

INTERIOR BOARD OF LAND APPEALS

Beverly D. Glass

167 IBLA 388 (February 13, 2006)

Title page added by:
ibiadecisions.com

BEVERLY D. GLASS

IBLA 2006-59

Decided February 13, 2006

Appeal from a decision of the Oregon State Office, Bureau of Land Management, declaring an unpatented lode mining claim forfeited and void by operation of law. ORMC-92620.

Affirmed; petition for stay denied as moot.

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

When a mining claimant timely submits two checks to BLM totaling \$125 (one for \$100 and the other for \$25) in payment of the maintenance fee for a mining claim and the bank properly dishonors the check for \$100, the fee is, in accordance with 43 CFR 3830.23(b), “unpaid.” The remaining payment is not a partial payment subject to cure because the payment of the fee is required by 30 U.S.C. § 28f(a) (2000), and, in accordance with 43 CFR 3830.93(a), “[i]f there is a defect in your compliance with a statutory requirement, the defect is incurable.”

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

A document, timely filed with BLM, which does not, in some fashion, apply for or request a waiver of the statutory requirement to pay a claim maintenance fee, is not a small miner waiver application or request, within the meaning of 30 U.S.C. § 28f(d)(3) (2000), and its implementing regulations.

APPEARANCES: Beverly D. Glass, Eugene, Oregon, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Beverly D. Glass has appealed from and petitioned for a stay of the effect of an October 18, 2005, decision of the Oregon State Office, Bureau of Land Management (BLM), declaring the Infinity Mine lode mining claim, ORMC-92620, forfeited and void by operation of law for failure to pay a claim maintenance fee or file a small miner waiver certification for the claim for the 2006 assessment year, on or before September 1, 2005, as required by 30 U.S.C. § 28f (2000), as amended, and 43 CFR 3834.11(a) and 3835.10(a).

Under 30 U.S.C. § 28f(a) (2000), as amended, the holder of each unpatented mining claim, mill site, or tunnel site is required to “pay to the Secretary of the Interior, on or before September 1 of each year for years 2004 through 2008, a claim maintenance fee of \$100 per claim or site.”^{1/} However, Congress directed the adjustment of the maintenance fee “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 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). Pursuant to that authority, BLM made its first adjustment of the maintenance fee effective June 30, 2004, raising the fee from \$100 to \$125. 69 FR 40294, 40296 (July 1, 2004); see 43 CFR 3830.21. Under 30 U.S.C. § 28j(c)(3) (2000), that

^{1/} The maintenance fee payment requirement and waiver provisions of 30 U.S.C. § 28f (2000) were originally enacted as part of sections 10101 through 10106 of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 405-407, codified at 30 U.S.C. §§ 28f-28k (1994). That statute has been amended four times by Congress, by the Act of September 25, 1998, Pub. L. No. 105-240, 112 Stat. 1566, 1570, the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-235 (1998), 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). These amendments have extended the requirement to pay a claim maintenance fee through 2008. The Department’s regulations implementing the statutory requirement to pay a maintenance fee, or, in lieu thereof, file a waiver certification have likewise been amended a number of times, now appearing in the 2004 version of 43 CFR at Parts 3830, 3834, and 3835. We will hereafter cite to those regulations.

adjustment was applicable “the first assessment year which begins after adjustment is made,” or during the 2005 assessment year, which began September 1, 2004. See 43 CFR 3834.23(b).

The failure to pay the claim maintenance fee “shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site 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). However, Congress provided the Secretary with discretion to waive the fee for a claimant who certified 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 had 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 Audrey Bradbury, 160 IBLA 269, 273-74 (2003). BLM implemented this statute with a regulation that requires a claimant to file “BLM’s waiver certification form on or before September 1 of each assessment year for which you are seeking a waiver.” 43 CFR 3835.10(a).^{2/} 43 CFR 3835.10(b) and 3835.11(a) specify the contents of a waiver certification. 43 CFR 3830.91(a) provides, in relevant part, that “[y]ou will forfeit your mining claims or sites if you fail to * * * [s]ubmit a small miner waiver request on or before the due date * * * and also fail to pay the annual maintenance fee on or before the due date[.]” 43 CFR 3835.92(a) reiterates that “[i]f you fail to submit a qualified waiver request * * * and also fail to pay an annual maintenance fee by September 1st, you forfeit the affected mining claims or sites.”

