

Appeal from a decision of the Arizona State Office, Bureau of Land Management, rejecting the maintenance fee filing for the Pinnacle lode mining claim. A MC 78452.

Affirmed; mining claim deemed forfeited; petition for stay denied as moot.

1. Mining Claims: Rental or Claim Maintenance Fees: Generally

Under secs. 10101-10106 of the Omnibus Budget Reconciliation Act of Aug. 10, 1993, P.L. 103-66, 107 Stat. 312, 405-06, and 43 CFR 3833.1-5, 3833.1-6, and 3833.1-7, 59 FR 44846, 44860-61 (Aug. 30, 1994), a person who held an unpatented mining claim was required to file a \$100-per-claim maintenance fee or a small miner waiver certification on or before Aug. 31, 1994, for the 1995 assessment year.

2. Mining Claims: Rental or Claim Maintenance Fees: Generally

Under 43 CFR 3833.0-5(m), 59 FR 44846, 44858 (Aug. 30, 1994), a claim maintenance fee will be considered timely if it is received within the time period prescribed by law, or, if mailed to the proper BLM office, is contained in an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed by law and received by the proper BLM State Office by 15 calendar days subsequent to such period. An envelope containing a maintenance fee, which bears only a Pitney-Bowes postage meter postmark, cannot be considered timely filed under 43 CFR 3833.0-5(m), because such a postmark is not the postmark of a "bona fide mail delivery service." The Department has stated that a bona fide mail delivery service must be independent of the claimant.

3. Mining Claims: Rental or Claim Maintenance Fees: Generally

A maintenance fee for the 1995 assessment year is timely filed if the envelope containing the fee is mailed to the proper BLM office, bears a postmark of Aug. 31, 1994, or earlier, affixed by a bona fide mail delivery service, and is received by BLM on or before Sept. 15, 1994. The attempted filing of a maintenance fee in an envelope bearing a Pitney-Bowes postage meter postmark of Aug. 23, 1994, which is presented over-the-counter to BLM on Sept. 16, 1994, is properly rejected as untimely, even assuming the U.S. Postal Service improperly returned the envelope to the claimant.

APPEARANCES: Paul W. Tobeler, Los Angeles, California, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Paul W. Tobeler has appealed from a September 20, 1994, decision of the Arizona State Office, Bureau of Land Management (BLM), rejecting the maintenance fee filing for the Pinnacle lode mining claim, A MC 78452. In his notice of appeal, Tobeler included reasons in support of his appeal, as well as a petition for stay.

In its decision BLM recited the following facts:

On September 16, 1994, the Bureau of Land Management (BLM) Arizona State Office received \$100 maintenance fee over-the-counter from Paul W. Tobeler. The filing document and the check in the amount of \$100 were contained in an envelope stamped with Postal Meter #7009507 from Artesia, California, dated August 23, 1994. The envelope was addressed to the Bureau of Land Management, Arizona State Office, Branch of Mining, P.O. Box 1656, Phoenix, Arizona 85011. The envelope had a yellow sticker attached which stated, "NO SUCH ADDRESS. RETURN TO SENDER."

(Decision at 1).

BLM cited 43 CFR 3833.0-5(m), 59 FR 44846, 44858 (Aug. 30, 1994), which provides:

File or filed means being received and date stamped by the proper BLM office. For purposes of complying with §§ 3833.1-2, 3833.1-3, 3833.1-5, 3833.1-6, 3833.1-7, or 3833.2, a filing or fee required by any of these sections is timely if received within the time period prescribed by law, or, if mailed to the proper BLM office, is contained within an envelope clearly post-marked by a bona fide mail delivery service within the period prescribed by law and received by the proper BLM State Office

by 15 calendar days subsequent to such period, except as provided in § 1821.2-2(e) of this title if the last day falls on a day the office is closed. [Emphasis in original.]

BLM held that the filing was not timely because it "was not received in an envelope clearly postmarked by a bona fide mail delivery service; it did not contain the proper address of P.O. Box 16563; nor was it received by the BLM within 15 calendar days subsequent to the deadline filing date of August 31, 1994" (Decision at 1). BLM rejected the maintenance fee and stated that if this was the only fee filing for the claim paid to BLM for 1995, a decision declaring the claim abandoned and void would be issued at a later date.

On appeal, appellant asserts that the fee was timely mailed on August 23, 1994, to the BLM State Office in Phoenix, Arizona; that "[a]fter several days our office discovered that these documents had been returned to our address, unclaimed and unopened by the BLM office"; and that "our filing claim [w]as mishandled by the U.S. Postal Service within boundaries of the City of Phoenix, Arizona on approximately August 25, 1994 thus resulting in our maintenance fees being undelivered to your BLM Arizona State Office" (Notice of Appeal at 1). Appellant further alleges that the envelope was properly addressed in that the envelope shows that the last digit in the post office box number is a 3. He contends the 3 "is faint but is legible." *Id.*

Appellant states that he did not become aware of the returned documents until September 15, 1994, when he was in Reno, Nevada. He claims that at approximately 1 p.m. on that day he telephoned the Arizona State Office and was informed that he had to submit the fee "before 5:00 PM on September 15th to meet the deadline for submitting the maintenance documents" (Notice of Appeal at 2). Appellant asserts that despite that representation by a BLM employee, he had the impression that he would be given the opportunity to submit his documents on September 16, which he did by flying to Phoenix on September 15 and appearing personally at the Arizona State Office on September 16.

Appellant argues that the Pitney-Bowes postmark on his envelope constitutes a postmark by a bona fide mail service. He also contends that he and his family have continually timely filed documents relating to the Pinnacle lode since 1948 and that rejection of the maintenance fee will cause economic hardship.

