

LARRY G. ANDRUS, JR.
SCOTT P. ANDRUS, SR.
(ON RECONSIDERATION)

IBLA 2005-121R

Decided August 10, 2006

Petition for reconsideration of 166 IBLA 17 reversing a decision of the Idaho State Office, Bureau of Land Management, declaring three mining claims, IMC 187480 through IMC 187482, forfeited by operation of law.

Petition for reconsideration granted; 166 IBLA 17 modified.

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

To the extent a BLM decision declares mining claims located and recorded in August 2004 forfeited by operation of law for failure to file with BLM an affidavit of assessment work on or before December 30, 2004, it is properly reversed because the obligation to perform assessment work for the claims did not arise until the 2005 assessment year, which commenced at noon on September 1, 2004. However, to the extent the same BLM decision declares the same mining claims also forfeited by operation of law for failure to file a notice of intent to hold on or before December 30, 2004, it must be vacated and the case remanded to allow the claimants the opportunity to submit a notice of intent to hold, because the requirement to file a notice of intent to hold in such circumstances is a regulatory requirement, not a statutory requirement.

APPEARANCES: Elizabeth Carls, Esq., and Karen Hawbecker, Esq., Office of the Solicitor, Branch of Onshore Minerals, Division of Mineral Resources, Department of the Interior, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) has filed a petition for reconsideration of our decision in Larry G. Andrus, Jr., 166 IBLA 17 (2005), in which we reversed the February 10, 2005, decision of the Idaho State Office, BLM, declaring three mining claims (IMC 187480-IMC 187482) forfeited by operation of law.

In this case, Larry G. Andrus, Jr., and Scott P. Andrus, Sr., located the three claims at issue on August 24, 2004. On August 30, 2004, they filed for recordation with BLM, in accordance with section 314(a)(2) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a)(2) (2000), copies of the location notices for those claims, paying all necessary fees including maintenance fees for the assessment year (2004) in which the claims were located, as required by 43 CFR 3834.11(a)(1).^{1/} On the same day, the claimants filed with BLM a waiver certification for eight mining claims, including the three at issue, for the 2005 assessment year, seeking, in accordance with 30 U.S.C. § 28f(d)(1) (2000) and 43 CFR 3835.10, a waiver of the annual maintenance fee.

The obligation to perform assessment work on a mining claim commences “at 12 o’clock meridian on the 1st day of September succeeding the date of location of such claim.” 30 U.S.C. § 28 (2000). Thus, the Board noted that the obligation to perform assessment work for mining claims located in August 2004 did not arise until the 2005 assessment year, which commenced at noon on September 1, 2004. We stated that appellants had no obligation to file an affidavit of assessment work on or before December 30, 2004, citing James J. Holmberg, III, 160 IBLA 372, 374 (2004). Such evidence, we stated, is only required by 43 CFR 3835.31(a) to be filed on or before December 30 of the calendar year in which the assessment year ends, which in this case was December 30, 2005. We, therefore, reversed BLM’s decision declaring the claims abandoned and void for failure to file an affidavit of assessment work or notice of intention to hold on or before December 30, 2004, concluding that the

^{1/} That regulation states: “When you first record a mining claim or site with BLM, you must pay a location fee and an initial maintenance fee for the assessment year in which you located the mining claim or site.” A claimant cannot receive a waiver for the initial maintenance fee. 43 CFR 3834.14(a); 43 CFR 3835.1(a).

claimants had no obligation to file an affidavit of assessment work on or before December 30, 2004, for the 2004 assessment year.

BLM does not dispute the correctness of the conclusion that its decision should be reversed because claimants did not have an obligation to file an affidavit of assessment work on or before December 30, 2004. However, it notes that its decision “declared the claims forfeited because no affidavit of annual assessment work or *notice of intent to hold* was filed on or before December 30, 2004.” (Petition at 3.) BLM asserts, citing 43 CFR 3835.31(c), that the filing of a notice of intention to hold the mining claims was required by regulation. However, it states that, in recognition that the requirement is only regulatory, the failure to file should be considered a curable defect under 43 CFR 3830.93(b).

The regulation governing the filing of petitions for reconsideration provides that “[t]he Board may reconsider a decision in extraordinary circumstances for sufficient reason.” 43 CFR 4.403. Having reviewed the petition, we find that BLM has established that reconsideration is warranted in this case. Therefore, we grant the petition.

The regulation cited by BLM, 43 CFR 3835.31(c), provides that

[i]f part 3836 of this chapter does not require you to perform assessment work, either because you located the claim during the current assessment year or because BLM has deferred assessment work, you must submit a notice of intent to hold under §§ 3835.32 and 3835.33 of this part as an annual FLPMA document filing. [^{2/}]

We note also that “[i]n order to obtain a small miner waiver for newly-recorded mining claims,” 43 CFR 3835.14(a) provides that a claimant must either (1) “[s]ubmit the waiver request on or before September 1,” or (2) “submit the waiver request at the time of recording the claim,” if the mining claim was located before

^{2/} 43 CFR 3836.11(a) provides that “[b]eginning in the assessment year that begins after you locate your mining claim, you must expend \$100 in labor or improvements for each claim for each assessment year preceding the date on which you file for a small miner waiver.” 43 CFR Part 3836 did not require claimants to perform assessment work.

September 1 and timely recorded after September 1.^{3/} In the present situation, the three claims in question were “newly-recorded” on August 30, 2004, and, in accordance with 43 CFR 3835.14(a)(1), the claimants filed a timely waiver certification for the 2005 assessment year on the same date. Under those circumstances, the claimants were required to comply with 43 CFR 3835.14(b),^{4/} which reads:

File on or before the December 30 immediately following the September 1st for which you applied for a waiver a notice of intent to hold the mining claim or site. The Mining Law does not require you to perform assessment work in the assessment year in which you locate a mining claim.

