

Editor's note: Reversed (minute order), Civ. No. 2:99CV-133ST (D. Utah, Nov. 7, 2000), rev'd (IBLA aff'd), No. 01-4063 (10th Cir. May 31, 2002), 291 F.3d 1250 petition for cert filed, S. Ct. No. 02-660 (Oct. 22, 2002), 71 USWL 3358, cert denied 123 S.Ct. 844 (Jan. 13 2003).

UNITED STATES

v.

CLIFFS SYN FUEL CORP.

IBLA 98-306

Decided November 23, 1998

Appeal from a decision by Administrative Law Judge Nicholas T. Kuzmack, declaring unpatented oil shale placer mining claims null and void. UTU 75522.

Affirmed.

1. Mining Claims: Assessment Work

30 U.S.C. § 28 (1994) calls for the expenditure of \$100 in assessment work on or for the benefit of a mining claim each year until patent. Before patent can be obtained the claimant must have made improvements valued at \$500 or more (30 U.S.C. § 29 (1994)), but the expenditure of \$500 does not terminate the ongoing requirement in 30 U.S.C. § 28 (1994), for expenditure of \$100 each assessment year.

2. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1994), and the Department has jurisdiction to challenge the validity of a mining claim for failure to substantially comply with the assessment work requirement.

3. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

Where a mining claimant resumes performance of assessment work after a period of nonperformance of assessment work, he generally may revive the claim. However, where a third party right attaches during the period of

inactivity, the claimant is precluded from regaining his claim by resuming work. In the case of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1994), the United States is the intervening third party and the resumption doctrine is no longer applicable to oil shale claims.

APPEARANCES: Robert G. Pruitt, Jr., Esq., Salt Lake City, Utah, for Appellant; David Grayson, Esq., Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Cliffs Synfuel Corporation (Cliffs) has appealed from an April 7, 1998, Decision by Administrative Law Judge Nicholas T. Kuzmack declaring the Cliff Nos. 6, 8, 9, and 10 unpatented oil shale placer mining claims, situated in the SW $\frac{1}{4}$ of sec. 31, T. 10 S., R. 25 E., Salt Lake Meridian, Utah, and the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and the W $\frac{1}{2}$ SW $\frac{1}{4}$ of sec. 5, and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 6 and the NW $\frac{1}{4}$ of sec. 8, T. 11 S., R. 25 E., Salt Lake Meridian, Utah, null and void for failure to substantially comply with annual assessment work requirements at 30 U.S.C. § 28 (1994).

The claims were located on September 14, 1917. (Ex. G-6, at 9.) Cliffs acquired the claims from Standard Oil in 1986. (Tr. 235.) On March 22, 1989, Cliffs filed a patent application for the claims. (Ex. G-6, at 1.) Cliffs paid the purchase price for issuance of a patent and on October 9, 1992, the First Half-Mineral Entry Final Certificate was issued. (Ex. G-4, Appendix B.)

The contest was initiated when the Bureau of Land Management (BLM), on June 19, 1996, filed a complaint charging lack of discovery, within the limits of each claim, of an oil shale deposit sufficient to support a valid location on or before February 25, 1920, the lack of a present discovery of a valid deposit, and failure of the claimant and predecessors in interest to comply with 30 U.S.C. § 28 (1994).

A hearing was held before Judge Kuzmack on December 15 and 16, 1997, in Salt Lake City, Utah.

In his Decision, the Judge found (a) that there had been a lack of substantial compliance with 30 U.S.C. § 28 (1994) "to demonstrate a diligent good faith effort to develop each mining claim" (Decision at 8), (b) that the "resumption doctrine" was inapplicable to restore Cliffs' interest in the claims, and (c) that compliance with the \$500 requirement (30 U.S.C. § 29 (1994)) does not satisfy the substantial compliance requirement of 30 U.S.C. § 28 (1994). (Decision at 10-11.)

