

Editor's note: Reconsideration denied by order dated June 3, 1980

L. LEON JENNINGS
MANSFIELD L. JENNINGS
GILBERT M. JENNINGS

IBLA 80-105

Decided April 14, 1980

Appeal from decision of the Utah State Office, Bureau of Land Management, declaring a mining claim abandoned and void. No. 3833 (U-952).

Affirmed.

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

43 CFR 3833.1-2(d) states that a location notice for each mining claim, millsite, or tunnel site filed for recordation shall be accompanied by a service fee. As this is a mandatory requirement, there is no recordation unless the documents are accompanied by the stated fee, or until it is paid. Therefore, where a notice of location of a mining claim was submitted to BLM for recordation on Oct. 22, 1979, the deadline date, and the filing fee therefore is not paid to BLM until after the deadline for filing had passed, the mining claim must be deemed abandoned and void.

APPEARANCES: Fay E. Reber, Esq., St. George, Utah, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This appeal is from a decision dated November 2, 1979, of the Utah State Office, Bureau of Land Management (BLM), declaring the

Jennings placer mining claim 1/ abandoned and void for failure to timely file a notice of location, as required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and the regulation 43 CFR 3833.1-2.

The facts are as follows: the Jennings placer mining claim was located by appellants on August 4, 1947, and therefore prior to October 21, 1976. Under 43 CFR 3833.1-2 2/ owners of mining claims located prior to October 21, 1976, must file location notices with BLM on or before October 22, 1979. The location notice for appellants' claim was received for recording by BLM on October 22, 1979. However, the location notice was not accompanied by the service fee, \$5 per claim, as required by 43 CFR 3833.1-2(d). 3/ On November 2, 1979, BLM wrote to appellants advising that the service fee should have accompanied its filing, and that the filing was "unacceptable for the reason that it was not accompanied by the required filing fee." Appellants were informed that their claim had been declared abandoned and void. Several days after the filing deadline, but pursuant to notification by the BLM that the filing did not include the required fee, appellants forwarded the proper filing fee, and in a telephone conversation urged that the matter be reconsidered. However, on November 2, 1979, BLM issued the decision holding appellants' claim abandoned and void for failure to comply with 43 CFR 3833.1-2(d).

[1] The regulation which was relied on by BLM and is controlling here is 43 CFR 3833.1-2(d), supra.

Both sentences of that regulation require that the service fee accompany the claim or site filed, and the second sentence clearly mandates rejection and return to its owner of a filing not accompanied by the fee.

1/ Although the BLM decision and appellant's statement of reasons both refer to "mining claims" (plural), the record before the Board indicates that only a single claim is involved, i.e., the Jennings Placer Mining Claim.

2/ 43 CFR 3833.1-2 provides in pertinent part:

"(a) The owner of an unpatented mining claim, mill site or tunnel site located on or before October 21, 1976, on Federal lands, excluding lands within units of the National Park System established before September 28, 1976, but including lands within a national monument administered by the United States Fish and Wildlife Service or the United States Forest Service, shall file (file shall mean being received and date stamped by the proper BLM Office) on or 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."

(Circular No. 2444-A.)

3/ 43 CFR 3833.1-2(d) provides: "Each claim or site filed shall be accompanied by a one time \$5 service fee which is not returnable. A notice or certificate of location shall not be accepted if it is not accompanied by the service fee and shall be returned to the owner."

In a recent decision, Joe B. Cashman, 43 IBLA 239 (1979), we construed that regulation in a manner which controls the disposition of the case at bar. We stated at 43 IBLA 240:

43 CFR 3833.1-2 requires that, for mining claims, millsites, or tunnel sites located prior to October 21, 1979, a copy of the location notice must be recorded with the proper office of BLM within 3 years, or before October 22, 1979. For such claims or sites located after October 21, 1976, the location notice must be recorded in the proper BLM office within 90 days following date of location. 43 CFR 3833.1-2(d) states that each claim or site filed with BLM shall be accompanied by a \$5 service fee. This is a mandatory requirement. Without payment of the filing fee, there is no recordation. Thus, as the filing fee for the notices of Apex No. 1 and Apex No. 2 millsites was not paid until February 10, 1978, it must be held that the date of recordation of these claims with BLM cannot be considered to have occurred earlier than that date. [Emphasis in original.]

It follows that the recordation date in the case at bar is the date the filing fee was paid, in this case well after the deadline for filing had passed. The record does not reflect the date the fee was paid. Under 43 CFR 3833.1-2, appellants' filing was not timely and the Jennings mining claim must conclusively be deemed abandoned and void, as required by FLPMA. 43 U.S.C. § 1744(c) (1976).