[1] Under sections 10101-10106 of the Omnibus Budget Reconciliation Act of August 10, 1993, P.L. 103-66, 107 Stat. 312, 405-06 (the Act), and 43 CFR 3833.1-5, 3833.1-6, and 3833.1-7, 59 FR 44846, 44860-61 (Aug. 30, 1994), a \$100-per-claim maintenance fee or small miner waiver certification was required to be filed for appellant's claim on or before August 31, 1994, for the 1995 assessment year. Appellant did not timely file the fee or a certification on or before August 31, 1994, or within the grace period, as established by 43 CFR 3833.0-5(m), 59 FR 44858 (Aug. 30, 1994).

[2] Even if BLM had received, on or before September 15, 1994, the envelope appellant presented over-the-counter on September 16, 1994, appellant's maintenance fee would have been subject to rejection. The reason is that the envelope evidenced only a Pitney-Bowes postmark of August 23, 1994. The Pitney-Bowes postmark on the envelope cannot be considered a postmark of a "bona fide mail delivery service" under 43 CFR 3833.0-5(m), 59 FR 44858 (Aug. 30, 1994).

BLM previously required by regulation that for the purpose of making annual filings pursuant to section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1988), a filing would be considered timely if it were mailed to the proper BLM office "in an envelope clearly postmarked by the United States Postal Service within the period prescribed by law and received by the proper BLM office within 15 calendar days subsequent to such period." 43 CFR 3833.0-5(m) (1993). That grace period regulation only recognized envelopes postmarked by the "United States Postal Service."

In the August 30, 1994, rulemaking, BLM not only expanded the scope of that rule to encompass maintenance fee filings under 43 CFR 3833.1-5, but it also expanded the postmarking services it would recognize from only the United States Postal Service to any "bona fide mail delivery service." 43 CFR 3833.0-5(m), 59 FR 44858 (Aug. 30, 1994).

The preamble to the August 30, 1994, rulemaking explained: "One comment asked whether paragraph (m) was restricted to mailings postmarked by the U.S. Postal Service. This paragraph has been amended to include other mail delivery systems that are independent of the claimant and for which the date of filing with the system can be verified." 59 FR 44848 (Aug. 30, 1994) (emphasis added).

It appears that BLM's expansion of the delivery services was intended to include overnight delivery services, such as Federal Express, which are independent of the claimant. The service utilized by appellant to apply a postmark to his envelope, a Pitney-Bowes postage meter, is not a bona fide mail delivery service which is "independent of the claimant."

Appellant asserts that his envelope contains the proper address. It is true that the post office box number on the original envelope in the file bears a very faint number 3 following the numbers 1656. However, there is no way of determining when that number was written on the envelope. In addition, appellant has filed no explanation from the Postal Service of why a letter addressed to the BLM Arizona State Office, evidencing the proper zip code and missing only the last digit of the post office box number would be returned marked "No such address--Return to sender." Nevertheless, we have stated many times that one who chooses a means of delivery thereby assumes the risk that his chosen agent may not deliver the item which was sent. Morgan Richardson Operating Co., 126 IBLA 332, 333 (1993); Amanda Mining & Manufacturing Association, 42 IBLA 144, 146 (1979). Assuming in this case that there was timely transmission of the maintenance fee, the loss caused by the failure to

131 IBLA 248

make timely delivery must be borne by appellant, who chose the means of delivery.

[3] Finally, presentation of the maintenance fee on September 16, 1994, was untimely. In order for appellant's fee in this case to have been timely filed, the envelope containing his fee must have borne a postmark of August 31, 1994, or earlier, affixed by a bona fide mail delivery service, and been received by BLM on or before September 15, 1994. Appellant's September 16, 1994, filing was untimely. 1/

In cases involving the annual filing requirements of section 314 of FLPMA, 43 U.S.C. § 1744 (1988), this Board has held that the Department is without authority to excuse lack of compliance with the requirements, to extend the time for compliance, or to afford any relief from the statutory

consequences, and that the Board may not consider special facts or provide relief in view of mitigating circumstances. Lynn Keith, 53 IBLA 192, 196, 88 I.D. 369, 372 (1981). The basis for that conclusion was that Congress had provided no waiver for the self-operative statutory requirement that a failure to file constituted an abandonment of the claim. In extending that rationale to the rental fee requirement, the Board reasoned that by including the abandonment language in the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1374, which imposed the rental fee, "[w]e must assume that Congress was aware of the interpretation that this Department and the courts had given to section 314 of FLPMA and that it intended the present language under consideration to be given the same construction. Thus, there is no reason to deviate from this interpretation in this case." Lee H. & Goldie E. Rice, 128 IBLA 137, 141 (1994).

Likewise, in section 10104 of the Act Congress provided that 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." 43 CFR 3833.4(a)(2), 59 FR 44862 (Aug. 30, 1994), which implements that provision, provides that failure to pay the maintenance fee "shall be deemed conclusively to constitute a forfeiture of the mining claim, mill site, or tunnel site." Despite the change in language from abandonment to forfeiture, Congress clearly again intended a self-executing statute and the Department has implemented it in that fashion. See William Jenkins, 131 IBLA 166 (1994).

Appellant has not alleged that any other timely maintenance fee payment for this claim was made on or before August 31, 1994, and the case record does not show any. Thus, we deem the claim forfeited in accordance with 43 CFR 3833.4(a)(2), 59 FR 44862 (Aug. 30, 1994). To the extent appellant alleges extenuating or mitigating circumstances, the Board is without authority to consider them.

^{1/} Because we have resolved this appeal on its merits, the petition for stay, filed in accordance with 43 CFR 4.21, is denied as moot.

Accordingly, 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, the mining claim is deemed forfeited, and the petition for stay is denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge