

H. L. SMITH

IBLA 79-422

Decided February 22, 1980

Appeal from decision of Idaho State Office, Bureau of Land Management, declaring lode mining claims IMC 939, 940, 941, and 942 abandoned for failure to timely file evidence of assessment work performed or notice of intention to hold said mining claims.

Affirmed.

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

The owner of an unpatented mining claim located prior to Oct. 21, 1976, has until Oct. 22, 1979, to record the location. Recordation is effected by filing a copy of the location notice or certificate with the proper BLM office.

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

Failure to comply with the regulations governing recordation of assessment work or notice of intention to hold mining claims must result in a conclusive finding that the mining claim has been abandoned.

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

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

H. L. Smith appeals the April 24, 1979, decision of the Idaho State Office, Bureau of Land Management (BLM), declaring Larson #1, #2, #3, and #4 lode mining claims (IMC 939, 940, 941, and 942) 1/ abandoned for failure to timely file evidence of assessment work performed or a notice of intention to hold the mining claims.

On June 15, 1964, one Robert Newcomb located the Larson lode mining claims numbers 1 (IMC 939), 2 (IMC 940), 3 (IMC 941), and 4 (IMC 942). The locations were filed for record in Idaho County on June 16, 1964. By quitclaim deeds dated June 17, 1977, James R. Newcomb 2/ transferred title to the subject claims to appellant, who on August 24, 1977, filed a copy of the deed, location notices, and location certificates with BLM. These documents were accompanied by a map and affidavit of assessment work performed during the preceding year, dated August 8, 1977.

In July 1978 appellant was notified by letter that the map submitted failed to show the situs of the claims by township, range, and section. Appropriate maps for appellant's use were enclosed.

By letter dated January 17, 1979, appellant was requested to furnish the map within 10 days of the date thereof. Appellant telephoned the Idaho State Office on February 2, 1979, at which time he was advised that evidence of assessment work had been due on or before December 30, 1978, and therefore appellant must "refile" by October 22, 1979, the date when proof of labor would also be due.

On February 12, 1979, appellant filed several maps depicting the location of the several claims, and evidence of assessment work performed in 1977-78.

By decision dated April 24, 1979, the subject claims were held "rejected," on the theory that the claims were recorded with BLM on August 24, 1977, and that appellant's evidence of assessment work or a of notice of his intent to hold was not filed by December 30, 1978.

[1] We affirm. The owner of an unpatented mining claim located prior to October 21, 1976, has until October 22, 1979, to record the

1/ The Larson #1 is situated in SE 1/4 sec. 12, T. 22 N., R. 6 E.; Larson #2, the SE 1/4 sec. 12, T. 22 N., R. 6 E., and SW 1/4 sec. 7, T. 22 N., R. 7 E.; Larson #3, the W 1/2 sec. 7, T. 22 N., R. 7 E.; and Larson #4, the N 1/2 sec. 7, T. 22 N., R. 7 E., Boise meridian.

2/ The record does not reveal whether Robert and James R. Newcomb are one and the same person.

location. Federal Land Policy and Management Act of 1976 (FLPMA), section 314(a), 43 U.S.C. § 1744(a) (1976); 43 CFR 3833.1-2(a). Recordation is effected by filing a copy of the location notice or certificate with the proper BLM office. 43 CFR 3833.1-2(a).

Having submitted the required documents on August 24, 1977, appellant had until December 30, 1978, to file either evidence of annual assessment work performed or a notice of intent to hold the claim. 43 CFR 3833.1-2(a)(1). Under that regulation, appellant must file such information on or before December 30 of each subsequent year following the year of recordation.

[2] Failure to comply with the regulations governing recordation of information relating to mining claims must result in a conclusive finding that the claim has been abandoned. FLPMA, section 314(c), 43 U.S.C. § 1744(c) (1976); 43 CFR 3833.4(a); Walter T. Paul, 43 IBLA 119 (1979); Joe B. Cashman, 43 IBLA 239 (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.

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

The issue upon which this appeal turns, as discussed in the opinion of Judge Henriques, is simply whether appellant's failure to file annual assessment work or a notice of intention to hold requires the finding that his claim is null and void. The answer, charted by numerous past precedents, is clearly in the affirmative. Judge Goss, however, *sua sponte*, raises an issue not pressed on appeal, and then decides it in a clearly erroneous fashion. Inasmuch as Judge Goss' position would inevitably lead to the invalidation of numerous claims heretofore filed, I think it important to address the issue he raises directly.

Judge Goss would hold, in effect, that the failure of appellant to file a map of his claims, delineated by township, range, and section, vitiated the recordation of the claims till such time as the requisite map was received by BLM. While the result of this ruling in the instant case would be that appellant was not required to file his annual assessment work or notice of intention to hold in calendar year 1978, I think that the ramifications of this rule must inevitably lead to the rejection of countless other claims which, when presented for recordation, did not completely comply with every requirement of the regulations.

In dealing with this question we should be mindful of the purpose which animated the adoption of section 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2769, 43 U.S.C. § 1744 (1976). Prior to the adoption of section 314, there was no general provision for the recordation with BLM of mining claims located on Federal lands. ^{1/} The absence of such a requirement greatly complicated the administration of the Federal lands. Such claims constituted a cloud on the title of the United States to its lands, and had served as the basis for many unauthorized occupancies. See S. Rep. No. 94-583, 94th Cong., 1st Sess. 65 (1975). In order to assure that mining claimants would comply with the recordation requirements, Congress provided that failure to file the required statements timely shall be deemed conclusively to constitute an abandonment of the claims.

Inasmuch as the penalty that attends the failure to timely record and file subsequent data is so rigorous, I feel that this Board should

^{1/} There were a few special laws which required the recordation of claims with BLM prior to the adoption of FLPMA. Thus, the Mining Claims Rights Restoration Act which opened certain lands in powersites to mineral entry, required that all subsequently located claims be recorded in 60 days of the date of location. Section 4 of the Act of August 11, 1955, 69 Stat. 683, 30 U.S.C. § 623 (1976). See also section 8 of the Mining in the Parks Act, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976). It was the absence of a general recordation law which impelled Congress to act.

very carefully examine the nature of the individual deficiencies to determine whether a mining claimant has complied with the Congressional directives. In this regard, I think it important to note that a number of specific requirements of the regulations are not expressly required by the statute. The statute requires the following:

1. The filing for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim [or] an affidavit of assessment work performed thereon.

(43 U.S.C. § 1744(a)(1)(1976)).

2. The filing with BLM of a copy of the notice of intention to hold or the affidavit of assessment work filed under paragraph (1), including a description of the location of the mining claim sufficient to locate the claimed lands on the ground. [Emphasis added.]

(43 U.S.C. § 1744(a)(2)(1976)).

3. The filing with BLM of a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground. [Emphasis added.]

(43 U.S.C. § 1744(b)(1976)).

It is only the regulation which requires that the filings for recordation be accompanied by a map. See 43 CFR 3833.1-2(c)(5) and (6). I do not mean to suggest that the regulation is beyond the scope of authority of BLM. On the contrary, I think it clearly comports with the purposes and mandates of FLPMA. I do, however, believe that this Board should view failures to comply with purely regulatory matters in a different light than failure to comply with statutory requirements.

There is support for this view in the Departmental actions taken in the recent amendments of the recordation regulations. In promulgating these new amendments, the Assistant Secretary, Energy and Minerals, noted:

The Bureau of Land Management will continue to check recordation filings to determine if they meet the minimum requirements of the law and the regulations. If the filing fails to meet the minimum requirements of the law and the regulations and there is sufficient time before the filing deadline to allow correction, the claimant will be notified of the deficiencies and requested to correct the deficiencies. If, however, a recordation filing fails

to meet the requirements of the law and the regulations and there is insufficient time to allow correction of the deficiencies, the recording will be rejected. The Bureau of Land Management will, in those instances where it finds a recordation filing meets the minimum requirements of the law and regulations, accept the filing for recording and contact the claimant for any additional information that might be desired.

44 FR 9721-22 (Feb. 14, 1979).

Thus, in the promulgation of the most recent changes to the relevant regulations, the Assistant Secretary has clearly contemplated that filings which do not totally comport with the regulatory requirements may nevertheless be considered as timely recorded subject to subsequent augmentation of the record as BLM may direct. The question, of course, is how one determines what constitutes the "minimum requirements of the law and regulations."

I think this question is best resolved by ruling that so long as a claimant provides everything which the statute expressly requires, he or she has met the "minimum requirements of the law and regulations" and the claim will be recorded, subject to eventual compliance with authorized requests by BLM for further data. To hold that all of the requirements of the regulations must be met before a recordation will be effective would inevitably result in the voiding of a vast number of claims simply because the claimant has failed to scrupulously follow the technical requirements of the regulations. The instant case serves as a useful example.

Appellant, herein, filed with his recordation papers a map of the claim. That map, however, did not show the situs of the claims by township, range, and section. The township, range, and section was provided in a copy of a quitclaim deed which was filed with the other papers. Thus, all relevant information was submitted, though not in the form which the regulation required. While Judge Goss' position in the instant case aids the present appellant, it is equally obvious that in a great number of other cases the rule would work to nullify claims. Thus, if the present claims had been located after October 21, 1976, instead of before, even had appellant's initial filings been timely made, Judge Goss' rule would result in a declaration that the claims were null and void since the regulations were not totally complied with until after the expiration of 90 days. I do not believe that such a result is in consonance with either the law or the regulations.

Judge Goss' premise that the explanatory preface to the 1979 amendments was intended to substantively change the manner in which such deficiencies were to be treated is simply an unsupported assumption which is contradicted by the very case record before us. Moreover, the present regulations still expressly state:

The copy of the notice or certificate filed * * * shall be supplemented by the following information unless it is included in the copy:

* * * * *

(6) For all claims or sites located on surveyed or unsurveyed land, either a topographic map published by the U.S. Geological Survey on which there shall be depicted the location of the claim or site, or a narrative or sketch describing the claim or site with reference by appropriate tie or some topographic, hydrographic or manmade feature.

43 CFR 3833.1-2(c) (1980). There is no textual support in the regulations to support Judge Goss' conclusion that the result attendant upon failure to comply totally with the purely regulatory filing requirements has been altered. Indeed, the preface of which he makes note, expressly states "[t]he Bureau of Land Management will continue to check recordation filings to determine if they meet the minimum requirements of the law and regulations."

Judge Goss seeks to have it both ways. First, he holds that the regulations, in effect in 1977, clearly provide that until all required documents have been filed there is no recordation. Then he declares that "any regulation presuming an abandonment in the face of the evidence, and requiring a forfeiture must be most strictly construed." If this is the case, however, I fail to see how one strictly construes the regulation by declaring that no recordation is complete until all the requirements of the regulations are met. Finally, having determined in the first instance that the regulation clearly required total compliance, he then seeks to excuse compliance by arguing that the regulation is unclear. As regards Judge Goss's contention that relief could be afforded an appellant under 43 CFR 1821.2-2(g), inasmuch as it is his belief that the recordation was not complete until all the requirements of the regulations were met, and inasmuch as the time limits for recordation are statutorily imposed, it is clear that the "law does not permit" late filings, and thus section 1821.2-2 would not be an available remedy. I must conclude that the result which he seeks to reach is attainable only under the most ad hoc of adjudications.

The majority on this Board is fully aware of the consequences which attend failure to comply with the minimum requirements of the law and regulations. In many instances the results are harsh. But it is Congress, not the Department, which has mandated the result. I think we have an obligation to be fair and even-handed in our adjudications under the recordation provisions. This does not mean, however, that we should exercise carte blanche to twist and distort regulations to achieve a desired result. This is particularly the

case when the result of such convolutions is beneficial to one individual before us, but of incalculable injury to many others who have attempted to comply with the regulations.

James L. Burski
Administrative Judge

46 IBLA 69

ADMINISTRATIVE JUDGE GOSS DISSENTING:

Under the Departmental regulations in effect at the time appellant attempted the recording of August 24, 1977, I would hold that recording was incomplete. No recording having been made in 1977, there was no requirement that notice of assessment work be filed in 1978. 43 CFR 3833.1-2, 3833.2-1(a), and 3833.4(a) (1977). Appellant should not be held to have abandoned his four mining claims.

The 1977 regulations speak for themselves. Departmental regulations at 43 CFR Subpart 3833 then required in part:

3833.1-2 Manner of recordation-other Federal lands.

(a) The owner of an unpatented mining claim, * * * located on or before October 21, 1976, on Federal land, excluding land within units of the National Park System, shall file (file shall mean being received and date stamped by the proper BLM office), before October 22, 1979, in the proper BLM office a copy of the official record of the notice or certificate of location of the claim or site filed under state law, or, if state law does not require the recordation of a notice or certificate of location of the claim or site, a certificate of location containing the information in paragraph (c) of this section.

* * * * *

(c) The copy of the notice or certificates filed in accordance with paragraphs (a) and (b) of this section shall be supplemented by the following additional information unless it is included in the copy:

* * * * *

(7) A map with a scale of not less than 1/4 inch to a mile showing the survey or protraction grids on which there will be depicted the location of the claim or site. Contiguous claims or sites and groups of claims or sites in the same general area may be depicted on this single map so long as the individual claims or sites are clearly identified;

* * * * *

§ 3833.2 Evidence of assessment work/notice of intention to hold claim.

§ 3833.2-1 When filing required.

(a) (1) The owner of an unpatented mining claim located on Federal land, excluding land within units of the National Park System, 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.

* * * * *

§ 3833.4 Failure to file.

(a) The failure to file such instruments as are required by §§ 3833.1 and 3833.2 within the time periods prescribed therein, shall be deemed conclusively to constitute an abandonment of the mining claim, mill site, or tunnel site and it shall be void. [Emphasis added.]

