



CHRISTOPHER L. MULLIKIN

180 IBLA 60

Decided September 21, 2010

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United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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CHRISTOPHER L. MULLIKIN
DONALD E. & JUDITH V. MULLIKIN

IBLA 2010-53
IBLA 2010-56

Decided September 21, 2010

Appeals from decisions of the Alaska State Office, Bureau of Land Management, declaring mining claims forfeited and void for failure to pay the \$140 per claim maintenance fee or file a Maintenance Fee Payment Waiver Certification on or before September 1, 2009, for the 2010 assessment year. AKFF 084383, *et al.*, and AKFF 057833, *et al.*

Affirmed; motion for an evidentiary hearing denied; petitions for stay denied as moot; motion for official notice and for a stay nunc pro tunc denied as moot.

1. Evidence: Presumptions--Evidence: Burden of Proof--Mining Claims: Rental or Claim Maintenance Fees: Generally

There is a legal presumption that administrative officials have properly discharged their duties and have not lost or misplaced legally significant documents filed with them and, hence, the absence of timely date-stamped documents from the record will support a finding that the documents were not timely filed. The Board accords great weight to this presumption of regularity. However, it may be rebutted by probative evidence to the contrary. Mere assertions or uncorroborated statements that a document was mailed to BLM are insufficient to overcome the presumption of regularity.

2. Administrative Procedure: Hearings--Evidence: Sufficiency--Hearings--Rules of Practice: Hearings

The Board will deny a motion requesting an evidentiary hearing, in accordance with 43 C.F.R. § 4.415, when the

moving party fails to raise an issue of material fact relevant to disposition of the case that cannot be decided based on the case record and submissions by the parties.

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

Although the time for filing a Waiver Certification is established by regulation as September 1 of each assessment year for which a waiver is sought (43 C.F.R. § 3835.10(a)), it does not follow that the failure to file a Waiver Certification on or before that date is a curable defect. The reason is that when that deadline passes without payment of the maintenance fee required by 30 U.S.C. § 28f(a) (2006), there is a defect in compliance with the statutory requirement, which is not subject to cure, and automatic forfeiture results from 30 U.S.C. § 28i (2006). Only a timely filed Waiver Certification can serve to forestall the statutory consequences of failure to file the maintenance fee.

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

Reliance by mining claimants on *Miller v. U.S. Dep't of the Interior*, 635 F. Supp. 2d 1224 (D. Colo. 2009), which concluded that the failure to timely file a Waiver Certification is a curable defect, must fail for two reasons. First, the judge subsequently vacated that decision. Second, even if he had not, this Board would not follow it because the Board may decline to follow a district court ruling where a reasonable prospect exists that other Federal courts might reach a contrary result.

APPEARANCES: Steven J. Lechner, Esq., Mountain States Legal Foundation, Lakewood, Colorado, for appellants; Steven N. Scordino, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Christopher L. Mullikin has appealed from and petitioned for a stay of a December 8, 2009, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring nine mining claims (AKFF 084383 through AKFF 084388, AKFF 084390, AKFF 085205, and AKFF 085206) forfeited for failure to pay the \$140 per claim maintenance fee or to file a Maintenance Fee Payment Waiver Certification (Waiver Certification) on or before September 1, 2009, for the 2010 assessment year. The Board docketed this appeal as IBLA 2010-53.

Donald E. and Judith V. Mullikin have appealed from and petitioned for a stay of two other decisions issued by the Alaska State Office on the same day. One declared four mining claims owned by Donald Mullikin (AKFF 057833, AKFF 057834, AKFF 057840, and AKFF 086267) forfeited for failure to pay the \$140 per claim maintenance fee or to file a Waiver Certification on or before September 1, 2009, for the 2010 assessment year. The other declared four mining claims owned by Donald and Judith Mullikin (AKFF 084389, AKFF 085204, AKFF 086323, and AKFF 086324) forfeited for the same reason. The Board docketed the appeal of these two decisions as IBLA 2010-56.

We consolidate IBLA 2010-53 and IBLA 2010-56 because they arise under the same factual circumstances and the appeals raise the same legal issues.

Synopsis

Appellants allege that they timely filed Waiver Certifications with BLM, and that BLM lost or misplaced them. In the alternative, they claim that even if BLM cannot locate their timely filed Waiver Certifications, they have the right to cure the failure to file. As a general rule, the absence of a document in BLM's records indicates that the document was not filed, based on the legal presumption that Government officials have properly discharged their duties and have not lost or misplaced legally significant documents filed with them. Appellants have failed to overcome that presumption of administrative regularity. In addition, there is no opportunity to cure the failure to timely file a Waiver Certification. Therefore, we must affirm BLM's decisions.

Applicable Law

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.¹ 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.” 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 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); *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).

“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” within 15 days after the due date. 43 C.F.R. § 3830.5.

Appellants’ Factual Allegations

On appeal, Christopher Mullikin asserts that he signed a Waiver Certification for the 2010 assessment year for the claims on March 27, 2009, and that, to the best of his knowledge and belief, his mother, Judith Mullikin, properly mailed that certification to BLM’s Fairbanks office on the same date. Statement of Reasons (SOR), Addendum A (Declaration of Christopher L. Mullikin), dated March 21, 2010,

¹ 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).

at ¶8. Judith Mullikin states in a declaration dated March 21, 2010, that she prepared a Waiver Certification for 8 other mining claims on March 27, 2009, owned by her husband or her and her husband; that they signed the Waiver Certification for those 8 claims on March 27, 2009; that she placed that Waiver Certification, along with the Waiver Certification signed on the same date by her son, Christopher, for his 9 claims, and a cover letter in an envelope addressed to the BLM Northern Field Office in Fairbanks, Alaska, “[a]ttention: Susan”; and that she deposited the envelope in the appropriate mail box in the U.S. Post Office in Homer, Alaska, “after lunch and before 3:00 p.m, which is the deadline for mail to go out that day.”² SOR, Addendum A, Ex. 2 at ¶¶11 through 17.³

Judith Mullikin states that when her computer program prompted her on August 1, 2009, “to ‘File Small Miner’s Exemption Report,’” she turned off the reminder because she “was certain that the appropriate paperwork had been mailed to BLM in March, 2009.” *Id.* at ¶18. She admits, however, that she did not “check to see if we had received date/time stamped copies from BLM.” *Id.*

According to Judith Mullikin, she received a call from Susan Rangel, a BLM employee, in the BLM Fairbanks office on September 25, 2009, who explained that “she could not find our 2010 Maintenance Fee Waiver Certificates,” and that if the Mullikins could not provide “copies with a time/date stamp on them, BLM had no choice but to close out the claims.” *Id.* at ¶19. Judith Mullikin stated that following the telephone call, she searched their papers and mining files and did not find copies of the Certificates with time/date stamps. *Id.* at ¶20.

² Accompanying Judith Mullikin’s declaration as Exhibit 2 is a copy of a letter dated Mar. 27, 2009, to the Northern Field Office, BLM, stating: “Please find enclosed an original and one copy of the 2010 Maintenance Fee Payment Waiver Certification for Christopher L. Mullikin and Donald E. Mullikin. Please return a date stamped copy to us. Thank you.” The letter is signed “Judy Mullikin.” Judith Mullikin also attaches, as Exhibit 3 to her declaration, a copy of a screen shot of her computer files showing that a cover letter for Waiver Certifications was prepared at 10:17 a.m. on Mar. 27, 2009.

³ All the Mullikins provided declarations in IBLA 2010-53. Donald and Judith Mullikin filed the same declarations in their appeal, IBLA 2010-56. Citations in this order are to the declarations included as addendums and exhibits in IBLA 2010-53. In addition, citations to the SOR in this decision are to that filed by Christopher Mullikins in IBLA 2010-53, as the SORs in the two appeals are essentially the same.

Judith Mullikin states that three days later she called Ms. Rangel's office and talked to a BLM employee named Kenita. Judith Mullikin represents that Kenita told her that they could not relocate their claims because the claims were located on state selection lands; that their mining files were now located in "BLM's Anchorage office" because mining boundaries or jurisdiction have changed in the last year or two; and that all future mining claim filings should be sent to the Anchorage office. *Id.* at ¶21. Judith Mullikin states that she got the impression from the conversation that their Waiver Certifications for the 2010 assessment year "could have been lost during, or as a result of, the file transfer." *Id.*

On November 12, 2009, Judith Mullikin sent copies of the Waiver Certifications for the 2010 assessment year to the BLM Northern Field Office in Fairbanks, Alaska. BLM received those copies on November 16, 2009.

Thereafter, on December 8, 2009, BLM issued the decisions in question. Following receipt of those decisions, the Mullikins submitted copies of the Waiver Certifications for the 2010 assessment year to the Alaska State Office in Anchorage, Alaska, on December 30, 2009. In an accompanying cover letter, they expressed their belief that "the original forms were lost in the BLM Fairbanks office." They also asserted that submission of the Waiver Certifications was made in accordance with 30 U.S.C. § 28f(d)(3) (2006), which they contend allows a defective Waiver Certification to be cured within 60 days after receipt of notification from BLM of the defect or defects.

Donald Mullikin asserts that he called the Northern Field Office in Fairbanks, Alaska, on December 30, 2009, and talked to a BLM employee named Kenita, who told him that at the time their Waiver Certifications should have arrived in the Fairbanks office she may have been on vacation in Hawaii and that a temporary employee was working in the Fairbanks office. SOR, Addendum C at ¶16. He alleges that she also told him that "the BLM employees in the Fairbanks office were quite busy at that time of year with cabin rentals." *Id.* He states: "I specifically asked her if she would look again through the paperwork that was received between March 28 and April 3, 2009[,] to see if somehow our paperwork had been accidentally filed in with them, but she declined to make that effort." *Id.* Donald Mullikin states that he got the impression from the conversation that "our Maintenance Fee Waiver Certificate may have been lost or misfiled by the BLM's Fairbanks office." *Id.*

BLM's Response to Appellants' Factual Allegations

In response to an order from this Board dated May 27, 2010, directing that BLM address appellants' factual allegations, BLM filed an answer to appellants' SORs.

BLM enclosed as exhibits to the answer the declarations of three BLM employees offered to establish a time line for events in this case. There is no dispute that from 1984 through 2008 appellants filed all necessary documents with the BLM office in Fairbanks to maintain the 17 mining claims at issue.

In a declaration dated June 16, 2010, Susan Rangel, a BLM Land Law Examiner in BLM's Fairbanks, Alaska, Public Room since 1989, explains that one of her duties is the processing of Waiver Certifications. Answer, Ex. A at ¶¶1, 2. She outlines the procedure followed in the Fairbanks Public Room when a Waiver Certification is filed. She states that any Waiver Certification received is date- and time-stamped by the mailroom clerk and hand delivered to her or Kenita Stenroos, a BLM Land Law Examiner in BLM's Fairbanks Public Room since 1995, and no one else;⁴ they check to see that such documents are properly stamped; and they enter information from the Waiver Certification into BLM's database, file a copy of the Waiver in the Public Room files, and file the original Waiver Certification in the mining claim case file. *Id.* at ¶3. She adds that if the Waiver Certification has been filed by mail, they send a date- and time-stamped copy of the Waiver Certification to the claimant. *Id.*

Rangel states that in 2008 numerous mining claim case files were transferred from BLM's Fairbanks Public Room to BLM's Anchorage Public Room, including those involving the mining claims at issue, which were transferred on April 25, 2008. *Id.* at ¶4. The case records show that appellants filed Waiver Certifications for the 2009 assessment year in the Fairbanks office on April 7, 2008, prior to the case file transfer.

