

INTERIOR BOARD OF LAND APPEALS

John V. Potter, Jr., et al.

145 IBLA 384 (September 24, 1998)

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JOHN V. POTTER, JR., ET AL.

IBLA 95-569

Decided September 24, 1998

Appeals from three decisions of the Montana State Office, Bureau of Land Management, declaring mining claims abandoned and void. MMC 12077, etc.

Affirmed.

1. Mining Claims: Abandonment–Mining Claims: Rental or Claim Maintenance Fees: Generally–Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

An applicant for a small miner exemption from payment of rental fees under the Act of Oct. 5, 1992, must file a certified statement by Aug. 31, 1993, for each of the assessment years (ending Sept. 1, 1993, and Sept. 1, 1994) for which the exemption is claimed including the information required by 43 C.F.R. § 3833.1-7(d). Where the applicant files a certificate of exemption rather than pay the rental fee for both of the assessment years in issue, he must satisfy the regulatory requirements that his claims are subject to an approved notice of intention to operate or plan of operations.

2. Mining Claims: Abandonment–Rental or Maintenance Claim Fees: Generally–Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

In order to qualify for a small miner exemption under the Act of Oct. 5, 1992, a mining claimant must meet all the conditions set out in 43 C.F.R. § 3833.1-6(a), including the statutory requirement that operations be conducted "under a valid notice or plan of operations." Where the claimant submitted neither a notice of intention to operate nor a plan of operations to the U.S. Forest Service by Aug. 31, 1993, because no surface disturbance of Forest Service land has occurred or is planned, the small miner exemption for the claims on Forest Service land is not authorized.

APPEARANCES: John V. Potter, Jr., Esq., White Sulphur Springs, Montana, pro se, and for Appellants.

OPINION BY ADMINISTRATIVE JUDGE TERRY

On July 10, 1995, John V. Potter, Jr., pro se, and as attorney for Linda Potter, Hallett Minerals Company, and Margaret O. Borland, filed an appeal of three Decisions of the Montana State Office, Bureau of Land Management (BLM), each dated June 12, 1995. ^{1/} In each Decision, BLM declared 10 separate unpatented mining claims abandoned and void for failure to pay, on or before August 31, 1993, the annual rental fee payment of \$100 per claim or to qualify for exemption from the fee, as required under the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (Act), Pub. L. No. 102-381, 106 Stat. 1374, 1378-79 (1992), and 43 C.F.R. § 3833.1-6 (1993). In this case, exemptions were denied because Appellants failed to file a notice or plan of operations on the unpatented mining claims, which were located on U.S. Forest Service lands. By Order of August 7, 1995, the Board granted Appellants' petition for stay of BLM's June 12, 1995, Decisions.

Under the Act, claimants had to pay rental fees in the amount of \$100 per claim for the 1993 and 1994 assessment years on or before August 31, 1993:

[F]or 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: Provided further, That for fiscal year 1993, each claimant - (I) that is producing under a valid notice or plan of operation not less than \$1,500 and not more than \$800,000 in gross revenues per year as certified by the claimant from ten or fewer claims; or - (ii) that is performing exploration work to disclose, expose, or otherwise make known possible valuable mineralization on ten or fewer claims on a valid notice or plan of operations, and that has less than ten acres of unreclaimed surface disturbance, from such mining activity or exploration work, may elect to either pay the claim rental fee for such year

^{1/} One BLM Decision, issued to John V. Potter, Jr., and Linda Potter, listed the following 10 claims: MMC 12077-MMC 12082, MMC 12086, MMC 12087, MMC 12095, and MMC 12096. A second Decision, addressed to Margaret O. Borland, listed these 10 claims: MMC 12083, MMC 12088-MMC 12093, MMC 12097, MMC 12099, and MMC 12100. A third, issued to Hallett Minerals Company, listed 10 other claims: MMC 12098, MMC 12101, MMC 12102, and MMC 12104-MMC 12110.

or in lieu thereof do assessment work required by the Mining Law of 1872 (30 U.S.C. 28-28e) and meet the filing requirements of FLPMA 43 U.S.C. 1744(a) and (c) on such ten or fewer claims and certify the performance of such assessment work to the Secretary by August 31, 1993 * * *.

