

INTERIOR BOARD OF LAND APPEALS

Lisa Tucker

167 IBLA 82 (September 29, 2005)

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LISA TUCKER

IBLA 2005-192

Decided September 29, 2005

Appeal from a decision of the Arizona State Office, Bureau of Land Management, declaring the Hackberry #2 association placer mining claim null and void ab initio. AMC 362808.

Affirmed as modified; petition for stay denied as moot.

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

When a mining claim is located before and recorded after the September 1 effective date of adjusted fees, the location and initial maintenance fees in effect at the time of location of the claim control what must be paid at the time of recordation. 43 CFR 3834.23(a) provides that “[y]ou must pay the adjusted initial maintenance and location fees when you record a new mining claim \* \* \* located on or after the September 1<sup>st</sup> immediately following the date BLM published its notice about the adjustment.” When mining claimants located mining claims in July 2004, after BLM published amended regulations in the Federal Register raising location and maintenance fees from \$25 to \$30 and \$100 to \$125, respectively, they were not responsible for the increased fees in October 2004 when they recorded their claims, because their claims were located before September 1, 2004.

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

When a mining claim is located before September 1, during one assessment year, and recorded after September 1, during the succeeding assessment year, the claimant is required to either pay the maintenance fee or file a waiver certification for the succeeding assessment year, but is also permitted the entire 90-day period for recording the claim with BLM to take such action.

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

When a mining claimant pays only part of the service charges, maintenance fees, and location fees when recording new mining claims, BLM must act in accordance with 43 CFR 3830.95 in applying that payment to the required fees and, when the fees paid are insufficient to cover the fees for a claim and the 90-day period for recording that claim has expired, the claim is properly deemed forfeited and null and void by operation of law.

APPEARANCES: Lisa Tucker, Gilbert, Arizona, for mining claimants.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Lisa Tucker, on her own behalf and on behalf of seven other mining claimants, has appealed from and petitioned for a stay of the effect of a May 10, 2005, decision of the Arizona State Office, Bureau of Land Management (BLM), declaring the Hackberry #2 association placer mining claim, AMC-362808, null and void ab initio, because insufficient fees were paid at the time of recordation of the claim.<sup>1/</sup>

On July 21, 2004, Tucker and the other seven claimants located two association placer mining claims (Hackberry # 1 and # 2) in sec. 33, T. 12 N., R. 1 E., Gila and Salt River Meridian, Yavapai County, Arizona, within the Prescott National Forest. On October 14, 2004, Tucker filed copies of notices of location of

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<sup>1/</sup> Those claimants are Jack Taylor, Lisa Antell, Mike Tucker, Anthony Crepezzi, Penny Crepezzi, Steve McAllister, and Paul Tucker.

the two claims for recordation with BLM, pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (2000), together with a check for \$330.<sup>2/</sup> On the same date, BLM assigned the claims recordation numbers AMC-362807 and AMC-362808, and allocated the \$330 as follows: original location fee for each of the claims (\$30); original service charge for each of the claims (\$10); and maintenance fee for the 2005 assessment year for each of the claims (\$125), for a total of \$330.

Thereafter, in its decision, BLM determined that its allocation had been incorrect and that the total amount due at the time of recording was \$520. BLM held that the fees due for each claim at the time of recording were, in accordance with 43 CFR 3830.21, a \$25 location fee, a \$10 service charge, and the initial \$100 maintenance fee for the 2004 assessment year, since “the date of location [of the claims] \* \* \* falls within the 2004 assessment year.”<sup>3/</sup> (Decision at 1.) However, it also noted that, since the claims were recorded during the 2005 assessment year, the annual maintenance fee for the 2005 assessment year for each of the claims (\$125) “was also due[.]” *Id.* Because the total amount paid (\$330) was less than the total amount owed (\$520), BLM held, as follows:

In accordance with 43 CFR 3830.25 and 3830.91, the fees must be paid in full at the time you record a new mining claim or your claim will be forfeited. The total received, \$330, is enough to pay the fees for 1 mining claim. Therefore, Hackberry #1 will be recorded with BLM. Hackberry #2 is declared null and void ab initio and is forfeited. You will receive a refund for the extra \$70 paid.