Thus, BLM has imposed by regulation (43 CFR 3835.31(c)) a requirement that a mining claimant, who is not otherwise required to perform assessment work under the General Mining Law and to file an affidavit of assessment work under FLPMA, submit a notice of intention to hold the mining claim on or before December 30, following the assessment year in which the claim was located.^{5/} Therefore, for a claim located during the 2004 assessment year (running from noon, September 1, 2003, through noon, September 1, 2004), a notice of intention to hold the claim must have been filed on or before December 30, 2004.

It also has imposed the requirement on claimants seeking a waiver for newly-recorded mining claims to file a waiver certification and file a notice of intention to hold “on or before the December 30 immediately following the September 1st for which you applied for a waiver * * *.” 43 CFR 3835.14(b).

^{3/} In the latter situation, the claimant would be required to file an initial maintenance fee for the assessment year in which the claim was located.

^{4/} The language of 43 CFR 3835.14(a) is clear that, if a claimant complies with either subsection (a)(1) or subsection (a)(2), the claimant must also comply with subsection (b).

^{5/} The regulations contain a table at 43 CFR 3835.33, which “describes the circumstances under which you must file annual FLPMA documents.” “Annual FLPMA documents” are defined at 43 CFR 3830.5 as “either a notice of intent to hold, or an affidavit of assessment work, as prescribed in section 314(a) of FLPMA (43 U.S.C. § 1744(a)).”

In this case, the mining claimants did not file a notice of intention to hold the claims on or before December 30, 2004. BLM states, however, that it erred in its decision in holding that the claims were forfeited and void for failure to file a notice of intention to hold. BLM asserts that it should have considered the failure to file timely to be a curable defect under 43 CFR 3830.93, which provides that, if there is a defect in compliance with a “regulatory, but not a statutory, requirement, the defect is curable,” upon notice from BLM.^{6/}

Despite this representation by BLM concerning the applicability of 43 CFR 3830.93, we note that the next section of the regulations is entitled “How may I cure a defect in my compliance with these regulations?” It expressly states at 43 CFR 3830.94(a)(1) that, “[w]hen BLM determines that you have filed any document that is defective or underpaid a fee or service charge, BLM will send a notice to you * * *.” (Emphasis added.) There is no indication in this regulation that a complete failure to file a document (whether required by statute or regulation) is a curable defect. Nevertheless, 43 CFR 3830.93 expressly allows the curing of a defect in compliance with a requirement that is regulatory only, and the failure to file a notice of intent to hold under the circumstances of this case is such a defect.

BLM requests that we reconsider our decision “so as to vacate BLM’s decision and remand it, in order that BLM might provide appellant with notice of the defect, as well as an opportunity to cure the defect.” (Petition at 4.)

[1] It is well established that a statutory requirement may not be treated as a curable defect. N.T.M., Inc., 128 IBLA 77, 79 (1993); Harvey Clifton, 60 IBLA 29, 39 (1981). However, the Department has determined by regulation that “a defect in compliance with a regulatory, but not statutory, requirement is curable.” 43 CFR 3830.93(b); see Harvey Clifton, 60 IBLA at 39. In this case, there was no statutory or regulatory requirement for claimants to file an affidavit of assessment work with BLM on or before December 30, 2004. The regulations, however, did require the filing of a notice of intention to hold on or before that date.

^{6/} The notice of intention to hold required in the circumstances of this case cannot be construed as “an annual FLPMA document,” under 43 CFR 3835.31(c), because FLPMA only requires, for a claim located after October 21, 1976, that the owner file a notice of intention to hold or an affidavit of assessment work “prior to December 31 of each year following the calendar year in which the said claim was located * * *.” See 43 U.S.C. § 1744(a) (2000). In this case, the claims were located in August 2004. The filing of a notice of intention to hold in this case is required only by regulation.

Therefore, based on the above discussion, we modify our decision at 166 IBLA 17 to limit our reversal to that part of BLM's decision declaring the claims forfeited by operation of law for failure to file an affidavit of assessment work on or before December 30, 2004. We also modify that decision to vacate that part of BLM's decision declaring the claims forfeited by operation of law for failure to file a notice of intention to hold and remand the case to BLM to allow it to provide appellants with a notice, as contemplated by 43 CFR 3830.93(b).^{7/}

In our earlier decision, we also stated that, "when a claimant seeking a waiver for the 2005 assessment year was not required to perform assessment work and make a FLPMA filing on or before December 30, 2004, for the 2004 assessment year because the claim had been located in the 2004 assessment year, that claimant's only obligation, under 43 CFR 3835.11(a), was to include with his or her waiver certification a declaration stating why he or she was not required to perform assessment work in the previous assessment year." 166 IBLA at 20. We noted that appellants had not included such a statement with their waiver certification filed on August 30, 2004, and that, if BLM considered that to be a defect, it was a curable defect under 43 CFR 3835.93.

While the claimants were not required to file "an annual FLPMA document" on or before December 30, 2004, under the circumstances of this case, they were required by regulation to file a notice of intention to hold their claims on or before that date. Failure to have done so, however, does not result in forfeiture of their claims. Instead, they must be given the opportunity on remand to supply that document.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's petition for reconsideration is granted. Our decision at 166 IBLA 17 is modified as discussed herein.

Bruce R. Harris
Deputy Chief Administrative Judge

^{7/} Presumably, based on BLM's argument concerning the curability of regulatory requirements, the curing of 43 CFR 3835.31(c) would also result in curing the regulatory requirement of 43 CFR 3835.14(b) for one seeking a waiver.

I concur:

H. Barry Holt
Chief Administrative Judge