

INTERIOR BOARD OF LAND APPEALS

Cheryl Jong

154 IBLA 71 (December 12, 2000)

Title page added by:
ibiadecisions.com

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring placer mining claims forfeited and void. FF-35402 et al.

Affirmed.

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

Under 30 U.S.C. § 28f(a) (1994), the holder of an unpatented mining claim, mill site, or tunnel site is required to pay a claim maintenance fee of \$100 per claim on or before Aug. 31 of each year for years 1994 through 1998, and failure to pay the fee renders the claim null and void by operation of law. The statute gives the Secretary discretion to waive the fee for a small miner who holds not more than 10 mining claims, mill sites, or tunnel sites, or combination thereof, and under 43 C.F.R. § 3833.1-7(d)(2) (1997), a claimant must file proof of the conditions for waiver by the Aug. 31 immediately preceding the assessment year for which the waiver is sought.

2. 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

A claimant who files a small miner waiver must perform assessment work and file the affidavit of assessment work with the proper BLM office on or before Dec. 30 immediately following the Aug. 31 by which the small miner filed for a waiver of payment of the maintenance fee, and failure to do so shall conclusively constitute forfeiture of the mining claim or site. The option of filing a

notice of intention to hold the claims is not contemplated under 43 C.F.R. § 3833.1-7, the regulation which sets forth the filing requirements for the maintenance fee waiver.

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

Under 43 C.F.R. § 3833.1-6(d)(1) (1997), a mining claimant may obtain an exemption from the payment of maintenance fees for mining claims and sites if (1) he has received a declaration of taking or a notice of intent to take from the National Park Service or has otherwise been formally denied access to his mining claims or sites by the United States, and (2) he timely provides proof of those conditions for exemption. The failure of a claimant to satisfy the conditions for obtaining approval of a plan of operations during a particular assessment year does not constitute a denial of access to the claims so as to exempt the claims from the maintenance fee.

4. Mining Claims: Assessment Work--Mining Claims: Rental or Claim Maintenance Fees: Generally

Under 43 C.F.R. § 3833.1-6(e) (1997), payment of mining claim maintenance fees may be deferred for the period during which a deferment of assessment work has been granted, but a mining claimant who has not filed a petition for deferment of assessment work does not qualify for a deferment of the maintenance fees.

APPEARANCES: Cheryl Jong, Deering, Alaska, pro se; Stephen Gidiere, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Cheryl Jong has appealed from a March 9, 1998, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring nine placer mining claims (FF-35402 through FF-35410) forfeited for failure to pay maintenance fees on or before August 31, 1997.

[1] Section 10101(a) of the Omnibus Budget Reconciliation Act of August 10, 1993 (the 1993 Act), 30 U.S.C. § 28f(a) (1994), provides that the holder of each unpatented mining claim, mill or tunnel site pay a claim maintenance fee of \$100 to the Secretary of the Interior on or before August 31 of each year for years 1994 through 1998. The 1993 Act

also affected a claimant's assessment work and filing obligations under section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1994). Payment of the maintenance fee would be in lieu of the assessment work requirements of 30 U.S.C. §§ 28-28e (1994), and the related filing requirements of section 314 of FLPMA.

The 1993 Act allows the Department to waive the fee for a "small miner," *i.e.*, one who certifies that, on the date the payment was due, the claimant held "not more than 10 mining claims, mill sites or tunnel sites, or any combination thereof, on public lands" and performed the assessment work required by the Mining Law of 1872. 30 U.S.C. § 28f(d) (1994). Those claimants who file for the small miner waiver and do not pay the fee are not excused from performing the assessment work required by the Mining Law of 1872, 30 U.S.C. §§ 28-28e (1994), and meeting the filing requirements of section 314(a) of FLPMA.

The mining claims in question, originally located in 1969, are currently within the boundaries of the Bering Land National Preserve, a unit of the National Park Service (NPS). On November 2, 1992, N.B. Tweet & Sons, as claim owners, and Jong, as operator, filed a plan of operations with NPS for continued mining operations on 17 mining claims, including the 9 claims at issue. On March 16, 1994, NPS approved the plan as to eight of the claims, but did not approve any operations on FF-35402 through FF-35410, the nine claims at issue in this case, because the claim corner locations had not been fully and accurately described as required by NPS procedures. Jong acquired claims FF-35402 through FF-35410 from N.B. Tweet & Sons by quitclaim deed on December 1, 1994.

