

Editor's note: Overruled to the extent inconsistent with Harvey A. Clifton, 60 IBLA 29 (Nov. 16, 1981)

DENNIS J. MERTZ AND RANDY MACK

IBLA 79-370, 79-444

Decided October 17, 1979

Appeal from decisions of the Oregon State Office, Bureau of Land Management, declaring mining claims abandoned and void. OR MC 4397, OR MC 290.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

Under 43 U.S.C. § 1744 (1976), and 43 CFR 3833.2-1(a), the owners of unpatented mining claims located before October 21, 1976, and recorded with BLM in 1977, must file affidavits of assessment work or notices of intention to hold the mining claims prior to December 31 of each calendar year following the calendar year of recording, or the claims will be conclusively deemed to have been abandoned under 43 U.S.C. § 1744(c) (1976), and 43 CFR 3833.4. Mining claimants are not relieved of the requirement to timely file their documents when they mistakenly mailed them to the wrong city, as the documents cannot be considered as filed until they are received by the proper office of the Bureau of Land Management.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

These appeals are from decisions dated April 4 and April 30, 1979, by the Oregon State Office, Bureau of Land Management (BLM), declaring two placer mining claims null and void. The appeals have been consolidated because of identity of parties and issues.

The decision in OR MC 4397 declared appellants' Son of a Ditch placer mining claim void for failure to file a 1978 annual assessment

statement, or notice of intention to hold the claims as required by the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. § 1744) and 43 CFR 3833.2-1.

The Son of a Ditch claim was located on March 3, 1976, and recorded with BLM on December 29, 1977. A proof of labor for this claim is date stamped January 5, 1979, by the Portland BLM office.

The Oregon State Office in Portland, Oregon, is the proper office for filing documents pertaining to mining claims in that State, inter alia. 43 CFR 1821.2-1(d).

The decision in OR MC 290 recited as follows:

Your Helplessly Hoping Mine Placer Claim (OR MC 290) was located March 3, 1976, and you filed the claim with BLM at this office on February 1, 1977. The case file shows receipt of a 1977 proof of labor at this office on December 29, 1977. Your 1978 proof of labor for the Peepshow "et al" which includes the Helplessly Hoping Mine Placer Claim (OR MC 290) was sent to the BLM Salem District Office and received there on January 4, 1979. This office received the evidence from the BLM Salem District Office on January 5, 1979.

Since your 1977 proof of labor did not meet 1978 assessment proof requirements and your 1978 assessment proof was not received at this office until after December 31, 1978, the 1978 assessment proof must be rejected and your Helplessly Hoping Mine Placer Claim (OR MC 290) is abandoned and void under 43 CFR 3833.4 for failure to timely file the instrument.

The decision appears to be in error in stating that the Helplessly Hoping claim was located on March 3, 1976. The file contains a copy of a notice of location for Josephine County, Oregon, which states that the claim was located on March 11, 1971. This notice is date stamped February 1, 1977, by the Portland BLM Office.

The provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1976), require that:

The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter file the instruments required by paragraphs (1) and (2) of this subsection.

The applicable regulation, 43 CFR 3833.2-1(a)(1), further states specifically:

The owner of an unpatented mining claim located on Federal land, * * * on or before October 21, 1976, shall file before October 22, 1979, and prior to December 31 of each calendar year following the calendar year of recording in the proper BLM Office pursuant to this subpart evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim. [Emphasis added.]

Appellants assert that the decisions declaring their claims void are premature because appellants sent BLM copies of the documents recorded in Josephine County, Oregon, many months before the October 1979 date required by FLPMA. Appellants further argue that if 43 CFR 3833.2-1 is "not in accordance with" FLPMA, then the regulation exceeds FLPMA and is void.

Appellants also state that their proofs of labor were mailed to BLM on December 26, 1978, and that they mistakenly thought BLM's offices were at Salem rather than Portland.

[1] Section 1744(a) of FLPMA and 43 CFR 3833.2-1(a)(1) initially allow 3 years for the filing of the required documents where the claim is located on or before October 21, 1976. However, where, as here, mining claimants have recorded their claims with BLM in 1976, 1977, or 1978, 43 CFR 3833.2-1(a)(1) clearly requires 1/ evidence of annual assessment work, or a notice of intention to hold to be filed in the year following the year of recording. Appellants recorded these claims with BLM in 1977; they were therefore required to file one or the other of the above documents by December 31, 1978. Since they failed to file either document timely in the proper BLM office, their claims were properly deemed conclusively to have been abandoned and void. Clair R. Caldwell, 42 IBLA 139 (1979); Charles and Pete Caress, 41 IBLA 302 (1979).

It is unfortunate that appellants' filings were delayed because they mailed them to the wrong city. As stated in H. P. Saunders, Jr., 59 I.D. 41, 42-43 (1945):

"Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office and not send through the United States mails. * * * A paper is filed when it is delivered to the proper official and by him received and filed."

1/ While the statute, section 1744(a) of FLPMA is amenable to a possible construction that appellants were not required to file proof of assessment work until October 1979, the Department's contrary construction of the statute as evidenced by the regulation, is binding upon this Board and has the force and effect of law. Fred S. Ghelarducci, 41 IBLA 277 (1979).

United States v. Lombardo, 241 U.S. 73, 76 (1916); Poynor v. Commissioner of Internal Revenue, 81 F. (2d) 521, 522 (C.C.A. 5th, 1936); Weaver v. United States, 72 F. (2d) 20, 21 (C.C.A. 4th, 1934); Tyson v. United States, 76 F. (2d) 533, 534 (C.C.A. 4th, 1935); Wampler v. Snyder, 66 F. (2d) 195, 196 (App. D.C., 1933); Stebbins' Estate v. Helvering, 74 App. D.C. 21, 121 F. (2d) 892, 894 (1941); Creasy v. United States, 4 F. Supp. 175, 177-178 (D.C.W.D. Va., 1933). Even if, as claimed by Saunders, the letter, in the usual course of the mails, should have reached the register at Las Cruces prior to the expiration of the lease, the fact nevertheless remains that the applications were not filed on time, for a paper is considered filed only at the time when it is actually delivered to and received by the office concerned, not when it could have reached that office in the regular course of the mails. Poynor v. Commissioner of Internal Revenue, *supra*; Weaver v. United States, *supra*. It is thus immaterial whether or not there was any unusual delay in the delivery of the letter and whether or not the post office was "negligent."
[Footnote omitted.]

Cf. Mar-Win Development Co., 20 IBLA 383 (1975). Accordingly since the documents were not timely filed 2/ BLM properly declared the claims void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge

2/ 43 CFR 1821.2-2(f) provides in applicable part as follows: "[F]iling is accomplished when a document is delivered to and received by the proper office. Depositing a document in the mails does not constitute filing."

