



JAMES J. McGARVEY

174 IBLA 299

Decided May 8, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

JAMES J. McGARVEY

IBLA 2008-4

Decided May 8, 2008

Appeal from decision of the Montana State Office, Bureau of Land Management, declaring a mining claim forfeited. MMC 32159.

Reversed.

1. Mining Claims: Rental or Claim Maintenance Fees: Postmark Rule

A maintenance fee waiver certification is timely received by BLM pursuant to 43 C.F.R. § 3830.5 when it is received no later than September 15 after it had been sent to BLM in an envelope postmarked on or before August 31, even though originally sent to the wrong address.

APPEARANCES: James J. McGarvey, Helena, Montana, *pro se*.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

James J. McGarvey has appealed from a September 11, 2007, decision of the Montana State Office, Bureau of Land Management (BLM), declaring the Bear Gulch Placer mining claim (MMC 32159) forfeited for failure to pay the \$125 per claim maintenance fee or to file a waiver certification on or before September 1, 2007, for the 2008 assessment year. For the following reasons, we reverse BLM's decision.

Under 30 U.S.C. § 28f(a) (2000),¹ the holder of an unpatented mining claim, mill site, or tunnel site is required to pay a maintenance fee for each claim or site on or before September 1 of each year for the years 2004 through 2008. *See* 43 C.F.R.

¹ Congress has amended 30 U.S.C. § 28f(a) (2000) twice in Department of the Interior and Related Agencies Appropriations Acts. The first, Pub. L. No. 107-63, 115 Stat. 414, 418-19 (2001), required payment of the claim maintenance fee on or before Sept. 1 of each year for the years 2002 and 2003, and the second, Pub. L. No. 108-108, 117 Stat. 1241, 1245 (2003), required payment of the claim maintenance fee on or before Sept. 1 of each year for the years 2004 through 2008.

§ 3834.11(a)(2). Payment of the claim maintenance fee is in lieu of the assessment work requirements of the Mining Law of 1872, 30 U.S.C. §§ 28-28e (2000), and the related filing requirements of section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (2000), for the upcoming assessment year that begins at noon on September 1 of the year payment is due. *See* 30 U.S.C. § 28f(a) and (b) (2000); 43 C.F.R. § 3834.11(a).

The 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 (2000); 43 C.F.R. §§ 3830.91(a), 3835.92(a). Congress, however, provided the Secretary with discretion to waive the fee for a claimant who certified in writing that on the date the payment was due, the claimant and all related parties held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands and had performed assessment work required under the Mining Law of 1872, for the preceding assessment year ending at noon on September 1 of the calendar year in which payment of the claim maintenance fee is due. 30 U.S.C. § 28f(d)(1) (2000); *see Audrey Bradbury*, 160 IBLA 269, 273-74 (2003). BLM implemented this statute with a regulation that requires a claimant to file “BLM’s waiver certification form on or before September 1 of each assessment year for which you are seeking a waiver.” 43 C.F.R. § 3835.10(a).

BLM declared McGarvey’s claim forfeited because BLM concluded that his waiver certification was not filed by September 1, 2007. Departmental regulation 43 C.F.R. § 3830.5 provides in pertinent part as follows:

Filed means a document is--

- (a) Received by BLM on or before the due date; or
- (b)(1) Postmarked or otherwise clearly identified as sent on or before the due date by a *bona fide* mail delivery service, and
- (2) Received by the appropriate BLM state office either:
 - (i) Within 15 calendar days after the due date; or
 - (ii) On the next business day after the 15th day, if the 15th day is not a business day (see subpart 1822 of this chapter).

BLM received McGarvey’s waiver certification on September 7 in an envelope that was postmarked September 6. Nevertheless, McGarvey asks that his mining claim be reinstated because his filing was mailed in an envelope bearing an August 31, 2007, postmark but it was returned to him because it had been sent to BLM’s former address. He then remailed the waiver to the correct address after September 1. Notice of Appeal at unpaginated 1. McGarvey included a copy of the envelope with

BLM's former address bearing an August 31, 2007, postmark and the notation "RETURNED NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD."

We find that BLM's decision should be reversed. McGarvey's waiver was sent in an envelope that was postmarked before the due date as required by subsection (b)(1) and it was received within 15 days after the due date as required by subsection (b)(2)(i). This appeal is nearly identical to an earlier case involving a similar filing requirement. In *Joe H. Vozza*, 121 IBLA 370 (1991), BLM had declared Vozza's mining claims abandoned and void for failure to file either evidence of annual assessment work or a notice of intention to hold the claims for the 1988 assessment year on or before December 30, 1988, as required by 43 U.S.C. § 1744(b) (2000). Like McGarvey, Vozza had put an outdated address on the envelope containing his filing, that was then returned to him because the Postal Service's forwarding order had expired.

[1] In *Vozza*, 121 IBLA at 372, we held that under a prior version of the regulation that defined a filing, 43 C.F.R. § 3833.0-5(m) (1988),² a document received within the grace period would be considered timely filed even though the envelope bearing the postmark prior to the due date had been improperly addressed and the filing arrived in a properly addressed envelope bearing a postmark after the due date. The regulation applied in *Vozza* was subsequently amended to provide that a filing would be considered "timely if received within the time period prescribed by law, or, *if mailed to the proper BLM office*, is contained within 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." 43 C.F.R. § 3833.0-5 (2002). As a result of the change indicated by the emphasized phrase "*if mailed to the proper BLM office*," a filing made within the grace period would be deemed timely only if the envelope that was postmarked "within the period prescribed by law" was also mailed to the proper BLM office. However, BLM again amended its regulations, in 2003, to omit the emphasized phrase. We see no material difference between the relevant portion of the regulation applied in *Vozza* and the current regulation, and look to *Vozza* for appropriate guidance.³

² This earlier regulation states that "timely filed" means received in the proper BLM office by the due date or within a 20-day period thereafter "in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law," similar to the current regulations. There is no mention of being mailed or addressed to the proper BLM office.

³ We note that the present definition of "filed" does not use the term "envelope," requiring instead that the "document" itself be "[p]ostmarked or otherwise clearly identified as being sent on or before the due date by a *bona fide* mail delivery

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“A fundamental norm of administrative procedure requires an agency to treat like cases alike.” *Westar Energy, Inc. v. Federal Energy Regulatory Commission*, 473 F.3d 1239, 1241 (D.C. Cir. 2007); *see also Colorado Interstate Gas Co. v. Federal Energy Regulatory Commission*, 850 F.2d 769, 774 (D.C. Cir. 1988) (“dissimilar treatment of evidently identical cases . . . seems the quintessence of arbitrariness and caprice”). Unlike the regulation previously in effect, the current regulation presents no basis for a departure from the *Vozza* rationale. On the record before us, we conclude that there has been good faith compliance with the requirements of 43 C.F.R. § 3830.5 when McGarvey’s waiver certificate was timely received by BLM within the regulatory grace period after it had been sent to BLM in an envelope postmarked on or before August 31, even though originally sent to the wrong address.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
Bruce R. Harris
Deputy Chief Administrative Judge

³ (...continued)
service.” However, we find no evidence of an intent to deviate from the interpretation that evidence of mailing may appear on the envelope containing the document to be filed.