Rangel further explains that if a Waiver Certification is filed in Fairbanks for a mining claim whose case file has been transferred to the Anchorage Public Room, the same processing procedure is followed, except the original of the Waiver Certification is forwarded to Anchorage for inclusion in the mining claim case file. *Id.* at ¶5.

⁴ We note a possible discrepancy between Rangel's description of the receipt of Waiver Certifications and a statement made by Stenroos in her declaration, dated June 16, 2010. Stenroos stated that "because only Ms. Rangel and I are permitted to open mail addressed to the Public Room, we are the only people who would have processed the Mullikins' Waiver forms, had they been received." Answer, Ex. B at ¶4. Rangel stated that Waiver Certification are date- and time-stamped by the mailroom clerk, implying that the clerk also opens the mail. On the other hand, Stenroos states that only she or Rangel are permitted to "open" mail. Nevertheless, their statements are consistent in explaining that any Waiver Certification received by the Fairbanks Public Room would be processed by Rangel or Stenroos.

Rangel states that the BLM Fairbanks office did not receive Waiver Certifications from the Mullikins before September 1, 2009, because if they had been submitted, they would have been processed as described: a copy would be in the Fairbanks Public Room files, an original would be in the mining claim case files in Anchorage, and the necessary information would be included in BLM's database. *Id.* at ¶6.

In response to appellants' allegation that BLM lost or misplaced their documents because it was busy with cabin rentals at the end of March 2009 at the time of their alleged filing, Rangel states that only approximately 12 cabins can be rented through the Fairbanks Public Room; the majority of the cabins are rented only during the winter; and the office does not receive many cabin rental requests during spring and summer, as only three may be rented during that time period, with only one, the one accessible by car, being rented regularly. *Id.* at ¶7. Cabin rental activities, she asserts, do not impact her performance processing mining claim documents. *Id.*

Regarding appellants' suggestion that a temporary employee may have been responsible for losing or misplacing their documents, Rangel states that no temporary worker would have processed the documents in question. *Id.* at ¶8. The only other BLM employee who provides help in the Public Room when Rangel or Stenroos are absent or need additional help is Elliott Lowe, but according to Rangel, Lowe was not working in the public room during the time period appellants allegedly filed their Waiver Certifications. *Id.*

Rangel states that although Stenroos was out of the office during the week of March 30, 2010, she was present the entire week, and if appellants' filings had arrived during that time period, she would have processed them. *Id.* at ¶9. She added that the Fairbanks Public Room was functioning properly during 2009, including during the time period when appellants' alleged filings would have been delivered to the Fairbanks office. *Id.* at ¶10.

In her declaration, Stenroos states that prior to receiving a telephone call from Donald Mullikin in December 2009, she had extensively searched BLM's records for the Mullikins' Waiver Certifications for the 2010 assessment year "and found nothing." Answer, Ex. B at ¶3. She asserts that during that conversation Donald Mullikin asked her to search BLM's records again, and that she told him that because she had already conducted a search and because she was busy helping a customer with a cabin rental at that time, she could not search the records for him. *Id.* She also told him that she may have been out of the office during the time when

appellants' Waiver Certifications would have been received by the Fairbanks Public Room. *Id.* at ¶4.

In a June 6, 2010, declaration, Melody J. Smyth, a Mineral Law Specialist in the Division of Resources, Energy, and Solid Minerals, Alaska State Office, explained that she is responsible for the oversight of administrative records for mining claims, ensuring that all paperwork is timely submitted and adjudicating and issuing decisions regarding mining claims.⁵ Answer, Ex. C at ¶¶1, 2. She stated that prior to issuing a decision, she reviews the entire mining claim file and all related files and calls the Fairbanks and Anchorage Public Rooms to make sure the case file is complete and there are no missing documents. *Id.* at ¶2. As the author of the “decision” in question, she declares that she undertook such a diligent search for documents prior to issuing the “decision” and found no Waiver Certifications filed by appellants on or before September 1, 2009, for the 2010 assessment year.⁶ *Id.* at ¶3. She further states that following receipt of the Board’s May 27, 2010, order, she again undertook a diligent search of all relevant BLM records at the Anchorage Public Room, all associated case files, and all filings related to appellants’ claims, and did not find the Waiver Certifications. *Id.* at ¶4.

The Presumption of Administrative Regularity Supports the Conclusion that Appellants Failed to Timely File Waiver Certifications for the 2010 Assessment Year

[1] There is a legal presumption that administrative officials have properly discharged their duties and have not lost or misplaced legally significant documents filed with them and, hence, the absence of timely date-stamped documents from the record will support a finding that the documents were not timely filed. *Wilson v. Hodel*, 758 F.2d 1369, 1372 (10th Cir. 1985); *John J. Trautner*, 165 IBLA 265, 270 (2005), and cases cited therein. The Board accords great weight to this presumption of regularity. However, this presumption of regularity may be rebutted by probative evidence to the contrary. *Legille v. Dann*, 544 F.2d 1, 8-9 (D.C. Cir. 1976); *John and Linda Nelson*, 156 IBLA 195, 199 (2002); *Trevor A. Freeman*, 138 IBLA 70, 72 (1997). This means that the burden of proof is shifted to the appellants to provide evidence that a filing was timely made and thereby rebut the presumption of administrative

⁵ Smyth has been a Mineral Law Specialist since December 2007 and has worked for BLM since August 1993. Answer, Ex. C at ¶1.