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<sup>2/</sup> Section 314(b) of FLPMA provides that the owner of a mining claim located after Oct. 21, 1976, “shall, within ninety days after the date of location of such claim, file [with BLM] \* \* \* a copy of the official record of the notice of location or certificate of location” of the claim. 43 U.S.C. § 1744(b) (2000); *see* 43 CFR 3833.11(a). Since the two mining claims here were located on July 21, 2004, the 90-day recordation period ended on Oct. 19, 2004.

<sup>3/</sup> The assessment year begins at noon on September 1 of one calendar year and continues until noon of September 1 of the following calendar year. *Jackie & Richard Balch*, 137 IBLA 72, 74 (1996) (citing 30 U.S.C. § 28 (2000)). Thus, in the present case, the 2004 assessment year began at noon on Sept. 1, 2003, and continued until noon on Sept. 1, 2004. Similarly, the 2005 assessment year began at noon on Sept. 1, 2004, and continued until noon on Sept. 1, 2005.

(Decision at 2.) BLM did not explain in its decision how it determined which of the two claims would be forfeited.

Tucker appealed timely. She states that, when she went to the BLM office to file the location notices, “the representative in the public room called upstairs to the adjudicators to ask about the filing fees due to the fact the claim was located in July, but filed in September” <sup>4/</sup> and that the representative “was told that the fee for filing was \$125, and that it was up to the discretion of the local BLM office as to whether or not the filing fees for 2004 would be included.” (Notice of Appeal (NA) at 1.) Tucker asserts that she “was instructed to pay \$125 for this claim” and that she filed another claim and “submitted my payment, as directed by BLM staff.” Id. It is clear that, in referring to “filing fees,” Tucker means only the maintenance fees, which for the 2005 assessment year were \$125 per claim, because she also paid location and service fees. She asserts that, upon receiving BLM’s decision, she was told by a BLM employee that the policy of affording discretion to BLM offices, regarding whether to charge filing fees for both the 2004 and 2005 years, had been “changed,” requiring payment for both years, thus resulting in BLM’s decision to void one of the claims. Id. She states: “I believe that I, at least, should have been notified and given an opportunity to correct, without the claim being voided.” Id.

Tucker concludes that the entire situation was handled improperly by BLM and requests the Board to reinstate the Hackberry # 2 mining claim, as originally filed. She also seeks a stay of BLM’s decision.

Congress has required in 30 U.S.C. § 28g (2000), as amended, <sup>5/</sup> that the locator of a mining claim, mill, or tunnel site located after August 10, 1993, and before September 30, 2008, pay a “location fee \* \* \* of \$25.00 per claim,” “at the time the location notice is recorded with the Bureau of Land Management[.]” <sup>6/</sup> That

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<sup>4/</sup> The record shows that Tucker filed copies of the location notices for the claims with BLM for recordation on Oct. 14, 2004, not in September, as represented by Tucker.

<sup>5/</sup> 30 U.S.C. § 28g (2000) has been amended twice by Congress, by the Department of the Interior and Related Agencies Appropriations Act, 2002 (2002 Appropriations Act), Pub. L. No. 107-63, 115 Stat. 414, 419 (2001), and the Department of the Interior and Related Agencies Appropriations Act, 2004 (2004 Appropriations Act), Pub. L. No. 108-108, 117 Stat. 1241, 1245 (2003).

<sup>6/</sup> 30 U.S.C. § 28f(b) (2000) also provides that the location fee required by § 28g “shall be payable not later than 90 days after the date of location.” This coincides  
(continued...)

section also states that the location fee is “in addition to the claim maintenance fee required by section 28f of [30 U.S.C.]” Congress has also required the holder of every mining claim located after August 10, 1993, to pay a “claim maintenance fee” of \$100 per claim “on or before September 1 of each year for years 2004 through 2008[.]” 30 U.S.C. § 28f(a) (2000), as amended.<sup>Z/</sup>

In 30 U.S.C. § 28j(c)(1) (2000), Congress directed the adjustment of the claim maintenance and location fees “to reflect changes in the Consumer Price Index published by the Bureau of Labor Statistics of the Department of Labor every 5 years after August 10, 1993, or more frequently if the Secretary [of the Interior] determines an adjustment to be reasonable.” 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 claim maintenance and location fees since 1993 by amending the applicable regulation (43 CFR 3830.21) effective June 30, 2004. BLM raised the maintenance fee from \$100 to \$125, and the location fee from \$25 to \$30. 69 FR 40294, 40296 (July 1, 2004). Thus, the applicable claim maintenance and location fees were \$100 and \$25 for the 2004 assessment year, and \$125 and \$30 for the 2005 assessment year, “the first assessment year which begins after adjustment is made.” 30 U.S.C. § 28j(c)(3) (2000).

Under 30 U.S.C. § 28f(b) (2000), the claim maintenance fee “shall be paid before the commencement of the assessment year, except that for the initial assessment year in which the location is made, the locator shall pay the claim maintenance fee at the time the location notice is recorded with the Bureau of Land Management.” We have held that 30 U.S.C. § 28f(b) (2000) requires payment, at the time of recordation of a claim, of a maintenance fee for the assessment year in which the claim was located, even where recordation occurs after the September 1 deadline for such payment. Carl Riddle, 155 IBLA 311, 312-13 (2001).

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<sup>S/</sup> (...continued)

with the requirement of section 314(b) of FLPMA that a copy of a notice of location be recorded with BLM “within ninety days after the date of location[.]” 43 U.S.C. § 1744(b) (2000).

<sup>Z/</sup> 30 U.S.C. § 28f(a) (2000) has been amended twice by Congress, by the 2002 Appropriations Act, 115 Stat. at 418-19, and the 2004 Appropriations Act, 117 Stat. at 1245.

At the time of location and recordation of the Hackberry Nos. 1 and 2 mining claims, 30 CFR 3830.25 provided: “You must pay the service charge, location fee, and initial maintenance fee, in full, as provided in § 3830.21 of [43 CFR], at the time you record new notices or certificates of location with BLM.”<sup>8/</sup> (Emphasis added.) See 43 CFR 3833.11(c). When the two claims were located on July 21, 2004, the version of 43 CFR 3830.21 in effect at that time, 43 CFR 3830.21 (68 FR 61046, 61067 (Oct. 24, 2003)), set forth a “table” which “lists service charges, maintenance fees, location fees, and oil shale fees[.]” The table had three columns labeled “Transaction,” “Amount due per mining claim or site,” and “Waiver available.” Id. For the recordation of a claim or site, the table listed a total amount due of \$135, which included a \$10 service charge, a one-time \$25 location fee, and an initial maintenance fee of \$100. However, as noted above, the regulation was amended, increasing the applicable location fee and the maintenance fee for the 2005 and subsequent assessment years, so that at the time the claims were recorded with BLM on October 14, 2004, the regulation provided for a \$10 service charge, a one-time \$30 location fee, and an initial \$125 maintenance fee, or “[a] total of \$165,” for “[r]ecording a mine claim or site location.”

[1] Claimants in this case were not responsible for those increased fees at the time of recordation because, when a mining claim is located before and recorded after the September 1 effective date of adjusted fees, it is the location and initial maintenance fees in effect at the time of location of the claim that control what must be paid at the time of recordation. 43 CFR 3834.23(a) provides that “[y]ou must pay the adjusted initial maintenance and location fees when you record a new mining claim \* \* \* located on or after the September 1<sup>st</sup> immediately following the date BLM published its notice about the adjustment.” (Emphasis added.) In this case, the claims were located before September 1, 2004. Therefore, the claimants were subject to the \$25 location fee and the \$100 initial maintenance fee, as well as the \$10 service charge.

Thus, as BLM properly concluded in its decision, the total amount due at the time of recordation of the two claims, in terms of the location fee, service charge, and

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<sup>8/</sup> Regulation 43 CFR 3834.11(a)(1) also provided: “When you first record a mining claim or site with BLM, you must pay a location fee and an initial maintenance fee for the assessment year in which you located the mining claim or site.” In addition, 43 CFR 3834.13 provided that BLM will not “prorate” maintenance fees, even where a claim was held only part of a year: “You must pay the full annual fee even if you hold the claim or site for just one day in an assessment year.” Claimants in this case were required to pay the full \$100 maintenance fee for the 2004 assessment year, even though they located the claims July 21, 2004, near the end of that year.

initial maintenance fee for the 2004 assessment year, was \$135 per claim, or a total of \$270 for the two claims.

In addition to requiring payment of the location fee, service charge, and initial maintenance fee for the 2004 assessment year, BLM held, in its May 2005 decision, that payment of the maintenance fee for the 2005 assessment year was required: “[B]ecause you did not record the claims until [October 14], 2004, the 2005 assessment year fee of \$125 per claim was also due at the time of recording.” (Decision at 1, emphasis added.) This accords with the statute and implementing regulations.

