

INTERIOR BOARD OF LAND APPEALS

Steve Hicks

136 IBLA 190 (July 30, 1996)

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STEVE HICKS

IBLA 96-192

Decided July 30, 1996

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring mining claims abandoned and void. FF-59005, FF-59034, and FF-59035.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim–Federal Land Policy and Management Act of 1976: Service Charges–Mining Claims: Abandonment–Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold–Mining Claims: Rental or Claim Maintenance Fees: Generally–Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

Under 43 CFR 3833.1-3(c), where a mining claimant submitted affidavits of assessment work and failed to submit the required service charges, it was improper for BLM to reject the affidavits without first providing him with a deficiency notice informing him that he had 30 days from receipt of the notice in which to submit the required service fees.

APPEARANCES: Steve Hicks, Livingston, Montana, pro se; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

Steve Hicks has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated January 23, 1996, declaring unpatented mining claims FF-59005, FF-59034, and FF-59035 abandoned and void. The basis for BLM's decision was that the affidavit of labor for the filing period ending December 30, 1995, was not accompanied by the service charge required by 43 CFR 3833.1-4(c). Hicks mailed the affidavit of labor for the claims to BLM in an envelope postmarked December 29, 1995,

and it was received by BLM on January 8, 1996. The affidavit of labor bears a stamp, presumably by BLM, which says: "CANCELLED DUE TO NON-PAYMENT OF FEES." 1/

In its decision, BLM states that pursuant to the regulations, "annual filings submitted in accordance with 43 CFR 3833.2 shall be accompanied by a nonrefundable service charge of \$5.00 for each mining claim or site. Failure to submit the proper service charge will cause the filings to be rejected and returned to the claimant/owner." Further, BLM states that "because the affidavit of assessment work for 1995 was not properly filed during the mandatory filing period, the mining claims * * * are deemed abandoned and void. The casefiles will be closed when this decision becomes final." (Emphasis in original.) Hicks filed his notice of appeal with BLM on February 23, 1996, and on that same date BLM transmitted the administrative record to this Board. It would appear that BLM considered its decision to be final upon issuance.

In his statement of reasons, Hicks offers the following as the "main reason" why the affidavit of labor was not accompanied by the service charge:

[T]he Alaska BLM office was closed the last week of December 1995 and Milan Martinek, the person who filed the assessment work was not able to file in person. With ever changing federal regulations that no doubt number in the tens or hundreds of thousands of pages, the only safe way to file mining documents is to do it in person.

(Statement of Reasons at 1).

Regulation 43 CFR 3833.1-4(c) requires that annual filings submitted pursuant to 43 CFR 3833.2, such as affidavits of assessment work, shall be accompanied by a nonrefundable service charge of \$5 for each mining claim, millsite, or tunnel site. However, 43 CFR 3833.1-3(c) provides:

Failure to provide full payment of service charges set forth in § 3833.1-4 will be curable for documents and filings made pursuant to §§ 3833.2 and 3833.3 and amended locations filed under § 3833.1. Such documents and filings will be noted as being recorded on the date initially received, provided that the claimant submits the proper service charge within 30 days of receipt of a deficiency notice from the authorized officer. Failure to submit the proper service charge as required by this

1/ On May 20, 1996, counsel for BLM filed a request with the Board that it expedite its review of this appeal. We hereby grant the request.

paragraph will cause filings made pursuant to § 3833.2 and 3833.3 and amended locations filed under § 3833.1 to be rejected and returned to the claimant/owner.

[1] The question presented by this appeal is whether BLM should have applied 43 CFR 3833.1-3(c) and provided Hicks with a deficiency notice. The Board addressed a similar question in R. Keith Barrett, 123 IBLA 240 (1992), wherein BLM declared a series of unpatented mining claims abandoned and void because the check which accompanied Barrett's affidavits of labor was not honored by his bank. The affidavits of labor arrived at the BLM office on January 3, 1991. 2/ The Board noted that "submission of a check, which upon presentment is dishonored by the bank on which it is drawn, does not constitute timely payment of the service fees for annual mining claim filings." 123 IBLA at 242. The regulation then in effect, 43 CFR 3833.1-4 (1988), which is identical in all material respects to the current version which applies to Hicks' appeal, provided:

(a) Prior to January 1, 1991. Filings that are not accompanied by the service charges set forth in § 3833.1-3 of this title shall be noted as being recorded on the date received provided that the claimant submits the proper service charge within 30 days of receipt of such deficiency notice by the authorized officer. Failure to submit the proper service charge shall cause the filing to be rejected and returned to the claimant/owner. 3/

2/ Because the envelope was not a part of the record, and the Board could not independently confirm that the envelope was postmarked on Dec. 31, 1996, as indicated by a handwritten notation on the affidavits of labor, the Board deemed the transmittal timely for purposes of the grace period regulation, 43 CFR 3833.0-5(m) (1992).

3/ Subsection (b) of the regulation eliminated any necessity for a deficiency notice beginning Jan. 1, 1991. This regulation was changed on July 15, 1993, when the Department promulgated regulations implementing the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Act), P.L. 102-381, 106 Stat. 1374. 58 FR 38186 (July 15, 1993). The regulation governing service charges, 43 CFR 3833.1-3(b)(2), reinstated the deficiency notice requirement:

"Filings submitted pursuant to §§ 3833.2, 3833.3, or 3833.1-7, and amended locations filed under § 3833.0-5(p), that are not accompanied by the full payment of service charges set forth in § 3833.1-4 shall be curable. Such filings shall be noted as being recorded on the date received provided that the claimant submits the proper service charge within 30 days of receipt of a deficiency notice from the authorized officer. Failure to submit the proper service charge shall cause the filing to be rejected and returned to the claimant/owner."

In R. Keith Barrett, supra, the Board ruled that Barrett's affidavits of labor were filed in compliance with the grace period provisions of 43 CFR 3833.0-5(m) (1992), ^{4/} and that they would have been considered timely filed had the check for the service charge not been dishonored by the bank on which it was drawn. ^{5/} The Board concluded that BLM should have provided Barrett with a deficiency notice pursuant to 43 CFR 3833.1-4(a) (1988) informing him that he had 30 days from receipt of the notice in which to submit the required service fee.

As noted, Hicks' affidavit of labor was mailed to BLM in an envelope postmarked December 29, 1995, and it was received by BLM on January 8, 1996. Thus, Hicks' affidavit of labor would have been considered timely filed had it been accompanied by the appropriate service charge. BLM did not apply 43 CFR 3833.1-3(c) in Hicks' case, but simply returned the affidavit of labor for the 1995 filing period to him. As in R. Keith Barrett, supra, this was improper. "[T]he appropriate course of action is for BLM to notify the claimant/owner that there is a deficiency, and that the claims will be rejected and returned if the amount of the deficiency is not submitted within 30 days of receipt of this notice." 123 IBLA at 243. Under 43 CFR 3833.1-3(c), it was improper for BLM to reject Hicks' affidavit of labor without first providing him with a deficiency notice informing him that he had 30 days from receipt of the notice in which to submit the required service fee.

Accordingly, we must set aside BLM's decision and remand this case to BLM to allow it to provide Hicks with the deficiency notice required by the regulation. Should he fail to submit the service charge of \$5 per claim within the 30 day period, BLM would be correct in rejecting the filings and returning them to him under 43 CFR 3833.1-3(c).

^{4/} This regulation was also changed on July 15, 1993, by the regulations promulgated to implement the Act. The amended version shortened the grace period from 20 calendar days to 15 calendar days:

"For the purposes of complying with § 3833.2, a filing is timely if the required affidavit of assessment work or notice of intent to hold is received within the time period prescribed by law, or if mailed to the proper BLM office, is in an envelope clearly postmarked by the United States Postal Service within the period prescribed by law and received by the proper BLM office within 15 calendar days subsequent to such period."

^{5/} The preamble to the promulgation of 43 CFR 3833.1-4(a) states that the regulatory grace period was to be extended to those claimants who submitted filings without the fees or with insufficient fees. 53 FR 48879 (Dec. 2, 1988).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and this case is remanded for further action consistent with this decision.

James L. Bynes
Chief Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge