

**Editor's Note: appeal filed, (D. Oreg. June 25, 1996); transferred to D.D.C. Civ. No. 97-0320 (RWR), Feb. 18, 1997, aff'd Harlow Corporation v. Norton, (July 23, 2001), appeal filed, No. 01-5326 (D.C. Cir.), aff'd (Jan. 2003) ; petition for cert filed, S. Ct. No. 02-1559 (April 24, 2003)**

HARLOW CORPORATION

IBLA 96-248

Decided June 7, 1996

Appeal from decisions of the Alaska State Office, Bureau of Land Management, declaring mining claims void for failure to file maintenance fees or waiver of payment on or before August 31, 1995. AA-50219 and AA-50621 through AA-50623.

Affirmed as modified.

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

Pursuant to sec. 10101(d) of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 28f(d) (1994), and the implementing regulation at 43 CFR 3833.1-7(d), an eligible mining claimant seeking a waiver of the annual mining claim maintenance fee shall file a certification of entitlement by Aug. 31. A decision declaring a mining claim to be forfeited is properly affirmed when claimant has failed to timely file either the required waiver certification or the annual maintenance fee.

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

A decision declaring a mining claim to be forfeited and void by operation of law under sec. 10101 of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 28f (1994), and the implementing regulations will be affirmed when a claimant has failed to timely file either the annual maintenance fee or a waiver certification by Aug. 31 regardless of the fact claimant was not given individual notice of the filing requirement prior to adjudication of the claim by BLM.

3. Estoppel

Affirmative misconduct is an essential element of a claim of estoppel against the Government. In the absence of any misrepresentation or concealment of

material facts, there is no basis to find any affirmative misconduct upon which a claim of estoppel could be based.

APPEARANCES: Roger F. Dierking, Esq., Portland, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Harlow Corporation has appealed from separate decisions of the Alaska State Office, Bureau of Land Management (BLM), dated February 12, 1996, declaring the Dave's Dream (AA-50219) and the Dave's Dream Nos. 2-4 mining claims (AA-50621 through AA-50623) void for failure to file maintenance fees or waiver of payment on or before the due date of August 31, 1995. No filing was received until January 10, 1996, when BLM received an affidavit of assessment work and a "small miners certification" dated December 27, 1995. Because no filing had been made by the August 31 deadline, BLM issued the decision from which this appeal was taken. Appellant filed a petition for a stay with the notice of appeal.

Because consideration of the stay request necessarily requires review of appellant's likelihood of success on the merits of the appeal and since appellant has raised issues involved in many similar appeals, we have resolved this appeal in an expedited decision on the merits. 1/

Pursuant to section 10101 of the Act of August 10, 1993, P.L. 103-66, 107 Stat. 405, the holder of an unpatented mining claim, mill or tunnel site is required to pay a claim maintenance fee of \$100 per claim on or before August 31 of each year for years 1994 through 1998. 30 U.S.C. § 28f(a) (1994). Under section 10104 of the same statute, 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 (1994).

Another section of this statute provides that "[t]he claim maintenance fee may be waived for a claimant who certifies \* \* \* that on the date payment was due, the claimant and all related parties--(A) held not more than 10 mining claims, mill sites, or tunnel sites, or combination thereof, on public lands; and (B) have performed assessment work required under the Mining Law of 1872." 30 U.S.C. § 28f(d)(1) (1994). The implementing regulation requires a claimant to file "a waiver certification on or before August 31 each year \* \* \* to hold the claims each assessment year beginning at 12 o'clock noon on September 1 of the calendar year the certification is due, through August 31, 1998." 43 CFR 3833.1-7(d). Because appellant

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1/ The judges of this Board ordinarily endeavor to resolve assigned appeals to the extent practical in the sequence in which they were docketed.

had not filed a certificate establishing its qualification for a waiver of the claim maintenance fee by August 31 as required by the quoted regulation, BLM determined that the claim maintenance fee had not been filed as required by 30 U.S.C. § 28f(a) (1994) and held that the claim was forfeited under 30 U.S.C. § 28i (1994).