Under 30 U.S.C. § 28f(a) (2000), as amended, the holder of a mining claim located after August 10, 1993, is required to pay a claim maintenance fee “on or before September 1 of each year for years 2004 through 2008[.]” (Emphasis added.) See 43 CFR 3834.11(a)(2). In addition, 30 U.S.C. § 28f(d) (2000) authorizes the Secretary to waive payment of a maintenance fee where a claimant certifies in writing that, “on the date the payment was due,” the claimant and all related parties held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands, and have performed assessment work, as required by the Mining Law of 1872, for the assessment year which ends September 1 of the calendar year in which payment of the maintenance fee was due. See 43 CFR Part 3835.

[2] We have held that, when a mining claim is located before September 1, during one assessment year, and recorded after September 1, during the succeeding assessment year, the claimant is required to either pay the maintenance fee or file a waiver certification for the succeeding assessment year, but is also permitted the entire 90-day period for recording the claim with BLM to take such action. Bear Creek Mining Company, 160 IBLA 308, 311-13 (2004), and cases cited. Bear Creek involved a prior regulation, 43 CFR 3833.1-5(a)(1) (1999), which provided, in the case of a claim whose location and recordation straddled September 1, that the maintenance 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.” (Emphasis added.) Nonetheless, we concluded that a claimant had the entire 90-day recordation period to pay the maintenance fee for the succeeding assessment year, and did not have to pay the fee at the same time as filing the location notice and paying the initial maintenance fee. We also held that the claimant could, in lieu of paying the maintenance fee, file a waiver certification for the succeeding assessment year, within the same time frame.

The current applicable regulations in 43 CFR Part 3834, relating to the required fees for mining claims, do not specifically address the timing of the payment

of the maintenance fee for the succeeding assessment year, when a mining claim is located in one assessment year and filed for recordation in the succeeding assessment year. However, they do provide that for “newly-recorded mining claims” properly “located before September 1 and recorded after September 1,” a claimant seeking a waiver of the maintenance fee requirement must submit a waiver certification “at the time of recording the mining claim \* \* \* with BLM[.]”<sup>9/</sup> 43 CFR 3835.14(a)(2). Because the waiver certification is filed in lieu of maintenance fees, it is arguable that a claimant must pay the maintenance fee for that succeeding assessment year at the time of recording the claim with BLM. Nevertheless, the rationale in Bear Creek is equally applicable to the current regulations. Accordingly, a mining claimant who records a claim in a succeeding assessment year should have the entirety of the 90-day recordation period within which to pay the fee for the succeeding assessment year or request a waiver by filing a waiver certification. See 160 IBLA at 311-13.

In the present case, when the two mining claims were located before, and recorded after, September 1, 2004, the claimants could have either paid the maintenance fees to BLM or filed a waiver certification with BLM for the claims for the 2005 assessment year on or before the expiration of the 90-day recordation period following location of the claims, *i.e.*, by October 19, 2004. 43 CFR 3835.14(a); Bear Creek Mining Company, 160 IBLA at 311.<sup>10/</sup>

Therefore, the claimants were required, in addition to the fees and charges payable in connection with recordation of the two claims (\$270), to pay annual maintenance fees for the 2005 assessment year, in the amount of \$125 per claim, or a total of \$250. Thus, the total amount owed at the time of recordation of the two claims was \$520.

It is clear that Tucker’s \$330 payment was considerably less than the total amount of \$520 required by statute and regulation at the time of recordation of the two claims. While sufficient to cover the location fee, service charge, initial maintenance fee for the 2004 assessment year, and annual maintenance fee for the

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<sup>9/</sup> When proposed, 43 CFR 3835.14(a) provided, more clearly, that it was intended to “establish the conditions for obtaining a small miner waiver in the assessment year [immediately] following the assessment year of location[.]” 64 FR 47023, 47028 (Aug. 27, 1999), emphasis added; see id. at 47041.

<sup>10/</sup> Had the claimants recorded the two claims with BLM before Sept. 1, 2004, there is no question that they would have been required to pay the maintenance fees or file a waiver certification for the 2005 assessment year on or before that date, or suffer the forfeiture of both claims. James W. Sircy, 158 IBLA 234, 236-37 (2003).

2005 assessment year for one claim (totaling \$260), it was not sufficient to pay all of those fees and charges for the other claim (\$260). Thus, we agree with BLM that the required fees were not paid in full.<sup>11/</sup>

The question is what are the consequences for the insufficient payment of location and other fees for the two mining claims where the amount paid is sufficient, at the time of recordation, to cover all of the fees for one of the claims, but not both.

The regulation governing the situation in which a claimant pays only part of the service charges, maintenance fees, and location fees when recording new mining claims, 43 CFR 3830.95(a), provides that BLM will, in such circumstances,

- (1) Assign serial numbers to each mining claim \* \* \*;
- (2) Treat the partial payment as payment of location and maintenance fees and apply the partial payment to the mining claims \* \* \* in serial number order until the money runs out; and
- (3) Send a notice to you that you must pay any outstanding service charges \* \* \*. For example, BLM will apply the money to cover the location and maintenance fees for as many mining claims \* \* \* as possible. BLM will return any remaining certificates or notices for which we cannot apply full payment of location and maintenance fees. BLM will apply any remaining funds as service charges in serial number order until the money runs out. BLM will then notify you if you must pay any outstanding service charges for mining claims \* \* \* for which you paid location and maintenance fees \* \* \*.

In addition, 43 CFR 3830.95(b) provides that, “[i]f you want to resubmit the new location notices or certificates that BLM returned to you, you must do so with the complete service charges, location fees and maintenance fees within 90 days of the original date of location of the claim \* \* \* as defined under state law, or you will forfeit the affected mining claims \* \* \*.”

In the present case, BLM followed the regulation, applying the \$330 payment to the location and maintenance fees (\$25 location fee, plus maintenance fees for the

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<sup>11/</sup> The claimants clearly did not, in lieu of paying the maintenance fees, file a waiver certification for the 2005 assessment year for both claims, on or before the expiration of the 90-day recordation period on Oct. 19, 2004. Thus, the present case is not akin to Bear Creek.

2004 assessment year (\$100) and 2005 assessment year (\$125), or a total of \$250) for the claim with the lower serial number (Hackberry # 1, AMC-362807). This left \$80, which was insufficient to pay the location and maintenance fees (also totaling \$250) for the claim with the higher serial number (Hackberry # 2, AMC-362808). Therefore, BLM applied the money paid “to cover the location and maintenance fees for as many mining claims \* \* \* as possible.” 43 CFR 3830.95(a)(3).

Further, since the remaining monies were insufficient to pay the location and maintenance fees for the Hackberry # 2 claim, BLM was directed to “return” the location notice for that claim, because it could not “apply full payment of location and maintenance fees” for the claim.<sup>11/</sup> 43 CFR 3830.95(a)(3). Return of the location notice was intended to afford the claimant an opportunity to “resubmit” the notice, along with full payment of the “complete service charges, location fees and maintenance fees” for the claim. 43 CFR 3830.95(b). Resubmission was required to be done within 90 days of the original date of location of the claim.

In this case, when BLM adjudicated the matter in May 2005, the 90-day recordation period had long since passed. Resubmission of the location notice at that point with the proper fees would have been a useless act.

Tucker’s arguments on appeal essentially amount to a contention that BLM should be estopped from declaring the Hackberry # 2 claim forfeited and void because of the alleged erroneous advice given to her when she sought to record the two mining claims and pay all applicable fees.

This Board has well-established precedents governing when estoppel is applicable against the Government. Carl Riddle, 155 IBLA at 314, and case cited therein. Oral misstatements alone by BLM officials cannot support a claim of estoppel; an appellant’s reliance must be predicated on a crucial misstatement in an official written decision. Mineral Hill Venture, 155 IBLA 323, 330 (2001); Carl Riddle, 155 IBLA at 314; see Floyd Higgins, 147 IBLA 343, 347 (1999). In the present case, Tucker refers only to oral statements made to her by BLM employees.

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<sup>12/</sup> BLM could, however, in the present case, apply the “remaining” \$80 to payment of the “service charges” for the claim with the lower serial number (Hackberry # 1), in accordance with 43 CFR 3830.95(a)(3). This left the \$70, which BLM properly held should be refunded to the claimants.

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.<sup>13/</sup> The petition for a stay is denied as moot.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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H. Barry Holt  
Chief Administrative Judge

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<sup>13/</sup> We modify BLM's decision only to the extent that it declared the claim "null and void ab initio." Such a declaration incorrectly determines the claim to be void as of its inception, *i.e.*, the date of its location. Instead, the claim was forfeited and null and void by operation of law, under 30 U.S.C. § 28i (2000), when claimants failed to pay the necessary fees on or before the expiration of the 90-day recordation period.