

CHARLIE CARNAL, WALTER PECK, AND
EDWARD BORZANSKY

IBLA 78-471

Decided September 11, 1979

Appeal from decision of the Arizona State Office, Bureau of Land Management, declaring mining claims abandoned and void. A MC 1139 and A MC 1140 (952).

Affirmed.

1. Administrative Authority: Generally -- Constitutional Law: Generally -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

Department of the Interior, as agency of executive branch of Government, is not proper forum to decide whether or not as to mining claims the recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

2. Federal Land Policy and Management Act of 1976: Assessment Work -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Assessment Work -- Mining Claims: Location -- Mining Claims: Recordation

For the purposes of filing affidavits of assessment work or notices of intention to hold a mining claim, the date of location of the claim is the date as defined in 43 CFR 3833.0-5(h).

3. Federal Land Policy and Management Act of 1976: Assessment Work
-- Mining Claims: Abandonment -- Mining Claims: Assessment Work

Under 43 U.S.C. § 1744(a) (1976), the owner of an unpatented mining claim located after Oct. 21, 1976, but in the calendar year 1976, must file an affidavit of assessment work or a notice of intention to hold the mining claim prior to Dec. 31 of the following calendar year, 1977, or the claim will be conclusively deemed to have been abandoned. Section 1744(a) does not conflict with 30 U.S.C. § 28 (1976) which pertains to the year in which the first affidavit of assessment work must be recorded.

APPEARANCES: Albert H. Mackenzie, Esq., Phoenix, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Charlie Carnal, Walter Peck, and Edward Borzansky have appealed from a decision dated May 17, 1978, of the Arizona State Office, Bureau of Land Management (BLM), holding the 3 Triangle and 3 Triangle Blue mining claims abandoned and void for failure to file an affidavit of assessment work or notice of intention to hold each claim. Section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976); 43 CFR 3833.2-1(b) and 3833.4(a).

The 3 Triangle Blue claim was located on November 22, 1976, and the 3 Triangle on December 2, 1976, according to copies of the location notices filed with the State Office on February 2, 1977.

Section 314(a)(1) and (2), supra, and 43 CFR 3833.2-1(b)(1) require that the owner of an unpatented mining claim located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which the claim was located, file with the State Office either evidence of annual assessment work performed during the previous assessment year or a notice of intention to hold the mining claim. Failure to file the required instruments is deemed conclusively to constitute an abandonment of the mining claim. Section 314(1)(c), supra; 43 CFR 3833.4(a).

Appellants contend that the above sections of the Federal Land Policy and Management Act and the implementing regulations are unconstitutional; they deprive appellants of property rights without due process under the Fifth and Fourteenth amendments, Constitution of the

United States, and the second amendment, Arizona Constitution. The appellants also argue that the Act and cited regulations are vague and in conflict with 30 U.S.C. § 28 (1976) which has not been repealed. Section 28 requires that appellants' first year assessment work be accomplished during the period September 1, 1977, to August 31, 1978.

[1] The Board adheres to its earlier holdings that the Department, as an agency of the executive branch of the Government, is not the proper forum to decide whether a statute enacted by Congress is constitutional. Alaska District Council of the Assemblies of God, 8 IBLA 153 (1972); Masonic Homes of California, 4 IBLA 23, 78 I.D. 312 (1971). If an enactment of Congress were to be in conflict with the Constitution, it is within the authority of the judicial branch, not the executive branch, to so declare. Al Sherman, 38 IBLA 300 (1978), reconsideration denied, March 28, 1979.

[2, 3] The relevant portion of the Act and regulations are clear, and controlling upon the Board. There is no conflict between section 314, 43 U.S.C. § 1744, and 30 U.S.C. § 28-1 (1976). Section 314 itself refers to section 28-1 and provides that either the notice of intention to hold or an affidavit of assessment must be filed within the prescribed period. 1/

"Date of location" is defined as the "date indicated on the notice of location or discovery posted on an unpatented mining claim." 43 CFR 3833.0-5(h). Because the claims were located in calendar year 1976, and after October 21, the documents were required to be filed prior to December 31, 1977.

1/ Section 314(a) provides in part:

"Sec. 314. (a) The owner of an unpatented lode or placer mining claim located prior to the date of this Act shall, within the three-year period following the date of the approval of this Act and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after the date of this Act shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

"(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on [sic] a detailed report provided by the Act of September 2, 1958 (72 Stat. 1701; 30 U.S.C. 28-1), relating thereto." (Emphasis added.)

The mining claimants failed to file either an affidavit or a notice of intention by the required date, and the State Office properly held the appellants' claims to have been abandoned and void. Paul S. Coupey, 35 IBLA 112 (1978). While the consequence of noncompliance with the Act is severe, it can only be assumed that this was the Congressional intent. See Nuclear Power and Energy Co., 41 IBLA 142, 144 (1979).

Therefore, 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.

Joseph W. Goss
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge

