

INTERIOR BOARD OF LAND APPEALS

Lanny Perry

131 IBLA 1 (September 16, 1994)

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Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring 43 mining claims abandoned and void for failure to pay the annual rental fees required by the 1992 Department of the Interior Appropriations Act. MMC 12242, et al.

Affirmed in part, vacated in part, and remanded.

1. Notice: Generally

One who deals with the Government is presumed to know the relevant statutes and duly promulgated regulations.

2. Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--Mining Claims: Rental or Claim Maintenance Fees: Generally

It is not improper for BLM to return the affidavit of assessment work which was submitted to satisfy the requirements of 43 U.S.C. § 1744(a)(2) (1988) where it retains a date-stamped copy in the case file as evidence that the document was in fact received. Compliance with filing requirements of 43 U.S.C. § 1744(a)(2) (1988) does not affect the requirement to pay an annual rental fee which Congress imposed in the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993.

3. Administrative Procedure: Decisions--Mining Claims: Determination of Validity--Notice: Generally--Rules of Practice: Generally

A decision declaring a mining claim abandoned and void must be mailed to each claim owner at his last address of record. Where BLM fails to serve each claim owner with a copy of a decision, the decision is not effective to adjudicate the rights and interests in the claims of those owners who were not served. A copy of the decision must be mailed even though previous correspondence has been returned to BLM. Without attempted delivery of a decision and its return to BLM, there cannot be constructive service under 43 CFR 1810.2(b).

APPEARANCES: Lanny Perry, Hobson, Montana, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

On June 16, 1994, the Montana State Office, Bureau of Land Management (BLM), issued a decision addressed to various owners of 43 mining claims declaring them abandoned and void for failure to pay annual rental fees of \$100 per year for 1993 and 1994 by August 31, 1993, as required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1374 (1992). 1/ In addition, BLM returned the affidavits of assessment work which appellant filed on October 13, 1993. Lanny Perry, who has an interest in all of the claims, filed a timely notice of appeal and requested a stay of the BLM decision pursuant to 43 CFR 4.21(a). The location certificates for the 43 mining claims at issue show they are held by various combinations of 16 individuals, 2/ with appellant identified as either a locator and owner of each claim or locator and agent for Vortex Mining. 3/

1/ Exhibit A attached to the decision lists the following claims: The Lost Hoover (MMC 12242), the Lost Hoover #2 and #3 (MMC 60246-60247), the Three Trees #1, #2, and #3 (MMC 103825-103827), the Sure Thing #1 (MMC 108898), #2 and #3 (MMC 109069-109070), the Sudbury I (MMC 110585), the Lost Hoover #4 (MMC 110586), the Sure Thing #4 and #5 (MMC 113210-113211) and #6 (MMC 118204), the Shoestring #1, #2, and #3 (MMC 126402-126404), the Iron Lady #1 (MMC 134191) and #2 (MMC 134193), the Top 1 and Top 2 (MMC 142463-142464), the Ogg (lode) (MMC 151366), the Westpoint (lode) (MMC 151749), the Last Hope #1 (MMC 189464), #3 and #4 (MMC 189466-189467), and #5 through #9 (MMC 190068-190072), the Dead Horse #1 through #11 (MMC 192671-192681), and the Waterwheel #6 (MMC 192985).

2/ We note that BLM mailed copies of its decision to only 12 individual locators and Vortex Mining. The four claim owners who were not served co-own a number of the Dead Horse mining claims. The location certificate for the Dead Horse #11 identifies Kelly Ferdinand, "c/o Vortex Mining--Utica, Mt.," and Louis Loader and Donna Loader, "Utica, Mt.," as locators. No decisions were mailed to these three individuals. Will Heireman, a co-locator of the Dead Horse #2, #4, #6, and #7 whose address is "c/o Vortex Mining--Utica Mt.," was also not issued a decision. Under the regulations, the decision issued to Vortex Mining cannot be deemed to have constituted service on Ferdinand or Heireman because it was not "addressed to the addressee at his last address of record." 43 CFR 1810.2(a). Due process requires that these owners like the others receive notice and have an opportunity to respond before being deprived of their rights and interests in these claims. Thus, the BLM decision does not affect their interests in the mining claims.

3/ The Notice of Appeal is signed by Perry for Vortex Mining. Practice before the Board of Land Appeals is controlled by 43 CFR 1.3. See 43 CFR 4.3(a), 1812.1-1. In addition to representation by an attorney, 43 CFR 1.3(b) lists a number of circumstances in which individuals who are not attorneys may appear before the Board. An individual may represent members of a mining partnership of which he is a member. 43 CFR 1.3(b)(3). An

Appellant raises four matters in his notice of appeal. He contends "that the action taken by the B.L.M. was untimely, without sufficient notice as to requirements of the Appropriations Act." He asserts that imposition of the fee failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1988), and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 (1988). He claims "this entire act has constituted an unfair taking of my property rights under the 5th Amendment of the Constitution." Finally, he argues that BLM's failure to accept the affidavits of assessment work was contrary to the Mining Law of 1872. See 30 U.S.C. §§ 21-54 (1988). Appellant also requests that a stay be granted pending resolution of the appeal. See 43 CFR 4.21(b).

Congress enacted the Appropriations Act at issue on October 5, 1992. In relevant part, it provides:

That notwithstanding any other provision of law and effective upon the date of enactment of this Act, for fiscal year 1993, for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e), and the filing requirements contained in section 314 (a) and (c) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of \$100 to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993 * * *.

P.L. 102-381, 106 Stat. 1374, 1378 (1992). The Act contains a substantially identical provision requiring claimants to pay, on or before August 31, 1993, a \$100 rental fee for the assessment year ending September 1, 1994. *Id.* Congress also provided that "failure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant * * *." *Id.* at 1379.

The Department published notice of the requirement to pay rental fees in the Federal Register. 57 FR 54102 (Nov. 16, 1992). It subsequently proposed regulations to implement the Act. 58 FR 12878 (Mar. 5, 1993). The final regulations were effective upon publication. 58 FR 38186 (July 15, 1993), correction 58 FR 41184 (Aug. 3, 1993), codified at 43 CFR parts 3730, 3820, 3830, and 3850.

fn. 3 (continued)

individual also may appear on behalf of "[a] corporation, business trust, or an association, if such individual is an officer or full-time employee." 43 CFR 1.3(b)(3)(iii). Perry's signature is a certification that he is authorized and qualified to represent Vortex Mining. 43 CFR 1.5(a). He and Vortex may represent co-owners of the mining claims.

[1] Appellant's first two arguments are without merit. It is well established that one who deals with the Government is presumed to know the relevant statutes and duly promulgated regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Jack Hammer d.b.a. Hammer Oil Co., 114 IBLA 340, 343 (1990). The question is not whether appellant was individually notified. The enactment of the statute constitutes sufficient notice. In addition to the legislation itself, notice of the requirement to pay rental fees was published in the Federal Register, as were the rules subsequently promulgated. Accordingly, appellant's argument must be rejected. See Belton E. Hall, 33 IBLA 349, 352 (1978). It is apparent that appellant did receive adequate notice of the statutory requirements, as the case files contain a letter to appellant from BLM dated June 16, 1994, captioned "Receipt of Documents" which acknowledges that on August 20, 1993, he paid \$2,400 rental fees for 12 mining claims which are not part of this appeal.

Appellant's argument regarding the APA is without merit because the requirement to pay rental fees was enacted by Congress, which is not subject to the APA. See 5 U.S.C. § 551(1) (1988) (defining "agency"). In regard to the regulation which also requires payment of the rental fees (43 CFR 3833.1-5), BLM undertook "notice and comment" rulemaking and appellant has not identified any deficiency in the procedure followed. See id. § 553. Similarly, Congress is not subject to the environmental review provisions of NEPA. 42 U.S.C. § 4332 (1988) ("agencies of the Federal Government shall"). In promulgating regulations, BLM determined that they did not constitute a major Federal action significantly affecting the quality of the human environment. 58 FR 38186, 38195 (July 15, 1993); 58 FR 12878, 12882 (Mar. 5, 1993). Appellant has not presented any argument that this determination was in error.

[2] The Mining Law of 1872 requires annually performing \$100 worth of assessment work to preclude location of the land by another. 30 U.S.C. § 28 (1988). The fact that BLM returned the affidavits of assessment work appellant submitted is without consequence, as BLM retained copies in the case files as evidence that the documents had been received. Copies of the seven pages of affidavits of assessment work filed by appellant on October 13, 1993, are contained in the case files, with a notation on each page that it was "filed for informational purposes only." Thus, the requirement to record an affidavit or notice of intent to hold which Congress imposed as part of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(1) (1988), was satisfied. Compliance with the filing requirement, however, does not affect the requirement to pay annual rental fees or excuse appellant's failure to pay, although payment of the fee obviates compliance with the assessment work requirement of the Mining Law of 1872 and the requirement to file a copy of the affidavit with BLM. P.L. 102-381, 106 Stat. 1374, 1378 (1992). Having retained copies of the documents in the case files as part of the history of the claims, it was not improper for BLM to return the affidavits because rentals fees had not been paid by August 31, 1993, as required by the Appropriations Act and appellants had not qualified for a small miner exemption. See 43 CFR 3833.1-6, 3833.1-7.

Finally, appellant argues that the Appropriations Act constitutes an unfair "taking" in violation of the Constitution. The Interior Board of Land Appeals is not the proper forum in which to raise this claim. See 28 U.S.C. § 1491 (1988).

Having rejected appellant's arguments, we affirm BLM's conclusion that, as a matter of law, the mining claims became abandoned and void for failure to pay the rental fees for the 1993 and 1994 assessment years by August 31, 1993. William B. Wray, 129 IBLA 173 (1994); Lee H. & Goldie E. Rice, 128 IBLA 137 (1994). Because we have decided the appeal on the merits, the request for a stay is denied as moot.

[3] Review of the case files, however, has revealed some deficiencies in the service of the BLM's decision that require discussion. Service of a decision is governed by 43 CFR 1810.2. It provides that "the requirement for mailing is met when the communication, addressed to the addressee at his last address of record in the appropriate office of the Bureau of Land Management, is deposited in the mail." 43 CFR 1810.2(a). Once this has been done, the "person will be deemed to have received the communication if it was delivered to his last address of record * * *, regardless of whether it was in fact received by him." 43 CFR 1810.2(b). If the item cannot be delivered to the last address of record "because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists" constructive service is achieved when the item is returned with substantiation by postal authorities. Id.; see Gerhard W. Befeld, 123 IBLA 118, 120-21 (1992).

A copy of the decision was mailed to Marion E. Heller, Jr., P.O. Box 873, Lewistown, Montana 59457, which was received and signed for by "M. Marklane." Ordinarily, the difference between the locator's name and the signatory of the return receipt card would not be significant because the decision would be deemed to have been delivered as provided by 43 CFR 1810.2(b). The location certificates for the Dead Horse #1 through #10, however, show Heller's address to be "Airport Rd. Box 873." We conclude the decision was not mailed to Heller's last address of record and, consequently, cannot affect his rights and interests in the Dead Horse #1 through #10 mining claims.

Also, the decision cannot affect the interests of Pete Prison, a co-owner of the Lost Hoover, the Lost Hoover #2, #3, and #4, and the Sudbury I mining claims, due to the failure of BLM to serve a decision at his last address of record. The decision names Pete Prison, "address unknown," indicating that no copy was sent to him. The location notice for the Lost Hoover located in 1978 lists Prison's address as "Hobson, Mt. 59452" and the case file includes two envelopes mailed to Prison at this address in 1985 and 1987 which were returned to BLM. The location certificate for the Lost Hoover #2 and #3 located in 1980, however, list his address as "Utica Mt. 59452" and the same address appears on the certificates of location for the Sudbury I located in 1981 and the Lost Hoover #4 located in 1984. Whether or not the more recent address is correct, the requirement to serve a decision has not been met until a copy has been mailed, 43 CFR

1810.2(a), and without attempted delivery of a decision and its return to BLM there cannot be constructive service under 43 CFR 1810.2(b).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Montana State Office is affirmed in part, vacated in part, and remanded to the extent it attempts to adjudicate the rights and interest of Pete Prison in the Lost Hoover (MMC 12242), the Lost Hoover #2 and #3 (MMC 60246-60247), the Sudbury I (MMC 110585), the Lost Hoover #4 (MMC 110586), and of Marion E. Heller, Jr., in the Dead Horse #1 through #10 (MMC 192671 through 192680).

Gail M. Frazier
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

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