⁶ Although in her declaration, Smyth used the term “decision,” *i.e.* “[w]hen writing the decision relating to the forfeiture of the Mullikins’ mining claims,” Answer, Ex. C at ¶2, she was the author of all three decisions at issue.

regularity by a preponderance of the evidence. In this case, appellants have failed to rebut the presumption.

Appellants alleged that they completed their Wavier Certifications and deposited them in the mail on March 27, 2009. They argue that the absence of their timely filed Waiver Certifications from BLM files is a result of mishandling by BLM. They assert that the presumption of regularity should not apply in this case for four reasons. We reject each of those reasons.

First, appellants argue that the presumption should never apply when a loss of valuable property rights is at stake. In support of that assertion, appellants cite *Henderson v. Carbondale Coal & Coke Co.*, 140 U.S. 25, 33 (1891), relating to forfeitures, and a statement in the dissenting opinion in *Foster v. People of State of Ill.*, 332 U.S. 134, 142 (1947). Appellants ignore the fact that forfeiture provisions relating to mining claims have been upheld by the Supreme Court and other Federal courts. *E.g.*, *United States v. Locke*, 471 U.S. 84, 98 (1985); *Jones v. United States*, 121 F.3d 1327, 1330 (9th Cir. 1997); *Kunkes v. United States*, 78 F.3d 1549 (Fed. Cir.), *cert. denied*, 519 U.S. 820 (1996). Moreover, the Court of Appeals for the Ninth Circuit upheld the Board's application of the presumption of regularity in *Red Top Mercury Mines, Inc.*, 96 IBLA 391, 393-94 (1987), resulting in the conclusive abandonment of six unpatented mining claims for failure to file a required document on or before a statutory deadline. *Red Top Mercury Mines, Inc. v. United States*, 887 F.2d 198 (9th Cir. 1989) (affirming and adopting the District Court's opinion in *Red Top Mercury Mines, Inc. v. United States*, No. A87-326 (D. Alaska Sept. 16, 1988)).

Second, appellants assert that the presumption should not apply because "BLM regulations encourage persons to file documents by mail," citing 43 C.F.R. § 1822.11, which provides that documents must be filed with BLM by personal delivery or by mailing via the Postal Service or other delivery service. SOR at 32. Appellants complain that the regulations do not explain that individuals who file by mail assume the risk if the Postal Service either loses the document or fails to deliver it to BLM.

The regulation does not "encourage" filing by mail. The regulation sets forth alternative methods for filing. Appellants could have chosen another method of delivery, but they chose delivery by the U.S. Postal Service. The Board has long held one who chooses a means of delivery thereby assumes the risk that the chosen agent may not deliver the item that was sent. *E.g.*, *Wilfred Plomis*, 139 IBLA 206, 208 (1997); *Morgan Richardson Operating Co.*, 126 IBLA 332, 333 (1993); *Amanda Mining & Manufacturing Association*, 42 IBLA 144, 146 (1979). Under the regulations governing the locating, recording, and maintaining of mining claims, mill

sites, and tunnel sites, “[f]iled” is defined as meaning “[r]eceived” by BLM. 43 C.F.R. § 3830.5.⁷ Appellants’ argument provides no basis for ignoring the presumption.

Third, appellants contend that the presumption should not apply to BLM’s handling of documents because “BLM has a long history of losing or misplacing documents.” SOR at 33. In support of that assertion, appellants cite various court and Board decisions relating to documents lost or misplaced by BLM. Considering the hundreds of thousands of documents handled by BLM on a yearly basis, the handful of cases cited by appellants, which span a time period of over 30 years, hardly establish a “history of losing or misplacing documents.” Moreover, in those cases there was sufficient evidence to support a finding that a document had been lost or misplaced, a factor notably missing in the present case.

Fourth, appellants claim the presumption should not apply “because BLM’s Fairbanks office was not functioning regularly” at the time appellants submitted their Waiver Certifications. They make this argument based on assertions that a BLM employee familiar with Waiver Certifications may have been on vacation during the time period in question; that a temporary employee was filling in for her; that the Fairbanks office was busy arranging cabin rentals; and that mining claim files were being transferred from the Fairbanks office to the Anchorage office. BLM rebutted each of these assertions in the declarations of Rangel and Stenroos, as set forth above, which establish that although Stenroos was absent from the office during the week of March 30, 2009, the office had an ordinary work load; Rangel was present the entire week; no temporary employee was working in the Fairbanks Pubic Room; and the office was not busy arranging cabin rentals.

Appellants next argue that even if the presumption is applicable, they have rebutted it because they have established, through their declarations, that the Waiver Certifications were signed on March 27, 2009, and that those certificates, along with a cover letter, were placed in an envelope addressed to the BLM office in Fairbanks and deposited in the mail in Homer, Alaska, on that same day. Appellants assert that

⁷ Appellants argue that 43 C.F.R. § 3835.10(a) requires qualifying claimants to “submit” their Waiver Certifications on or before September 1 of each assessment year for which a waiver is being sought. SOR at 32, n.21. The term “submit,” they claim, is not defined in 43 C.F.R § 3830.5, and, therefore, should not be interpreted like the term “filed” as requiring receipt by BLM. Appellants assert that mailing is sufficient, which they allege they did. While appellants are correct that “submit” is not defined in the regulations, clearly it encompasses receipt by BLM. Moreover, even assuming mailing were sufficient, appellants do not provide any evidence corroborating their allegation that they timely mailed the Waiver Certifications.

there is a strong presumption that mail, properly addressed, stamped, and deposited in an appropriate receptacle, is duly delivered, and that that presumption should overcome the presumption of administrative regularity.

While appellants note our decision in *Bernard S. Storper*, 60 IBLA 67, 70-71 (1981), *aff'd*, No. 82-0449 (D.D.C. Jan. 20, 1983), which they characterize at page 35 of the SOR as “suggesting that the presumption of administrative regularity be accorded greater weight than the presumption that mail is duly delivered,” examination of that decision reveals that the Board did more than suggest that the presumption of administrative regularity be accorded greater weight.

In that case, Storper argued that a necessary document supporting his oil and gas lease application had been duly transmitted by the U.S. Postal Service to the proper BLM office, even though that office had no record of its receipt. The Board recognized each of the presumptions, but held that when they “have come into conflict, we have traditionally accorded greater weight to the former,” *i.e.*, the presumption of administrative regularity, citing *David F. Owen*, 31 IBLA 24 (1977). 60 IBLA at 70. As we noted: “This choice has been predicated on considerations of public policy and supported by burden of proof analysis.” *Id.*

The *Storper* rationale supports rejection of appellants’ argument in this case:

[E]ven if public policy considerations did not dictate that greater weight be given to the presumption of regularity over that accorded the presumption that mail, duly addressed and deposited, is delivered, we are of the belief that burden of proof analysis would necessitate the same choice.

As we have noted in the past, rebuttable presumptions are, in essence, procedural devices by which the burden of proof is shifted from one party to another. *See generally United States v. Hess*, 46 IBLA 1, 7-8 (1980). To invoke two opposing presumptions of equal weight would, of course, beg the question of where the original burden of proof reposed. In such a potential situation, we believe that the conflict can only be resolved by analyzing the practical and logical consequences that would flow from affording preference to either presumption.

If preference is granted to the presumption that mail properly addressed is delivered, the burden of proof would be on BLM to prove that it did not receive the document. In essence, this requires BLM to prove a negative, *i.e.*, to prove that it did not receive a specific

submission. It is difficult to perceive how this burden could ever be met.

If, on the other hand, priority is accorded to the presumption of regularity, it would be appellant's obligation to show that the document was, indeed, received. We have had a number of cases in the past in which appellants have convinced this Board that documents were timely received when there was no office record of receipt.

60 IBLA at 70-71. (Footnote omitted.)

We then held that "since granting priority to the presumption of mailing would result in a virtually conclusive presumption whereas affording precedence to the presumption of regularity would be far easier to rebut, we are required to afford priority to the presumption of regularity and leave it to an appellant to submit evidence that might overcome this presumption." *Id.* at 71. Thus, we ruled in *Storper* that evidence of mailing was insufficient to rebut the presumption because it is the receipt of documents that is critical.⁸ *Id.*

In this case, appellants offer evidence of mailing but no evidence of receipt by BLM. They have not overcome the presumption of administrative regularity, which we have applied numerous times in mining fee and like cases.⁹ As we stated most recently in *Consolidated Golden Quail Resources, Ltd.*, 179 IBLA 309, 319 (2010):

Appellants simply offer insufficient evidence. A copy of a letter, bearing a particular date but no BLM-received date stamp, that was sent

⁸ "While we do accept as true appellant's assertions of prompt mailing, this fact we find insufficient to overcome the presumption of regularity." 60 IBLA at 71. We note that the Court of Appeals for the Ninth Circuit cited *Storper* with approval in a decision not selected for publication in the Federal Reporter (197 Fed. App'x 708, 710 (2006)), which upheld the Board's Apr. 29, 1999, order in *Steve E. Lankford*, IBLA 96-216, applying the presumption in determining that Lankford failed to pay maintenance fees on or before the statutory deadline, resulting in forfeiture of five unpatented mining claims.

⁹ To rebut the presumption of regularity, appellants assert that they have timely filed necessary documents with BLM for many years. However, the Board has held that even a perfect record of compliance does not necessarily demonstrate that an individual must have complied in a subsequent instance. *David F. Owen*, 31 IBLA at 28. Appellants' prior compliance does not constitute evidence negating the absence of timely filed Waiver Certifications from the case record.

to BLM after the deadline, and L. Schaffer's uncorroborated statement that the letter was mailed before the deadline and that there may have been confusion in BLM's mailroom does not prove the letter was timely mailed and received by BLM and cannot overcome the presumption of regularity in BLM's actions. See *Paul C. Lewis v. BLM*, 150 IBLA [76] at 82 [(1999)]; see also *Red Top Mercury Mines, Inc. v. U.S.*, 887 F.2d 198, 202-03 (9th Cir. 1989) (uncorroborated statement that filings were believed to have been mailed timely does not overcome presumption of regularity when there is no evidence filings were received). More than self-serving testimony is required. Consequently, appellants' argument that they timely paid the 2010 maintenance fees and that BLM lost the payment authorization fails, and appellants must bear the consequences of a filing "lost in the mail."

Motion for an Evidentiary Hearing Denied

Appellants move, pursuant to 43 C.F.R. § 4.415, for the Board to refer this matter to an administrative law judge for an evidentiary hearing. Appellants assert that a hearing is necessary to: satisfy due process, resolve issues of material fact, and determine whether the presumption of regularity should apply in these cases. BLM opposes the motion.

We reject appellants' assertion that a hearing is necessary in this case to satisfy due process requirements. In *Frances Skaw*, 62 IBLA 235, 239 (1982), a case in which we affirmed a BLM decision declaring mining claims abandoned and void for failing to timely file a required document, we denied a request for an evidentiary hearing, stating:

Due process does not require notice and a right to be heard prior to the initial decision in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final. Appeal to this Board satisfies due process requirements. *Fahey Group Mines, Inc.*, 58 IBLA 88 (1981); *George H. Fennimore*, 50 IBLA 280 (1980); *Dorothy Smith*, 44 IBLA 25 (1979); *H. B. Webb*, 34 IBLA 362 (1978).

The Supreme Court in *United States v. Locke*, 471 U.S. at 109 n.17, reached the same result in a case involving the failure to make a timely mining claim filing with BLM:

BLM does provide for notice and a hearing on the adjudicative fact of whether the required filings were actually made, and appellees availed themselves of this process by appealing, to the Department of Interior

Board of Land Appeals, the BLM order that extinguished their claims for failure to make a timely filing.

Clearly, the Mullikins' appeals to this Board satisfy due process considerations.

[2] Appellants allege that the competing declarations of the Mullikins and the BLM employees establish issues of material fact and that a hearing is necessary to allow the Mullikins to establish that they timely submitted their certificates to BLM, "just as they did every year since 1993." Motion at 5. At such a hearing, appellants assert, both sides would have the opportunity to present evidence and cross-examine witnesses and the administrative law judge would be able to weigh the evidence and determine whether the presumption of regularity should apply.

Appellant have failed to raise an issue of material fact relevant to disposition of the case. Appellants have offered their declarations, which, at best, establish that the Waiver Certifications were mailed to BLM's Fairbanks office on March 27, 2009.¹⁰ They offer no evidence that those certifications were timely received by BLM. Nor do they indicate that they have any such evidence that would be offered at a hearing. Instead, their case rests entirely on their allegations, gathered from impressions Donald and Judith Mullikin got from telephone calls they had individually with BLM employees, that BLM lost or misplaced their Waiver Certifications. Those impressions have been rebutted by the declarations of the BLM employees provided by BLM.¹¹

In *Consolidated Golden Quail Resources, Ltd.*, 179 IBLA at 320, we addressed an allegation of faulty mailroom procedures by BLM and denied a hearing, stating:

In this case, however, appellants have presented no issue that requires a hearing. The administrative record shows that the maintenance fees for the 2010 assessment year were not timely paid, and appellants proffer no evidence otherwise, except for an uncorroborated declaration that is

¹⁰ We note that the cover letter Judith Mullikin stated that she enclosed with the Waiver Certifications expressly requested that BLM "[p]lease return a date stamped copy" of the Waiver Certifications "to us." She states that when the pop-up calendar on her computer reminded her on Aug. 1, 2009, to file the Waiver Certifications, "I turned off the reminder because I was certain that the appropriate paperwork had been mailed to BLM in March, 2009." SOR, Addendum A, Ex. 2 at ¶18. She added that she "did not think to check to see if we had received date/time stamped copies from BLM." *Id.*

¹¹ In their motion for an evidentiary hearing, appellants attempt to create issues based on a comparison of the Mullikins' and BLM's declarations. See Motion at 3-4. While appellants raise questions, none presents a dispositive issue of material fact.

insufficient to overcome the presumption of regularity with respect to BLM's actions. And, to the extent appellants argue that a hearing would confirm allegedly faulty BLM mail room procedures, the submitted declarations of BLM employees show otherwise. *See* Response, Attach. 2, ¶¶ 5, 11 (Declaration of BLM Supervisor for the Branch of Minerals Adjudication) (“All documents sent to the BLM California State Office are processed in a single mailroom location,” and that mail is “processed according to the mailroom’s standard operating procedures,” and “[a] search was carefully performed and no missing documents were found.”) and Attach. 3 (Declaration of BLM Chief of the Branch of Fiscal and Business Services). A hearing is not necessary, and appellants’ request is denied. *See Orion Reserves Ltd. Partnership v. Salazar*, 553 F.3d 697, 707-08 (D.C. Cir.), *cert. denied*, 130 S. Ct. 110 (2009). [Footnote omitted.]

That rationale is applicable in this case. Appellants’ motion for an evidentiary hearing is denied.

*The Failure to File Waiver Certifications with BLM on or Before September 1, 2009,
Is Not a Curable Defect*

Appellants assert that BLM’s decisions are contrary to law because Congress intended that small miners, like the Mullikins, should have the right to cure defective Waiver Certifications, including those purportedly submitted late. While appellants construct an impressive argument in favor of their position, it ultimately rests on overturning Board precedent that rejects the position that the late filing of a Waiver Certification is a curable defect and on following a District Court decision that has been vacated. We decline to overturn our precedent and find no basis for following the District Court decision, even if it were a viable ruling.

[3] As set forth above, under 30 U.S.C. § 28f(a) (2006), appellants were required to pay to BLM on or before September 1, 2009, for the 2010 assessment year, maintenance fees for their mining claims. The consequence of a failure to pay the fees is set forth at 30 U.S.C. § 28i (2006), which states that failure to timely pay the required maintenance fees automatically results in forfeiture of the mining claims by operation of law. However, as small miners, the Secretary provided appellants with the option, in accordance with 30 U.S.C. § 28f(d)(1) (2006), to submit a Waiver Certification by the same date. 43 C.F.R. § 3835.10(a). While BLM has no evidence of receipt of fees or Waiver Certifications from appellants on or before September 1, 2009, for the 2010 assessment year, appellants claim that in accordance with

30 U.S.C. § 28f(d)(3) (2006), they are entitled to cure the untimely filing of a Waiver Certification upon receipt of written notice from BLM of the defect.¹²

While Congress did not set forth the types of defects that would be curable, BLM in its rulemaking made clear that a defect in compliance with a regulatory requirement was curable, but a defect in compliance with a statutory requirement was not curable, unless the statute gave the Secretary authority to permit exceptions. 43 C.F.R. §§ 3830.93(a) and (b). Although the time for filing a Waiver Certification is established by regulation as September 1 of each assessment year for which a waiver is sought (43 C.F.R. § 3835.10(a)), that does not mean that the failure to file a Waiver Certification on or before that date is a curable defect. In fact, we have long held that “the regulatory deadline for filing a waiver certification is binding on a claimant, and that the failure to timely file (absent payment of the maintenance fee) results in the automatic forfeiture of the affected claim.” *Otto Adams*, 155 IBLA 1, 4 (2001), and cases cited.