In the amendment to 43 CFR 3833.4(a), effective March 16, 1979, 1/ the Department recognized the severity of the 1977 regulations, 2/ and established that failure to furnish the map required under 43 CFR 3833.1-2(c) would not prevent a recording from being effective.

Despite the mandate of 43 CFR 3833.1-2 and 3833.4 (1977), the majority concludes that recordation occurred on August 24, 1977. The claims are held rejected on the theory that because of the attempted August 24, 1977, recording, appellant's evidence of assessment work was required to be filed by December 31, 1978.

The filing of the location notice in 1977 did not constitute recordation because the map submitted by appellant was inadequate for the purposes stated at 43 CFR 3833.1-2(c)(7) (1977), and was accordingly rejected. Without all the items required under 43 CFR 3833.1-2, there was no effective recording. 43 CFR 3833.4 (1977).

1/ "§ 3833.4 Failure to file. (a) The failure to file an instrument required by §§ 3833.1-2(a), (b), and 3833.2-1 of this title within the time periods prescribed therein, shall be deemed conclusively to constitute an abandonment of the mining claim, mill or tunnel site and it shall be void."

2/ The recordation regulations, as amended in 1979, were construed in Topaz Beryllium Company v. United States, 479 F. Supp. 309 (D. Utah 1979).

Appellant, however, had until October 22, 1979, to record his location. 43 U.S.C. § 1744(a) (1976); 43 CFR 3833.1-2(a). There having been no 1977 recordation, appellant was not subject to any requirement that assessment work be filed during 1978 under 43 CFR 3833.2-1(a) (1977).

Any regulations presuming an abandonment in the face of an appellant's clearly documented intention not to abandon, must be most strictly construed against the Government. If the Board, under some theory of construction of the regulations, 3/ were to conclude that the 1977 attempted recording would otherwise be effective, such a theory should not be applied against this appellant. He should not be deemed to have abandoned his claims when he failed to file the 1978 evidence of assessment work. It is a fundamental policy of the Department that unclear regulations should not be applied in a manner

3/ It is recognized that while application of 43 CFR 3833.4(a) as worded prior to 1979 would be of benefit to this appellant, it could work to the detriment of some who located after October 21, 1976, and whose filing was incomplete under the regulations. For any such miners whose filing deadline expired prior to the 1979 amendment, and who could be adversely affected by a literal interpretation of 43 CFR 3833.4(a) as worded prior to the 1979 amendment, some relief would appear proper. See Topaz Beryllium, supra, n.2 at 315; Statement by Assistant Secretary, Energy and Minerals, 44 FR 9721-22 (Feb. 14, 1979), quoted in majority, supra. There are two doctrines under which such relief could be accorded:

1. In the absence of countervailing public policy reasons or properly recorded intervening rights, it is appropriate to apply the amended version of the regulation to a pending matter where it benefits the affected party to do so. James E. Strong, 45 IBLA 386 (1980). See B. B. Wadleigh, 44 IBLA 11, 15 (1979); Wilfred Plomis, 34 IBLA 222, 228 (1978); Henry Offe, 64 I.D. 52, 55-56 (1957). I submit that the majority herein overturns Wadleigh, Plomis, and Offe by applying the doctrine in reverse. Appellant does not receive the benefit of the regulations in effect at time of his 1977 filing; rather, to his detriment, the 1979 regulation is applied to the 1977 facts.

2. Where there are no recorded intervening rights, a late filing of the map or other material required solely by regulation may be considered as being timely filed under 43 CFR 1821.2-2(g):

"Time Limit for filing documents.

* * * * *

(g) When the regulations of this chapter provide that a document must be filed or a payment made within a specified period of time, the filing of the document or the making of the payment after the expiration of that period will not prevent the authorized officer from considering the document as being timely filed or the payment as being timely made except where:

(1) The law does not permit him to do so.

which would deprive an appellant of a substantive right. This policy was firmly expressed in Mary I. Arata, 4 IBLA 201, 204 (1971): "Therefore, because of the ambiguity of the regulations, an interpretation favorable to the applicant is required." The Arata doctrine should be applied to appellant here.

Joseph W. Goss
Administrative Judge

fn. 3 (continued)

(2) The rights of a third party or parties have intervened.

(3) The authorized officer determines that further consideration of the document or acceptance of the payment would unduly interfere with the orderly conduct of business."

Rather than applying the traditional Wadleigh doctrine or section 1821.2-2(g), the majority appears ready to disregard 43 CFR 3833.4(e) (1977) across the board. While this approach could be of benefit to some who made incomplete filings, there could be problems where a top filer has fully complied with the regulations as written. Under McKay v. Wahlenmaier, 226 F.2d 714 (1958), the Department may not disregard a valid regulation where conflicting rights of parties are involved.

