



JAMES WICKEN

188 IBLA 13

Decided June 7, 2016



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

703-235-3750

703-235-8349 (fax)

JAMES WICKEN

IBLA 2014-203

Decided June 7, 2016

Appeal from two decisions issued by the Central Yukon Field Office, Bureau of Land Management (BLM), notifying James Wicken that his notice to conduct mining operations expired on January 21, 2013, and ordering him to cease using and occupying the public lands associated with his mining operations. FF090624 (3809), FF092118 (3715).

Affirmed; petition for stay denied as moot.

1. Evidence: Presumptions;
Evidence: Burden of Proof

The Board accords great weight to the legal presumption that administrative officials have properly discharged their duties and have not lost or misplaced legally significant files. The burden is on an appellant to provide evidence that a filing was timely made, and mere assertions or uncorroborated statements that a document was mailed to BLM are insufficient. Where a mining operator provides no corroborating evidence that he mailed an extension notice to BLM prior to the expiration of his existing notice, a copy of the notice bearing a particular date but no BLM-received date stamp, does not prove the notice was timely mailed, and cannot overcome the presumption of regularity in BLM's actions.

APPEARANCES: James T. Wicken, Fairbanks, Alaska, *pro se*; Mike Gieryic, Esq., Office of the Solicitor, Alaska Region, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE SOSIN

Summary

James Wicken appeals from and petitions for a stay of the effect of two decisions issued by the Central Yukon Field Office, Bureau of Land Management (BLM), related to his mining operations on Gold Creek, near the town of Wiseman, Alaska. In the first decision, dated January 21, 2014, BLM notified Wicken that because he had failed to notify BLM of his intent to continue mining operations by January 20, 2013, his mining operations were no longer authorized. In the second decision, dated April 18, 2014, BLM ordered Wicken to stop all mining activities on Gold Creek and reclaim the site because Wicken's use or occupancy of the public lands was no longer authorized.

Under BLM regulations, commercial mining activities can be conducted on 5 acres or less of public lands under a "notice of operations," so long as the operator had a notice in place by January 20, 2001, and notifies BLM in writing every 2 years of its intent to continue mining.¹ If an operator fails to notify BLM of its intent to continue mining prior to the expiration of a 2-year notice, the notice expires; as a result, the mining operations are no longer authorized and the operator must stop mining operations and promptly reclaim the site.² Further, when mining operations are no longer authorized, the use or occupancy of the site for mining purposes cannot continue and BLM may issue a cessation order.³ Because there is no evidence that Wicken notified BLM of his intent to continue his mining operations on Gold Creek before the January 21, 2013, expiration of his January 20, 2011, notice, BLM properly determined that Wicken's notice had expired and ordered him to cease his operations and reclaim the site as required by BLM regulations. We therefore affirm both BLM decisions and deny Wicken's petition for a stay as moot.

Wicken's Mining Claims and Notices of Extension

To facilitate BLM's ability to identify and manage surface disturbances from mining activities on public lands, BLM's regulations divide operations on mining claims into three categories: casual use, notice-level operations, and plan-level operations.⁴ Notice-level operations consist of "exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been

¹ 43 C.F.R. §§ 3809.21, 3809.332, 3809.333.

² 43 C.F.R. §§ 3809.335, 3809.605(e).

³ 43 C.F.R. § 3715.7-1(b).

⁴ 43 C.F.R. § 3809.10; *Steve Hunt*, 187 IBLA 306, 310 (2016).

completed.”⁵ Under the regulations, an operator that had a notice on file with BLM on January 20, 2001, may continue such notice-level operations if it files a request with the agency to extend the notice every 2 years.⁶ If an operator’s notice expires, the operator’s operations are no longer authorized.⁷ As a result, the operator may no longer use or occupy the public lands associated with its mining claims, and BLM is authorized to “order a temporary or permanent cessation” of such use or occupancy.⁸

In this case, Wicken has been conducting notice-level gold mining operations on four mining claims along Gold Creek since 1996.⁹ It is undisputed that Wicken had a notice on file with BLM prior to January 20, 2001, and that he properly filed extension notices every two years, until the last extension notice filed on January 20, 2011.¹⁰ What is in dispute is whether Wicken filed an extension notice before January 21, 2013, the date his January 20, 2011, notice expired, and thus extended his ability to conduct operations on his mining claims for another 2 years.

In his appeal, Wicken states that on December 21, 2012, one month before the expiration of his notice, he mailed to BLM a letter extending his notice for another 2 years.¹¹ He explains: “I did not fail to inform BLM of my intent to extend my notice. I have always mailed it in the past and it was not an issue [and] I always checked to make sure I have filed everything I am required to at the end of each year.”¹² BLM, however, responds that it “has no record or staff recollection of having timely received” Wicken’s December 21, 2012, extension notice, and that the agency properly notified Wicken that his notice had expired and ordered Wicken to cease operations and reclaim the site.¹³ BLM states that it became aware of Wicken’s

⁵ 43 C.F.R. § 3809.21(a).

⁶ 43 C.F.R. §§ 3809.300(a), 3809.332, 3809.333.

⁷ 43 C.F.R. § 3809.605(e).

⁸ 43 C.F.R. §§ 3715.1, 3715.2, 3715.7-1(b)(1)(i) (“BLM may order a temporary or permanent cessation of all or any part of your use or occupancy if . . . [a]ll or any part of your use or occupancy is not reasonably incident [to authorized mining operations] but does not endanger health, safety or the environment, to the extent it is not reasonably incident.”); *see also Austin Shepherd*, 178 IBLA 224, 232 (2009) (“Any occupancy by a mining claimant must be reasonably related to actual activities on the claims involving *authorized* prospecting, mining, or processing operations.”).

