

E. JOE SWISHER

IBLA 79-291, 79-494

Decided November 19, 1979

Consolidated appeals from decisions of the Idaho State Office, Bureau of Land Management, declaring 44 mining claims (IMC 414-427, 3996-4025) void for failure to file 1978 proofs of labor or notices of intention to hold.

Affirmed in part; vacated in part and remanded.

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

Decisions by BLM declaring mining claims abandoned and void for failure to file timely annual notices of intention to hold the claims or affidavits of assessment work will be vacated, notwithstanding the fact that BLM's records contain no such documents marked as timely filed, where the claimant is able to show that he mailed such documents to BLM and that it received them timely, and where it does not appear unlikely that BLM misplaced the documents or misconstrued their contents, owing to the absence of a numbering system and the similarity of the names of the claims to others.

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

Under 43 CFR 3833.2-1(a) and 3833.4(a), the owner of an unpatented mining claim located before Oct. 21, 1976, notice of which is

recorded with BLM in the calendar year 1977, must file an affidavit of assessment work or a notice of intention to hold the claim on or before Dec. 30 of the following calendar year, 1978, or the claim will be conclusively deemed to have been abandoned.

APPEARANCES: E. Joe Swisher, pro se.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

These appeals have been consolidated, owing to the similarity of circumstances in which they arose. The earlier appeal, IBLA 79-291, concerns 14 mining claims, IMC 414-427, seven of which were located in January 1977, and seven of which were located at various times in 1975. 1/ On March 28, 1977, E. Joe Swisher, the locator of these claims, timely filed copies of the notices of location for them with the Idaho State Office, Bureau of Land Management (BLM), as required by section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1976), and 43 CFR 3833.1. The latter appeal, IBLA 79-491, concerns 30 more mining claims, IMC 3996-4025, located in late October 1977, copies of the notices of location for which were timely filed on January 13, 1978, as required. 2/

The records which BLM has transmitted to us on appeal do not contain any further submissions from Swisher thereafter concerning any of these claims until January 15, 1979, when he filed evidence of annual assessment work performed during the assessment year ending on August 31, 1979.

On February 26, 1979, BLM issued two decisions holding IMC 414-427 claims "rejected" because Swisher had allegedly failed to file evidence of assessment work or notices of intention to hold the claims for the assessment year ending on August 31, 1978, on or before December 30, 1978, as required by section 314(a) of FLPMA, supra, and

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1/ See appendix.

2/ While the rules for filing copies of notices of location are different for claims located before October 21, 1976, and for claims after this date, Swisher's filings satisfied both these rules. For the claims located before this date, he was required to file these copies on or before October 20, 1979, which he obviously did. 43 CFR 3833.1-2(a). As to those located after this date, he was required to file these copies within 90 days of the date of location, which he also did, both for the claims located in January 1977 and in October 1977. 43 CFR 3833.1-2(b).

43 CFR 3833.2. <sup>3/</sup> On March 5, 1979, Swisher wrote to BLM and advised that his records indicate that he had filed proof of assessment work performed during the assessment year ending on August 31, 1978, with BLM on September 11, 1978, in good time to satisfy 43 CFR 3833.2. On March 8, 1979, BLM responded, enclosing copies of what it asserted were the only affidavits which it had received concerning these claims, to wit: affidavits concerning assessment work done in the assessment year ending on August 31, 1977, for IMC 421-427, the claims located in 1975, which affidavits Swisher had filed in 1977 along with copies of the notices of location for these claims; affidavits for all the claims concerning assessment work done in the assessment year ending September 30, 1979, which he had filed on January 15, 1979; and a copy of a 1978 proof of labor for some of the claims marked "BLM Only" by Swisher, which was date stamped on January 15, 1979, after the December 30, 1978, deadline. BLM was unable to locate any other affidavits concerning assessment work performed on these claims in the assessment year ending August 31, 1978, and accordingly did not alter its decision. Swisher filed a timely notice of appeal of BLM's decision concerning IMC 414-427 on March 21, 1979.

While this matter was on appeal, on June 1, 1979, BLM issued another decision holding claims IMC 3996-4025 "rejected" for failure to file timely evidence of annual assessment work or notices of intention to hold, as before, from which decision Swisher also appealed. As noted above, we have consolidated these appeals.

