

INTERIOR BOARD OF LAND APPEALS

Carol E. Shaw, et al.

136 IBLA 84 (July 1, 1996)

Title page added by:  
[ibiadecisions.com](http://ibiadecisions.com)

CAROL E. SHAW ET AL.

IBLA 94-792

Decided July 1, 1996

Motion to expedite consideration of an appeal from a decision of the California State Office, Bureau of Land Management, declaring mining claims abandoned and void, and to lift a stay of the decision. CAMC 33102 et al.

Stay dissolved; case expedited; decision affirmed.

1. Administrative Authority: Generally--Delegation of Authority--Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Generally--Office of Hearings and Appeals--Regulations: Interpretation--Rules of Practice: Appeals: Stay

A stay of a BLM decision declaring a mining claim abandoned and void is properly dissolved upon a showing that mining claimants have no likelihood of success on the merits of their pending appeal and there is no likelihood of injury to them if the stay is dissolved.

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

Enactment of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 gave sufficient notice of the mining claim rental fee payment requirement contained therein; BLM was not required to provide individual notification of the rental requirements imposed by the statute, nor was BLM estopped to deny such payment had not been made in the absence of such notification.

APPEARANCES: Louis Demas, Esq., Sacramento, California, for appellants; Rose Miksovsky, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the U.S. Forest Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Carol E. Shaw and Robert H. Shaw have appealed from a July 21, 1994, decision of the California State Office, Bureau of Land Management (BLM), declaring the Horseshoe Bend placer mining claim numbered CAMC 33102 abandoned and void for failure to timely pay rental fees for the 1993 and 1994 assessment years, as required by the Department of the Interior

and Related Agencies Appropriations Act for Fiscal Year 1993 (1992 Act), 106 Stat. 1378-79 (1992), as implemented by Departmental regulations 43 CFR 3833.1-5 (1993), 3833.1-6 (1993), and 3833.1-7 (1993). The BLM decision also declared null and void ab initio the Horseshoe Bend claim, relocated by appellants as CAMC 260347 on October 4, 1993, for the reason that the claim was situated on land closed to mineral entry. Pursuant to provision of the Department's general stay regulation provided at 43 CFR 4.21, the BLM decision was stayed pending appeal on September 22, 1994, to permit briefing of issues presented by appellants in the statement of reasons (SOR) they filed in support of their appeal. On May 6, 1996, the U.S. Department of Agriculture, U.S. Forest Service (Forest Service), responding to the SOR, filed a motion to expedite consideration of this appeal, or lift the stay. Appellants have joined in the Forest Service request for expedited consideration of this appeal.

The Forest Service, as the agency responsible for management of lands encompassing the claims here at issue, complains that no prior notice that an application for stay had been filed by appellants was provided to the agency, and that Forest Service administration of National Forest System Lands included in the Trinity Alps Wilderness is hampered by the fact that a stay was issued without prior participation by the agency. The stay issued in 1994 is now said to provide a basis for proposals by appellants to continue mining operations on CAMC 33102 and/or CAMC 260347, to the detriment of the Forest Service. It is alleged that, since some operations on the claim have continued since the stay issued, and because further placer mining operations are proposed, there will be irreparable harm to surface resources and loss of wilderness values if the stay continues in effect. According to the Forest Service, the activity proposed by appellants would be contrary to policy governing management of the land as wilderness; the Forest Service explains that:

Carol Shaw has submitted a proposed plan of operations to conduct mining activities on the former Horseshoe Bend unpatented mining claim in the Trinity Alps Wilderness from June 15, 1996 with no proposed ending date. \* \* \* Ms. Shaw proposes to suction dredge on her former mining claim \* \* \*. She also proposes to use a sluice box \* \* \*. Major impacts to surface resources in a wilderness are the disturbance to the riparian area by digging into the stream bed with the suction dredge, short term loss of water quality caused by the silt and debris that are disturbed and carried downstream with the flowing stream water and later settle out on potential anadromous fish spawning gravel, the potential of spillage of petroleum products into or next to the river during the fueling and change of lubricants for the suction dredge engine, noise pollution from the dredge engine in an area where motorized equipment would otherwise be prohibited, the occupancy of National Forest System lands with a storage shed that would otherwise be prohibited, and the nonconforming use

of commercial operations in a wilderness that would otherwise be prohibited.

(Forest Service Motion, Affidavit of Albert W. Buchter at 2).

A placer mining claim location notice for CAMC 33102 filed with BLM by appellants on August 30, 1979, recites that it is an amended location of the Muleshoe Bend Placer, which was located in 1923 in sec. 8, T. 37 N., R. 10 W., Mount Diablo Meridian, California. All of sec. 8 is presently within the Trinity Alps National Forest Wilderness; effective at 12 p.m. December 31, 1983, National Forest Wilderness lands were withdrawn from mineral entry. See 43 CFR 3823.4. Consequently, if the Horseshoe Bend claim was void, as BLM found, then the land in sec. 8 where the claim was originally located was no longer available for mineral entry in October 1993 when CAMC 260347 was attempted to be located. See John F. Malone, 86 IBLA 85, 88 (1985) and cases cited therein. The principal issue on appeal, therefore, is whether BLM correctly found that failure to pay rental fees for the 1993 and 1994 assessment years caused the Horseshoe Bend claim to become abandoned and void. It is undisputed that rental fees on the Horseshoe claim for 1993 and 1994 were not paid by appellants, nor did they apply for exemption from such payment.

