for annual filings. In this case, when the bank returned the company's check on January 13, 1992, there was no timely payment of the service charge and because the deadline for filing had passed, there could be no timely filing for 1991. Accordingly, while BLM properly declared the claims abandoned and void, it should have done so upon receipt of the dishonored check from the bank. At that time BLM should have returned the notice of intention to Nish and declared the claims abandoned and void. <sup>7/</sup> BLM's notice implying that payment of the service charge within 10 days of receipt of the notice would cure the situation was clearly incorrect. At the time BLM issued that notice, payment of the service charge could not cure what had become, because of the dishonored check, an untimely filing.

The reasons cited on appeal do not establish that BLM incorrectly declared the claims abandoned and void. Nish admits that there were insufficient funds in the bank to cover the check tendered for the service fees. The thrust of the statement of reasons is that the claims should not be declared void because his illness prevented the company

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<sup>5/</sup> The service charge for annual filings was instituted by regulation with an effective date of Jan. 3, 1989. 53 FR 48876 (Dec. 2, 1988). Prior to Jan. 1, 1991, annual filings not accompanied by the service charges were noted as being recorded on the date received provided that the claimant submitted the proper service charges within 30 days of receipt of a deficiency notice. Failure to submit the service charge resulted in rejection of the filing. 43 CFR 3833.1-4(a).

<sup>6/</sup> This Board has held also in the context of the payment of oil and gas rentals that the timely tender of rental by means of a check, which, when presented, is dishonored by the bank on which it is drawn, does not constitute timely payment. James S. Guleke, 9 IBLA 73, 74 (1973).

<sup>7/</sup> Such a declaration would not preclude a claimant from establishing that the bank had improperly dishonored a check tendered in payment of service fees, and, thus, that the filing had been accompanied by the requisite fee. Cf. James S. Guleke, *supra* at 76 (proof that a bank erred in denying payment of a check for annual oil and gas lease rental would suffice to establish that payment had been tendered as required by the reinstatement provisions of the Mineral Leasing Act). The BLM decision could then be vacated on that basis.

from receiving the January 27 notice to pay. Receipt of that notice, however, as pointed out above, is not critical to resolution of this case.

Since its records do not reflect that annual filing documents were filed in the proper BLM office on or before December 30, 1991, BLM properly deemed the subject claims to be abandoned and void. Doyle C. Cape, 110 IBLA 16 (1989); Charlene Schilling, 87 IBLA 52 (1985); J. Neil Smith, 77 IBLA 239 (1983).

Responsibility for complying with the recordation requirements of FLPMA rests with the owner of the unpatented mining claim as Congress mandated that failure to file the proper documents in the proper offices within the time periods prescribed in section 314 of FLPMA will, in and of itself, cause the claim to be lost. The Supreme Court has upheld the constitutionality of the statute, expressing that a claim for which timely filings are not made is extinguished by operation of law notwithstanding the claimant's intent to hold the claim. See United States v. Locke, 471 U.S. 84 (1985).

The fact that assessment work was done or that timely filings have been made in other years has no effect on the conclusive presumption of abandonment embodied in the statute. Since the statute is self-operative, a claim must be deemed abandoned when an annual filing is not timely received. See Ptarmigan Co., 91 IBLA 113 (1986), aff'd, Bolt v. United States, 994 F.2d 603 (9th Cir. 1991). As Congress did not provide for waiver of this requirement, the Department is without authority to excuse lack of compliance, to extend the time for compliance, or to afford any relief from the statutory consequences. See Lynn Keith, 53 IBLA 192, 196, 88 I.D. 369, 372 (1981). Thus, the Board may not consider special facts or provide relief in view of mitigating circumstances. Where an annual filing is not timely received, for whatever reason, the consequences must be borne by the claimant.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Bruce R. Harris  
Deputy Chief Administrative Judge

CHIEF ADMINISTRATIVE JUDGE BYRNES CONCURRING IN THE RESULT:

I agree with Deputy Chief Administrative Judge Harris that the BLM decision should be affirmed. However, I do not believe that the decision need be modified.

As an initial matter, the appeal is resolved on the basis that the appellant did not make the payment required within the time allowed by BLM. Therefore, the claims were properly declared null and void.

Previous Board decisions have not dealt directly with the issue of whether the current regulation, 43 CFR 3833.1-4(b), mandates that BLM return an annual filing because a check used to pay the filing fee is returned unpaid by the financial institution on which it is drawn.

It is clear that, pursuant to the regulation, after January 1, 1991, all annual filings must be accompanied by the service fee valid on its face or be returned. 1/ However, there is nothing in the regulation which compels BLM to reject an otherwise timely filing because the check used to submit the service fee is returned, for whatever reason, 2/ by the financial institution on which it is drawn.

It is within BLM's discretion, therefore, to mandate in BLM Manual § 1372.28 K, that:

If an uncollectible check is received for other land applications, consider them as filed, but do not process until settlement is made. Give the applicant a set period of time in which to pay the fee. If it is not paid within the time limit, reject the application. Offset uncollectible checks for filing fees against other payments received by the same applicant.

This was the authority cited by BLM in the instant case and fulfills the purpose of the regulation which is to recoup the cost to BLM of processing the filings required by law. See 53 FR 48878, Dec. 2, 1988.

Other sections of the BLM manual have presented an inconsistent approach to the issue. Since the annual filing has already been processed, a good

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1/ It is clear that there was considerable confusion over this requirement prior to the regulation being promulgated in 1988, since it allowed for the filing of documents as long as a filing fee was submitted within 30 days of receipt of a deficiency notice from BLM until Dec. 31, 1990. See 43 CFR 3833.1-4(a).

2/ Presumably, some reasons for the return, such as bank error, are more excusable than others, such as insufficient funds or improper endorsement.

case can be made under the regulation that BLM is merely recouping costs already incurred. On the other hand, BLM could reasonably interpret the returned check as the absence of the filing fee and allow only evidence

of bank error as a valid excuse. <sup>3/</sup> However, when BLM attempted to resolve the confusion regarding filing fees it left the decision of how to handle returned checks to the discretion of the BLM state offices. See BLM

Instruction Memorandum 92-57, Nov. 27, 1991.

Judge Harris states that, in applying the requirements of FLPMA, "the Board has indulged in a bifurcated curable/noncurable approach. Generally, where a requirement is statutory the Board has considered it to be mandatory and not curable, but where the requirement is regulatory only, failure to comply with the regulatory requirement has been considered a curable defect", with the exception of the recordation fee requirement. I agree with the reasoning of the curable approach to regulatory requirements and see no reason that the same logic could not be extended to the filing fee requirements required by 43 CFR 3833.1-4(b), at least insofar as annual filing service fees are concerned. <sup>4/</sup> In the instant case, no harm was

done to any statutory purpose and the regulatory purpose was fulfilled by allowing a short time to replace a returned check to recoup costs already incurred.

For the reasons stated above, I agree that the BLM decision should be affirmed.

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James L. Byrnes  
Chief Administrative Judge

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<sup>3/</sup> BLM has adopted such a policy regarding \$100 mining claim rental fees. See BLM Instruction Memorandum 94-20, Oct. 15, 1993.

<sup>4/</sup> The two cases cited by Judge Harris, Edward Szykowski, 53 IBLA 310 (1981), and Glen W. Taylor, 67 IBLA 393 (1982), are easily distinguishable from the instant BLM decision since they involve claim recordation rather than annual filings and do not interpret the regulation at issue in this appeal. In Szykowski, the Board made no comment on the fact that BLM, as in the case at hand, notified the appellant and allowed him time to "cure" the returned check. When he failed to do so, the claims were declared abandoned and void.

