



CHAGDUD L'HUNDRUB LING

185 IBLA 365

Decided June 2, 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

CHAGDUD L'HUNDRUB LING

IBLA 2015-59

Decided June 2, 2015

Appeal from a decision of the New Mexico State Office of the Bureau of Land Management (BLM) declaring unpatented mining claims null and void by operation of law. NMMC 189693 through NMMC 189702.

Affirmed.

1. Rules of Practice: Appeals: Generally--Rules of Practice:
Appeals: Service on Adverse Party--Rules of Practice:
Appeals: Statement of Reasons

A party that serves any document under 43 C.F.R. Part 4, Subpart E, must serve it concurrently on the appropriate official of the Office of the Solicitor. 43 C.F.R. § 4.401(c). Service of a statement of reasons only on the Board of Land Appeals is insufficient, and an appeal to the Board will be subject to summary dismissal if the statement of reasons is not served upon adverse parties within the time required. 43 C.F.R. § 4.402(c). The Board will not dismiss an appeal for failure to serve a statement of reasons on the Office of the Solicitor when there is no showing of prejudice.

2. Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

In the absence of timely-filed maintenance fees or a mining fee waiver certification, BLM properly declares unpatented mining claims forfeited by operation of law. The requirement to timely pay the required fees, or to file a proper waiver certification, is a statutory defect and is not curable. The Board is without authority to excuse lack of compliance with the statutory requirement.

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

The Board will not apply the doctrine of estoppel based upon allegations of oral misstatements; there must be reliance predicated on a crucial misstatement in an official written decision.

APPEARANCES: John P. Pollack, for appellant; Frank Lupo, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Chagdud L'hundrub Ling (Appellant)¹ has appealed from and petitioned for a stay of a November 12, 2014, decision of the New Mexico State Office, Bureau of Land Management (BLM), declaring the TER-1 through TER-9 and the TER-11 unpatented lode mining claims (NMMC 189693 through NMMC 189702) null and void by operation of law for failure to pay the mining claim maintenance fees or to file a maintenance fee waiver certification (Waiver Certification) by September 1, 2014, for the 2015 assessment year. In its decision, BLM correctly points out that Appellant's Waiver Certification for the assessment year beginning September 1, 2014, and ending September 1, 2015, was postmarked September 12, 2014, and received by its office on September 16, 2014. Therefore, BLM determined the Waiver Certification was untimely and declared the claims forfeited for failure to pay the annual maintenance fee on or before September 1, 2014.

Background

On December 15, 2014, Appellant filed a Notice of Appeal (NOA) and a Petition for Stay of BLM's decision with the Board. Those documents indicate that they were served on the Office of the Regional Solicitor (Solicitor's Office) as well as the New Mexico State Office, BLM.

On January 8, 2015, the Solicitor's Office filed with the Board an entry of appearance and a request for extension of time to file an Answer, which the Board

¹ John P. Pollack, who gives his title as "Member of the Board of Directors," filed this appeal on behalf of Appellant. Some documents in the record include alternative spellings for Appellant's name, including "Lhundrub" or "Lundrup."

granted. On January 15, 2015, the Board received Appellant's Statement of Reasons (SOR). The SOR indicates service on the New Mexico State Office, but does not indicate service on the Solicitor's Office. SOR at unpaginated (unp.) 2. On February 4, 2015, the Solicitor's Office filed an Answer in the case.

On April 6, 2015, the Board received a letter from the Solicitor's Office stating that after submitting its Answer in this matter, it received a copy of the SOR, but not until February 24, 2015, when it was sent to its office via e-mail.² Letter to Board at unp. 1. Citing to the Board's rules of practice, the Solicitor's Office describes Appellant's service of the SOR as deficient. *Id.* (citing 43 C.F.R. §§ 4.401(c), 4.412(a)). In its letter, the Solicitor's Office responds to the substance of the SOR. *Id.* at unp. 1-2.

Analysis

[1] We begin with the procedural issue concerning Appellant's failure to serve its SOR on the Solicitor's Office. The SOR must be filed with the Board no later than 30 days after the NOA was filed. 43 C.F.R. § 4.412(a). The Board's rules of practice (40 C.F.R. Part 4) also require that upon filing any document, the Appellant must "concurrently" serve a copy on the appropriate official of the Solicitor's Office. *See* 43 C.F.R. § 4.401(c)(1)(i). The rules provide that the "appropriate official of the Office of the Solicitor" for appeals from the New Mexico State Office is the Office of the Regional Solicitor, Southwest Region, with a street address in Albuquerque, New Mexico. 43 C.F.R. § 4.401(c)(1)(i), adopting 43 C.F.R. § 4.413(c) and (d). The rules allow for service by e-mail if the person to be served has previously consented to that means in writing. 43 C.F.R. § 4.401(c)(4). The rules provide that if an SOR not contained in the NOA is not served upon adverse parties within the time required, the appeal to the Board "will be subject to summary dismissal." 43 C.F.R. § 4.402(c).

Appellant did not serve the SOR on the Solicitor's Office in a timely manner, and therefore service was deficient. The SOR was not served on the Office of the Regional Solicitor, Southwest Region, at its street address in Albuquerque, New Mexico. *See* 43 C.F.R. § 4.401(c)(1)(i), adopting, 43 C.F.R. § 4.413(c) and (d). Rather, the SOR was sent by email to the Solicitor's Office and received more than one month after the filing of the SOR, on February 24, 2015. Letter to the Board at unp. 1. Therefore, service of the SOR was not concurrent with the filing of that document and therefore not timely. In addition, there are no filings before the Board indicating that

² The Solicitor's Office does not explain whether the e-mail was sent by the State Office or by the Appellant.

the Solicitor's Office consented in writing to electronic service of documents, as required by 43 C.F.R. § 4.401(c)(4).

When service of an SOR is deficient, the Board's rules provide that the appeal is "subject to summary dismissal." 43 C.F.R. § 4.402(c). Under this rule, the Board has discretion as to whether dismissal of an appeal is appropriate.³ See *Red Thunder, Inc.*, 117 IBLA 167, 172 (1990) (construing "subject the appeal to dismissal"). In practice, the Board will not dismiss an appeal for a procedural deficiency in failing to serve an SOR when there is no showing that a party has been prejudiced. *Colorado Environmental Coalition*, 173 IBLA 362, 366-67 (2008); *United States v. Frank R. Petersen*, 170 IBLA 231, 233-34 (2006); *Red Thunder*, 117 IBLA at 172-73.

Although the Solicitor's Office points out the deficiency in serving the SOR, it does not claim it has been prejudiced by the delay in service. At this point, not only has that Office received a copy of the SOR, but in its April 1, 2015, letter, it responded to the substance of the SOR, and sent a copy of that letter to Appellant. There has been no claim by or actual prejudice to the Solicitor's Office. Accordingly, we will not dismiss the appeal for the deficiency in serving the SOR in these circumstances.

[2] We turn to the substantive law issue before us concerning the requirement of the claimant to make timely payment of maintenance fees or file a Waiver Certification. 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); 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 (2012), and the related filing requirements of section 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (2006), for the upcoming assessment year. 30 U.S.C. § 28f(a) (2012); 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 (2012); 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

³ Although the Board's rules have been modified somewhat since the cases we cite herein, we see no difference that would overturn our long-standing precedent. The principles articulated in those cases remain relevant under current Board rules.

therefore, 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. 30 U.S.C. § 28f(d)(1) (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).

There is no dispute that the Appellant failed to file the Waiver Certification in a timely manner, as it mailed the Waiver Certification on September 12, 2014, after the date it was due. Furthermore, Appellant does not assert it paid the maintenance fees for the assessment year. Instead, in its SOR, the Appellant offers what it believes are legitimate reasons for its failure to meet the filing requirements. Appellant states it misunderstood those requirements, as it is not a professional mine owner. Moreover, Appellant contends it was misled into believing the deadline was an “on or about” date because its filing of a waiver form for the previous assessment year was also “a bit tardy,” but there was no similar consequence (i.e., declaring the claims forfeited). Appellant states that it is a non-profit humanitarian entity with limited financial resources and that denial of the appeal would cause harm because of filing fees for refiling the claims. It asserts there is no known harm to the Department of the Interior or any third parties.

It is well-established that failure to pay a maintenance fee or to file the Waiver Certification by the deadline is a statutory defect and is not curable. *Christopher L. Mullikin*, 180 IBLA 60, 76 (2010); *see also Larry Brockman*, 185 IBLA 290, 292 (2015). Therefore, the Board cannot excuse the Appellant’s failure to carry out its responsibilities, despite its confusion or its hardships.

[3] As to Appellant’s suggestion that it was misled by BLM’s inaction on its failure to comply with the law in a previous year into believing the deadline was an “on or about date,” we reject that argument since the law is clear about the deadline. Furthermore, to the extent Appellant suggests BLM should be estopped from declaring its claims forfeited, we see no basis for application of estoppel in this case. Estoppel against the Government in matters concerning the public lands is an extraordinary remedy, and must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. *Ron Coleman Mining*, 172 IBLA 387, 391 (2007) (citing *United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978)). Moreover, there is no assertion that it relied upon a “crucial misstatement in an official written decision.” *Id.*

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/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
Eileen Jones
Chief Administrative Judge