Appellants contend, citing United States v. Locke, 471 U.S. 84, 108 (1985), that BLM's decision finding CAMC 33102 abandoned and void operated to deny them due process of law by depriving them of their claim without giving them "reasonable opportunity both to familiarize themselves with the general requirements and to comply with those requirements." It is also argued that the United States is estopped to deny that appellants complied with the requirements of the 1992 Act, because BLM failed to give them adequate notice of the fee payment requirements. In support of these arguments, appellants explain that:

Ms. Shaw provided to the Bureau her address for all communications regarding her claims. \* \* \* During the times she was away from her primary residence she made arrangements to have all her Bureau mail brought to her immediate attention. \* \* \* Second, beginning in 1990, Ms. Shaw visited the Bureau's Redding Office to insure that all requirements of law had been met. Specifically, such a visit was made in September of 1992 shortly before passage of the act that is the subject of this appeal. At that time, in response to her questions, Bureau officials assured her that all the requirements of the law for recording and maintaining such claims had been fully met. At that time she was not told that any change of law was imminent or even proposed. \* \* \* Ms. Shaw was careful to comply with the requirements imposed on claimants under FLPMA. She caused her proof of labor, for the Horseshoe Bend Placer Mining Claim and her other claims, for the assessment year ending September 1, 1992 to be recorded by the

Siskiyou County Recorder and when it was returned, Ms. Shaw timely mailed it to the Bureau for filing, as required by FLPMA and Bureau Regulations. The proof of labor was returned by mail by the Bureau along with a receipt for payment of service fees. The date of receipt was November 9, 1992. \* \* \* The Bureau did not forward with the return mail any type of reference to the Act of October 5, 1992, or in any way mention its requirements. \* \* \* The Bureau easily could have returned in the return mailing some type of notice of the change of law, at a minimum, the Bureau easily could have hand-stamped the envelope with some type of information at least triggering an obligation for Ms. Shaw to make a further inquiry. \* \* \* On or about July 15, 199, [sic] the Bureau made a special mailing to Ms. Shaw regarding new Bureau filing requirements. \* \* \* On the outside of the mailing the Bureau had printed: "IMPORTANT NOTICE REGARDING MINING CLAIM FILING REQUIREMENTS." \* \* \* There is no reason that a similar notice could not have been sent to Ms. Shaw's address of record sufficiently prior to August 31, 1993. [Emphasis in original; internal citations and footnotes omitted.]

(SOR at 8, 9).

Under the circumstances outlined by the parties, we grant expedited consideration of this case to consider whether to continue to stay the BLM decision; in so doing, we find that the record presently demonstrates there is no likelihood that appellants can prevail on the merits of their appeal and dissolve the stay. Further, we affirm the BLM decision finding the claim was forfeited when there was neither payment of rental fees nor certification of exemption from payment by appellants before expiration of the August 31, 1993, deadline. Because the claim is situated on land withdrawn from mineral entry in 1983, we also affirm BLM's finding that the 1993 location attempt by appellants was a nullity. We consider first the question raised by the Forest Service motion to lift the stay imposed in 1994 on the BLM decision.

[1] In David L. Burton, 11 OHA 117 (1995), the Director, Office of Hearings and Appeals, found that the Interior Board of Land Appeals possesses authority under the general grant of authority from the Secretary at 43 CFR 4.1 to issue, modify, or dissolve stays of BLM decisions during the pendency of an appeal before the Board without regard to the time limitation imposed by 43 CFR 4.21(b)(4). 11 OHA at 120. This authority to administer stays of decisions pending appeal, the Director found, must be flexible enough to permit the Board to adjust to changed circumstances that become known during an appeal: "When circumstances change, there must be a corresponding ability [by IBLA] to respond." 11 OHA at 128. Such a response is required here. Nonetheless, the 45-day limitation on Board action set by the general stay regulation at 43 CFR has now passed, and direct application of the rule is therefore problematic, as the Burton decision points out. The test for stay issuance established by 43 CFR

4.21(b) restates standards generally followed by this Board in deciding whether to grant a stay such cases. See Jan Wroncy, 124 IBLA 150, 152 (1992); Marathon Oil Co., 90 IBLA 236, 245, 246 (1986). This test, borrowed from Federal court cases dealing with preliminary temporary injunctions, requires consideration of likelihood of success on the merits, relative harm to the parties, possibility of irreparable harm, and the public interest, as factors relevant to stay issuance. Compare Marathon Oil Co., and Jan Wroncy, supra, with 43 CFR 4.21(b), where the same four standards are invoked. This four-part test requires that "a party must demonstrate either (1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor." Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992). We apply this test in deciding whether to continue the stay previously issued in this case; in doing so, we first consider whether the record before us shows appellants have a probability of success on the merits of their appeal.

The 1992 Act provides 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. A mining claimant must either make his rental fee payment or certify his qualification for exemption from such payment and election to perform the assessment work to the Secretary by August 31, 1993. Id. Since appellants did not certify they qualified for a small miner exemption for the 1993 and 1994 assessment years, they were required to pay the required rental fee for the claims on or before August 31, 1993. Because there is no evidence in the record of such payment, and it is undisputed that appellants did not pay the required fees, their failure to timely satisfy the requirements of the 1992 Act resulted in a conclusive presumption of abandonment of the claims. See Jesse L. Cleary, 131 IBLA 296, 297 (1994) and cases cited therein. Under the circumstances, therefore, there is no likelihood that they can prevail on the merits of their appeal consistent with standards for stay issuance stated by 43 CFR 4.21(b)(ii) or the Wroncy opinion; nor can they, under the circumstances, claim any injury to a legally recognized right in the land occupied by their former claim. There is, as a consequence, insufficient basis in the record to support continuance of the stay issued in 1994.

[2] Appellants argue that, notwithstanding the statutory rental fee payment requirement, they were entitled to adequate and individual notice before it could be imposed upon them. The Department, however, has taken the position that enactment of the statute gave sufficient notice of the new requirement. Keith Lindsey, 130 IBLA 346, 348 (1994). Moreover, notice of the requirement to pay rental fees was published in the Federal Register, as were subsequently promulgated rules implementing the 1992 Act. 57 FR 54102 (Nov. 16, 1992); 58 FR 38186 (July 15, 1993). Individual notice of enactment of the statutory fee payment requirement was not needed in order to afford appellants due process of law under

these circumstances; the argument that it was must therefore be rejected. See Lanny Perry, 131 IBLA 1, 4 (1994), and authorities cited therein.

Nor can their reliance on incomplete information received from BLM excuse appellants from compliance with requirements imposed by the 1992 Act. See 43 CFR 1810.3. Advice from BLM upon which reliance is predicated so as to support a claim of estoppel must appear as a crucial misstatement in an official decision. See Steven E. Cate, 97 IBLA 27, 32 (1987), and authorities cited. No such decision was issued in this case. The obligation to satisfy rental fee requirements imposed by the 1992 Act rests with claim holders, not with BLM, since the 1992 Act provides "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." 106 Stat. 1379. As stated in Nannie Edwards, 130 IBLA 59, 60 (1994), "failure to qualify for the small miner exemption or to pay the \$100 claim rental on or before August 31, 1993, resulted in extinguishment of the affected claims by operation of law notwithstanding [an] intention to continue to hold them." The arguments advanced by appellants in support of their appeal must, therefore, be rejected.

Appellants propose to continue placer mining operations while this appeal remains pending before us. Under the circumstances now shown to exist, however, appellants have no grounds upon which to oppose dissolution of the stay granted in 1994. They do not dispute that they failed to make the required mining claim rental fee payments on time. Since their arguments that this failure should be excused cannot prevail on appeal, the mining claim was extinguished, as BLM found, when payment was not made. In the absence of a valid mining claim, none of the standards generally applied to determine whether to grant a stay request can be met by appellants, who lack any legally recognized right in the land formerly occupied by their claim. As the record on appeal does not provide support for continuation of the stay, it must be dissolved.

As a further consequence of our finding that there is no likelihood of success on the merits of this appeal, the BLM decision finding their original claim, CAMC 33102, to be abandoned and void for failure to make required rental payments must be affirmed. 130 IBLA at 60. There is no point in delaying a decision in such cases as this, for in considering whether to continue to stay BLM's decision we have necessarily decided the case on its merits. See Clay Worst, 128 IBLA 165, 166 (1994). After the original claim became void, the attempt by appellants in 1993 to make a new location of their claim was ineffective because it was made on land withdrawn from mineral entry. John F. Malone, *supra*. Therefore, BLM also correctly found that the claim located as CAMC 260347 in 1993 was null and void ab initio.

Appellants have requested an opportunity for hearing before an Administrative Law Judge if there is any disputed material fact that is

relied upon by the Board in reaching a decision in this case. There is, however, no dispute about the essential fact of nonpayment of fees upon which this decision rests. There being no material question of fact that could be reasonably be referred to hearing, none will be ordered. Appellants also request, in the event this appeal is unsuccessful, that a stay be ordered so as to permit them to take an appeal herefrom. Appellants have cited no authority in support of this request, and it is not clear that this Board is empowered to grant such relief. See 5 U.S.C. § 704 (1994).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the stay issued on September 22, 1994, is dissolved effective August 31, 1996, and the decision appealed from is affirmed.

---

Franklin D. Amess  
Administrative Judge

I concur.

---

Gail M. Frazier  
Administrative Judge