[1] Swisher maintains that he mailed proofs of labor for 1978 for all of these claims to BLM in Boise, Idaho, on September 9, 1978, via certified mail, article No. 331023, and that BLM received this material on September 13, 1978. In support of this assertion, he has provided a copy of a delivery receipt for article No. 331023, signed by Howard S. Essman for BLM on September 13, 1978. He alleges that he included four proofs of work done in 1978 in this article, three of which had been filed previously at the local level and which bear serial numbers 271849-271851, and an unnumbered fourth document marked by

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<sup>3/</sup> For the claims located in 1777, Swisher was required to file affidavits of assessment work or notices of intention to hold the claims on or before December 30 of 1978, the following calendar year. 43 CFR 3833.2-1(c); Silvertip Exploration & Mining, 43 IBLA 250 (1979), and cases cited therein. For the claims located before October 21, 1976, Swisher was also required to file such affidavits or notices on or before December 30 of 1978, the year following the calendar year in which he first recorded copies of his notices of location with BLM. 43 CFR 3833.2-1(a); Clair R. Caldwell, 42 IBLA 139 (1979), and cases cited therein.

Swisher as "BLM Only." Swisher has provided copies of these four documents which are proofs of labor for 1978 for the claims in question, with one exception. <sup>4/</sup>

It is clear that Swisher mailed article No. 331023 to BLM and that it received it on September 13, 1978, well in advance of the December 30, 1978, deadline. The question is whether he enclosed these 1978 proofs to BLM in article No. 331023 as he alleges.

We are persuaded that he did. Swisher has provided a copy of his receipt for certified mail for this article, stamped by the postal service on September 9, 1978. This receipt is marked on the bottom "1978 Proofs." While this is not dispositive, it is strongly probative that Swisher had in fact enclosed these proofs in this article. Cf. Roger Kuhn, 43 IBLA 182 (1979); Amanda Mining & Manufacturing Assoc., 43 IBLA 144 (1979). We are also impressed by the willingness shown by Swisher to support his allegation with corroborating affidavits from witnesses to the mailing, and the consistency of his allegations in presentations to BLM and this Board, spanning over a year.

Our conclusion is also supported by the fact that it appears not unlikely that BLM misplaced or misconstrued the content of these documents. The record demonstrates that there was some confusion in BLM about these claims, owing to close similarity of the names of a large number of claims held by Swisher. For example, the present records for the Eagle No. 2 and Golden Eagle No. 5 quartz placer claims, IMC 414 and 419, contain misfiled information concerning the Eagle No. 2 and Golden Eagle No. 5 quartz lode claims (which are not at issue here). Furthermore, the record shows that BLM has recently assigned serial numbers to many of the "Eagle" and "Golden Eagle" claims without specifying whether the numbers apply to the lode or placer claim of those names.

Also, BLM did not inform Swisher of the serial number for these claims until March 2, 1979, after the deadline for filing 1978 proofs, so that he could only have referred to them by name in filing his 1978 proofs. Thus, it would have been impossible for BLM to identify the claims to which the proofs applied except by means of the names of the claims. As Swisher has hundreds of claims with similar names, it would have been very easy for BLM to have misfiled the information

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<sup>4/</sup> Document No. 271849 is adequate proof for claims IMC 415-417, and 420-423; document No. 271850 is adequate proof for claim IMC 426; document No. 271851 is adequate proof for claims IMC 418 and 427; and the document marked "BLM Only" is adequate proof for claims IMC 415-420, 424, 425, 427, and 3996-4025. Claim IMC 414 is not addressed by these documents.

submitted by Swisher or to have mistakenly believed that it was repetitious or duplicative of other material previously filed. This situation was complicated by the method of filing proofs employed by Swisher, in which he routinely includes as many as 73 claims on one proof of labor sheet and often submits more than one proof per claim for a particular year.

The uncertainty of BLM's system here is highlighted further by Swisher's allegation that some of his more recent correspondence to BLM, in which he repeatedly requests that BLM supply him with the new serial numbers of his claims, has gone unanswered, raising the possibility that these requests have been misplaced.