Clearly, BLM would not be making a defect determination if a Waiver Certification had not been filed on or before the regulatory deadline, since that same deadline is the statutory deadline for payment of the maintenance fee and failure to timely pay the maintenance fee results, by statute, in automatic forfeiture of the claim. Only a timely filed Waiver Certification can serve to forestall the statutory consequences of failure to pay the maintenance fee. Thus, if the September 1 deadline passes without receipt of a Waiver Certification, the mining claim is deemed forfeited by operation of law if no timely fee is paid. Filing a Waiver Certification after the deadline cannot reverse the statutory consequences of failure to pay the fee. As we explained in *Otto Adams*, 155 IBLA at 4:

To hold otherwise would be to permit a claimant to delay filing a waiver certification indefinitely until well after the statutory September 1 deadline for paying the maintenance fee and still be able to take advantage of the 60-day grace period for payment, following a determination and notification that the certification was defective. Such a state of affairs is legally untenable, and plainly not Congress’ intent, which is clearly to permit a claimant to avoid forfeiture where a timely, but defective certification is filed, and the claimant thereafter cures the defect or pays the maintenance fee.

¹² That statutory provision states: “If a small miner waiver application is determined to be defective for any reason, the claimant shall have a period of 60 days after receipt of written notice of the defect or defects by the Bureau of Land Management to: (A) cure such defect or defects, or (B) pay the \$100 claim maintenance fee due for such period.”

[4] In support of their position, appellants cite *Miller v. U.S. Dep't of the Interior*, 635 F. Supp. 2d 1224 (D. Colo. 2009). In that case, Chief Judge Wiley Y. Daniel reversed an order by this Board in *Robert & Marjorie Miller*, IBLA 2008-149 (July 15, 2008), which had affirmed a BLM decision declaring five lode mining claims forfeited and void by operation of law for failure to pay the claim maintenance fees or to file a Waiver Certification for the 2008 assessment year on or before the deadline, September 4, 2007.¹³ The Board rejected the Millers' assertion that they should be able to cure their Waiver Certification, which was mailed on September 14, 2007, and received by BLM on September 17, 2007. In reversing, Chief Judge Daniel held that the deadline for submitting a Waiver Certification is a regulatory requirement and that defects in compliance with regulatory requirements may be cured. Chief Judge Daniel also stated that allowing the right to cure was consistent with the general policy that forfeiture is disfavored.

Appellants' reliance on *Miller* must fail for two reasons. First, in an order dated September 4, 2009, Chief Judge Daniel vacated his rulings in *Miller* in response to a joint motion to do so. Second, even if the *Miller* decision had not been vacated, this Board would not follow it. The reason is that "the Board may decline to follow a district court ruling where a reasonable prospect exists that other Federal courts might reach a contrary result." *Union Oil Company of California*, 98 IBLA 37, 43 (1987), and cases cited therein. Clearly, there is a reasonable prospect that other Federal courts might reach a different result.

Chief Judge Daniel's conclusion that the deadline for submitting Waiver Certifications is a regulatory requirement is correct and not inconsistent with Board precedent.¹⁴ However, where his reasoning strays is in concluding that because the deadline for filing Waiver Certifications is established by regulation, a Waiver Certification filed after that date may be cured. That is not the case. Nor do the cases cited by the Chief Judge support such a conclusion.¹⁵

¹³ While the maintenance fee documents would normally have been due on Sept. 1, 2007, that day was a Saturday. The next business day was Tuesday, Sept. 4, 2007, Monday being Labor Day, a Federal holiday.

¹⁴ In *David G. Kukowski*, 169 IBLA 19, 20 (2006), we stated: "BLM's regulations require claimants to submit waiver certifications on or before September 1 of the calendar year certification is due." See *Otto Adams*, 155 IBLA at 3; *Goldie James*, 143 IBLA 289, 292-94 (1998).

¹⁵ While Chief Judge Daniel found "the IBLA's reasoning for disallowing the cure" to be "inconsistent," and, therefore, "entitled to lesser deference from this Court," 635 F. Supp. 2d at 1232, that finding is based strictly on a misunderstanding of the Board's cases.

The Chief Judge construed our cases as holding that “the regulatory deadline must be enforced without opportunity for cure,” then stating that “the Board has since undercut that finding,” citing *Larry G. Andrus, Jr. (On Reconsideration)*, 169 IBLA 353 (2006). 635 F. Supp. 2d at 1232. In that case, we granted 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 forfeited by operation of law for failure to file an affidavit of assessment work or notice of intention to hold on or before December 30, 2004.

The claims in question had been located on August 24, 2004, and filed for recordation with BLM on August 30, 2004, in accordance with section 314(a)(2) of FLPMA, 43 U.S.C. § 1744(a)(2) (2006). At the time of recordation, the claimants paid all necessary fees, including the initial maintenance fees for the assessment year (2004) in which the claims were located, as required by 43 C.F.R. § 3834.11(a)(1). On the same day, the claimants filed a Waiver Certification with BLM for eight mining claims, including the three at issue, for the 2005 assessment year.

The Board noted that the obligation to perform assessment work for mining claims located in August 2004 commenced, in accordance with 30 U.S.C. § 28 (2006), at 12 o'clock meridian on the 1st day of September succeeding the date of location of the claims, *i.e.*, at noon on September 1, 2004, for the 2005 assessment year. Therefore, we concluded that the appellants had no obligation to file an affidavit of assessment work on or before December 30, 2004. We 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.

On reconsideration, BLM did not dispute the correctness of the Board's conclusion that BLM's decision should be reversed because claimants did not have a statutory obligation to file an affidavit of assessment work on or before December 30, 2004. Instead, it pointed out that the Board also reversed because it found no obligation to file a notice of intention to hold. It asserted that the filing of a notice of intention to hold the mining claims was required by 43 C.F.R. § 3835.31(c). However, it stated that, in recognition that the requirement was only regulatory, the failure to file should be considered a curable defect under 43 C.F.R. § 3830.93(b). We agreed with BLM, granted reconsideration, and modified our decision accordingly. In doing so, we explained:

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. 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.

169 IBLA at 356 (footnote omitted).

Importantly, the Board noted that the case did not involve a statutory requirement:

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.

Id. at 357, n.6.

Unlike *Andrus (On Reconsideration)*, the present case involved a failure to comply with a statutory requirement, *i.e.*, the statutory requirement of 30 U.S.C. § 28f(a) (2006) to pay the maintenance fees for the claims on or before September 1, 2009. A late filed Waiver Certification cannot resurrect claims that are conclusively forfeited as a matter of law pursuant to 30 U.S.C. § 28i (2006), upon the failure to pay the maintenance fees on or before the September 1 due date.¹⁶

Appellants also cite Congressional action as supporting their position that the cure provision applies to “late-submitted” Waiver Certifications. SOR at 15. They point to private relief legislation passed as part of the Department of the Interior and

¹⁶ We do not disagree with Chief Judge Daniel’s statement that *Topaz Beryllium Co. v. United States*, 649 F.2d 775, 778 (10th Cir. 1981), holds that “a claim cannot be deemed abandoned for failure to comply with requirements that are contained in regulations but not in statutes.” We disagree, however, that it supports his finding of inconsistency in Board adjudication. What needs emphasis is that in the maintenance fee context, the claimant must, by statute, pay the maintenance fee on or before the September 1st deadline. If a Waiver Certification is filed late, the statutory deadline intervenes and the claim is deemed forfeited and void for failure to pay the fee on time.

Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2004). Section 144 of that bill required BLM to give Compass Mining Company notice of defect and opportunity to cure its late-filed Waiver Certification for specific claims that had been forfeited by operation of law for failure to pay the claim maintenance fee or file a waiver certification. *See Compass Mining Company*, IBLA 2000-85, April 2, 2003, Order at 3-4. The Conference Report describes Section 144 as follows: “The conference agreement modifies Senate section 139 retroactively restoring a mining claim voided because of a defective waiver of the \$100 hard rock mining maintenance fee.” H.R. Rep. No. 108-330 at 121 (Oct. 28, 2003), *reprinted in* 2003 U.S.C.C.A.N. 1310, 1342.

We rejected the same argument in *David G. Kukowski*, 169 IBLA at 23, stating:

Congress uses private legislation when it generally recognizes the consequences imposed by laws and regulations but wishes to provide an exception for a particular individual or company. If Congress had wanted to amend the statute to impose a 60-day grace period for all late-filed waiver certifications, it could have. Instead, it chose to grant relief only to one company in the form of private legislation. It is settled law that private legislation is binding only with respect to the specific subject matter addressed; it does not have general applicability. *See Unity v. Burrage*, 103 U.S. 447, 454 (1881) (“Special or private acts are rather exceptions than rules, being those which operate only upon particular persons and private concerns”)(*quoting* 1 Blackstone’s Commentaries *86); *see also Ram Petroleums, Inc. v. Andrus*, 658 F.2d 1349, 1353 (9th Cir. 1981); *Louis Samuel*, 8 IBLA 268, 270 (1972) (stating that Congress passed Act of May 12, 1970, Pub. L. No. 91-245, a public law, in part to relieve itself of the burden of passing multiple private relief laws). Thus, Congress’ use of a private law to grant relief to Compass Mining Company indicates that Congress believes that forfeiture would result for all other claimants who miss the September 1 deadline. Our interpretation of 30 U.S.C. § 28f(d)(3) is unchanged, and we adhere to our earlier precedents. A claimant who files a certification after the September 1 deadline has forfeited the claim by operation of law.

Appellants have provided no basis for deviating from that rationale.

To the extent appellants raise other issues not addressed herein, they have been carefully considered by the Board and rejected.

Conclusion

The presumption of administrative regularity supports the conclusion that appellants failed to timely file Waiver Certifications with BLM for the 2010 assessment year. The failure to file Waiver Certifications with BLM on or before September 1, 2009, is not a curable defect because when maintenance fees were not filed on or before that date, as required by 30 U.S.C. § 28f(a) (2006), the claims were properly deemed forfeited, in accordance with 30 U.S.C. § 28i (2006).

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 decisions appealed from are affirmed. The petitions for stay are denied as moot. Appellants' motion for an evidentiary hearing is denied. Appellants' Motion for Official Notice and for a Stay Nunc Pro Tunc is denied as moot.

/s/
Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

/s/
H. Barry Holt
Chief Administrative Judge