SAN MATEO–SAN GEORGE MINING COMPANY

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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

SAN MATEO–SAN GEORGE MINING COMPANY

IBLA 2011-87 Decided April 11, 2011

Appeal from a decision of the California State Office, Bureau of Land Management, declaring unpatented mining claims forfeited for failure to pay the claim maintenance fee or to file an effective maintenance fee payment waiver certification (Waiver Certification) on or before September 1, 2010, for the 2011 assessment year. CAMC 27183, *et al*.

Affirmed; request for stay denied as moot.

1. Mining Claims: Patent - - Mining Claims: Rental or Claim Maintenance Fees: Generally

   Mining Claims for which the claimant has filed a patent application but not paid the purchase price or received a first half final certificate remain subject to the requirement to pay claim maintenance fees under 30 U.S.C. § 28f (2006).

APPEARANCES: Richard Keith Corbin, Esq., Sacramento, California, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

The San Mateo–San George Mining Company has appealed from and requested a stay of a December 22, 2010, decision of the California State Office, Bureau of Land Management (BLM), declaring the San Mateo–San George #1–#6 (CAMC 27183–CAMC 27188) unpatented mining claims 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, 2010, for the 2011 assessment year. We affirm BLM's decision and deny appellant's request for stay as moot.

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 (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); *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 received appellant's Waiver Certification on September 13, 2010, in an envelope bearing a postmark of September 10, 2010. In its Statement of Reasons (SOR), appellant does not explain or even dispute its untimely filing. Instead, appellant engages in an extensive diatribe against the Secretary of the Interior for failure to process appellant's patent application for the six claims involved in this appeal. Appellant focuses on its receipt of a letter from the BLM California State Office dated November 28, 1994, informing appellant that because of the passage of the "Moratorium Act," secs. 112–13 of the Interior and Related Agencies Appropriation Act of 1994, Pub. L. 103-332, 108 Stat. 2499, 2519 (1994), appellant's

[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).

patent application would be held in abeyance and not adjudicated.[2] SOR at 3, 5, Exhibit D.

Appellant's point is that its patent application was complete, the "Moratorium Act" did not apply to its application, the Secretary should have processed its application and, therefore, appellant was not required to pay maintenance fees or file a Waiver Certification for its claims. SOR at 5. The status of appellant's patent application, however, is not before us.[3] Appellant states: "The issue before the Board in this case is not whether appellant's claims can be wiped out by . . . [the maintenance fee/Waiver Certification requirement], but rather, whether appellant's claims can be wiped out by the failure and/or refusal of the Department of the Interior Secretary to commence and complete processing appellant's mineral patent application." *Id*. at 8. That is incorrect. The issue before the Board is whether appellant's failure to file a timely Waiver Certification should result in forfeiture of its claims.[4]

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[2] The "Moratorium Act" provides that no funds shall be expended to accept or process applications for patent under the Mining Law. It also provides an exemption from those restrictions for patent applications filed before its effective date of Sept. 30, 1994, that fully complied with all requirements of 30 U.S.C. §§ 29 and 30 (2006).

[3] To the extent appellant attempts to challenge any BLM decision evidenced by the Nov. 28, 1994, letter, its challenge clearly is untimely. *See* 43 C.F.R. § 4.411(a)(2)(i) (notice of appeal must be filed in the appropriate office "no later than 30 days after the date of service of the decision"). To the extent appellant attempts to challenge any decision made or approved by the Secretary, this Board has no jurisdiction to hear it. *Robert L. Bayless Producer*, 177 IBLA 83, 84 (2009).

[4] Appellant mis-characterizes this process as an abandonment of interests in the claims, and then argues that "there is no intent by appellant to abandon its right, title and interest in the valuable mineral deposits located upon its six lode mining claims." SOR at 3. However, Congress characterized the failure to timely pay the maintenance fee (in the absence of a waiver of the fee) as "conclusively constitut[ing] a forfeiture of the unpatented mining claim," to which process the claimant's intent is not relevant. 30 U.S.C. § 28i (2006). Automatic statutory 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); *see also Harlow Corp.*, 135 IBLA 382 (1996), *aff'd*, *Harlow Corp. v. Norton*, No. 97-0320(RWR) (D.C.C. July 24, 2001), *aff'd*, 56 Fed. Appx. 513 (D.C. Cir.), *cert. denied*, 539 U.S. 959 (2003).