There is some doubt that the document designated "BLM Only" by Swisher was filed in September 1978, as the record contains a copy of this document date stamped by BLM on January 15, 1979, after the deadline for filing. However, Swisher has explained this fact to our satisfaction. On March 1, 1979 (even before BLM had informed him that it believed he had originally filed this document on January 15, 1979, after the December 30, 1978, deadline), Swisher advised BLM that he had enclosed a copy of this document (possibly as part of his effort to learn the serial numbers of the claims described therein) along with his 1979 proofs, filed on January 15, 1979. It is thus likely that the document in BLM's records date stamped on January 15, 1979, is this copy. Of course, the fact that there is a copy of this document with a later date stamp in the record does not preclude the possibility that he had filed the original in September 1978 as alleged.

In view of the strength of Swisher's assertion that he did mail these proofs to BLM by certified mail, and his showing that BLM received this mailing in good time, coupled with our realization that the filing system for these claims may have been confused and prone to mishap, we conclude that the four documents referred to above were filed timely by Swisher as required by 43 CFR 3833.2-1. These four documents provide adequate proof of labor for 43 of these claims, IMC 415-427, and 3996-4025. 5/ Accordingly, we vacate BLM's decision as to these claims.

[2] As to the remaining claim, IMC 414, Swisher has not filed anything to show that proof of labor was filed in 1978. None of the four documents refers to the Eagle No. 2 placer claim. Accordingly, BLM properly declared this claim null and void. 43 CFR 3833.2-1(a), 3833.4(a); Clair R. Caldwell, supra.

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5/ See note 4.

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 in part, vacated in part, and remanded.

Edward W. Stuebing  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

## APPENDIX

Serial No.

<u>IMC</u>	<u>Name</u>	<u>Located</u>
414	Eagle No. 2 placer	Jan. 9, 1977
415	Eagle No. 57 lode	Jan. 8, 1977
416	Eagle No. 56 lode	Jan. 8, 1977
417	Eagle No. 55 lode	Jan. 8, 1977
418	Golden Eagle No. 28 lode	Jan. 10, 1977
419	Golden Eagle No. 5 placer	Jan. 10, 1977
420	Eagle No. 54 lode	Jan. 8, 1977
421	Eagle No. 33 lode	Nov. 8, 1975
422	Eagle No. 32 lode	Nov. 8, 1975
423	Eagle No. 30 lode	Oct. 9, 1975
424	Golden Eagle No. 19 lode	Aug. 13, 1975
425	Golden Eagle No. 18 lode	Aug. 8, 1975
426	Golden Eagle tunnel	Oct. 10, 1975
427	Golden Eagle lode	Feb. 8, 1975
3996	Golden Eagle No. 29 lode	Oct. 25, 1977
3997	Golden Eagle No. 30 lode	Oct. 25, 1977
3998	Golden Eagle No. 31 lode	Oct. 25, 1977
3999	Golden Eagle No. 32 lode	Oct. 25, 1977
4000	Golden Eagle No. 33 lode	Oct. 25, 1977
4001	Golden Eagle No. 34 lode	Oct. 26, 1977
4002	Golden Eagle No. 35 lode	Oct. 25, 1977
4003	Golden Eagle No. 36 lode	Oct. 24, 1977
4004	Golden Eagle No. 37 lode	Oct. 24, 1977
4005	Golden Eagle No. 38 lode	Oct. 26, 1977
4006	Golden Eagle No. 39 lode	Oct. 26, 1977
4007	Golden Eagle No. 40 lode	Oct. 26, 1977
4008	Golden Eagle No. 41 lode	Oct. 25, 1977
4009	Eagle No. 58 lode	Oct. 26, 1977
4015	Eagle No. 64 lode	Oct. 23, 1977
4016	Eagle No. 65 lode	Oct. 23, 1977
4017	Eagle No. 66 lode	Oct. 23, 1977
4018	Eagle No. 67 lode	Oct. 27, 1977
4019	Eagle No. 68 lode	Oct. 27, 1977
4020	Eagle No. 69 lode	Oct. 27, 1977
4021	Eagle No. 70 lode	Oct. 27, 1977
4022	Eagle No. 71 lode	Oct. 27, 1977
4023	Eagle No. 72 lode	Oct. 27, 1977
4024	Eagle No. 73 lode	Oct. 27, 1977
4025	Eagle No. 74 lode	Oct. 27, 1977

