



DEBRA SMITH

179 IBLA 220

Decided June 2, 2010



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

DEBRA SMITH

IBLA 2010-93

Decided June 2, 2010

Appeal from and Petition for Stay of a decision of the Oregon State Office, Bureau of Land Management, declaring unpatented mining claims forfeited for failure to timely file an affidavit of assessment work on or before December 30, 2009, for the 2009 assessment year when claimant failed to include the required processing fee. ORMC 152877, ORMC 152878.

Vacated and remanded; Petition for Stay denied as moot.

1. Fees--Mining Claims: Generally

BLM may refund a payment if such payment is not required or is an overpayment of a required fee. BLM is not required to apply an overpayment to future charges, unless a mining claimant maintains a declining deposit account with the appropriate BLM State Office and receives appropriate authorization from the claimant.

2. Mining Claims: Abandonment--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold

The Board considers that forfeitures should be strictly construed and that self-executing forfeitures must be authorized by statute and not just by an implementing regulation. BLM's decision that mining claims are forfeited because a timely-filed affidavit of assessment work was not accompanied by the required processing fee will be vacated when BLM did not provide claimants with notice and an opportunity to cure, because such a defect is regulatory in nature and is, therefore, curable.

APPEARANCES: Debra Smith, La Grande, Oregon, *pro se*.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Debra Smith<sup>1</sup> has appealed from a March 4, 2010, decision of the Oregon State Office, Bureau of Land Management (BLM), declaring the Pawnee #1 (ORMC 152877) and Pawnee #2 (ORMC 152878) unpatented mining claims forfeited for failure to file an affidavit of assessment work on or before December 30, 2009, for the 2009 assessment year because the affidavit was submitted without the required processing fee.<sup>2</sup> Because the failure to submit a processing fee is a curable defect, we vacate BLM's decision and remand the matter for further action.

*Legal and Factual Background*

The holder of an unpatented mining claim, mill site, or tunnel site is required pay a maintenance fee for each claim or site on or before September 1 of each year.<sup>3</sup> 30 U.S.C. § 28f(a) (2006); *see* 43 C.F.R. § 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 (2006), 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) (2006), for the upcoming assessment year that begins at noon on September 1 of the year payment is due. 30 U.S.C. § 28f(a) and (b) (2006); *see* 43 C.F.R. § 3834.11(a).

The failure to timely submit 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.”

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<sup>1</sup> Appellant is not an owner of the claims. The claimants are brothers Larry R. Smith, Gary E. Smith, and Dallas Smith. Considering appellant shares the last name of the claimants, and shares the address of one of them, Larry R. Smith, we presume appellant is related at least to Larry R. Smith and, as a family member, is entitled to practice before the Department in this matter. *See* 43 C.F.R. § 1.3(b)(3)(i).

<sup>2</sup> BLM's regulations describe this and similar fees variously as “processing fees,” “filing fees,” “filing or processing fees,” “fees,” or “service charges.” *See, e.g.*, 43 C.F.R. §§ 3000.10, 3000.12, 3830.5, 3830.20, 3830.21, 3830.22, 3830.23, 3830.95, 3830.96, 3830.97. Because the regulation specific to recording an annual FLPMA filing, such as an affidavit of assessment work, refers to the fees as “processing fees,” we will use that terminology here. *See* 43 C.F.R. § 3830.21.

<sup>3</sup> The Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2101 (2007), has made the September 1st maintenance fee requirement permanent by removing the date range previously imposed by Pub. L. No. 108-108, 117 Stat. 1241, 1245 (2003) (years 2004 through 2008).

30 U.S.C. § 28i (2006); *see* 43 C.F.R. §§ 3830.91(a)(3), 3835.92(a). Congress, however, has provided the Secretary with discretion to waive the fee for a claimant who has certified in writing (Waiver Certification) 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 has performed assessment work required under the Mining law of 1872 with respect to the mining claims, 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) (2006); 43 C.F.R. § 3835.10(a); *see Audrey Bradbury*, 160 IBLA 269, 273-74 (2003).

The fee waiver is for the upcoming assessment year commencing at noon on September 1 of the calendar year in which the payment is due. Thus, a claimant who has filed a Waiver Certification is required to (1) perform assessment work during that upcoming assessment year for which the waiver is granted, and (2) file an affidavit of the assessment work, as required by FLPMA, on or before December 30 of the calendar year in which the assessment year ends. 43 U.S.C. § 1744(a)(1) (2006); 43 C.F.R. §§ 3835.12, 3835.15, 3835.31(a);<sup>4</sup> *see John J. Trautner*, 165 IBLA 265, 267 (2005); *Earl Riggs*, 165 IBLA 36, 39 (2005). Congress has stipulated that the failure to timely file an affidavit of assessment work performed when required under the mining laws “shall be deemed conclusively to constitute an abandonment of the mining claim . . . by the owner,” thereby rendering the claim void. 43 U.S.C. § 1744(c) (2006); *United States v. Locke*, 471 U.S. 84, 97-100 (1985).<sup>5</sup>