Appellants' principal contention is that BLM's Utah District Office informed Mansfield L. Jennings that there were no set forms to follow, and purportedly gave him as a guideline a BLM publication entitled "Questions and Answers," which contained all essential information to complete the filing. Appellants state that in accordance with the published notices and this guideline, all the necessary documents were filed with the Utah State Office of BLM on October 18, 1979, and at no place in these instructions is it clearly and unambiguously expressed that a \$5 filing fee is absolutely required in all cases. Accordingly, appellants state that because they complied with the officer's directive, BLM is estopped from declaring their claim abandoned and void.

Appellants' contention on this point is clearly in error. The "Question and Answer" publication, incorporated in appellants' statement of reasons as Exhibit "B" thereto, includes the following:

Q. Are owners of unpatented mining claims, mill or tunnel sites located both before and after October 21, 1976, required to file a notice or certificate of location?

A. Yes.

* * * * *

Q. Is there a fee for filing either of these documents?

A. A \$5 service fee should accompany each claim or site filed.

The "guideline" publication referred to by appellant and incorporated as Exhibit "A" to their pleadings includes rather prominently the following: "This recording is required by the new Federal Land Policy and Management Act of 1976 (Public Law 94-579; 94 Statute 2743). (See Title 43 Code of Federal Regulations, Subpart 3833). Copy available at above address."

Thus, not only was the reader of this guideline publication referred to the section of the CFR which contained the requirement for the filing fee; he was advised where he could procure a copy. There was no misrepresentation in these documents concerning the requirement for a fee, and hence, no basis for assertion of estoppel against the Government, even assuming that such estoppel might lie in other circumstances.

Appellants cite United States v. Eaton Shale Co., 433 F. Supp. 1256 (D. Colo. 1977), for the Court's holding in that case that the burden of proof of the intent to abandon a mining claim rests on the party who asserts an abandonment. Furthermore, abandonment is a question of fact and the claimant's intent to abandon must be established by clear and convincing evidence after a consideration of all pertinent facts.

In United States v. Eaton Shale Co., *supra*, the issue of the abandonment of the mining claims arose from an entirely different set of circumstances from those presented here, and the Court resorted to the established common law principles to test whether an abandonment had occurred.

By contrast, in this case the failure to record a claim properly and timely triggers the statutory consequence, *i.e.*, that the failure "shall be deemed conclusively to constitute an abandonment of the mining claim * * * by the owner" 43 U.S.C. § 1744(c) (1976). This statutory consequence may not be defeated by recourse to common law standards, particularly in light of the legislative history, which equated such conclusively deemed abandonment with "extinguishment." House Conf. Rep. No. 94-1724, 94th Cong., 2d Sess. at 62 (1976).

Appellants further argue that the requirement of submitting a filing fee is not imposed by the Federal Land Policy and Management

Act of 1976, but is imposed by administrative regulations which are beyond the scope of and in conflict with the Act.

The Federal Land Policy and Management Act of 1976 is codified at 43 U.S.C. § 1701 (1976). Section 1733 of the Act provides that the Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon.

Congress directed that the broad outlines of the FLPMA, including 43 U.S.C. § 1744 (1976), be "filled in" by regulations to be promulgated by the Secretary. See 43 U.S.C. §§ 1701(a)(5), 1733(a), and 1740 (1976). 43 U.S.C. § 1740 states, "[T]he Secretary, with respect to the public lands shall promulgate rules and regulations to carry out the purposes of this Act and other laws applicable to the public lands * * *." (Emphasis added.)

Appellants contend that section 1744(a) and (b) provide that certain "instruments" must be filed locally and with the BLM. According to the terms of the Act, these instruments include a notice of intention to hold the mining claim, an affidavit of assessment work performed, and either a certificate or notice of location. Section 1744(c) then provides that the failure to file any of these instruments shall be deemed conclusively to be an abandonment of the claim.

Appellants further contend that it is critical to note that the term "instrument," as used in section 1744(a) and (b), does not include a filing fee. Thus, it is argued, by the terms of the Act itself, failure to submit a filing fee does not amount to a failure to file an instrument, and, therefore, cannot be deemed to be an abandonment of the claim.

While the statute itself does not require the filing fee, Congress has entrusted the Department with the responsibility of administering and enforcing the statutory provisions. To this end, regulations are promulgated which the Department is bound to follow. Such regulations have the force and effect of law. Vitarella v. Seaton, 359 U.S. 535 (1959); Accardi v. Shaughnessy, 347 U.S. 260 (1954); Chapman v. Sheridan Wyoming Co., 338 U.S. 621, 629 (1950); Electronics Components Corp. of N.C. v. N.L.R.B., 546 F.2d 1088 (4th Cir. 1976); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); Wilfred Plomis, 34 IBLA 222 (1978); and Arizona Public Service Co., 20 IBLA 120 (1975).

In Topaz Beryllium Co. v. United States, 479 F. Supp. 309, 316 (D. Utah, 1979), the filing fee was expressly found to be reasonable. The court said that the fee, rather than being onerous and unlawful, is in reality modest and moderate. The method of computation was rational, reasonable, and extremely conservative. In short, there is nothing wrong with the fee, or the manner of its imposition.

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.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