106 Stat. 1378. The Act also contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of an additional \$100 rental fee on or before August 31, 1993. 106 Stat. 1378-79.

Implementing Departmental regulations provided as follows:

Mining claim or site located on or before October 5, 1992. A non-refundable rental fee of \$100.00 for each mining claim, mill site, or tunnel site, shall be paid on or before August 31, 1993, for each of the assessment years beginning on September 1, 1992, and September 1, 1993, or a combined rental fee of \$200.

43 C.F.R. § 3833.1-5(b) (1993).

The only exemption provided from this rental requirement was the so-called small miner exemption, available to claimants holding 10 or fewer claims on Federal lands who meet all the conditions set forth in 43 C.F.R. § 3833.1-6(a) (1993). Washburn Mining Co., 133 IBLA 294, 296 (1995). The regulations provide that a claimant had to apply for the small miner exemption by filing certificates of exemption for both years on or before August 31, 1993. 43 C.F.R. § 3833.1-7(d) (1993). That regulation provided: "[T]he small miner shall file a separate statement on or before August 31, 1993, supporting the claimed exemption for each assessment year a small miner's exemption is claimed."

In each of the three appeals herein, the issue is whether BLM properly declared the unpatented mining claims abandoned and void because claimants failed to meet requirements of the small miner exemption from the annual rental fee. In order to come within the exemption, claimants had to file form 3830-1 Certification of Exemption from Payment of Rental Fee, (hereinafter "certificate"), and meet specific regulatory requirements. The printed instructions on the certificate form stated in part: "The ten or fewer mining claims listed below are operated under a Notice, Plan of Operations, Special Use Permit, or other State or local permits described in the regulations at 43 C.F.R. § 3833.1-6, issued by:" At this point, claimants were asked to list the issuing agency and the serial number or other designation of the notice, plan of operations, or permit.

In the absence of payment of the annual rental fee, the statute and implementing regulations clearly required a timely filing (by August 31, 1993) of a certificate of exemption for both assessment years (ending September 1, 1993, and September 1, 1994), as well as a reference to the notice or plan of operations under which exploration was conducted.

See 43 C.F.R. § 3833.1-7(d) (1993); Edwin L. Evans, 132 IBLA 103, 105-06 (1995). Appellants in this case provided no such reference to the required notice or plan of operations, but claim that a plan of operations is not authorized under these circumstances.

In a Statement of Reasons (SOR) filed in support of appeal, Appellants claim that Forest Service regulations precluded them from obtaining approval of a plan of operations or a notice of intent because "there was no disturbance of the surface resources on the unpatented claims [on Forest Service lands] because the assessment work was performed on adjacent land in private ownership." (SOR at 2.)

The regulation at 36 C.F.R. § 228.4(a) provides that "a notice of intention to operate is required from any person proposing to conduct operations which might cause disturbance of surface resources." A plan of operations is required where such operations "will likely cause significant disturbance of surface resources." Id. The determination of whether a plan, rather than a notice is necessary is to be made by the District Ranger "having jurisdiction over the area." Id.

[1] It is well established that an applicant for a small miner exemption from payment of rental fees under the Act was required to file separate, complete certified statements for each of the assessment years (ending September 1, 1993, and September 1, 1994) for which the exemption was claimed, by August 31, 1993. Richard L. Shreves, 132 IBLA 138, 139 (1995); Edwin L. Evans, 132 IBLA at 106. This requirement is explained by the fact that a claimant may elect to file for exemption for 1 year and pay the rental fee for the other. 43 C.F.R. § 3833.1-5(e) (1993).

Where a claimant fails to file an application or 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. Edwin L. Evans, 132 IBLA at 106; William B. Wray, 129 IBLA 173, 175 (1994); Lee H. Rice, 128 IBLA 137, 141 (1994). The Department is without authority to excuse lack of compliance with the rental fee requirement of the Act, to extend the time for compliance, or to afford any relief from the statutory consequences. Id. In the absence of timely rental payments or an applicable exemption, BLM properly declares the claims abandoned and void. 43 C.F.R. § 3833.4(a)(2).

[2] In each of the three Decisions before us, BLM declared the claims abandoned and void for the reason that the claimants had failed to show that they were operating under a notice or plan of operations approved by the U.S. Forest Service on or before August 31, 1993, as required by 43 C.F.R. § 3833.1-6(a)(4)(ii). Appellants (through common counsel) allege that it was impossible to obtain approval of a plan of operations by the Forest Service because Forest Service regulations "specifically provided that * * * issuance of a Plan of Operations shall not apply where there was no disturbance of the surface resources, and in this case there was no disturbance of the surface resources on the unpatented claims because the

assessment work was performed on adjacent land in private ownership." (SOR at 2.) It is the contention of the claim holders that the three Decisions of the Montana State Office therefore deny them their statutory right to perform unpatented claim annual assessment work for the benefit of the unpatented claims on adjacent lands, the surface of which is in private ownership and required only a State Reclamation Permit, which is in effect. (SOR at 1-2.) Appellants claim "[t]he "impossible" requirement of Chief Samsel is that of a Forest Service Plan of Operations where none could be obtained on application." (SOR at 2.)

The requirement for submission of a notice or plan of operations is a statutory requirement which must be met by the deadline date, August 31, 1993. See Pub. L. No. 102-381, 106 Stat. 1374, 1378-79 (1992). See Lookout Mountain Mining & Milling Co., 140 IBLA 17, 22 (1997); Ronald E. Miller, 133 IBLA 214, 217 (1995). It is not one of the curable defects specifically listed under 43 C.F.R. § 3833.4(b). Among other enumerated conditions for meeting the small miner exemption, the Act allows a claimant to demonstrate either that he is producing under a valid notice or plan of operations or that he is performing exploration work to disclose possible valuable mineralization.

The governing regulation provides:

(a) In order to qualify for an exemption from the rental fee requirements, a small miner shall meet all the following conditions:

* * * * *

(4) The mining claims shall be under:

(i) One or more Notices or approved Plans of Operation pursuant to Subparts 3802 or 3809 of this title; or

(ii) A Notice or Plan of Operations issued under parts 9 and 228 of Title 36 of the Code of Federal Regulations for National Park System lands and National Forest System lands respectively;
or

(iii) A special use permit issued by a Federal agency for the mining or removal of locatable minerals; or

(iv) A State or local authority mining or reclamation permit if the surface estate of the mining claim is not in Federal ownership.

43 C.F.R. § 3833.1-6(a)(4) (1993) (emphasis supplied). A claimant seeking a small miner exemption for mining claims located on National Forest lands must be under a notice or a plan of operations issued under 36 C.F.R.

Part 228 on August 31, 1993. If the claimant does not meet this requirement for an exemption, mining claims are properly declared abandoned and void where no rental has been paid before the deadline date. Robert Limbert, 135 IBLA 364, 367 (1996).

The lands covered by Appellants' unpatented claims are under the surface management jurisdiction of the U.S. Forest Service. Under Forest Service regulations, an operator must submit a notice of intention to operate if the activities "might cause disturbance of surface resources." 36 C.F.R. § 228.4(a). Where the operations are likely to "cause significant disturbance," the operator must submit a proposed plan of operations. Id. A notice of intent is not needed for prospecting or sampling activities that will not cause significant disturbance, or for operations not involving mechanized earthmoving equipment. 36 C.F.R. § 228.4(a)(1).

Accepting Appellants' statement that there was no disturbance of the surface resources on the mining claims on Forest Service lands, Appellants' mining claims did not qualify for approval of a plan of operations or a notice of intention to operate by the Forest Service pursuant to 36 C.F.R. Part 228. Qualifying for neither approval of a notice of intent nor a plan of operations as required by 43 C.F.R. § 3833.1-6(a)(4) (1993), Appellants were thus precluded from qualifying for the small miner exemption for these claims, and were required to pay the \$100 per claim rental fee on or before August 31, 1993, for the assessment years ending September 1, 1993, and September 1, 1994, respectively.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed.

James P. Terry
Administrative Judge

I concur:

Franklin D. Amess
Administrative Judge