It appears from the record that appellant paid the annual maintenance fee of \$100 per claim for the assessment year from September 1, 1994, to September 1, 1995, by the statutory deadline of August 31, 1994, despite an assertion in the cover letter enclosing the check that appellant qualified for a waiver of fees. The record discloses that appellant also paid the mining claim rental fee of \$100 per claim for each of the assessment years September 1, 1992, to September 1, 1993, and September 1, 1993, to September 1, 1994, before the statutory deadline of August 31, 1993. 2/ As noted above, appellant failed to either pay the annual maintenance fees for the claims or file a certificate of qualification for waiver by the deadline of August 31, 1995. Rather, appellant filed an affidavit of assessment work for the four claims as well as a "maintenance fee waiver" on January 10, 1996. Consequently, BLM issued the decision finding the claims were deemed "abandoned" and declaring them void. 3/

In the statement of reasons for appeal, appellant challenges the validity of the statute as implemented in the regulations to the extent the regulations are applied to forfeit mining claims without prior notice

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2/ These payments were made to comply with the requirements of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (1992 Act), P.L. 102-381, 106 Stat. 1374, 1378-79 (1992). This predecessor statute required payment by the Aug. 31 deadline of a "rental fee" for each of the assessment years of \$100 per unpatented mining claim (or \$200 per claim for both assessment years).

3/ To the extent that the BLM decision held that the failure to either pay the maintenance fee or file the waiver of payment by Aug. 31 constituted "abandonment" of the mining claims, it was applying terminology found in the 1992 Act as well as the mining claim recordation provisions of section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1994). Under the 1992 Act, failure to make the rental payment or (in the case of the holder of 10 or fewer claims) to file a certified statement in support of claimant's exemption from rental payment by Aug. 31, 1993, is deemed to "conclusively constitute an abandonment" of the claims. 106 Stat. 1378-79; 43 CFR 3833.1-5; 3833.1-7; 3833.4(a)(2) (1993). Similarly, under section 314(c) of FLPMA, the failure to timely file the required instruments "shall be deemed conclusively to constitute an abandonment" of the claims. 43 U.S.C. § 1744(c) (1994).

Under the Act of Aug. 10, 1993, the failure to pay the claim maintenance fee "shall conclusively constitute a forfeiture" of the unpatented claim which "shall be deemed null and void by operation of law." 30 U.S.C. § 28i (1994); see 30 CFR 3833.4(a)(2).

from BLM and an opportunity to submit a waiver certificate. This is asserted to constitute a deprivation of property rights without due process of law contrary to the fifth amendment to the Constitution. Appellant further contests the validity of the regulation establishing a deadline for filing a waiver certificate on the ground no deadline for filing the waiver certificate, as distinguished from the maintenance fee payment, is set by the statute. Further, appellant claims entitlement to equitable relief on the ground of estoppel.

[1] With respect to appellant's challenge of the deadline for the waiver documents found in the regulations, we note that the Board recently addressed this issue in depth in a decision cited as Alamo Ranch Co., 135 IBLA 61 (1996). Therein, we analyzed the validity of the regulation at 43 CFR 3833.4(a)(2) to the extent it provides that failure to file maintenance fee waiver documents by August 31 is conclusively presumed to constitute a forfeiture of the claim. Recognizing that terms of the statute itself did not expressly require a forfeiture of the claim for failure to file waiver documents by that deadline, we held:

It is absolutely clear from the foregoing that Congress knowingly chose to grant the Secretary of the Interior the discretionary authority to provide for the waiver of required maintenance fees for those holding 10 or fewer claims if he deemed such a waiver desirable. In doing so, Congress necessarily vested in the Secretary broad authority to fashion rules implementing such a waiver system. The Secretary's discretionary authority to develop such rules is not constrained by any former procedures used to implement the Rental Fee legislation but rather is only constrained by such express limitations as are inherent in the legislative grant of authority. \* \* \* Since Congress left it to the Secretary to determine if any waiver of the maintenance fee for small miners was to be allowed, the Secretary clearly has the authority to require, as a precondition for granting a waiver, that certification of qualifications for a waiver be filed as of a date certain, failing in which no waiver will be granted. This is essentially what 43 CFR 3833.1-7(d) provides. As this regulation has been promulgated pursuant to lawful authority, \* \* \* this Board is required to enforce it according to its plain terms. [Footnotes omitted; emphasis in original.]

175 IBLA at 75. Since appellant failed to either pay the claim maintenance fee or file a waiver certification by August 31 as required by 43 CFR 3833.1-7(d), the claims are conclusively deemed to be forfeited. 43 CFR 3833.4(a)(2).

[2] With respect to appellant's challenge regarding the adequacy of notice, we have previously considered the same issue under the 1992 Act and its implementing regulations. In Dee W. Alexander Estate, 131 IBLA 39 (1994), we noted that the language of the 1992 Act dealing with the consequences of the failure to make the annual payment of the claim rental fee is very similar to the language used by Congress in section

314(c) of FLPMA, 43 U.S.C. § 1744(c), which provides that the failure to record the notice of location of a mining claim, millsite or tunnel site with BLM or file evidence of annual assessment work or a notice of intention to hold "shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner." <sup>4/</sup>

As we noted in Alexander, the Supreme Court has upheld the constitutionality of section 314 of FLPMA, concluding that a mining claim for which timely filings are not made is extinguished by operation of law notwithstanding the claimant's intent to hold the claim. United States v. Locke, 471 U.S. 84, 97 (1985). "Regulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." 471 U.S. at 107 (citations omitted). On the issue of the adequacy of notice to claimants, the Court reversed the District Court finding that individualized notice of the filing deadlines was constitutionally required and held:

In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements. Texaco, [Inc. v. Short], 454 U.S. [516,] at 532. [Additional citations omitted.]

471 U.S. at 108. <sup>5/</sup> In this context, when deciding Alexander we found the 1992 Act as implemented by BLM to be consistent with the constitutional requirements set forth in the Locke and Texaco cases. The constitutionality of the 1992 Act has also been upheld in Court against fifth amendment challenge. Kunkes v. United States, 32 Fed. Cl. 249 (Ct. Fed. Cl. 1994), aff'd, 78 F.3d 1549 (Fed. Cir. 1996). Finding "Congress retains the affirmative power to change the conditions for continued ownership of mineral claims, assuming that power is reasonably exercised," the Court further held that:

Claimholders have always been subject to some ongoing proof of their interest in developing the mineral resources of their claims. Although the [1992] Act raised the ante, it did so in a way that cannot be considered substantially different in kind or degree from what had previously been required. It was plainly

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<sup>4/</sup> See note 3, supra.

<sup>5/</sup> In rejecting the need for individualized notice to claim holders, the Court further noted that claimants, like appellant in the case presently before the Board, had already made a prior filing under the statute thus establishing their knowledge of its existence. United States v. Locke, 471 U.S. at 108.

motivated by the same purpose, namely elimination of stale or worthless claims. H.R.Rep. No. 626, 102nd Cong., 2d Sess. 14 (1992). The Supreme Court has held that this is a legitimate governmental interest. Locke, 471 U.S. at 105-06. [Additional footnotes omitted.]

32 Fed. Cl. at 254-55. 6/ Although provisions of 30 U.S.C. §§ 28f and 28i (1994) vary in some particulars from the 1992 Act, the laws are sufficiently pari materia that they must be construed with reference to each other. Thus, we find the analysis in Kunkes and Alexander applicable to this case decided under 30 U.S.C. §§ 28f and 28i (1994). Accordingly, we find that individual notice to appellant was not a prerequisite to adjudication of the claims resulting from the failure to either pay maintenance fees or file a waiver certificate by August 31. 7/

[3] Appellant also argues that BLM should be equitably estopped from finding the mining claims to be forfeited, citing the decision in United States v. Wharton, 514 F.2d 406 (9th Cir. 1975). This assertion is predicated in large part on the lack of any reply by BLM to appellant's letter of July 28, 1994, enclosing the rental fee for the previous year. Reference to that letter discloses no specific request for information which compelled a response. 8/ Further, no misrepresentation of a material fact by BLM has been demonstrated. It is well established that the Government may be estopped only upon a showing of "affirmative misconduct," among other things. See Schweiker v. Hansen, 450 U.S. 785 (1980); Phelps v. Federal Emergency Management Administration, 785 F.2d 13 (1st Cir. 1986); Leland O. Phelps, 134 IBLA 124 (1995). This case is distinguishable from Wharton where there was an affirmative misrepresentation as to the

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6/ On appeal, the Court noted:

"It is entirely reasonable for Congress to require a \$100 per claim fee in order to assess whether the claim holders believe that the value of the minerals in their claims is sufficiently great to warrant such a payment; and whether claim holders have the resources and desire to develop these claims. If the claims are not valued by the claim holders sufficiently to warrant a \$100 fee payment, then the claim holders' decision not to pay the fee eliminates an unnecessary encumbrance on public lands and frees the land for a more valued use."  
78 F.3d at 1556.

7/ This analysis is particularly compelling in cases such as this where it is clear that the claimant had actual notice of the statute requiring annual filings.

8/ Appellant's inquiries were vague and did not clearly require a response. Thus, appellant stated:

"If there is a form that we should be using to make our maintenance fee payments we would appreciate receiving the forms for future filings.

"If there is any other requirement in terms of filing or forms that we need to be filing with regard to maintaining our claims, we would appreciate your advising us of any such requirements."

availability of the land and not merely a failure to advise a claimant. United States v. Wharton, supra at 410. In the absence of any misrepresentation or concealment of material facts, we are unable to find any affirmative misconduct upon which a claim of estoppel could be based. Leland O. Phelps, supra at 131-32.

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 and the petition for stay is denied as moot.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge