

INTERIOR BOARD OF LAND APPEALS

John J. Trautner

165 IBLA 265 (April 25, 2005)

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JOHN J. TRAUTNER

IBLA 2005-97

Decided April 25, 2005

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring nine mining claims forfeited by operation of law. AA-23149, et al.

Affirmed as modified; petition for stay denied as moot.

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

Payment of the annual maintenance fee for a mining claim is in lieu of the assessment work requirements of the Mining Law of 1872, 30 U.S.C. §§ 28-28e (2000), and the related filing requirements of section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (2000), for the upcoming assessment year that begins at noon on September 1 of the year payment is due. However, where a waiver certification is filed for that assessment year, the claimant is required, by the Mining Law of 1872, to perform assessment work during that assessment year and, by section 314(a) of FLPMA, to file an affidavit of having performed such work on or before December 30 of the calendar year in which the assessment year ends. If the claimant fails to timely file the evidence of assessment work, the result is a statutory abandonment of the claims in accordance with 43 U.S.C. § 1744(c) (2000).

APPEARANCES: John J. Trautner, Girdwood, Alaska, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

John J. Trautner has appealed from and petitioned for a stay of the effect of a January 26, 2005, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring nine placer mining claims forfeited by operation of law. The claims involved are the Jones No. 3, AA-23149, Woody No. 6, AA-23163, Golden Horseshoe Bench, AA-47913, Roaring Mine, AA-47914, Final Drive, AA-47915, Wagner No. 2, AA-47916, Ray Claim No. 1, AA-47917, Ray Claim No. 2, AA-47918, and Golden Horseshoe, AA-47919. All of the claims are situated in unsurveyed secs. 4 and 9, T. 7 N., R. 1 W., Seward Meridian, Alaska, within the Chugach National Forest. They were surveyed under Mineral Survey No. 2517, Alaska, in connection with mineral patent application AA-72648, which Trautner filed on August 12, 1994. Because it determined the claims to be forfeited, and thus void, BLM also rejected that application.

[1] Under 30 U.S.C. § 28f(a) (2000), as amended,^{1/} the holder of an unpatented mining claim is required to pay a claim maintenance fee for each claim on or before September 1 of each year for the years 2004 through 2008. See 43 CFR 3830.21 and 3834.11(a).^{2/} The statute establishes the annual maintenance fee as \$100 per claim or site. 30 U.S.C. § 28f(a) (2000).^{3/} Payment of the claim maintenance fee is in lieu of the assessment work requirements of the Mining Law of 1872, 30 U.S.C. §§ 28-28e (2000), and the related filing requirements of

^{1/} 30 U.S.C. § 28f(a) (2000) has been amended twice by Congress, specifically by the Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 414, 418-19 (2001), and the Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241, 1245 (2003).

^{2/} Regulatory citations herein are to the regulations in 43 CFR Parts 3830, 3834, and 3835, revised and reorganized effective Nov. 24, 2003. See 68 FR 61064, 61069, 61073 (Oct. 24, 2003).

^{3/} The statute also provides, however, for periodic adjustments in the fee “every 5 years after August 10, 1993, or more frequently if the Secretary determines an adjustment to be reasonable.” 30 U.S.C. § 28j(c)(1) (2000). Notice of any adjustment is to be provided “not later than July 1 of any year in which the adjustment is made.” 30 U.S.C. § 28j(c)(2) (2000). Adjustments are to be applicable “the first assessment year which begins after adjustment is made.” 30 U.S.C. § 28j(c)(3) (2000). BLM made its first adjustment of the maintenance fee in 2004, raising the fee from \$100 to \$125. 69 FR 40294, 40296 (July 1, 2004); see 43 CFR 3830.21.

section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (2000), for the upcoming assessment year that begins at noon on September 1 of the year payment is due.^{4/} See 30 U.S.C. § 28f(a) and (b) (2000); 43 CFR 3834.11(a).

The statute, however, grants the Secretary of the Interior the discretion to waive the fee payable in any year for a claimant who certifies in writing that, on the date the payment is due, the claimant and all related parties hold not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands and have performed assessment work required under the Mining Law of 1872, for the preceding assessment year ending at noon on September 1 of the calendar year in which payment of the claim maintenance fee is due. 30 U.S.C. § 28f(d)(1) (2000); see 43 CFR 3835.1, 3835.10(a), and 3835.11(a); Audrey Bradbury, 160 IBLA 269, 273-74 (2003). The waiver, however, is for the upcoming assessment year commencing at noon on September 1 of the calendar year in which the payment is due. The claimant is then required by the Mining Law of 1872 to perform assessment work during that assessment year and, by section 314(a) of FLPMA, to file an affidavit of having performed such work on or before December 30 of the calendar year in which the assessment year ends.^{5/} 43 CFR 3835.31(a) and (d); see 43 CFR 3835.10(a), 3835.12, 3835.15, and 3835.16(a); Earl Riggs, 165 IBLA 36, 39 (2005); Audrey Bradbury, 160 IBLA at 274-75.

Under section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (2000), the failure to file an affidavit (or other evidence) of assessment work “shall be deemed conclusively to constitute an abandonment of the mining claim * * * by the owner,” thereby rendering the claim void. United States v. Locke, 471 U.S. 84, 97-100 (1985); Audrey Bradbury, 160 IBLA at 275. The current regulations, however, state at

^{4/} When payment is not waived, failure to pay the claim maintenance fee “shall conclusively constitute a forfeiture of the unpatented mining claim * * * by the claimant and the claim shall be deemed null and void by operation of law.” 30 U.S.C. § 28i (2000); see 43 CFR 3830.91(a) and 3835.92(a).

^{5/} The regulation at 43 CFR 3835.12 is titled: “What are my obligations once I receive a waiver?” It states: “If BLM allows you the waiver, you must perform annual assessment work on time and file annual FLPMA documents.” There is no formal procedure for allowing a waiver. If a claimant timely files a waiver certification and BLM finds no defects, the waiver is apparently allowed and the obligation to file an affidavit of assessment work is triggered. See 43 CFR 3835.31(d).

43 CFR 3830.91(a) and 43 CFR 3835.91 that failure to file an affidavit of assessment work results in a “forfeiture” of the claim.^{6/}

In this case, Trautner did not pay claim maintenance fees, but instead filed a waiver certification for the nine mining claims at issue on July 23, 2003, for the 2004 assessment year, beginning at noon on September 1, 2003, and ending at noon on September 1, 2004. Thus, he was required to file an affidavit of assessment work performed during the 2004 assessment year “on or before the December 30th of the calendar year in which the assessment year ends.” 43 CFR 3835.31(a). Since the 2004 assessment year ended on September 1, 2004, Trautner was required to file evidence of the performance of assessment work with BLM on or before December 30, 2004. However, BLM has no record of the filing of such evidence on or before December 30, 2004.

In its January 2005 decision, BLM provided the following basis for its forfeiture determination:

[B]ecause the affidavit of assessment work for **2004** was not timely received during the mandatory filing period, the claimant did not qualify for the small miner waiver. Consequently, the claimant is subject to the maintenance fee requirements. Since the claimant did not pay the maintenance fees which were due on [September 1,] 2004, the mining claims [at issue] * * * are deemed forfeited. [^{7/}]

(Decision at 2.)

Trautner appealed from BLM’s January 2005 decision, filing a notice of appeal, request for stay, and later a statement of reasons (SOR) for appeal. Attached to his SOR, which was filed with the Board on March 25, 2005, Trautner provided his own affidavit, dated March 22, 2005, which sets forth his reasons for appeal. Trautner asserts that he did, in fact, comply with the requirement to file an affidavit of assessment work for the 2004 assessment year with BLM, on or before December 30, 2004, as follows:

^{6/} BLM defines “[f]orfeit or forfeiture” in 43 CFR 3830.5 to mean “the voidance or invalidation of an unpatented mining claim or site.” It adds that “[t]he terms ‘abandoned and void,’ ‘null and void,’ ‘void ab initio,’ and ‘forfeited’ have the same effect in these regulations.”

^{7/} BLM incorrectly stated that the deadline for paying claim maintenance fees in the present case was Aug. 31, 2004. See 43 CFR 3834.11(a)(2). In addition, as discussed infra, BLM’s basis for forfeiture is incorrect.

On August 10, 2004[,] I went to the BLM recorders office in Anchorage, Alaska and filed a small miners exemption certificate (Maintenance Fee Waiver Certification) * * * [.] [A]t the same time I also left my Affidavit of Annual Labor for recording with a BLM employee at the counter. I believe it was Ms. Peggy Richardson, who at the time was taking care of several people at the counter. The top copy was stamped and given back to me. I recall there was some problem with the computer and printer and so I left the packet at the desk.

As in the past, I left cash (two twenties and a five dollar bill) in an envelope for the recording fee. * * *

For the past couple of years I have filed both my Maintenance Fee Waiver Certification and my Affidavit of Annual Labor at the same time. [^{8/}] In some cases a hand written receipt is given and [in] some cases it is printed. * * *

Subsequently, on August 25[,], 2004, I filed a[n] Affidavit of Annual Labor in the State Recorders Office in Anchorage to comply with State of Alaska mining regulations. * * *

I thought everything was fine until I received the letter stat[ing] my claims had been forfeited.

(Trautner Affidavit at 1.) Trautner states that, “since November of 1982, for over twenty-two years, I have filed the annual assessment each and every year as required by regulations,” and that BLM must have “misplace[d]” his August 2004 affidavit of assessment work. Id. at 2. He argues that, in order to rectify this error, “my Affidavit of Labor [should] be accepted and recorded again.” Id.

Along with his SOR, Trautner also provided a copy of an “Affidavit of Annual Labor” (Ex. 3), in which he attested to having personally performed assessment work on the nine claims at issue during the 2004 assessment year, from September 1, 2003, to August 8, 2004. The affidavit was executed by Trautner, before a notary public, on August 16, 2004. In addition, the affidavit reflects the fact that it was filed for recordation with the local recording district in Alaska on August 25, 2004. However, the affidavit bears no BLM date stamp.

^{8/} The case record show that a certification and an affidavit for the claims were both filed on July 23, 2003, while in 2002 and 2001, certifications were filed in August and affidavits in November.

Trautner argues, in his stay request, that he has “to the best of his abilities complied with the state and [F]ederal mining regulations while proceeding to patent,” and has never intended to abandon or forfeit the claims. (Request for Stay at 1.) He asserts that BLM’s decision will result in “significant financial loss,” given the considerable monies expended over the years in acquiring, improving, maintaining, and applying for patent to the claims. Id.

Trautner claims that he submitted an affidavit of assessment work for the 2004 assessment year to BLM on August 10, 2004, along with payment of the \$5 per claim service charges required for recordation of such affidavit. Since there is no requirement that a claimant pay a service charge along with recording his waiver certification, payment of \$45, if submitted on August 10, 2004, would have been in connection with Trautner’s filing of an affidavit of assessment work for the nine claims. However, BLM has no record of having received the affidavit of assessment work, or payment of the service charges.

The absence of a legally significant document from BLM’s public records gives rise to the presumption that it was never filed with BLM, since Federal Government employees are presumed to have properly performed their official duties and not lost or misplaced such a document. Robert L. Mendenhall, 127 IBLA 73, 84 (1993) (citing Wilson v. Hodel, 758 F.2d 1369, 1372-75 (10th Cir. 1985)); James L. Gleave, 112 IBLA 281, 284 (1990). We cannot conclude that BLM received, but then lost or misplaced, the required affidavit, unless Trautner presents sufficient evidence to overcome the presumption of administrative regularity, demonstrating that it is more likely than not that the document was in fact filed with BLM. James L. Gleave, 112 IBLA at 285. In this case, Trautner has the burden to show, by a preponderance of the evidence, actual receipt of the document by BLM. Tom Hash, 140 IBLA 244, 245 (1997); H.S. Rademacher, 58 IBLA 152, 156, 88 I.D. 873, 876 (1981).

Trautner asserts that he filed the required affidavit of assessment work with BLM. However, his mere assertion that he made such a filing is not sufficient. Red Top Mercury Mines, Inc. v. United States, 887 F.2d 198, 202-03 (9th Cir. 1989); John R. Wellborn, 87 IBLA 20, 22 (1985). The copy of the affidavit of assessment work provided on appeal clearly shows filing with the local recorder on August 25, 2004. However, it does not support his claim to have filed the affidavit with BLM on August 10, 2004.^{2/} The date Trautner executed the affidavit of assessment work,

^{2/} Trautner also refers to an Aug. 9, 2004, file entry on the Jan. 31, 2005, Case Abstract (Ex. 2 attached to SOR) for the Wagner No. 2 claim, AA-47916, of “Small Miner’s Cert[ificate],” as well as a succeeding Aug. 10, 2004, file entry of “Maint[enance] Waiver Doc[ument],” both with respect to the 2005 assessment year.
(continued...)

August 16, 2004, is six days after he purports to have filed it with BLM. While that fact is not controlling, because he could have filed an undated copy with BLM,^{10/} there is no BLM date stamp on the copy he has provided.

Trautner also does not provide a receipt for payment of the \$45 in service charges purportedly paid by him at the time he filed his affidavit of assessment work with BLM on August 10, 2004, despite the fact that he asserts that such a receipt is normally given. We recognize that Trautner also states that the “computer and printer” were not working at the time he made his filing, indicating that BLM was unable to give him a “printed” receipt, and that he “left” his payment, indicating that he did not wait for a “hand written” receipt. (Trautner Affidavit at 1.) However, the absence of such a receipt in the case files indicates a lack of filing.

Trautner has failed to overcome, by a preponderance of the evidence, the presumption that BLM did not lose or misplace the affidavit of assessment work purportedly filed with BLM on August 10, 2004. We must conclude that no affidavit of assessment work was filed on or before December 30, 2004.

Having filed a waiver certification on July 23, 2003, in lieu of paying claim maintenance fees for the assessment year ending at noon on September 1, 2004, for the claims at issue, Trautner was required to perform assessment work for that assessment year, and then file an affidavit, attesting to that assessment work, on or before December 30, 2004. See Earl Riggs, 165 IBLA at 39; Audrey Bradbury, 160 IBLA at 275. Failure to file the affidavit resulted in abandonment of the claims

^{9/} (...continued)

He states that, at best, the Aug. 9 file entry, one day before he was at BLM’s offices, reflects the “flawed” nature of BLM’s recordation process, and may even refer to the “missing Labor Affidavit.” (Trautner Affidavit at 2.) While the Aug. 9 entry is troublesome, we note that the case abstract also contains double entries for July 23, 2003, and Aug. 29, 2002, for “Small Miner’s Cert” and “Maint Waiver Doc” with separate July 23, 2003, and Nov. 22, 2002, entries for “Evid of Assmt Filed.” Having reviewed the casefile for the claims serialized from AA-47913 through AA-47919, we do not find any filing date stamped Aug. 9, 2004. In addition, the duplicate entries for “Small Miner’s Cert” and “Maint Waiver Doc” do not appear to represent separate filings. We cannot find that these entry errors establish that appellant timely filed his affidavit of assessment work in 2004.

^{10/} The affidavit of annual assessment work filed with BLM for the claims on July 23, 2003, for the 2003 assessment year is undated. It is somewhat ambiguous, however, because it lists the dates on which assessment work was performed as “Sept 15-Oct 31st, 2002, May 23 August 22, 2003,” the latter date being after the date of filing.

under section 314(c) of FLPMA. Id. That abandonment was effective December 31, 2004.

Under BLM's analysis forfeiture was retroactive to September 2, 2004. BLM determined that the failure to file the affidavit of assessment work on or before December 30, 2004, meant that appellant did not qualify for a waiver for the 2005 assessment year, and that in not qualifying for a waiver, he was obligated to have paid the maintenance fees for the claims on or before September 1, 2004, which he did not do. Because he failed to do so, BLM considered his claims to be forfeited.

While the result of abandonment/forfeiture of a claim is the same in that the claim is void (see 43 CFR 3830.5), the date upon which such abandonment/forfeiture is effective may be, as in this case, different depending upon the analysis applied and in a particular case could be critical in determining issues, such as claim locatability. In Earl Riggs, supra, and Audrey Bradbury, supra, we concluded that a failure to file evidence of assessment work for claims for which small miner waiver certifications had been filed resulted in a statutory abandonment in accordance with section 314(c) of FLPMA. We believe that is the proper analysis in this case also.

BLM's analysis depends on a conclusion that failure to file the affidavit of assessment work on or before December 30, 2004, resulted in appellant not qualifying for the 2005 assessment year waiver. However, all appellant needed to do to qualify for the 2005 assessment year waiver was file a waiver certification on or before September 1, 2004, in which he certified that he held 10 or fewer claims or sites and that he had performed the assessment work for the assessment year (2004) ending at noon on September 1, 2004. The record shows that appellant filed a waiver certification on August 10, 2004, certifying to the above requirements and that he, in fact, performed the assessment work for the 2004 assessment year. However, in this case appellant was still obligated, based on his July 23, 2003, filing of a waiver certification for the 2004 assessment year, to file an affidavit of assessment work for the 2004 assessment year on or before December 30, 2004. See 43 CFR 3835.12 and 3835.31(d).

Failure to file the affidavit of assessment work in this case on or before December 30, 2004, resulted in a statutory abandonment of the claims under section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (2000), and we modify BLM's decision in that regard.^{11/} As noted, BLM has, by regulation, construed this statutory abandonment to be a forfeiture. See 43 CFR 3830.91(a)(3) and 3835.91.

^{11/} That failure did not constitute a failure to comply with 30 U.S.C. § 28f (2000), as amended, or give rise to the statutory forfeiture of 30 U.S.C. § 28i (2000), even though the consequences for appellant are the same.

Although we sympathize with appellant in the loss of the claims, the statutory provision is self-executing, and, even where extenuating circumstances are asserted, the Department is without authority to excuse lack of compliance, to extend the time for compliance, or to afford any relief from the statutory consequences. See United States v. Locke, supra; Kathryn Firestone, 146 IBLA 126, 129-30 (1999).

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 as modified, and appellant's petition to stay the effect of the decision is denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge