

I.M. and ROBERT L. CLAUSEN

IBLA 72-51

Decided September 22, 1972

Appeal from a decision (A 6330) by Arizona state office, Bureau of Land Management, declaring mining claims null and void.

Affirmed.

Accounts: Payments -- Administrative Practice -- Indian Lands:  
Generally -- Mining Claims: Special Acts -- Act of June 18, 1934

The failure of a mining claimant to make the required annual rental payments in advance for claims located under the Act of June 18, 1934, 48 Stat. 984, as amended, August 28, 1937, 50 Stat. 862, 863, within the Papago Indian Reservation is a sufficient basis for invalidating the claims where the annual rental payments were not remitted until almost three months after the due date and no explanation is offered for the delay.

APPEARANCES: W. T. Elsing, Esq., for the appellants.

OPINION BY MR. FISHMAN

I. M. Clausen and Robert L. Clausen have appealed to the Secretary of the Interior from a decision by the Arizona state office, Bureau of Land Management, dated June 21, 1971. The decision declared seven unpatented mining claims 1/ held by the appellants to be null and void for the reason that the appellants failed to make rental payments on or prior to the anniversary date of the location of the claims in compliance with 43 CFR 3825.1(b).

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1/ The mining claims, all of which were situated within the boundaries of the Papago Indian Reservation, were the Silver Reef Fraction, and the Silver Reef Nos. 3, 4, 6, 7, 8, and 9. The mining claims were located on March 16, 1936.

43 CFR 3825.1(b) provides in pertinent part:

\* \* \* the locator of a mining claim within the Papago Indian Reservation shall furnish to the \* \* \* officer in charge of the reservation \* \* \* a sum amounting to 5 cents for each acre and 5 cents for each fractional part of an acre embraced in the location \* \* \* as yearly rental. Failure to make the required annual rental payment in advance each year \* \* \* shall be deemed sufficient grounds for invalidating the claim. The payment of annual rental must be made \* \* \* each year on or prior to the anniversary date of the mining location. [2/]

The record shows that the rental payments for the claims in issue were due on March 16 of each year. The rental due on the claims for the year of 1971-1972 had not been paid on or before the anniversary date, March 16, 1971, and the Papago Indian Agency, by letter dated April 30, 1971, requested the Bureau of Land Management to declare the claims null and void. Thereafter, appellants remitted a check for the rental payments which was received by an authorized employee of the Bureau of Indian Affairs on June 14, 1971. After the Bureau of Land Management declared the claims null and void, a refund check was sent to appellants.

In seeking reversal, appellants rely on Mrs. Frances S. Warner, A-28265 (June 2, 1960). In Warner, annual rental payments were apparently mailed to the Papago Indian Reservation in advance, but received one or two days late. The mining claimant was permitted to retain her mining claims within the reservation even though the applicable language of the regulation 3/ stated that, "payments of annual rental must be made \* \* \* each year on or prior to the anniversary date of the mining location." In stating the facts, Warner recites that on two prior occasions payments made two or three months late for the mining claims involved in that case had been accepted, apparently without question.

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2/ Mineral entries may no longer be made within the Papago Indian Reservation. 43 CFR 3825.0-3(b) (1972); see 25 U.S.C. § 463 (1970). However, the claims in issue were located by a predecessor in interest of the appellants under the Act of June 18, 1934, 48 Stat. 984, as amended, August 28, 1937, 50 Stat. 862, 863, at a time when the reservation was open to location and purchase under the mining laws. The cited regulation applies to locations made prior to May 27, 1955.

3/ At the time of Warner, the regulation was codified as 43 CFR 185.37(c); however, the pertinent language of the regulation is identical to the language quoted above.

In the case at bar, appellants point out that the Papago Agency, on at least two prior occasions, also had accepted their late rental payments without question, and argue that they should be permitted to retain their mining claims.

The fact that the Papago Agency had accepted late rental payments in the past does not alter the requirement for making timely rental payments. As stated in Warner, the case relied upon by the appellants:

\* \* \* the failure of officials of the Bureau of Indian Affairs to require prompt payment of rentals in the past could not operate to change the terms of a plain regulation \* \* \*

Although not articulated in these terms, the appellant in Warner, seemingly was permitted to retain her claims, not only because the Papago Agency had accepted late payments in the past, but also, because her payment, due June 23, 1959, was mailed on or before June 21, 1959, in sufficient time to be received timely within the ordinary course of the mail. In other words, the appellant in Warner had shown due diligence. Cf. Pressentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960).

The regulation plainly states that, "failure to make the required annual rental payments in advance each year \* \* \* shall be deemed sufficient grounds for invalidating the claim." While the regulation does not require the invalidation of claims for late rental payment in every instance, it does authorize the Bureau of Land Management to invalidate claims for that reason. In short, invalidation on that basis is directory, not mandatory.

In that frame of reference, considering whether to accept the late payment turns upon the exercise of discretion. See United States v. Haskins, 3 IBLA 78, 82 (1971), which recites:

Thus discretion is to be exercised not on an arbitrary basis, but in the light of the particular circumstances.

In the case at bar appellants were almost three months late in remitting their annual rental payments and have offered no explanation of their delay. That payments made two or three months late have been accepted, in the past, by the Papago Agency does not afford a sufficient basis for relief in this case. Cf. Ralph J. Fuchs, A-27295 (March 27, 1956).

Appellants also argue that the acceptance of their late payments by an employee of the Papago Agency, the collection officer, requires reversal of the decision below. We disagree. The acceptance of money by an authorized employee is merely a ministerial function, and authorized collectors are not vested with authority to waive the requirements for the timely payment of any fee.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, 43 CFR 4.1, the decision of the Bureau of Land Management is affirmed.

Frederick Fishman  
Member

I concur:

Martin Ritvo  
Member

MEMBER LEWIS DISSENTING:

I would accept the rental herein of \$ 7.65 as timely and would not declare the seven unpatented mining claims of appellants null and void for late payment of the rental for the following reasons:

In the past the Papago Agency on at least two occasions has accepted without question rental payments by appellants that were two or three months late. In Mrs. Frances S. Warner, A-28265 (June 2, 1960), the Papago Indian Reservation on two occasions had accepted payments of mining claim rentals that were two or three months late. In none of these instances is there any evidence that a good excuse was required for the late payment to be accepted.

In these circumstances, it appears that more than one exception to the rule has been made. Further, the decision to accept the late rental is discretionary and not mandatory. Mrs. Frances S. Warner, supra.

Accordingly, with this background of exceptions to the regulation, I would exercise discretion and would therefore accept the rental submitted by appellants.

Anne Poindexter Lewis  
Member