On May 6, 1998, Cliffs filed in the Office of Hearings and Appeals' (OHA's) Salt Lake City Office a Petition for Stay of Judge Kuzmack's Decision "pending the outcome of appeals to determine finally whether the

subject unpatented mining claims are valid, or are null and void." Discussing the standards for stay in 43 C.F.R. § 4.21, Cliffs filed the petition in order to maintain "the status quo of the virtually complete processing of Mineral Patent Application UTU-65275." In light of our decision herein, the Petition for Stay is denied as moot.

On May 12, 1998, BLM filed a Notice of Appeal from Judge Kuzmack's decision. Cliffs filed a Motion to Dismiss BLM's appeal as being late under 43 C.F.R. § 4.411(a). Cliffs asserts that BLM was served with Judge Kuzmack's Decision on April 10, 1998, and filed its Notice of Appeal on May 12, 1998 (a Tuesday), 32 days after service.

The relevant Departmental regulation provides that a notice of appeal from a BLM decision must be filed with BLM "within 30 days after the date of service [of the decision]." 43 C.F.R. § 4.411(a); see 43 C.F.R. § 4770.3(a). Failure to timely file a notice of appeal requires dismissal of the appeal since, in that event, the Board is without jurisdiction to decide the appeal. See 43 C.F.R. § 4.411(c); Commission For The Preservation Of Wild Horses, 133 IBLA 97 (1995) and cases there cited.

According to the return receipt in the file, BLM received Judge Kuzmack's Decision on April 10, 1998, which began the running of the appeal period. See 43 C.F.R. § 1810.2(b); Victor M. Onet, Jr., 81 IBLA 144, 146 n.2 (1984); Lloyd M. Baldwin, 75 IBLA 251, 253 (1983).

The regulations provide a 10-day grace period for filing a notice of appeal whereby an appeal will be deemed timely filed when the notice "is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed." 43 C.F.R. § 4.401(a). BLM's Notice of Appeal contains a handwritten note "Rec'd in OHA 5/12/98." The certification of service attached to the Notice of Appeal states that it was "Hand Carried" to the addressees. Accordingly, though BLM's Notice of Appeal was filed within the 10-day grace period, it was not transmitted before the end of the original appeal period and must therefore be dismissed as untimely. See Ilean Landis, 49 IBLA 59, 62 (1980). 1/

Proceeding to the merits, Cliffs challenges that part of Judge Kuzmack's Decision dealing with lack of substantial compliance with statutory assessment work requirements.

The Judge found from the evidence that no assessment work affidavits were filed and no assessment work performed for a 47-year period, from July 1, 1931, through September 1, 1977, except that assessment work was performed in 1975. (Tr. 43-44, 266-67.) The Judge observed that Cliffs did not attempt to rebut this evidence and agreed with it in its patent

1/ BLM filed no statement of reasons (SOR), nor an answer to Cliffs' SOR.

application. In a document entitled "Description of Workings And Improvements" between 1918 and 1988, no activities are listed for the years from 1931 through 1977. (Ex. G-6 at Ex. M.) The Judge found that assessment work was properly performed for the years 1918 through July 1, 1930, and for the assessment year ending on September 1, 1978, through the assessment year ending on September 1, 1992. He concluded, however, that the failure to perform assessment work for 47 of 70 years demonstrated a lack of good faith in developing each of the claims and constituted a showing that Cliffs "has not substantially complied with the requirement of performing at least \$100 of assessment work per year for each claim." (Decision at 8.)

Relying on United States v. Herr, 130 IBLA 349, 101 I.D. 113 (1994), the Judge rejected Cliffs' claim that even though a claimant performed no assessment work for a time, the claim may be revived by the claimant's resumption of assessment work regardless of intervening rights which attached during the period when no assessment work was performed. (Decision at 9.)

Finally, quoting from Jerry D. Grover d.b.a. Kingston Rust Development, 139 IBLA 178, 181-82 (1997), the Judge held that compliance with the \$500 requirement (30 U.S.C. § 29 (1994)) was not "substantial compliance" with assessment work requirements.

Cliffs challenges the Judge's conclusion that lack of performance of assessment work in the years between 1930 and 1974 rendered the claims null and void. Cliffs asserts that the Judge failed to consider "the possibility of an exemption from the requirement to perform annual assessment work on oil shale mining claims based upon 1930 and 1935 U.S. Supreme Court decisions and Department of Interior acquiescence in those decisions since 1935." Further, Cliffs states that at the hearing it introduced testimony and evidence on this point. (SOR at 4.) Cliffs cites Ex. R-24 (Affidavit of William T. Schwartz) and Tr. 208-18.

At Tr. 210-18,, Cliffs' president, Gary D. Aho, testified with respect to two cases, Wilbur v. Krushnic, 280 U.S. 306 (1930), and Ickes v. Virginia-Colorado Development Co., 295 U.S. 639 (1935). Aho gave his interpretation of these cases as holding that "the Government could not take away an oil shale claimant's rights for lack of assessment work, and that the Claim owner was entitled to resume assessment work at, at his, at any time he wanted to * * *." (Tr. 210.)

William T. Schwartz is an attorney and a former president of Utah Shale and Oil Corporation. In his affidavit, he expressed his opinion that the Government had no right to challenge oil shale placer claims for failure of the locator to perform assessment work. (Ex. R-24.)

Cliffs characterizes the evidence outlined in the previous two paragraphs as a "widely known `exemption' from performing annual assessment work." (SOR at 5.)

Cliffs asserts that the effect of United States v. Herr, *supra*, is "to retroactively wipe out currently maintained oil shale claims [which] does not meet any test of propriety, necessity or fairness." (SOR at 9.) Cliffs asserts that the Board erred when it stated in Herr that Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), marked the demise of the resumption doctrine. (SOR at 10-11.)

Next, Cliffs contends that the critical date for determining the validity of a mining claim where a mineral patent application has been filed is the date when the First Half-Mineral Entry Final Certificate was issued, in this case, October 9, 1992. Cliffs states that the applicable guidance is found in proposed rules "Affecting Petroleum Placer Claims" published at 56 Fed. Reg. 938 (Jan. 9, 1991), and a December 16, 1988, Memorandum of the Director, BLM, providing guidelines on the processing of oil shale patent applications. (Exs. R-3 and R-2.)

The January 9, 1991, proposed regulation, 43 C.F.R. § 3851.3, provided:

(a) Failure of a mining claimant to comply substantially with * * * (30 U.S.C. § 28) shall render the mining claim subject to contest proceedings * * * if the mining claim was located for minerals of a type no longer subject to disposition under the mining law, * * *. In order to meet the requirement for substantial compliance, the claimant shall annually perform not less than \$100 worth of labor or make improvements in such amount in an effort to develop a valuable mine. Resumption of qualifying assessment work, prior to the initiation of a challenge by the United States, is an absolute defense in a contest brought on that basis.

This provision was not promulgated. While it is well established that the Department is bound by its duly promulgated regulations, the same is not true of proposed regulations which have not been promulgated. The relevant regulation in effect from 1972 provided:

(a) Failure of a mining claimant to comply substantially with the requirement of an annual expenditure of \$100 in labor or improvements on a claim * * * (30 U.S.C. § 28) will render the claim subject to cancellation.

(b) Failure to make the expenditure or perform the labor required upon a location will subject the claim to relocation unless the original locator, his heirs and assigns, or legal representatives have resumed work after such failure and before relocation.

37 Fed. Reg. 17836 (Sept. 1, 1972). The preamble to this regulation states that:

The purpose of the amendment is to revise the regulations in light of the principles set out in *Hickel v. Oil Shale Corporation*, 400 U.S. 48 (1970). The Department's regulations relating to assessment work on mining claims state that failure to perform the required assessment work relates solely to the right of possession between rival or adverse claimants to the same mineral land. The Supreme Court's decision in *Hickel v. Oil Shale Corporation* shows that the existing regulation is not consistent with the law.

* * * * *

[I]t is the Department's view that the proposed regulation correctly reflects the law as stated in that decision.

Therefore, the proposed amendment is hereby adopted without change * * *.

Id. Thus, the regulations recognized that oil shale mining claims were subject to invalidation for failure to substantially comply with the assessment work requirements long before issuance of the Herr decision.

In the October 1, 1993, revision, 43 C.F.R. § 3851.3(b) was amended as follows: "(b) Except as provided in § 3851.5 and subpart 3852, failure to perform the assessment work required under § 3851.1 causes the interest of the claimant(s) in the minerals subject to the mining laws to revert back to the public domain." No modification of this regulatory language has occurred since October 1, 1993.

The other item cited by Cliffs is the December 16, 1988, Memorandum from BLM's Director to the Colorado and Utah State Directors concerning the processing of oil shale placer applications. (Ex. R-2.) Included in the memorandum was a standard for the determination of the validity of such claims under which a claim was to be considered valid if it yielded 15 gallons or more of shale oil per ton of rock or 1,500 barrels or more per acre.

Finally, Cliffs argues that equitable title, which it claims vested when the First Half-Mineral Entry Final Certificate was issued in 1992, bars cancellation of the claims for failure to perform assessment work.

The issue in this appeal is whether the failure to perform assessment work renders these claims void. We hold that the Judge correctly so found.

[1] The law applicable to the disposition of this appeal was stated in United States v. Herr, supra. The governing statutory provision, 30 U.S.C. § 28 (1994), calls for the expenditure of \$100 in assessment work on or for the benefit of a mining claim each year until patent. Before patent can be obtained a claimant must have made improvements valued at \$500 or more (30 U.S.C. § 29 (1994)), but the expenditure of

\$500 does not terminate the ongoing requirement for expenditure of \$100 each assessment year specified in 30 U.S.C. § 28 (1994). Andrus v. Shell Oil Co., 446 U.S. 657, 658 n.1 (1980). In United States v. Energy Resources Technology Land, Inc., 74 IBLA 117 (1983), rev'd sub nom. Savage v. Hodel, Civ. No. 83-1838 (D. Colo., Nov. 19, 1983), vacated as moot, TOSCO Corp. v. Hodel, 826 F.2d 948 (10th Cir. 1987), we observed that the requirements of 30 U.S.C. § 29 (1994) (performance of \$500 worth of assessment work as a prerequisite to the issuance of patent) and 30 U.S.C. § 28 (1994) (yearly performance of \$100 worth of assessment work) are only tangentially related. We stated:

[W]hile it is true that the requirement of section 29 can be satisfied by the performance of annual labor pursuant to section 28, the reverse is not possible. If it were, a claimant could do \$500 worth of improvement on his claim during the first year of location--before the obligation to perform assessment work had even accrued--and then hold the unpatented claim for the next 50 years without ever performing any of the annual assessment work required by section 28. Clearly the 1872 Act did not contemplate that once a claimant had accomplished \$500 worth of work he would thereafter be excused from any further work. The Congress must have been aware that many claims would not be patented within 5 or 6 years after their location, and yet it required in section 28 that the annual labor be performed on each claim, "until a patent has been issued therefore * * * during each year." Nothing could be more plainly stated.

Id. at 122.

In Jerry D. Grover d.b.a. Kingston Rust Development, supra, at 181-82, the Board held that while a claimant may have made improvements valued at \$500 in order to obtain patent, such expenditure

does not terminate the ongoing requirement for expenditure of \$100 each assessment year in 30 U.S.C. § 28 (1994). Andrus v. Shell Oil Co., 446 U.S. 657, 658 n.1 (1980); Hickel v. The Oil Shale Corp., 400 U.S. 48, 54-55 (1970). In United States v. Herr, 130 IBLA 349, 357, 101 Interior Dec. 113 (1994), we adhered to our prior decision in United States v. Energy Resources Technology Land, Inc., 74 IBLA 117 (1983), rev'd sub nom Savage v. Hodel, Civ. No. 83-1838 (D. Colo., Nov. 19, 1983), vacated as moot, TOSCO Corp. v. Hodel, 826 F.2d 948 (10th Cir. 1987), where we observed that the requirements of 30 U.S.C. § 29 (1994) (performance of \$500 worth of assessment work as a prerequisite to the issuance of patent) and 30 U.S.C. § 28 (1994) (yearly performance of \$100 worth of assessment work) are only tangentially related.

[2, 3] Deposits of oil shale on the public lands were withdrawn from location under the mining law by section 37 of the Mineral Leasing Act of 1920 which made oil shale deposits subject to leasing. 30 U.S.C. §§ 193,

241(a) (1994). Excepted from this provision were valid mining claims located before February 25, 1920, "thereafter maintained in compliance with the laws under which initiated." 30 U.S.C. § 193 (1994). Wilbur v. Krushnic and Ickes v. Virginia Colorado Development Corp., *supra*, are not controlling in this context. As we noted in Herr, *supra*, at 366, 101 I.D. at 122, the "resumption doctrine" articulated in Krushnic held that if a claimant does not do the necessary annual labor for a period of time, but resumes before another party's rights attach, nothing is lost by allowing the claimant to revive the claim with his labor, rather than formally relocating the claim. However, during the period that the claim has been abandoned and the land is subject to appropriation, if another party's rights attach, the intervention of those rights deprives the claimant of the ability to reactivate the claim by resumption of work. The attachment of valid rights during a period of nonperformance of assessment work was recognized when the Supreme Court found in Hickel v. Oil Shale Corp., *supra*, that the United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1994). With respect to Krushnic and Virginia-Colorado, the Hickel Court specifically held that "every default in assessment work does not cause the claim to be lost." However, "token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28 is not adequate to 'maintain' the claims within the meaning of § 37 of the Leasing Act." *Id.* at 57.

The intervening rights were created when the 1872 Mining Law was effectively amended in 1920 by making oil shale a leasable, rather than a locatable, mineral. For a period following this event the courts and the Department stated that a failure to do assessment work would not inure to the benefit of the Government. ^{2/} However, this interpretation was abandoned after the Supreme Court handed down Hickel v. Oil Shale Corp., the Court concluding that "[Krushnic and Virginia-Colorado Development] must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act." Hickel v. Oil Shale Corp., *supra*, at 57. We stand by our observation in Herr at 367, 101 I.D. at 122, that after Hickel v. Oil Shale Corp., the resumption doctrine was no longer applicable to oil shale claims.

Cliffs' reference to 43 C.F.R. § 3851.3 is of no avail, since the resumption doctrine, proposed for inclusion in that regulation, was not promulgated. As noted earlier, the regulation as promulgated and carried forward in subsequent editions of the Code of Federal Regulations did not provide that the resumption doctrine was an "absolute defense" in a contest brought for failure to perform qualifying assessment work.

Finally, Appellant's assertion that issuance of the First Half-Mineral Entry Final Certificate bars cancellation for failure to do assessment work from 1931 to 1977 is without merit. The regulation at 43 C.F.R. § 3851.3(b) provides that "failure to perform the assessment work

^{2/} See 30 Rocky Mt. Min. L. Inst., § 10.02 [2] (1984), for a discussion of pre-Oil Shale Corp. decisions and regulations.

required under § 3851.1 causes the interest of the claimant(s) in the minerals subject to the mining laws to revert back to the public domain." The issuance of a First Half-Mineral Entry Final Certificate does not negate the effect of 43 C.F.R. § 3851.3(b). Such a certificate may constitute evidence that the entry had been allowed, which under 43 C.F.R. § 3851.5, would excuse the claimant from the necessity of performing assessment work. However, the claimant is excused only for that work which would have been required to have been performed "after" the date of allowance of mineral entry.

In Herr, supra, at 367-68, we stated: "Having concluded that [the Judge] properly found the claims void for failure to perform assessment work, we need not, and will not consider whether the claims are invalid for other reasons." This principle applies to the present case. Thus, to the extent not discussed herein, Cliffs' other arguments are rejected.

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.

James P. Terry
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge