



LEO WITTNER

185 IBLA 329

Decided May 14, 2015



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

LEO WITTNER

IBLA 2014-235, *et al.*

Decided May 14, 2015

Appeal from decisions of the California State Office, Bureau of Land Management, declaring unpatented mining claims forfeit (closed) and void by operation of law. CAMC208008, CAMC221064, and CAMC274199.

Reversed.

1. Administrative Procedure: Administrative Record--
Evidence: Generally--Mining Claims: Rental or Claim
Maintenance Fees: Generally--Mining Claims: Rental or
Claim Maintenance Fees: Small Miner Exemption--Mining
Claims: Rental or Claim Maintenance Fees: Postmark Rule

Under 43 C.F.R. § 3830.5, *Filed* means a document is received by BLM on or before the due date, or is postmarked or otherwise clearly identified as sent on or before the due date by a *bona fide* mail delivery service, and is received by the appropriate BLM office within 15 calendar days after the due date. This regulation implicitly requires BLM to retain the envelopes in which filings were made. Absent the mailing envelope, the Board cannot verify when a document was transmitted, and absent the document itself, the Board cannot verify when that document was received. Where the record does not contain the envelope in which the document was sent, the mining claimant will not be required to bear the responsibility of BLM's failure to retain the envelope, and a decision declaring the claims forfeit will be reversed.

APPEARANCES: Leo Wittner, Athol, Idaho, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Leo Wittner has appealed from three decisions of the California State Office, Bureau of Land Management (BLM), declaring unpatented placer mining claims forfeit

for failure to pay a claim maintenance fee or file a maintenance fee waiver certification (Waiver Certification) on or before September 3, 2013,¹ for the 2014 assessment year. In the first decision, dated June 11, 2014, BLM declared the Trust I placer mining claim (CAMC208008) forfeit and void by operation of law. In the second decision, dated June 11, 2014, BLM declared the Independent IV placer mining claim (CAMC274199) forfeit and void by operation of law. In the third decision, dated June 16, 2014, BLM declared the Independent III placer mining claim (CAMC221064) forfeit and void by operation of law. The Board assigned a docket number to each of the three decisions, docketing them as IBLA 2014-235, 2014-236, and 2014-237, respectively.

In its decisions, BLM stated: “Our records indicate that a maintenance fee waiver certification form was received in this office after the September 1 due date for the 2014 assessment year.” Decisions at 1. Therefore, BLM declared the mining claims forfeit (closed) and void by operation of law. *Id.*

The record does not contain the Waiver Certification or the envelope in which Appellant would have mailed the Waiver Certification to BLM. At issue is whether the Board should affirm BLM’s decisions in the absence in the record of the Waiver Certification, which would bear BLM’s date-stamp, or the mailing envelope, which would bear the post-mark date showing the date the Waiver Certification was mailed to BLM. The latter item is critical, since if the Waiver Certification was mailed in a timely fashion and received by BLM within the following 15-day grace period, it would be deemed timely received pursuant to 43 C.F.R. § 3830.5 (definition of “Filed”). See *James J. McGarvey*, 174 IBLA 299, 301 (2008); *L.R. Church*, 155 IBLA 367, 370-71 (2001). As discussed below, in the absence of the mailing envelope, we have no way to verify when the Waiver Certification that BLM states it received was transmitted, and without the Waiver Certification, we have no way of knowing when BLM actually received that document. We conclude that we cannot affirm BLM’s decisions based on the record before us and accordingly reverse them.

Legal Background – Mining Filings and the Grace Period

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. 30 U.S.C. § 28f(a) (2012); 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 (2012), and the related filing requirements of section 314 of

¹ Because the September 1 deadline fell on a nonbusiness day, the deadline was extended to Sept. 3, 2013. 43 C.F.R. § 1822.14.

the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (2012), for the assessment year. 30 U.S.C. § 28f(a) (2012); 43 C.F.R. § 3834.11(a).

The failure to timely submit a 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 (2012); 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, and has performed assessment work required under the Mining Law of 1872 with respect to the mining claims for the preceding assessment year. 30 U.S.C. § 28f(d)(l) (2012); *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).

The mining regulations provide a grace period for the filing of a document with BLM, when the mailing envelope bears a postmark prior to the due date and is received by the appropriate BLM office within 15 calendar days after the due date. *See* 43 C.F.R. § 3830.5 (definition of *Filed*); *see also James J. McGarvey*, 174 IBLA at 301; *L.R. Church*, 155 IBLA at 370-71. Specifically, the regulation provides that *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).

43 C.F.R. § 3830.5.

Analysis

[1] With respect to determining whether a filing is timely, the Board has long-recognized the necessity that BLM maintain the mailing envelopes for filings, as the postmarks are of great importance to determining timeliness. For instance, in *R.G. Price*, 8 IBLA 290, 292-93 (1972), in a case involving timely rental payments for oil and gas leases, at issue was whether a lessee timely mailed its payment to BLM. The lessee contended that although it post-dated its check, it mailed the check three

days in advance of the deadline. *Id.* at 292. However, BLM did not retain the mailing envelope for the check. *Id.* The Board found BLM's destruction of the envelope prevented reference to the critical postmark date, and concluded the absence of such important proof should not work to the detriment of the lessee. *Id.* at 292-93. Accordingly, the Board ruled in favor of the lessee. *Id.* at 293. We instructed BLM to retain the mailing envelopes, as the postmarks on the envelopes were of great importance. *Id.* At the time of the Board's holding in *R.G. Price*, there was no oil and gas regulation which specifically concerned the postmarks on envelopes transmitting oil and gas rentals, but as the Board later stated in *Gary Hennis*, 108 IBLA 121, 124 (1989), "the Board imposed a duty on BLM to retain such envelopes."

As to the timeliness of filings in mining cases, the Board adopted its rationale from *R.G. Price*, and determined such rationale has even greater applicability for the timeliness of filings regarding mining claims, as there is a grace period regulation which is intended to provide mining claimants some relief from the filing deadline.² *Id.* By providing a grace period in its mining regulations, the Department implicitly required BLM to keep the envelopes in which filings were made. *Id.* Thus, an appellant should not be responsible for bearing the consequences of BLM's failure to retain the envelope. *Id.*

In *Gary Hennis*, BLM at one point had an envelope with the filing it claimed was untimely, which may or may not have included a postmark indicating a timely transmittal, but that envelope was no longer part of the record at the time of the Board's review. *Id.* at 123. The Board held since the envelope containing the appellant's filing "apparently was destroyed or discarded by BLM, it would be patently unfair to allow BLM to utilize that fact in support of its position that the appellant's . . . filing was untimely." *Id.* at 124. Accordingly, the lack of the envelope required that we find the appellant mailed his paperwork in a timely manner. *Id.*; accord *L.R. Church*, 155 IBLA at 370-71 (a BLM decision declaring mining claims forfeited based on untimeliness cannot be sustained when BLM has lost the mailing envelope); *Howard G. Willison*, 114 IBLA 323, 324-25 (1990).

² During the previous mining fee cases we cite herein regarding timeliness and retention of envelopes, the grace period regulation was slightly different from the current version. However, these minor differences have no bearing on the present case, as both required a postmark and receipt by the proper BLM office within a certain number of days after the due date. Compare 43 C.F.R. § 3830.5 (2004-2014) (definition of *Filed*) against 43 C.F.R. § 3833.0-5(m) (1983-2003) (definition of *file* or *filed*).

In the decisions presently at issue before the Board, BLM states that it received the Waiver Certification after the due date of September 1. Decisions at 1. However, the record does not include the Waiver Certification that BLM says it received, or the envelope showing when Appellant transmitted that Certification to BLM. *See id.* Due to the lost or missing mailing envelope, the Board lacks the necessary evidence to determine when Appellant transmitted the Waiver Certification, and absent the Certification, we cannot determine whether it was received during the 15 day grace period allowed by the regulation. Consequently, in accordance with Board precedent, we reverse BLM's decisions.

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 reversed.

_____/s/
James F. Roberts
Administrative Judge

I concur:

_____/s/
Eileen Jones
Chief Administrative Judge