The only relevant argument that can be distilled from appellant's SOR is that appellant is not required to pay the annual maintenance fee or file a Waiver Certification because appellant filed a complete patent application that is being wrongly held in abeyance by the Department under the guise of the "Moratorium Act." SOR at 5.

Under the Mining Law of 1872, a claimant was required to perform not less than $100 worth of assessment work every year to maintain his possession of the claim and to prevent appropriation of that claim by others, as the failure to perform the labor was considered an abandonment. Act of May 10, 1872, sec. 5, 17 Stat. 91, 92 (codified, as later amended, at 30 U.S.C. § 28 (2006)); *see* Curtis H. Lindley, A Treatise on the American Law Relating to Mines and Mineral Lands (Lindley on Mines) § 623 (1897). In 1993, Congress amended the Mining Law to require a claimant to pay a claim maintenance fee of $100 per claim "in lieu of the assessment work requirement contained in the Mining Law." Act of August 10, 1993, Pub. L. 103-66, sec. 10101, 107 Stat. 312, 405 (codified at 30 U.S.C. § 28f). However, the maintenance fee may be waived for a "small miner" (owns not more than 10 mining claims, mill, or tunnel sites) who timely files a Waiver Certification and performs assessment work. 30 U.S.C. § 28f(d). All of these requirements (first the annual assessment work and later the annual maintenance fee or Waiver Certification and assessment work) were and still are intended, among other things, to secure a claimant's possessory interest in a claim against rival claimants, in the absence of a contest.

In 1994, BLM included in its mining regulations a provision that "[p]erformance of annual assessment work and payment of maintenance fees is not required after the date that the mineral entry has been allowed." 59 Fed. Reg. 44846, 44863 (Aug. 30, 1994) (then codified as 43 C.F.R. § 3851.5 (1995)). This basic provision has been retained in BLM's current regulations, which allow a waiver from the annual maintenance fee (or Waiver Certification) requirements if "[y]ou have submitted an application for a mineral patent . . . and the Secretary has granted you a final certificate." 43 C.F.R. § 3835.1(b) "Type of waiver" "(e) Mineral Patent Application" (2010). Those provisions arose out of many years of judicial confirmation that once entry has been allowed by the Department, through a claimant's submission of appropriate proofs and payment of the purchase price and acquisition of a certificate of purchase (receipt), a patent applicant's possession of a claim is secure against "the assaults of third parties[]. The obligation to perform the annual labor ceases." Lindley on Mines § 637 (citing directly to *Benson Mining and Smelting Co. v. Alta Mining and Smelting Co.*, 145 U.S. 428 (1892); *see Scott Burnham*, 100 IBLA 94, 110 (1987) ("With issuance of a Final Certificate of mineral entry, the land encompassed by the mining claim is segregated from the location of other claims and may not be located by another.").

Under long-standing BLM regulations, mineral entry is allowed after the submission of proofs and the purchase price under 43 C.F.R. Subparts 3862, 3863, 3864. *See* 43 Fed. Reg. 9756, 9758 (June 13, 1970). BLM memorializes this stage of patent processing by issuing a First Half Final Certificate which confirms, among other things, that the claimant need not adhere to maintenance fee (or Waiver Certification) requirements, even though it has not been established that all the requirements for a valid mining claim have been satisfied. BLM Handbook H-3860-1 Ch. VI.A.

In this case, it is clear that appellant has not received a First Half Final Certificate. *See* SOR at 5, Exhibit D. In fact, the record contains no evidence that appellant has paid the purchase price or that the Secretary has allowed mineral entry, which are essential to securing the land against rival claimants and to triggering the waiver of maintenance fee (or Waiver Certification) requirements.[5]

Appellant argues that the decision in *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167 (10th Cir. 1997), supports its assertion, but that case is clearly distinguishable. In *Mt. Emmons* the plaintiff had paid the purchase price for its claims and the BLM Colorado State Office had issued a receipt bearing the notation "mineral entry allowed." 117 F.3d at 1168.[6] The record reveals no such evidence regarding appellant's claims. Although appellant vociferously asserts that it "complied with the paperwork requirements of Title 30 United States Code § 29," SOR at 12, paper is not all that is required. That provision of the Mining Law also states "it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre," among other things. *See* 117 F.3d at 1168 n.1 (court quotes BLM Handbook H-3860-1 Ch. IV.A, that states "'paperwork' requirements of the Mining Law (title, proofs, posting requirements, *purchase money*)." (Emphasis added)).

[1] Appellant's case is much closer in its facts to that of the plaintiff in *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061 (9th Cir. 1997).[7] In that case Vanderbilt submitted a patent application but had not yet paid the purchase price for the claims

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[5] Appellant's position also is undermined by appellant's own actions evidenced in the record, in timely filing Waiver Certifications and performing assessment work, apparently without protest, every year since 1993, until the 2011 assessment year.

[6] The court finally held that the Secretary was required to continue processing the Mt. Emmons patent application to determine if it was sufficiently complete to be exempt from the restrictions of the "Moratorium Act." 117 F.3d at 1172-73.

[7] Surprisingly, *Vanderbilt* was not discussed or referenced by appellant, despite appellant's claims being located in California, within the Ninth Circuit.

on the effective date of the "Moratorium Act," and the Department did not continue to process the application. The court found that:

> Requiring payment of the purchase price enumerated in the statutes cited in the second prong of [the Moratorium Act] is not an arbitrary reading of [the Moratorium Act]. The Secretary's construction of [the Moratorium Act] that all the requirements of the cited code sections be satisfied is a reasonable construction of the statute. Thus, the district court did not err in upholding the Secretary's interpretation of the grandfather clause; Vanderbilt is not exempted from the moratorium.

113 F.3d at 1066; *accord Glen and Marie Teague*, 179 IBLA 324, 336 (2010). Here, when the "Moratorium Act" became effective, appellant had not yet paid its purchase price and had not been allowed mineral entry, as would be evidenced by receipt of a First Half Final Certificate. Although appellant had filed a patent application, "[t]he mere filing of a patent application is not sufficient to exempt [appellant's] claims from payment of the maintenance fee. Under the regulation, the 'entry' has to be 'allowed.'" *Hugh D. Guthrie*, 145 IBLA 149, 152 (1998). Appellant clearly has failed to show that it was entitled to mineral entry and a First Half Final Certificate and, therefore, a waiver of the maintenance fee (or Waiver Certification) requirements.

Notwithstanding all of appellant's arguments, BLM's decision involves appellant's failure to timely file a Waiver Certification. The facts are clear that appellant's Waiver Certification was not filed timely.

The statute is self-operative. It explicitly states that failure to timely pay the required maintenance fee automatically results in forfeiture of the mining claim by operation of law. 30 U.S.C. § 28i (2006); *see* 43 C.F.R. §§ 3830.91(a)(4), 3835.92(a). When a claimant fails to timely file a Waiver Certification and no payment has been made, forfeiture results from the statutory directive. *Howard J. Hunt*, 147 IBLA 381, 384 (1999). BLM and this Board are without authority to excuse lack of compliance with the maintenance fee requirement, to extend the time for compliance, or to afford any relief from the statutory consequences. *Jon Roalf*, 169 IBLA 58, 62 (2006); *Carl A. Parker, Sr.*, 165 IBLA 300, 303-304 (2005), and cases cited. In the absence of a timely-filed maintenance fee payment or Waiver Certification, BLM properly declared the mining claims forfeited by operation of law. 43 C.F.R. § 3835.92(a); *see Joe Bob Hall*, 135 IBLA 284, 286 (1996); *Alamo Ranch Co.*, 135 IBLA 61, 76 (1996).

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 affirmed and the petition for stay is denied as moot.

/s/
H. Barry Holt
Chief Administrative Judge

I concur:

/s/
Bruce R. Harris
Deputy Chief Administrative Judge