The case record shows that Glass timely submitted a check to BLM for \$125 on August 23, 2004, in payment of the maintenance fee for the claim for the 2005 assessment year. See 43 CFR 3834.11(a)(2).^{3/} In order to maintain the mining claim for the 2006 assessment year, Glass was required, on or before September 1, 2005, to pay a maintenance fee of \$125 to BLM or file a waiver certification.

^{2/} 43 CFR 3835.10(a) provides, in relevant part: “You must submit BLM’s waiver certification form on or before September 1 of each assessment year for which you are seeking a waiver. You must submit your waiver on or before September 1 for BLM to exempt your claims or sites from the annual maintenance fee requirement that is due on the same date.”

^{3/} 43 CFR 3834.11(a)(2) provides: “You must pay an annual maintenance fee on or before September 1st of each year in order to maintain a mining claim or site for the upcoming assessment year.”

On August 22, 2005, BLM received a \$100 check from Glass in payment of the claim maintenance fee for the subject claim for the 2006 assessment year. On the same date, BLM received a copy of a "MINING CLAIM AFFIDAVIT," signed by Glass on August 12, 2005, and date-stamped as received by the County Clerk, Linn County, Oregon, on August 13, 2005.

That form, which is a standard typewritten form ("FORM No. 602"), provides the affiant, under the subheading "(PAYMENT OF FEDERAL FEES OR PERFORMANCE OF ANNUAL ASSESSMENT WORK)," with the opportunity to check separate boxes attesting to having met either (1) the "federal maintenance fee requirements" or (2) the "federal qualifications for maintenance fee waiver * * * including filing certified statement of maintenance fee waiver." If the affiant selects box number 2, the form provides space for including additional information concerning the performance of assessment work, such as number of days of labor performed; value of improvements; character and location of improvements; dates of performing labor or making improvements; name of person performing the labor or making the improvements; name of person on whose behalf or at whose request activities were undertaken; and amount paid and by whom paid (if activities undertaken by a person other than the owner). In the affidavit, Glass checked box number 1 attesting to the fact that she had met the Federal maintenance fee requirements. The affidavit also bears the handwritten notation: "\$100.00 fee paid - BLM." Glass provided no information on that form related to the performance of assessment work.

On August 26, 2005, BLM received a note from Glass titled "Ref: Underpayment of claim ORMC 92620." Therein, Glass stated: "I paid only [(\$)]100 oo for the fee for Sept 1, [20]05 so I owe you \$25 oo more. Here it is." The note was accompanied by a check for \$25.00. Sometime after the September 1 deadline for filing, Glass' bank returned her check for \$100.00 for insufficient funds.

In its decision declaring the claim forfeited and void, BLM cites 43 CFR 3830.23(b), which states that, "[i]f the issuing institution of your check * * * refuses to pay and it is not because the institution made a mistake, BLM will treat the service charges and fees as unpaid." BLM then stated that the "second check for \$25.00 received on August 29 [sic], 2005, was insufficient for the 2006 maintenance payment." (Decision at 1.) Accordingly, it found that neither a waiver request nor the fee had been submitted timely and the claim was forfeited. BLM stated that Glass' \$25 payment would be refunded.

On October 31, 2005, BLM received a letter from Glass, dated October 27, 2005, stating: "I am writing to request that you accept this information pursuant to

43 CFR 3835.93(c) to cure the defect in my request for a maintenance fee waiver.” (Emphasis added.) Glass went on to explain:

When I filed my timely waiver I forgot to indicate I wished to request a fee waiver and to include my information regarding maintenance of my claim. My understanding is this is not described in 43 CFR 3833.91 as an incurable defect. Therefore, it is a curable defect and I wish to cure this defect in my filing in accordance with 43 CFR 3835.93(c). Here is the additional information:

Number of days of labor performed:	two days[]
Value of improvements:	\$200
Character and location of improvements:	Filling in holes and reclamation work
Dates:	June 2005
Performed at request of:	Self
Performed by:	Self
Amount paid:	\$0

Appended to her letter was a copy of BLM Receipt No. 1140114, reflecting BLM’s August 26, 2005, receipt of the \$25 payment by appellant, and a copy of the August 12, 2005, Mining Claim Affidavit stamped “CANCELLED” across the BLM August 22, 2005, date stamp.

On November 21, 2005, Glass filed with BLM a document styled “Appeal From Decision.” Therein, she states: “I appeal this decision and request a hearing. I wish to present both written and testamentary evidence.” The remainder of the document is identical to that part of her October 27, 2005, letter quoted above, except she adds: “Furthermore, although I paid the annual fee, I inadvertently stopped payment on the check I wrote to BLM instead of the check I actually lost.” A “Petition for Stay of Decision,” also filed on November 21, 2005, states: “I request a stay of execution of this decision.” The remainder of that document is also identical to that part of her October 27, 2005, letter quoted above, with the additional sentence from her “Appeal from Decision.”

BLM considered Glass’ October 27, 2005, letter to be a notice of appeal, stating in a December 1, 2005, letter to her that it was “acknowledg[ing] receipt of your Notice of Appeal filed * * * on October 31, 2005,” and that it had forwarded the case file to the Board.

On appeal, Glass makes no allegation that she timely paid the maintenance fee for the claim. In fact, she admits that she stopped payment on the original \$100 check. Her only argument is that in filing the Mining Claim Affidavit on August 12, 2005, she actually intended to claim a small miner waiver for the 2006 assessment year and that she should be allowed to cure any defects in that document.

[1] In this case, Glass timely presented to BLM two checks totaling \$125 for the payment of the maintenance fee for the claim for the 2006 assessment year. The check for \$100 was returned by the bank as dishonored. 43 CFR 3830.23(b) provides that, “[i]f the issuing institution of your check * * * refuses to pay and it is not because the institution made a mistake, BLM will treat the service charges and fees as unpaid.” Here, there is no evidence that Glass’ bank made a mistake. In fact, Glass admits that she stopped payment on the \$100 check. It is well established, as a matter of Departmental regulation and longstanding precedent, that payment of the maintenance fee by a check that is not honored by the bank or other issuing institution does not satisfy the maintenance fee payment requirement of 30 U.S.C. § 28f(a) (2000), as amended. Loco Mining Co., 155 IBLA 153, 155 (2001), and cases cited therein. Thus, the maintenance fee must be considered as unpaid.

While Glass timely submitted a second check for \$25 in payment of the maintenance fee, that partial payment is not a curable defect because payment of the maintenance fee is required by statute (30 U.S.C. § 28f(a) (2000)), and, in accordance with 43 CFR 3830.93(a), “[i]f there is a defect in your compliance with a statutory requirement, the defect is incurable.” (Emphasis added.)

[2] The record belies Glass’ assertion that she timely filed a maintenance fee waiver request. The document relied on by Glass as her “waiver certification” is the Mining Claim Affidavit. That document made no representation that it was a waiver certification. It provided the affiant with the opportunity to attest to either having met the maintenance fee requirements or having met the maintenance fee waiver requirements and providing information about the performance of assessment work. Glass attested to the former. Absolutely nothing on the face of the Mining Claim Affidavit communicates the intent to request a maintenance fee waiver. In fact, Glass admits as much in her October 27, 2005, letter to BLM, when she states that, when she filed her “timely waiver,” she “forgot to indicate” that she “wished to request a fee waiver[.]”

30 U.S.C. § 28f(d)(3) (2000) requires BLM to provide a claimant notice and a 60-day opportunity to either cure the “defect” in a “small miner waiver application” or, instead, pay the maintenance fee if the “application is determined to be defective for any reason[.]” See 43 CFR 3830.94(c) (“defective fee waiver request”). We have

held that a claimant cannot qualify for a small miner waiver when no document which might be construed as a waiver application (or certification) was filed on or before the September 1 deadline: “Congress’ intent * * * is clearly to permit a claimant to avoid forfeiture where a timely, but defective[,] certification is filed, and the claimant thereafter cures the defect or pays the maintenance fee.” Otto Adams, 155 IBLA 1, 4 (2001). ^{4/} In this case, no document that could be construed as an “application” or “request” for a waiver, within the meaning of the statute and its implementing regulations, was filed with BLM by Glass on or before September 1, 2005.

Absent submission of a proper maintenance fee payment or waiver request for the claim for the 2006 assessment year, on or before the September 1, 2005, deadline, BLM properly declared the claim forfeited and void by operation of law. See Goldie James, 143 IBLA 289, 294 (1998); 43 CFR 3830.91(a) and 3835.92(a).

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, and appellant’s petition for stay is denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge

^{4/} In Adams, when the claimants “did not submit any waiver certification” on or before the statutory deadline for the applicable assessment year, we concluded that there was no basis for invoking 30 U.S.C. § 28f(d)(3) (2000), adding: “In the absence of any waiver certification filing, appellants were not entitled either to written notice by BLM of a defective certification or to a period of 60 days following receipt of the notice to pay the maintenance fee.” 155 IBLA at 4.