Those claims were the subject of a previous appeal by Jong challenging a March 13, 1997, BLM decision declaring them forfeited for failure to file an affidavit of assessment work for the 1996 assessment year on or before December 30, 1996. In a decision dated December 19, 1997, the Board reversed that decision concluding that Jong had paid the maintenance fees for that year so that an affidavit of assessment work was not required. Cheryl Jong, 142 IBLA 75 (1997).

On August 17, 1997, while BLM's March 13, 1997, decision was stayed by order of the Board, Jong filed a small miner waiver certification with BLM for the nine claims. She did not pay the maintenance fee on or before August 31, 1997. On December 8, 1997, Jong filed a notice of intent to hold the claims. On March 9, 1998, BLM issued the decision in question.

[2] Under the regulations, a claimant who files a small miner waiver must perform assessment work and file the affidavit of assessment work with the proper BLM office pursuant to 43 C.F.R. § 3833.2. 43 C.F.R. § 3833.1-7(b) (1997). The regulations further provide that

[t]he failure to make annual filings required by §§ 3833.2-1 and 3833.2-2 on or before December 30 immediately following the August 31 by which the small miner filed for a waiver of payment of the maintenance fee, shall conclusively constitute forfeiture of the mining claim or site.

43 C.F.R. § 3833.4(a)(1) (1997). In Dale J. LaCrone, 135 IBLA 203, 207 (1996), we stated: "The option of filing a notice of intention to hold the claims is not contemplated under 43 CFR 3833.1-7, the regulation which sets forth the filing requirements for the maintenance fee waiver." ^{1/}

Although Jong asserts that "[t]he sole reason BLM has deemed these claims forfeited is because no assessment work was performed" (Notice of Appeal and Statement of Reasons (NOA/SOR) at 6), that is not technically correct. BLM determined that her failure to perform assessment work made her ineligible for a waiver of the maintenance fees. Therefore, it was her failure to pay the maintenance fees that resulted in the forfeiture of her claims.

Appellant contends that she should be granted a waiver from payment of the maintenance fees under 43 C.F.R. § 3833.1-6(d)(1) (1997), which pertains to claimants who have been denied access to their claims. She asserts that "it is impossible to obtain an economically approved plan of operation for mining" because her claims are located in the Bering Land Bridge National Monument. (NOA/SOR at 5.) Appellant refers to her 1992 testimony at an oversight field hearing before the Subcommittee on Public Land, National Parks and Forests of the Senate Natural Resources Committee, a copy of which she appended to her NOA/SOR, which, she alleges, shows the "insurmountable roadblocks faced when a mining claim is located within a park boundary." (NOA/SOR at 6-7, Attachments A.2 - A.5.) Appellant also argues that she should be granted a deferment of the maintenance fees under 43 C.F.R. § 3833.1-6(e) (1997). We will first consider whether she may receive a waiver under 43 C.F.R. § 3833.1-6(d)(1) (1997).

[3] The maintenance fee legislation provided for a waiver only for small miners. 30 U.S.C. § 28f(d) (1994). Despite that statutory limitation on waivers of the maintenance fee requirement, BLM's regulations at 43 C.F.R. § 3833.1-6(d) (1997) provided for a separate waiver, as follows:

[U]nder the following circumstances, a waiver may be obtained from the payment of the maintenance fee for mining claims and sites:

(1) The claimant has received a declaration of taking or a notice of intent to take from the National Park Service pursuant to sections 6 and 7 of the Act of September 28, 1976,

^{1/} In LaCrone, the claimant performed assessment work and filed evidence thereof with the county, but failed to file such evidence with BLM. He argued that his small miner waiver certification should be considered a notice of intention to hold. The Board noted that in the context of the case it would not reach the question whether the performance of annual assessment work, certification of that work on the date the maintenance fee was due, and a proper filing of a notice of intention to hold under FLPMA were sufficient to fulfill the statutory requirements of the 1993 Act and FLPMA. In this case, Jong never performed the required assessment work.

as amended (16 U.S.C. 1905, 1906) or the Act of December 2, 1980, as amended (16 U.S.C. 3192); or the claimant has otherwise been denied access by the United States to his/her mining claims or sites.

(Emphasis added.)

We note that a claimant must submit a plan of operations approved in accordance with 36 C.F.R. § 9.3(a) and (b) (1997) as a prerequisite to issuance of an access permit. The NPS regulation at 36 C.F.R. § 9.9(a) (1997) states that no operations shall be conducted without an approved plan of operations, and that all operations shall conform to the approved plan. To support her contention that holders of claims within a National Park have been denied access, Jong refers to the following NPS regulation that provides in part:

No access permits will be granted solely for the purpose of performing assessment work in these units except where claimant establishes the legal necessity for such permit in order to perform work necessary to take the claim to patent, and has filed and had approved a plan of operations as provided by these regulations.

36 C.F.R. § 9.7(b)(2); see also 36 C.F.R. § 9.3. Jong concludes: "The obvious meaning of the regulation is that when access is denied for assessment purposes, then the waiver applies." (NOA/SOR at 7-8.) She asserts that assessment work and claim development work "are separate activities and should not be confused." Id. at 8.

Notwithstanding the language of 36 C.F.R. § 9.7(b)(2), BLM asserts that activities that fulfill the assessment work requirement may be conducted within NPS units. Referring to the cited regulation, BLM explains:

Subsection 9.7(b)(2) does not prevent claimants in NPS units from conducting assessment work. Instead, this subsection precludes the NPS from approving proposed plans of operations designed solely to fulfill the assessment work requirement. The purpose of this subsection is to reduce necessary surface disturbance in park units by ensuring that the surface disturbance will actually further the ultimate commercial mineral development of the claim, such as delineation of the mineral deposit or commencement of commercial mineral development.

(Answer at 6.)

The cited NPS regulation implements the Mining in the Parks Act, 16 U.S.C. §§ 1901-1907 (1994), a provision of which reads:

[A]ll mining operations in areas of the National Park System should be conducted so as to prevent or minimize damage

to the environment and other resource values, and, in certain areas of the National Park System, surface disturbance from mineral development should be temporarily halted while Congress determines whether or not to acquire any valid mineral rights which may exist in such areas.

16 U.S.C. § 1901(b) (1994). In implementing this legislation, the NPS determined that "little or no discretion is vested with the Secretary to allow additional surface disturbance, except as expressly authorized by the Act." 42 Fed. Reg. 4836 (Jan. 26, 1977).

In Richard C. Swainbank, 141 IBLA 37, 43-44 (1997), we considered an appeal in which the owner of mining claims in a park likewise contended that his inability to secure approval of a plan of operations from the NPS should exempt him from paying maintenance fees required by the 1993 Act and the rental fees previously required by the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-381, 106 Stat. 1378-79 (1992). We rejected the argument that the NPS regulations per se constituted a "legal impediment" to the performance of assessment work in the absence of an application by each claimant because holding otherwise

would * * * create a general exemption for virtually every claim in a National Park, without regard to whether the individual claimants have any desire or intention to perform the assessment work. See 36 C.F.R. § 9.7(b)(2). Such a broad construction of the NPS regulations would perpetuate the speculative holding of claims and thwart a principal purpose of the rental fee legislation, "to eliminate stale or worthless claims as encumbrances on public land." See Kunkes v. United States, 78 F.3d 1549, 1552 (Fed. Cir. 1996). Clearly, when BLM promulgated regulations implementing the rental fee legislation, a blanket exemption for claims in National Parks was not contemplated nor intended.

Although the 1994 regulations, providing for a waiver of maintenance fees, deleted the reference to NPS lands, which had appeared in the 1993 regulations (compare 43 C.F.R. § 3833.1-6(d)(1) (1997) with 43 C.F.R. § 3833.1-7(g) (1993)), this deletion was made "to make it clear that an agency other than the National Park Service may deny access to a claimant's mining claim" and that "[a]ll such denials may be grounds for a waiver under this paragraph." 59 Fed. Reg. 44851 (Aug. 30, 1994).

In Swainbank, supra at 42, we looked to the explanation BLM provided in the preamble to its final rental fee regulations in determining what constituted a denial of access:

Denial of access means that BLM, in consultation with NPS, has determined as reasonable the claimant's assertion that he has been denied the ability to operate on his claims. This would include situations where the NPS has permanently denied

authorization to the claimant to exercise rights to the mining claim. Concerning the forms of exemption proofs that would be acceptable, these would include copies of declarations of takings, or NPS letters that state the denial of access, or any other judicial or administrative order. A declaration by the claimant alone will not be acceptable. When a claim holder has been denied access to his/her mining claims by the NPS, the claim holder is not required to obtain a deferment of assessment work from BLM pursuant to 43 CFR part 3852 in order to be exempt from the rental fee requirement.

58 Fed. Reg. 38195 (July 15, 1993). Thus, we found that the references to "declarations of takings," "letters," or other "order" suggested that an exemption would be recognized only when a claimant submitted a document showing a formal denial of access to a particular claim.

In our decision in Jong's prior appeal, we noted that a mining plan of operations had been filed but that NPS did not approve operations on the nine claims at issue. Jong, supra at 46. But denial of a plan of operations does not necessarily constitute a denial of access under the applicable regulations. In Ahtna, Inc., 139 IBLA 89 (1997), a case arising under the rental fee regulations, NPS notified the claimant that it could not act on the claimant's plan of operations because the boundaries of the claims had not been fixed and the NPS lacked authority to permit off-claim activities. Id. at 90-91. The Board held:

While Ahtna may have been precluded from then conducting the activities that it wanted to pursue on its claims, the case record fails to show that it was denied access to the claims in question. In rejecting Ahtna's plans of operations as incomplete, NPS required finalization of the location of the claim boundaries and specifically authorized Ahtna to access the Nike-Becky group of claims by fixed wing aircraft to conduct surveys on foot to locate existing claim corners and discovery points. There is no reason to believe that Ahtna could not have obtained the same authorization for the remaining claims for which NPS also required finalization of location. Thus, we are unable to conclude, as required by 43 C.F.R. § 3833.1-7(g) (1993) [2/], that Ahtna was denied access to its claims.

Id. at 94. In the instant appeal, BLM asserts that Jong's plan likewise was not approved because of uncertain claim boundaries, specifically "unresolved claim corner locations." (Answer at 6.) BLM states: "NPS has not denied access but has temporarily rejected the plan of operations as incomplete as to the claims at issue in this case." Id.

^{2/} The basis for an exemption from the payment of rental fees provided for in 43 C.F.R. § 3833.1-7(g) (1993) is the same as for a waiver of the maintenance fee requirement under 43 C.F.R. § 3833.1-6(d) (1997).

BLM refers to a notice published on January 22, 1996, in which the NPS explained the conditions a mining claimant must satisfy in order to obtain approval of a plan of operations. (Answer at 5-6, Exh. D, 61 Fed. Reg. 1600-02 (Jan. 22, 1996)). The notice states:

To reduce unnecessary surface disturbance in park units, [36 C.F.R.] § 9.7(b)(2) * * * precludes the NPS from accepting or approving plans of operations for activities in park units that are conducted solely for the purpose of fulfilling BLM's requirement of \$100 annual assessment work. For claimants seeking a small miner waiver, this means that their intended activity in a park unit must encompass more than the assessment work that BLM requires of claimants on public lands. To receive NPS approval, the activity in question must further the ultimate commercial mineral development of the claim. Activities that are acceptable to NPS include delineation of the mineral deposit or commencement of commercial mineral development. Performing these or similar activities will fulfill NPS regulations and BLM's assessment work requirement.

61 Fed. Reg. 1601 (Jan. 22, 1996).

NPS further notes that even when a complete plan is submitted, it may not be approved until NPS conducts a validity determination. *Id.* In Swainbank, *supra* at 45, we recognized that an agency operating under a mandate to minimize surface disturbance may properly require a mining claimant to affirmatively establish the discovery of a valuable mineral deposit before allowing an approved plan of operations to proceed.

Jong contends that requiring a miner to "apply for a development work plan of operations that would cost many thousands of dollars per claim makes a mockery of an exemption for maintenance fee of \$100.00 per claim." (NOA/SOR at 11.) Although Jong contends that the "small miner exemption was designed as a small business relief provision," her argument is misdirected for several reasons. *Id.* First, payment of the maintenance fee is required by statute, and although Congress gave BLM discretionary authority to waive the fee for small miners, it did not require BLM to do so. *See Alamo Ranch Co.*, 135 IBLA 61, 75 (1996). Second, there is no language in the maintenance fee legislation authorizing BLM to waive the fee for any miner who does not perform assessment work. *See Richard C. Swainbank*, *supra* at 41. The waiver Jong seeks under 43 C.F.R. § 3833.1-6(d)(1) (1997) is not the small miner waiver but a separate waiver under BLM's regulations available to a claimant who has been denied access to his or her claims. In providing for this waiver, BLM did not intend to create a blanket waiver for all claims in national parks, because doing so would thwart the principal purpose of the maintenance fee legislation, as noted above.

[4] Jong next contends that if she does not qualify for the waiver, she should be granted a deferment of assessment work, which, under 43 C.F.R. § 3833.1-6(e) (1997), would result in deferment of the payment

of maintenance fees for the period during which a deferment of assessment work has been granted. (NOA/SOR at 12.) That regulation further provides:

If a petition for a deferment of assessment work, as required by § 3852.2 of this title, is filed with the proper BLM office on or before August 31 of a given year, the maintenance fee need not be paid on the claims listed on the petition for deferment until the authorized officer has acted upon the petition.

If the petition is granted, all deferred fees must be paid within 30 days of the end of the deferment, unless the claimant/owner qualifies as a small miner. If the claimant/owner qualifies as a small miner, all deferred assessment work shall be performed upon expiration of the deferment. 43 C.F.R. § 3833.1-6(e)(1) (1997). If the petition is denied, the fees must be paid within 30 days after receipt of the decision denying the deferment. 43 C.F.R. § 3833.1-6(e)(2). There is no indication in the record that Jong filed a petition for deferment of assessment work for the 1997 assessment year on or before August 31, 1996, so maintenance fees could not have been deferred.

Finally, Jong asserts that BLM should be estopped from declaring her claims to be forfeited, contending that "a miner who follows BLM's advice in the filing of a mining notice should not be penalized for following that advice." (NOA/SOR at 12.) She states:

My understanding of the regulations through reading the regulations and soliciting information from BLM, Fairbanks[,] where my claims are recorded was that I need not pay a maintenance fee if I owned fewer than ten claims and was within the boundaries of a National Park. Further, letters such as those from David B. Ames, Acting Regional Director National Park Service were widely distributed. In part, the letter states: "Regulations of both BLM and NPS indicate that a notice of intention to hold or affidavit of assessment work is sufficient evidence and notification to hold a claim on National Park System lands. Consequently, the NPS will not request the BLM to initiate contest proceedings against a claimant based solely on the failure to file an annual affidavit of assessment provided the claimant has filed timely a Notice of Intention to Hold in the manner required by BLM." Although the Ames letter predates the August 10, 1993, regulations for the small miner, I have no knowledge of another letter from NPS that negates that position. It is in keeping with the NPS philosophy and regulatory structure by which the Park Service is governed.

(NOA/SOR at 13.)

Appellant has provided a copy of an August 21, 1991, letter from Ames to one Barry Donnellan, Esq., containing the quoted language upon which appellant bases her estoppel claim. (NOA/SOR, Attachment A.17.)

While a mining claimant reading that letter could reasonably conclude that a notice of intention to hold could be filed in lieu of an affidavit of assessment work, the letter, dated more than 1 year before the enactment of the rental fee legislation and nearly 2 years before the enactment of the maintenance fee legislation, clearly does not address the changes in filing requirements dictated by those statutes and their implementing regulations. The letter itself does not contain erroneous information regarding filing requirements in August 1991. Inasmuch as appellant can point to no erroneous information in that letter on which she relied, no basis for estoppel can be shown. See generally, Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 65 (1984).

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 decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

John H. Kelly
Acting Chief Administrative Judge