In this case, claimants timely filed the Waiver Certification for the 2009 assessment year on August 30, 2008, and were obliged, therefore, to perform assessment work during the 2009 assessment year and file an affidavit of that assessment work with BLM on or before December 30, 2009. *See Audrey Bradbury*, 160 IBLA at 274. They also timely filed a Waiver Certification for the 2010 assessment year on August 28, 2009. Accompanying the 2010 Waiver Certification

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<sup>4</sup> The regulation at 43 C.F.R. § 3835.12 is titled: “What are my obligations once I receive a waiver?” It states that, “[i]f BLM allows you the waiver, you must then perform annual assessment work on time and file annual FLPMA documents.” 43 C.F.R. § 3835.31(a) is titled: “When do I file an annual FLPMA document?” It states that “you must file your annual FLPMA documents with BLM on or before the December 30th of the calendar year in which the assessment year ends.”

<sup>5</sup> The Department defines these consequences as a “forfeiture” of the claim. The regulations at 43 C.F.R. § 3830.5 define “[f]orfeit or forfeiture” to mean “the voidance or invalidation of an unpatented mining claim or site,” adding that “[t]he terms ‘abandoned and void,’ ‘null and void,’ ‘void ab initio,’ and ‘forfeited’ have the same effect in these regulations.” 43 C.F.R. §§ 3830.91(a)(7), 3835.91.

was payment in the amount of \$20 (\$10 per claim) as a processing fee. However, no processing fee is required for filing a Waiver Certification, *see* 43 C.F.R. §§ 3830.21, 3000.12, and on November 30, 2009, BLM determined that the \$20 should be refunded. A refund check was issued by the Department to the order of claimant Larry Smith on January 12, 2010. In the meantime, claimants submitted on December 21, 2009, an affidavit of assessment work conducted on the claims for the 2009 assessment year. Claimants did not, however, submit the required processing fee of \$10 per claim. *See id.*

### *Analysis*

In its decision, BLM states that although the affidavit of assessment work for the 2009 assessment year was received on December 21, 2009, no fee was included. “BLM will not accept a document that you submit without the proper filing or processing fee. (43 CFR 3000.10(b)).” The decision continues that “[b]ecause you did not submit the fee to record the document, your claims are forfeit. (43 CFR 3835.91).” In her Notice of Appeal, appellant argues that apparently there has been a change in the way checks were handled by BLM, and that because the \$20 refund check was not issued until January 12, 2010, BLM was in possession of both the affidavit of assessment work and the proper amount of fees prior to December 30, 2009, and the claims should be reinstated.

[1] BLM may refund a payment if such payment is not required or is an overpayment of a required fee. 43 U.S.C. § 1734(c) (2006). BLM regulations provide that although service charges (including processing fees) generally are not refunded, overpayments will be. 43 C.F.R. § 3830.22(a). Because a processing fee was not required for filing a Waiver Certification, the claimants’ \$20 payment on August 30, 2009, was an overpayment, eligible for refund. On November 30, 2009, prior to BLM’s receipt of the affidavit of assessment work, BLM determined that a refund was appropriate and initiated the refund process, which culminated with the issuance of a check to a claimant dated January 12, 2010. Only under limited circumstances may BLM apply overpayments to future charges. For example, if a mining claimant maintains a declining deposit account with the appropriate BLM State Office, BLM may add overpayments to the account, from which service charges and fees may be deducted, with the authorization of the claimant. 43 C.F.R. § 3830.23(a)(5).<sup>6</sup> The record in this case reveals no such account held by claimants, and no request from claimants that the overpayment be applied to the processing fee for the affidavit of assessment work. As a result, BLM had no obligation to apply the

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<sup>6</sup> BLM also may apply overpayments of mining claim maintenance and location fees to similar obligations for future years, if requested by the claimant. 43 C.F.R. § 3830.22(c). In this case, however, maintenance and location fees are not at issue.

overpayment to other fees the claimants might owe, and BLM properly authorized a refund of the overpayment.

However, BLM's decision raises another issue. The decision states "BLM will not accept a document that you submit without the proper filing or processing fee," referencing 43 C.F.R. § 3000.10(b), a regulation addressing the filing of documents and related processing fees associated with minerals management in general. BLM then states "[b]ecause you did not submit the fee to record the document, your claims are forfeit," referencing 43 C.F.R. § 3835.91. The latter regulation states that a mining claim or site will be forfeited if a claimant fails to "file an annual FLPMA document [such as an affidavit of assessment work] by December 30." 43 C.F.R. § 3835.91. In this case, BLM applies the referenced regulations to effect a self-executing forfeiture of the mining claims for failing to include the processing fee with the affidavit of assessment work.

[2] Although FLPMA authorizes the Department to "establish reasonable filing and service fees and reasonable charges," 43 U.S.C. § 1734(a) (2006), there is no statutory authorization of forfeiture of a mining claim for failing to include the proper fee when filing a required document.<sup>7</sup> In this context, self-executing forfeitures were addressed conclusively by the Federal Court of Appeals for the 10<sup>th</sup> Circuit in the case *Topaz Beryllium Company v. United States*, 649 F.2d 775 (10<sup>th</sup> Cir. 1981). That case involved a challenge by mining interests of the promulgation of BLM's mining-related regulations under FLPMA. Those regulations, promulgated in 1977, 42 Fed. Reg. 5300 (Jan. 27, 1977), and revised in 1979, 44 Fed. Reg. 9722 (Feb. 14, 1979),<sup>8</sup> introduced a number of "supplemental" filing requirements that were not specifically enumerated in FLPMA, almost all of which were challenged (including nominal filing fees). See *Topaz Beryllium Company v. United States*, 479 F. Supp. 309, 314 (D. Utah 1979), *aff'd*, 649 F.2d 775 (10<sup>th</sup> Cir. 1981).

The Circuit Court not only upheld the Department's regulations, but also addressed plaintiffs' fears that the Secretary of the Interior would deem a claim abandoned because supplemental filings were not made. "[W]e hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833 and not by the statute are not made.

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<sup>7</sup> This is in marked contrast to the provisions addressing failure to actually file an affidavit of assessment work. "The failure to file such instruments as required by subsection (a) and (b) of this section *shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner . . .*" 43 U.S.C. § 1744(c) (2006) (emphasis added).

<sup>8</sup> Although the regulations have been revised a number of times since then, most of the basic filing requirements have remained the same.

*This is also the Secretary's view: failure to file the supplemental information is treated by the Secretary as a curable defect.*" 649 F.2d at 778 (emphasis added). Consistent with the court's view, the Board considers that forfeitures should be strictly construed and that self-executing forfeitures must be authorized by statute and not just by an implementing regulation. See *Jerry D. Grover d.b.a. Kingston Rust Development*, 160 IBLA 234, 258-59 and n.26 (2003).

Here, BLM applied 43 C.F.R. § 3000.10(b) with § 3835.91 to effect a forfeiture of mining claims based upon the failure to submit processing fees with a timely-filed affidavit of assessment work, which forfeiture is not authorized by FLPMA.<sup>9</sup> Such application of those regulations must be rejected and is, in fact, unnecessary. BLM's mining regulations provide that:

If there is a defect in your compliance with a regulatory, but not statutory, requirement, the defect is curable. You may correct curable defects when BLM gives you notice. If you fail to cure the defect within the time BLM allows, you will forfeit your mining claims or sites.

43 C.F.R. § 3830.93(b). In this case, the defect involved a regulatory requirement that the filing be accompanied by a processing fee. The regulations continue:

(a)(1) When BLM determines that you have filed any document that is defective . . . , BLM will send a notice to you . . . .  
 . . .

(b) If you have filed any defective document . . . you must cure the defects within 30 days of receiving BLM's notification of the defects.

43 C.F.R. § 3830.94. The regulation at 43 C.F.R. § 3000.10(b) does not require BLM to take any other action.

The claimants in this case timely filed their affidavit of assessment work but failed to include the processing fee, violating a regulatory requirement. BLM should have notified the claimants of the defect in their filing, *i.e.* the failure to pay the processing fee, and allowed them 30 days for the opportunity to cure the defect by submitting the processing fee. BLM provided claimants no such opportunity, instead

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<sup>9</sup> The argument that this forfeiture is actually for failure to timely file the affidavit of assessment work, see 43 C.F.R. § 3835.91, which affidavit cannot be accepted for filing without the proper processing fees, see 43 C.F.R. § 3000.10(b), is merely syntactic sleight of hand. In this case, the affidavit was submitted to BLM prior to Dec. 30, 2009, but did not include the processing fee. This failure to submit the processing fee was the trigger for BLM's forfeiture of the claims.

declaring the claims forfeited. BLM's decision was inappropriate and must be vacated and the matter remanded to BLM for issuance of the required notice to claimants.

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 BLM's decision is vacated, the Petition for Stay is denied as moot, and the matter remanded to BLM for appropriate action.

\_\_\_\_\_/s/\_\_\_\_\_  
H. Barry Holt  
Chief Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Bruce R. Harris  
Deputy Chief Administrative Judge