

INTERIOR BOARD OF LAND APPEALS

Bart Cannon

138 IBLA 242 (February 25, 1997)

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BART CANNON

IBLA 94-493

Decided February 25, 1997

Appeal from a decision of the Oregon State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. ORMC 43198 et al.

Affirmed.

1. Mining Claims: Rental or Claim Maintenance Fees—Regulations: Interpretation

Because mining claim rental fee filings were excluded from the 15-day grace period provided by 43 CFR 3833.0-5(m) (1993) for payments by mail, a claim of exemption from rental fees received by BLM on Sept. 2, 1993, was untimely, although it was mailed before the filing deadline of Aug. 31, 1993.

APPEARANCES: Bart Cannon, Seattle, Washington, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Bart Cannon has appealed an April 7, 1994, decision of the Oregon State Office, Bureau of Land Management (BLM), declaring unpatented mining claims ORMC 43198, ORMC 56523, ORMC 124959, ORMC 124962, ORMC 126487, ORMC 126451, ORMC 126467, and ORMC 126475, abandoned and void for failure to file on or before August 31, 1993, either rental fees of \$100 per claim or an application for certification of exemption from payment of rental fees for the 1993 and 1994 assessment years. BLM's decision was based on the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), P.L. 102-381, 106 Stat. 1374, 1378-79 (1992) and implementing regulations.

In his statement of reasons Cannon states that he mailed his application for certification of exemption from payment on August 27, 1993, using the United States Postal Service "Second Day Priority" mail. The mailing envelope is in the case file and confirms that assertion. The envelope also bears a stamp on the outside from the BLM mailroom in Portland, Oregon, showing that the envelope was received at 7:55 a.m. on September 2, 1993. The application also bears a received stamp of 7:55 a.m., September 2, 1993. Cannon argues that the Postal Service states the envelope should have been delivered by August 29, 1993.

He also argues that BLM was negligent in failing to provide him personally, prior to the August 31, 1993, deadline with information of the new filing requirements pertaining to the Act. He asserts he became aware of the new regulation shortly before the filing deadline, when he received a notice from the Northwest Mining Association. Cannon maintains he received no information from BLM and that the statutory and regulatory changes were not available to him from any readily obtained publication. He also contends he had no prior notice there would be no 15-day grace period for filing the required documents.

On October 5, 1992, the Act became law. A provision of the Act relating to mining established that rental fees were to be paid "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 Act contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of the \$100 rental fee on or before August 31, 1993. 106 Stat. 1378-79. The Act further provided, under certain circumstances, for exemption from payment of rental fees for claimants holding 10 or fewer claims, the so-called small miner exemption. *Id.* Additionally, the Act directed "[t]hat 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.

On July 15, 1993, the Department promulgated regulations implementing the rental fee provisions of the Act. 58 FR 38186. The regulations required a claimant to pay, on or before August 31, 1993, a rental fee of \$100 for each mining claim, mill site, or tunnel site located on or before October 5, 1992, for each of the assessment years beginning on September 1, 1992, and September 1, 1993, or a combined rental of \$200 per claim. 43 CFR 3833.1-5(b) (1993). The regulations also included sections governing rental fee exemption qualifications, 43 CFR 3833.1-6 (1993), and rental fee exemption filing requirements. 43 CFR 3833.1-7 (1993). The regulations further provided that failure to pay the required rental fee or to timely file the required rental fee exemption documents "shall be deemed conclusively to constitute an abandonment of the mining claim, mill site, or tunnel site, which shall be void." 43 CFR 3833.4(a)(2) (1993).

The record on appeal shows that Cannon's application for exemption from payment of rental fees was received by BLM on September 2, 1993. The exemption documents were, however, required to be filed no later than August 31, 1993. See 43 CFR 3833.1-7(b) and (d) (1993); see also 43 CFR 3833.1-5 and 3833.1-6 (1993). The regulations did not provide a grace period for filing late certificates of exemption. See 43 CFR 4833.0-5(m) (1993), which provides that the 15-day grace period "does not apply to filings made pursuant to * * * 3833.1-5 or 3833.1-7." Kathleen K. Rawlings, 137 IBLA 368, 373 (1997). This strict filing requirement is imposed in recognition of the requirement imposed by Congress that, for every unpatented mining claim, "each claimant shall,

except as otherwise provided 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." 106 Stat. 1378; Kathleen K. Rawlings, *supra* at 369, 374. The decision in Rawlings is controlling here.

As to Cannon's assertion that the Postal Service stated that the documents should have been delivered by August 29, 1993, which would have made them timely, the record shows that they in fact were not delivered until September 2, 1993. Cannon states that on August 27, 1993, he mailed documents to both the Oregon and California State Offices of BLM, using the United States Postal Service "Second Day Air Priority." According to Cannon both envelopes were received on September 2, 1993. This reinforces the view that the late delivery was due to a failure of the Postal Service. One who sends a communication to the Department through the Postal Service bears the risk that it may not be delivered on time. See James B. Pauley, 53 IBLA 1, 4 (1981) and cases cited. The loss caused by the failure to make timely delivery must be borne by Cannon, since it was he who chose the means of delivery. Paul W. Tobeler, 131 IBLA 245, 248 (1994).

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.

Franklin D. Amess
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING:

My opposition to the result reached in Kathleen K. Rawlings, 137 IBLA 368 (1997) was expressed in my dissent in that decision. If the majority in the Rawlings case had agreed with me and my dissenting colleagues, the holding in this case would surely have been that the documents were received in a timely manner. However, the majority of this Board did not agree with me, and, recognizing that the precedent set by the majority opinion in Kathleen K. Rawlings is controlling unless and until overturned, I am bound to concur with the disposition in this case.

R.W. Mullen
Administrative Judge