

ST. ANTHONY MINES, INC.

IBLA 70-626

Decided June 14, 1972

Appeal from decision of Sacramento, California land office rejecting verified statement (S 2929 E).

Affirmed.

Mining Claims: Special Act -- Mining Claims: Surface Uses -- Surface
Verified Statement

Resources Act:

A verified statement filed by a mining claimant pursuant to Section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1970), asserting rights to the surface resources on its mining claim is properly rejected where the statement is filed more than 150 days from the first date of the publication of notice to miners under Section 5(a) of the Act.

APPEARANCES: H. G. Rogers, Jr., Vice President, on behalf of St. Anthony Mines, Inc.

OPINION BY MR. STUEBING

St. Anthony Mines, Inc., has appealed from the decision of the Sacramento land office, Bureau of Land Management, issued May 4, 1970, rejecting appellant's verified statement filed under section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1970), to assert its rights to surface resources of certain unpatented mining claims located in Nevada County, California. The land office rejected this statement because appellant failed to file such statement within 150 days from the date of the first publication of notice to claimants that such filing was required by statute.

The first day of publication was November 12, 1969. The 150-day period specified in the Act during which the claimant could file its statement expired Saturday, April 11, 1970, but because that was a

day the office was not open, it would be deemed timely filed if received the first working day thereafter, i.e., on Monday, April 13, 1970. 43 CFR 1821.2-2(e). Appellant's verified statement was filed on Wednesday, April 15, 1970, too late for compliance.

On appeal, H. G. Rogers, Jr., vice president of St. Anthony Mines, Inc., on behalf of the corporation, alleges that: (1) the Government did not comply with the Act and the regulations issued pursuant to the Act and consequently, appellant did not receive actual or other notice for the 150-day period prescribed by the Act; (2) C. Dan Lange mailed the verified statement on April 13, 1970, and thereby complied with the law; (3) forfeiture of appellant's rights in and to the surface rights of the unpatented claim is a violation of due process and therefore unconstitutional.

Appellant's first contention, that he did not have notice because the Bureau had not complied with the Act and regulations, is not supported by the record.

The Act provides that the head of any federal department or agency administering surface resources of the United States may file with the Department of the Interior a request for publication of notice to mining claimants for a determination of surface rights. Persons who made claims prior to the passage of the Act (July 23, 1955) must, when called upon to do so by such notice, assert their rights to the use of the surface of their claim. Section 5 of the Act provides that this assertion be in the form of a verified statement filed within 150 days from the first publication of notice.

Section 5 of the Act also prescribes that certain documents must support a request for publication. 43 CFR 3712.2-2(b) (1972) summarizes these requirements:

(b) This part of the act requires the filing of an affidavit which may be made by any person or persons over twenty-one years of age who have examined the lands. It must show whether any person or persons were "in actual possession of or engaged in the working of such lands (the lands described in the request for publication of notice) or any part thereof" and, if they were, the name and address of each such person must be given if it can be learned by reasonable inquiry * * *. The request for publication must also be accompanied by a certificate executed as provided in the third paragraph of section 5(a) and containing the information required by that paragraph to be

furnished. ^{1/} If there are no tract indexes, as defined in the act, in the county office of record affecting the lands described in the request for publication, a certificate executed as provided in the said third paragraph of section 5(a) to that effect must be furnished.

The regulations require that a notice published in a daily newspaper must be published in the Wednesday issue for nine consecutive weeks. The agency requesting the publication must file proof of such publication with the office where the request for publication was filed. 43 CFR 3712-4 and 3712.2-5 (1972).

Subsequent to the publication of the notice, the Act requires that the agency requesting publication serve by personal delivery or registered or certified mail a copy of the notice to all persons identified in the documents required by 43 CFR 3712.2-2(b) (1972). Service must be made within 15 days after the date of the first publication of such notice. 43 CFR 3712.2-6 (1972). The agency must file, in the office where the request for publication was made, an affidavit showing that copies have been delivered or mailed. 43 CFR 3712.2-6 (1972).

The record in this case shows that the Bureau submitted the necessary documents in support of its request for publication; the affidavit of examination (which includes appellant's name and address) and a certificate stating that there were no tract indexes involved. The file also contains the affidavit from the publisher of the notice verifying that the notice was published for the proper length of time. The Bureau served a copy of the notice on appellant on November 15, 1969, and filed its proof of this service in the Sacramento land office on November 17, 1969. All documents were filed within the time permitted by the Act.

^{1/} The Act requires that the request for publication be accompanied by the certificate of a title or abstract company, or of a title abstractor or of an attorney, based upon the company's abstractor's or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in the request for publication. This certificate must include the names and addresses of persons disclosed by such instruments to have an interest in the lands under any unpatented mining claim. This section of the Act is of no concern in this case, as there are no tract indexes affecting the land in question.

Appellant's second contention, that he mailed the statement on April 13, 1970, and thereby complied with the law is incorrect. The law requires the statement to be filed.

The Department has promulgated regulations specifically dealing with the filing of documents. Filing is accomplished when the document is delivered to and received in the proper office. Depositing a document in the mails does not constitute filing. 43 CFR 1821.2-2(f).

Appellant argues that he telephoned the Sacramento land office on April 13, 1970, and was advised that the document must be filed before the end of the day. He then set out from San Francisco to Sacramento by car to file the document. While enroute to Sacramento he again telephoned the land office and learned that the document would not be received after 4 o'clock, although appellant had been informed that the office hours were from 8:30 a.m. to 5:00 p.m. Since it was impossible to reach the office by 4 o'clock, he returned to San Francisco and mailed the statement by certified mail.

The fact remains, however, that the statement was not filed in the proper office within the time allowed by the Act. The statute is clear in its requirement that the document be filed within 150 days of the first publication. The Secretary is not free to enlarge or restrict the period of time prescribed by Congress. Hines Gilbert Gold Mines Company, 65 I.D. 481 (1958). Therefore, a verified statement filed after the termination of the 150 days allowed by statute is properly rejected. See Paul J. Hinkey, 67 I.D. 288 (1960); Murray E. Poast, A-27968 (July 22, 1959).

Appellant's third argument, that forfeiture of his rights in and to the surface rights of the mining claim is unconstitutional, is without merit. The Act states that if any mining claimant fails to file a verified statement within 150 days from the date of the first publication of the notice, such failure will be conclusively deemed to constitute a waiver and relinquishment by the claimant of any contrary right, title or interest in the claim and to constitute a consent by the claimant that the claim shall be subject, prior to patent, to the limitations specified in the Act, and preclude thereafter, prior to patent, any assertion by such claimant of any conflicting right in the claim. In accordance with due process, the Act also requires that the claimant be properly notified of his obligation to file a verified statement, before there can be a determination of surface rights. Appellant has based his appeal on the premise that the Bureau was not in compliance with the Act and regulations and therefore, he

did not receive proper notice. Since we have found that the Bureau did comply and appellant was afforded notice, the conclusion in the decision below expressed the proper result under the Act and does not violate due process.

Appellant has requested a hearing in this case but we do not find that a hearing is warranted. If there were facts in dispute, for example, as to whether the verified statement was filed in the proper office within the time allowed by the Act, then a hearing might be appropriate; but appellant has failed to allege any facts which, if proven, would entitle him to the relief sought. See Herschel E. Crutchfield, A-30876 (September 30, 1968). Appellant's request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is affirmed.

Edward W. Stuebing, Member

We concur:

Martin Ritvo, Member

Joan B. Thompson, Member

