

INTERIOR BOARD OF LAND APPEALS

Bear Creek Mining Company

160 IBLA 308 (January 22, 2004)

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BEAR CREEK MINING COMPANY

IBLA 2000-62

Decided January 22, 2004

Appeal from decision of the Nevada State Office, Bureau of Land Management, declaring mining claims forfeited and void by operation of law. NMC 807181 and -82.

Reversed.

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

Where the 90-day period allowed by 43 U.S.C. § 1744(b) (2000) and 43 CFR 3833.1-2(a) to record copies of the certificates of location of newly-located mining claims “bridges” the September 1 annual deadline for filing mining claim maintenance fees under 43 CFR 3833.1-5, the claimant (1) must file a \$100 fee for each claim located for the assessment year in which the claim was located (the initial maintenance fee) and (2) may either file a second \$100 fee for each claim for the succeeding assessment year or may establish entitlement to a fee waiver for its claims for the succeeding assessment year and pay no fee. If the requisite payment and/or filings are made with BLM within the 90-day filing period allowed for new claims, the claimant has complied. Where the claimant makes two filings (one paying requisite filing fees and the initial maintenance fees and another presenting a maintenance fee payment waiver certification for the claims for the succeeding assessment year) within the 90-day period, a BLM decision declaring its claims forfeited will be reversed.

APPEARANCES: Ralph E. Wilcox, Jr., President, Bear Creek Mining Company, Otis Orchards, Washington, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

On July 27, 1999, Bear Creek Mining Company (BCMC) located two lode mining claims (NVPE VL-9 and NVPE VL-10). On September 1, 1999, BCMC recorded certificates of location for and maps of the claims with the Pershing County, Nevada, recorder.

On September 30, 1999, within the 90-day period after the date of location allowed by section 314(b) of the Federal Land Policy and Management Act, 43 U.S.C. § 1744(b) (2000), and Departmental regulations at 43 CFR 3833.1-2(a), BCMC filed copies of certificates of location for and maps of the claims with the Nevada State Office, Bureau of Land Management (BLM). Along with that filing, BCMC included a check for \$270, which was not adequate to cover the requisite filing and claim maintenance fees (which totaled \$470) due at that time. Nevertheless, BLM accepted BCMC's filing and, according to a receipt and accounting advice in the record, assigned serial numbers NMC 807181 and NMC 807182 to the two claims on September 30, 1999.

On October 18, 1999, still within the 90-day period after location, BCMC filed with BLM a maintenance fee payment waiver certification for four claims, including NMC 807181 and -82.

On October 28, 1999, after the expiration of the 90-day period allowed by 43 U.S.C. § 1744(b) (2000) and 43 CFR 3833.1-2(a), BLM issued the decision under appeal, which provides:

The filings for new mining claims [NMC 807181 and -82] * * * are hereby rejected for failure to submit the required maintenance fees.

In accordance with the regulations in 43 CFR 3833.1-5(a) (1), the initial \$100.00 nonrefundable maintenance fee for the assessment year in which the mining claim or site is located shall be paid for each mining claim, mill site, or tunnel site at the time of its filing with BLM pursuant to section 314(b) of FLPMA and [43 CFR] 3833.1-2. If such claims or sites are located prior to an August 31, and the notice of location is properly filed within the FLPMA time frame but after August 31, then the \$100.00 fee that was due on August 31 for the

succeeding assessment year shall be paid at the time of filing the location notice along with the initial \$100.00 fee.^{1/1}

We received your Maintenance Fee Payment Waiver Certification, commonly called a small miners exemption on October 18, 1999, and regard it as the filing for the 2000 assessment year due on or before September 1, 1999. This document is not considered timely filed. Timely filed is defined in 43 CFR 3833.0-5(m) as being received and date stamped by the proper BLM office, or if mailed to the proper BLM office, is contained within an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed by law and received by the proper BLM State Office by 15 calendar days subsequent to such period. According to the regulations as stated above the maintenance fees for the 2000 assessment year were required at the time of filing, not a small miners exemption. Failure to comply with the regulations constitutes a forfeiture of the claim or site and the claim or site is void by operation of law.

(BLM Decision dated Oct. 28, 1999, at 1-2.)

This case concerns circumstances where mining claims are located prior to the September 1 annual deadline for submitting mining claim maintenance fees or requests for waivers, such that the 90-day filing period allowed by FLPMA to record notice of the location of the claim “bridges” the September 1 deadline. See Artemis Exploration, 145 IBLA 232, 235 (1998). The rules governing this situation are, for the most part, clearcut. The claimant has 90 days from the date of location to file copies of the notices or certificates of location for his claims with BLM. 43 CFR 3833.1-2(a). In addition to the \$10 per claim non-refundable service charge for filing the copy of the notice or certificate of location (43 CFR 3833.1-4(a)) and the \$25 per claim non-refundable location fee, a maintenance fee of \$100 per claim is due for the assessment year in which the claim was located (the “initial maintenance fee”). 43 CFR 3833.1-5(a)(1). That initial maintenance fee may not be waived. 43 CFR 3833.1-5(a)(2). If the 90-day period “bridges” the annual September 1 deadline for filing maintenance fees, the claimant may elect to pay its initial maintenance fee(s) when it files the copies of the notice or certificates of location with BLM, even though that may be later than that deadline. 43 CFR 3833.1-5(a)(1).

^{1/} The regulations referred to by BLM were amended effective Aug. 27, 1999, to change the filing date from Aug. 31 to Sept. 1. 64 FR 47021 (Aug. 27, 1999); see Flynn C. Johnson, 155 IBLA 24, 26 (2001). That regulatory change does not affect the present appeal.

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In the present case, BCMC located its claims on July 27, 1999, and therefore had until October 25, 1999, to file copies of its certificates of location with BLM. It did so timely, on September 30, 1999, at the same time it paid the requisite filing and location fees. It also paid \$100 per claim, clearly intended to be the maintenance fees for the claims that were due for the assessment year ending at noon on September 1, 1999, the year in which the claims were located. Those fees totaled \$270.

However, as of September 30, 1999, BCMC had not paid the additional \$200 in maintenance fees that were due for the assessment year after the claims were located (the “succeeding assessment year”), in this case the assessment year ending at noon on September 1, 2000. It is established that a claimant has 90 days from the date of location of its claim to pay the maintenance fee for the succeeding assessment year or file the maintenance fee payment waiver certification; this is so even though such payment or filing may be made after the annual maintenance fee deadline. 43 CFR 3833.1-5(a)(1); Artemis Exploration, 145 IBLA at 235-36; accord, Carl Riddle, 155 IBLA 311, 313 (2001). Thus, it was error for BLM to interpret that provision as excluding the possibility of seeking a small miners exemption from the maintenance requirement for the succeeding assessment year. (BLM Decision at 2.)

[1] Nevertheless, 43 CFR 3833.1-5(a)(1) provides, that, if mining claims or mill sites “are located prior to September 1, and the notice of location is properly filed within the FLPMA time frame but after September 1, then the \$100 fee that was due on September 1 for the succeeding assessment year shall be paid at the time of filing the location notice along with the initial \$100 fee.” We conclude that, despite its apparent requirement that all payments and/or certificates of exemption (COEs) be submitted at the same time, 43 CFR 3833.1-5(a)(1) is properly interpreted to mean that the claimant has complied if requisite payments and/or filings are made with BLM any time within the 90-day filing period allowed for new claims under 43 CFR 3833.1-2(a). The requirements of 43 CFR 3833.1-5(a) have already been interpreted in Artemis and Riddle to allow the filing of a COE in lieu of filing the \$100 fee. The language of 43 CFR 3833.1-5(a)(1) must be read in pari materia with 43 CFR 3833.1-3(b), allowing resubmission of filings within the full 90 days allowed by 43 CFR 3833.1-2(a).

Further, the Board has considered the closely analogous language of 43 CFR 3833.1-2(d) (1979), which provided that a copy of a notice of location for a mining claim or mill site must be filed with BLM within 90 days of the date of location of the claim or mill site and that such filing “shall be accompanied by a one time \$5 service

fee,” ^{2/} concluding in effect that the failure to file and pay the fee at one time is not fatal. Joe B. Cashman, 43 IBLA 239, 240 (1979). ^{3/}

The Board has declined to strictly enforce other regulatory provisions ostensibly requiring the filing of multiple documents at one time. We have held in other contexts that there is no reason to impose an unduly restrictive interpretation on a requirement that certain documents be filed “together with” other documents where an applicant has, in fact, complied with the spirit of the filing requirements by providing all that was required within the regulatory time limits. Robert E. Oriskovich, 128 IBLA 69, 70 n.1 (1999) (holding that a petition for stay will be considered under 43 CFR 4.21(a)(2) to be filed “together with” the notice of appeal if it is received any time during the time period for filing the notice of appeal); Northwest Exploration Co., 73 IBLA 123 (1983) (holding that the requirement in 43 CFR 3112.4-1(b) that an attorney-in-fact signing a lease offer or paying the rental must file certain information “together with the offer and/or rental” is satisfied when all that was required was provided within the regulatory time limits); see also R. Gerald Jones, 101 IBLA 57, 63 (1988). In Fresa Construction Co., Inc. v. OSM, 101 IBLA 229 (1988), we held as follows:

A party seeking administrative review before OHA of a notice of proposed assessment of a civil penalty must file a petition for review with the Hearings Division, OHA, within 15 days from service of notice by OSMRE’s conference officer that the informal conference has been completed, if there has been such a conference. 43 CFR 4.1151(b). Cf. 43 CFR 4.1151(a). The regulations state that such petition must be “accompanied by full payment of the proposed assessment” to be placed in an escrow account pending final determination of the assessment. 43 CFR 4.1152(b)(1).

^{2/} The requirement to pay the non-refundable service charge for new claims is now codified at 43 CFR 3833.1-4(a). The amount of the service charge is now \$10.

^{3/} We held in Cashman that there is no filing of the notice of location “without payment of the filing fee,” with the result that, where the notice of location was separately filed prior to submission the filing fee (so that the copy of a notice of location is not “accompanied by” its service fee), the timeliness of that filing is judged by the date of submission of the filing fee, not by the earlier date of filing of the copy of the notice of location. We reasoned that, since the copy of the notice of location had to be accompanied by a \$5 service fee, there was no recordation of that notice of location without payment of the fee. As a result, where the notice of location and service fee were filed separately, the controlling date for determining whether the 90-deadline was met was when both were filed with BLM. Id. at 240.

Here, Fresa's petition was timely filed, having been postmarked on August 26, 1987, one day after service of notice that the assessment conference was completed, but the petition was not "accompanied by" prepayment as provided by the regulations. However, a check providing the necessary prepayment of the amount of the proposed civil penalty was received later, also within the 15-day period established by 43 CFR 4.1151(b).

We do not believe that a literal reading of the filing requirements is appropriate in this case. There has been no failure to file: within 15 days of receipt of notice Fresa filed everything required by the regulations.

Id. at 231-32 (emphasis supplied). So it is here.

In summary, in the situation presented here, where the 90-day period "bridges" the annual deadline for filing maintenance fees, the claimant must file a \$100 fee for each claim located for the assessment year in which the claim was located (the initial maintenance fee) and may either file a second \$100 fee for each claim for the succeeding assessment year or may establish entitlement to a fee waiver for the succeeding assessment year and pay no fee, within the 90-day period. This interpretation is consistent with the provisions of 43 CFR 3833.1-3(b), which state:

(b) Recordation of new mining claims, mill sites, or tunnel sites with the Bureau of Land Management. (1) New location notices or certificates submitted for recording pursuant to § 3833.1-2 that are not accompanied by full payment of the maintenance and location fees required by § 3833.1-4 or 3833.1-5 will not be accepted, and the submittal will be returned without further action by the authorized officer. The claimant may resubmit the filings with the proper payment of service charges and fees within the same 90-day filing period referred to in § 3833.1-2(a).

43 CFR 3833.1-3(b) (emphasis supplied.) ^{4/}

Since BCMC fully and timely complied with regulatory requirements concerning (1) the initial filing of copies of proofs of labor or certificates of labor and

^{4/} We are aware that BLM inexplicably failed in this case to follow the dictates of 43 CFR 3833.1-3(b), which appear to be mandatory. In view of the fact that BCMC did fully and timely comply, it is unnecessary to address the consequences of BLM's acceptance of and failure to promptly return BCMC's incomplete submission filed on Sept. 30, 1999.

filing fees therefor, (2) the payment of maintenance fees for the claims for the assessment year in which the claims were located, and (3) the filing of a COE for the payment of maintenance fees for the claims in the succeeding year, BLM's decision declaring the claims forfeited must be reversed.

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 reversed.

David L. Hughes
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING:

When Bear Creek filed its location notices with BLM, Bear Creek submitted \$270.00 to cover the fee for recording the location notices and the \$100 initial maintenance fee for each of the claims. BLM accepted Bear Creek's filings and fees and assigned NMC serial numbers to the claims. When, on October 18, 1999, Bear Creek filed a maintenance fee payment waiver certification for the 2000 assessment year, the document was filed within 90 days of the date of location. The lead opinion correctly finds that the certification was filed in a timely manner.

After considering the facts of this case and the applicable regulations, I find it appropriate to write separately to stress how important it is that BLM follow the regulations it promulgates. The regulation specifically applicable to this case, 43 CFR 3833.1-3(b), states:

(b) *Recordation of new mining claims, mill sites, or tunnel sites with the Bureau of Land Management.* (1) New location notices or certificates submitted for recording pursuant to § 3833.1-2 that are not accompanied by full payment of the maintenance and location fees required by § 3833.1-4 or 3833.1-5 will not be accepted, and the submittal will be returned without further action by the authorized officer. The claimant may resubmit the filings with the proper payment of service charges and fees within the same 90-day filing period referred to in § 3833.1-2(a).

(Emphasis added.) If BLM had rejected Bear Creek's tender of the documents, as called for in BLM's regulations, Bear Creek would have been put on notice that it had failed to comply with those regulations, and would have had the opportunity to immediately cure the defect. This appeal, and the time and effort it has taken to resolve it, would have been avoided.

However, BLM accepted Bear Creek's location notice filing and fees, issued the receipt and accounting advice and assigned serial numbers to the claims. After the 90-day period elapsed BLM declared the claims forfeited. The language of foregoing regulation renders it clear that BLM should have returned Bear Creek's submittal without further action.^{1/} As noted in the lead opinion, after BLM had

^{1/} Compare section (b)(1) of the regulation to section (b)(2). The latter section deals only with failure to submit full payment of the service charges set forth in § 3833.1-4. 43 CFR 3833.1-3(b)(2) states:

(2) Failure to provide full payment of service charges set forth in § 3833.1-4 will be curable for new location notices or certificates submitted for recordation pursuant to § 3833.1-2 when the proper
(continued...)

improperly accepted its filing (but within 90 days), Bear Creek filed a waiver certification. Had it not, we would now be faced with considering the propriety of applying of the doctrine of estoppel.

When applying estoppel, this Board looks to the elements of estoppel set forth in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970). These elements are: (1) the party to be estopped shall know the facts; (2) he must intend that his conduct be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. United States v. Georgia-Pacific Co., 421 F.2d at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960). See also, Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd, Bolt v. United States, 994 F.2d 603 (9th Cir. 1991).

Estoppel is an extraordinary remedy and at least in the case of the public lands, estoppel must be based on affirmative misconduct, such as misrepresentation or concealment of material fact. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978; Arpee Jones, 61 IBLA 149, 151 (1982). Oral statements (standing alone) by BLM employees are insufficient to support a claim of estoppel, and erroneous advice upon which reliance is predicated must be in the form of a crucial (material) misstatement in an official decision. Martin Faley, 116 IBLA 398, 402 (1990).

In Leitmotif Mining Co., 124 IBLA 344 (1992), the Board held that a letter from BLM to Leitmotif failing to explain that the Nevada State Office was not the proper place for filing a notice of location constituted "an official decision." In Rudy S. Sutlovich, 139 IBLA 79 (1997), we held that a BLM form letter constituted an "official decision" which misled or concealed material facts from Sutlovich. We held that BLM having taken the action of advising Sutlovich of how to perfect his filing was bound to disclose all items required to be corrected. By failing to satisfy this obligation, we held, BLM concealed material facts from Sutlovich inducing him not to file a certificate of exemption for the 1983 assessment year. In Sutlovich, we concluded:

^{1/} (...continued)

maintenance and location fees have been submitted. Such documents will be noted as being recorded on the date received provided that the claimant submits the proper service charge either within 30 days of receipt of a deficiency notice sent by the authorized officer, or on or before the 90th day of the filing period referred to in 3833.1-2(a), whichever date is later.
(Emphasis added.)

This is not a situation where estoppel will result in Sutlovich being granted a right not authorized by law. Rather, this is the case in which Sutlovich could clearly have timely filed the required documents, but for BLM's concealment of a material fact. In such circumstances, estoppel is properly invoked to prevent BLM from declaring the claim abandoned and void for failure to file a certification of exemption for the 1993 assessment year.

139 IBLA at 83.

The same rationale applies in this case. BLM accepted Bear Creek's filings and fees, issued a receipt and accounting advice, and assigned serial numbers for the claims. Under 43 CFR 3833.1-3(b)(2) these acts are to occur only when a filing is accompanied by full payment of the maintenance and location fees required by § 3833.1-4 or 3833.1-5. BLM's action was contrary to the applicable regulation, constituted a crucial written misstatement in an official decision upon which Bear Creek was entitled to rely.^{2/} Rudy Sutlovich, *supra*; Leitmotif Mining Co., *supra*; *see also* Floyd Higgins, 147 IBLA 343 (1999); Carl Dresselhaus, 128 IBLA 26 (1993). If Bear Creek had not filed its waver certificate in a timely manner, it would have been proper for this Board to invoke estoppel to prevent BLM from declaring Bear Creek's claims forfeited.

R.W. Mullen
Administrative Judge

^{2/} This cases is similar to United States v. Locke, 471 U.S. 84 , 91n.7 (1985). In Locke, the Supreme Court recognized that BLM could be estopped from enforcing a statutory requirement when BLM had misled a mining claimant as to what was required by the statute. The case was remanded to the District Court to allow it to examine that question and was eventually settled with the reinstatement of the claim. Locke v. United States, Civ. No. R-82-297 BRT (D. Nev. July 22, 1985)