⁹ Answer at 3.

¹⁰ Administrative Record (AR) FF090624/1 (2001 and 2003 notices); AR FF090624/2 (2005, 2007, 2009 and 2011 notices); *see also* Answer at 4.

¹¹ *See* Notice of Appeal (NOA).

¹² *Id.*

¹³ Answer at 2, 4.

extension notice only on April 18, 2014, and on May 28, 2014, when Wicken “hand-delivered to BLM a purported copy of an extension notification letter dated December 12, 2012, which did not contain a date stamp or other proof of receipt by BLM.”¹⁴

Wicken Does Not Provide Evidence to Rebut the Legal Presumption that BLM Did Not Lose or Misplace the December 21, 2012, Notice

[1] In a case such as this one, where an appellant claims to have submitted a document to an agency but the agency has no record of receiving the document, this Board’s decision is governed by “the legal presumption that Government officials have properly discharged their duties and have not lost or misplaced legally significant files.”¹⁵ The Board accords great weight to this presumption of regularity and the burden is on the appellant to provide evidence that a filing was timely made.¹⁶

Our case law establishes that, in order to rebut the presumption of regularity, an appellant must provide “substantial evidence tending to show receipt of the document in question by the appropriate BLM office.”¹⁷ Further, “mere assertions or uncorroborated statements that a document was mailed to BLM are insufficient to overcome the presumption of regularity.”¹⁸

In this case, Wicken states that he mailed an extension notice to BLM on December 21, 2012, from the Fairbanks Airport post office, and suggests that BLM misfiled the document.¹⁹ Yet he provides no evidence corroborating his assertion. The December 21, 2012, notice attached to Wicken’s appeal is date-stamped by BLM with the date of May 28, 2014, one of the days that Wicken hand-delivered the document to BLM, and there is otherwise no indication that the agency timely received it. Aside from his statement in his appeal, Wicken has provided no independent corroborating evidence showing that he mailed, or that BLM timely received, his December 21, 2012, extension notice. Although it is possible for an

¹⁴ *Id.* at 5.

¹⁵ *Bradford Koles*, 186 IBLA 149, 151 (2015); *Christopher L. Mulliken*, 180 ILBA 60, 68 (2010); *see also Paul C. Lewis v. Bureau of Land Management*, 150 IBLA 76, 78 (1999) (presumption may be rebutted by “substantial evidence tending to show that BLM’s action was not regular in a particular instance.”).

¹⁶ *Bradford Koles*, 186 IBLA at 151; *Christopher L. Mulliken*, 180 IBLA at 68.

¹⁷ *Bradford Koles*, 186 IBLA at 151.

¹⁸ *Consolidated Golden Quail Resources, Ltd.*, 179 IBLA 309, 319 (2010).

¹⁹ NOA.

appellant to overcome the presumption of regularity,²⁰ Wicken's single, self-serving statement is insufficient to do so here. As we stated in a case where an appellant claimed it had timely mailed fees associated with mining claims:

A copy of a letter, bearing a particular date but no BLM-received date stamp, that was sent to BLM after the deadline, and [an] uncorroborated statement that the letter was mailed before the deadline . . . does not prove the letter was timely mailed and received by BLM and cannot overcome the presumption of regularity in BLM's actions.^[21]

We reach the same conclusion here. Without any corroborating evidence showing that Wicken, in fact, mailed the December 21, 2012, extension notice to BLM, and that BLM received it, he is unable to rebut the presumption that BLM properly discharged its duties and did not lose or misplace the December 21, 2012, extension notice. As we have stated: "The presumption of regularity operates to compel a conclusion that, when BLM records do not contain a certain document date stamped as timely received, the document was not timely filed."²² Because Wicken has not rebutted the presumption of regularity, we affirm BLM's January 21, 2014, decision.

Moreover, because we find that BLM's January 21, 2014, decision properly notified Wicken that his notice had expired, we further conclude that BLM's April 18, 2014, cessation order was also proper. As provided by BLM's regulations, any use or occupancy of public lands associated with mining operations is prohibited when it is not "reasonably incident" to authorized mining operations.²³ Here, BLM correctly explained in its cessation order that because Wicken's notice had expired, his use or

²⁰ See, e.g., *Bruce L. Baker*, 55 IBLA 55, 57-58 (1981) (presumption of regularity rebutted by evidence of the date a document was notarized and an affidavit).

²¹ *Consolidated Golden Quail Resources, Ltd.*, 179 IBLA at 319; see also *H.S. Rademacher*, 58 IBLA 152, 156 (1981) ("[T]he Board has held that uncorroborated statements, even where placed in affidavit form, to the effect that a document was filed are not sufficient to overcome the inference of nonfiling drawn from the absence of the document from the file and the practice of BLM officials to handle properly filings of legally operative documents.").

²² *Consolidated Golden Quail Resources, Ltd.*, 179 IBLA at 318.

²³ 43 C.F.R. § 3715.1; *Austin Shepherd*, 178 IBLA at 232 ("Any use or occupancy of a mining claim that is not allowed under the public land laws, the mining laws, the mineral leasing laws, or other applicable laws is unauthorized and prohibited.").

occupancy of the public lands associated with his mining claims no longer satisfied this regulatory requirement.²⁴ As such, we find no error in BLM's decision ordering Wicken to cease operations and reclaim the site associated with his mining claims.

Conclusion

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,²⁵ we affirm both BLM decisions and deny the petition for stay as moot.

_____/s/
Amy B. Sosin
Administrative Judge

I concur:

_____/s/
James F. Roberts
Deputy Chief Administrative Judge

²⁴ Cessation Order, dated Apr. 18, 2014, at 1.

²⁵ 43 C.F.R. § 4.1.