INTERIOR BOARD OF LAND APPEALS

George Jaslowski

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GEORGE JASLOWSKI

IBLA 94-423 Decided January 17, 1997

Appeal from a decision of the Chief, Solid Minerals Adjudication Section, Montana State Office, Bureau of Land Management, declaring mining claims abandoned and void for failure to pay rental fees for both the 1993 and 1994 assessment years. M MC 22756 - M MC 22760

Affirmed.

1. Regulations: Validity--Mining Claims: Rental or Claim Maintenance Fees: Generally

Mining claim rental fee regulation 43 CFR 3833.1, which was made effective upon publication in the Federal Register on July 15, 1993, was not defectively published in violation of 5 U.S.C. § 553(d) (1994) because it was not in the public interest to delay the effective date of the rule for 30 days following publication.

2. Mining Claims: Rental or Claim Maintenance Fees: Generally

Failure to pay the rental fee required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), resulted in forfeiture of an unpatented mining claim.

APPEARANCES: Eric Rasmusson, Esq., Boulder, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

George Jaslowski has appealed from a March 22, 1994, decision of the Chief, Solid Minerals Adjudication Section, Montana State Office, Bureau of Land Management (BLM), declaring mining claims, M MC 22756 - M MC 22760 abandoned and void for failure to pay rental fees for assessment years ending September 1, 1993, and September 1, 1994.

The BLM decision declared the mining claims abandoned and void for failure to comply with requirements imposed by the Department of the

Interior and Related Agencies Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1374, 1378-79 (1992). The decision found that in order to hold a claim, Jaslowski was required to pay rental fees in the amount of $100 for each claim for both the 1993 and 1994 assessment years on or before August 31, 1993, in the absence of qualifying for a small miner exemption. Since BLM did not receive either rental fees or qualifying certificates of exemption from Jaslowski by August 31, 1993, BLM held the claims were conclusively deemed to be abandoned and void by operation of law.

The Appropriations Act at issue became law on October 5, 1992. In relevant part it provides that

> 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 * * *.

106 Stat. 1378. The Appropriations Act also contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, and requiring payment of an additional $100 rental fee for each claim on or before August 31, 1993. 106 Stat. 1378-79. On July 15, 1993, the Department published regulations to implement the rental fee provision. 43 CFR 3833.1; 58 FR 38186, 38199.

Jaslowski argues that the Secretary violated provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553(d) (1994) by publishing regulations implementing the Appropriations Act fee schedule that became effective on the date of publication. The Board has been frequently called upon to consider the question of whether Departmental regulations were in fact legally published. See, e.g., Georesources, Inc., 107 IBLA 311, 96 I.D. 77 (1989).

Jaslowski asserts the comment period for the proposed regulation was too brief considering the substantive nature of the regulation and cites State v. Bowen, 656 F. Supp. 1093 (D. Colo. 1987) as proof that in some situations even a 60-day comment period has been held to be too brief. The proposed regulations were published March 5, 1993, with comments due by April 19, 1993. We must reject his argument. State v. Bowen is distinguished as involving a complex issue in which a particular study did not become available until after the comment period ended. Unlike the situation in the Bowen case, there is nothing in the record to indicate

that Jaslowski ever asked BLM to extend the comment period, nor has he shown that these regulations involve such a complex issue as to require an extended comment period. The comment period was not too brief for the issue involved, as indicated by the fact that BLM received 240 comments on the proposed regulations.

[1] Jaslowski also contends that making the final regulation effective on the date of its publication, July 15, 1993, violated the APA. The APA requires that publication of a substantive rule shall be made no less than 30 days before its effective date. 5 U.S.C. § 553(d) (1994). Nonetheless, the statute provides for certain exceptions to the 30-day rule including "as otherwise provided by the agency for good cause found and published with the rule." Id. BLM found that there was good cause for making the final regulations effective on the date of publication, rather than 30 days later. This was so, BLM stated in the preamble to the final regulations, because it would not have been in the public interest to delay the effective date until 30 days after publication, since the mining industry needed as much time as possible to prepare to comply with the rule. BLM also concluded that BLM offices would not be able to accept filings or payments or assist the public in other ways until the rule was effective.

Jaslowski cites Kelly v. DOI, 339 F. Supp. 1095 (E.D. Cal. 1972), in support of his argument: the Kelly court stated that in order for an agency to avail itself of the "good cause" exception, it must first determine that compliance with the 30-day requirement is either impracticable, unnecessary or contrary to the public interest. Id. at 1101. The legislative history of the APA shows that a purpose for deferring the effectiveness of a rule under section 553(d) was "to afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take other action which the issuance may prompt" (S. Rep. No. 752, 79th Cong., 1st Sess. 15 (1946); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 25 (1946)). The regulations at issue here did not create the requirement of paying rental fees, nor did they set the August 31, 1993, deadline: Congress established the rental fee requirement and set the deadline for payment in the Appropriations Act.

The regulations established procedures to be followed to meet the deadline fixed by Congress. The date set by the statute for payment of rental fees would have remained August 31, 1993, no matter when the regulations were made effective. The practical effect of declaring the regulations to be invalid would, consequently, be a nullity as far as Jaslowski is concerned. The August 31, 1993, rental fee deadline is statutory and exists separately from the regulation. Jaslowski's rental fees were received on September 1, 1993. Even if this Board were to declare the regulations invalid, the rental fee deadline would remain August 31, 1993, and his fees would still have been received after that date. It would therefore have been contrary to the public interest to delay the effective

date of the regulations, because delay would have given mining claimants less time to prepare to make the newly required payments. That would have been contrary to the purpose of the APA to provide notice that changes were about to occur. Therefore we conclude that good cause was shown in making the regulations effective immediately and we find that the regulations were properly published.

Jaslowski also argues that the Secretary should have adopted Alternative Two that was stated in the proposed rules published on March 5, 1993 (58 FR 12878). That alternative would have exempted claimants from the requirement to pay the rental fee if assessment work was done during the period between September 1 and October 4, 1992. He maintains that he filed his affidavit of assessment work, showing he had performed assessment work from November 1991 through November 1992, on December 7, 1992. He argues that because BLM did not reject his filing BLM should be estopped from arguing he was not in compliance with the law in effect before the Appropriations Act became law, and that application of the final rule to him is a void retroactive application of the laws.

His argument must be rejected. In proposing regulations, BLM did consider the possibility that some mining claimants performed assessment work prior to passage of the legislation, as Jaslowski asserts he did. BLM asked for comments on the option (Alternative Two) of exempting claimants who completed assessment work between September 1 and October 4, 1992, from paying the rental for the year ending on September 1, 1993. 58 FR 12878, 12879 (Mar. 5, 1993). Alternative Two was not adopted, however, in part because the Chairman and the Ranking Minority Member of the House Appropriations Subcommittee on Interior and Related Affairs informed the Department that it was not the intent of Congress to allow an exemption as outlined in Alternative Two and that Alternative One reflected the will of Congress. They noted that such an exemption had been passed by the House but had been struck in the Senate and not restored by the House-Senate Conference Committee. 58 FR 38186, 38190-91 (July 15, 1993). Congress did allow a small miner exemption under which Jaslowski could have avoided the choice of paying the rental fee or losing his claims. Procedures to implement this exemption were established as part of the regulations. 43 CFR 3833.1-7. The record does not indicate that Jaslowski applied for exemption.

We must also reject his contention that the application of the regulation is retroactive. The Appropriations Act became law on October 5, 1992. It was that Act that established the fees and set the payment deadline. On November 16, 1992, BLM published notice in the Federal Register of the statutory requirement to pay rental fees on or before August 31, 1993. 57 FR 54102. On March 5, 1993, BLM proposed regulations to implement the Act. 58 FR 12878. 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. Jaslowski

therefore had advance notice that the rental fees set by Congress were due on August 31, 1993; all persons dealing with the Government are presumed to have knowledge of relevant statutes and regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

Even if we were able to accept Jaslowski's argument concerning the possible application of Alternative Two, it would not change the result in this case because Alternative Two would only have excused him from paying rental for the assessment year ending September 1, 1993. 58 FR 12878, 12885. The rental due on August 31, 1993, however, also included the need to make payment for the assessment year ending on September 1, 1994. 106 Stat. 1378. Since no rental fees were received on or before August 31, 1993, the fees for the assessment year ending on September 1, 1994, were late, rendering the claims abandoned and void.

Jaslowski contends there is a conflict between the Appropriations Act and the Omnibus Reconciliation Act of 1993 (Budget Act), 107 Stat. 405 that relieves him of the need to comply with the rental payment requirement. He states that the Appropriations Act is applicable to 1993 and 1994 while the Budget Act applies to 1994 through 1998. He concludes that the Appropriations Act is therefore void for vagueness, rendering it constitutionally defective. This conclusion is a continuation of the argument that the two statutes are in conflict and cannot be reconciled with one another. While the two statutes might be confusing, there is no conflict between them. The Appropriations Act requires a rental fee be paid for each claim for the assessment years beginning at noon on September 1, 1992, and at noon on September 1, 1993. The fees for both years were to be paid by August 31, 1993. The Budget Act requires that a maintenance fee be paid before the commencement of each assessment year starting with the assessment year beginning on September 1, 1994. 107 Stat. 405, § 10101. The first maintenance fees under the Budget Act were to be paid on or before August 31, 1994, for the assessment year starting September 1, 1994. See 43 CFR 3833.1-5. Therefore, there is no conflict between the statutes, since they cover different assessment years, and the arguments based upon this perceived dissonance in legislative drafting must be rejected.

[2] The Appropriations 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; see 43 CFR 3833.4(a)(2). When a claimant fails to qualify for a small miner exemption from the rental fee requirement, failure to pay the rental fee in accordance with the Act and the regulations results in a conclusive presumption of abandonment. William B. Wray, 129 IBLA 173, 175 (1994) and cases cited therein. The Department is without authority to excuse lack of compliance with the rental fee requirement of the Appropriations Act or to extend the time for compliance. Id. In the absence of timely rental payments or an applicable exemption, BLM properly declared the claims abandoned and void.

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 affirmed.

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Franklin D. Arness
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge