

R. L. DURRANT
NOD MULVILLE
B. E. KARN

IBLA 80-244

Decided May 13, 1980

Appeal from a decision of the Utah State Office, Bureau of Land Management, declaring certain mining claims abandoned and void. 3833 (U-952).

Affirmed as modified.

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

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 therefor is not paid to BLM until after the deadline for filing had passed, the mining claim must be deemed abandoned and void.

APPEARANCES: Monta W. Shirley, Esq., Los Angeles, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This appeal is taken from a decision dated November 23 1979, of the Utah State Office, Bureau of Land Management (BLM), declaring the Donavon #1 through Donavon #7 lode mining claims abandoned and void for failure to timely file notices of location, accompanied by service fees, as required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and the applicable regulation, 43 CFR 3833.1-2.

The Donavon claims were located between 1942 and 1952, many years prior to October 21, 1976, the date of enactment of FLPMA. Under 43 CFR 3833.1-2 1/ owners of mining claims located prior to October 21, 1976, must file copies of the officially recorded location notices with the proper office of BLM on or before October 22, 1979. The location notices of appellants' claims were received for recording by BLM on October 22, 1979, but these filings were held to be unacceptable because they were not accompanied by a service fee of \$5 per claim, as required by 43 CFR 3833.1-2(d). 2/ Appellants were notified of the deficiency and purportedly submitted the required service fees on October 25, 1979. 3/ However, by decision of November 23, 1979, BLM declared appellants' claims abandoned and void for failure to comply with the regulations.

1/ This regulation states in part:

"(a) The owner of an unpatented mining claim * * * located on or before October 21, 1976, on Federal lands, * * * shall file (file shall mean being received and date stamped by the proper BLM Office) on or before October 22, 1979, * * * a copy of the official record of the notice or certificate of location of the claim * * * filed under state law. * * *

"(b) The owner of an unpatented mining claim * * * located after October 21, 1976, on Federal land shall file (file shall mean being received and date stamped by the proper BLM office), within 90 days after the date of location of that claim 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 * * *.

* * * * *

"(d) Each claim * * * 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."

2/ The record includes a letter of October 19, 1976, received by BLM on October 22, 1979, presumably accompanying appellants' notices of location, which letter refers to a \$5 fee enclosed therein. Neither this fee nor a photocopy of this fee appears in the record.

3/ BLM received a handwritten letter from R. L. Durrant on October 25, 1979, which recited that a check for \$55 was enclosed to cover filing costs for the subject claims and others. Neither this check nor a photocopy of this check appears in the file.

Appellants argue that there was no intention on their part to abandon the subject mining claims, and that, to the contrary, they made every effort to comply with both the law and the regulations. Their failure, they contend, to comply strictly was caused by their mistaken interpretation of the legal requirements. Inasmuch as no rights of any third parties have intervened, appellants maintain that it will be in the interests of justice to reverse the BLM holding.

[1] The regulation on which BLM relied, and which 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.

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, 1976, a copy of the location notice must be recorded with the proper office of BLM within 3 years, [on] 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 [location] 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 before us is the date the service fee was tendered, which in this case was after the deadline for filing had passed. The record does not reflect the date the fee was tendered. Under 43 CFR 3833.1-2, appellants' filing was not timely and the Donavon claims must conclusively be deemed abandoned and void, as required by FLPMA. 43 U.S.C. § 1744(c) (1976).

Appellants argue that under the mining law, abandonment of a mining claim includes both the act and the intention to relinquish the claim, and that failure to strictly comply with the mining law as to the time of filing notices of location is not necessarily fatal to the claimants' rights. They cite a number of court cases, all rendered prior to 1950, in support of their proposition. In each of the cited cases, the issue of abandonment arose from an entirely different set of circumstances from those presented here, and in each case the court

resorted to the established common law principles to test whether an abandonment had, in fact, occurred. This Board held in L. Leon Jennings, 47 IBLA 47, 50 (1980):

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., 2nd Sess., at 62 (1976).

Appellants further argue that even if they are held not to have strictly complied with the applicable regulations, they are entitled to be relieved of their default because they made a good faith effort to comply with all legal requirements.

While the statute itself does not require the service fee, Congress has entrusted the Department of the Interior with the responsibility of administering and enforcing the statutory provisions of FLPMA. To this end, the Secretary has promulgated regulations 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 (1950); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); L. Leon Jennings, *supra*; Wilfred Plomis, 34 IBLA 222 (1978).

In Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah, 1979), the filing fee for mining claim recordation 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.

Finally, appellants request that their tender of \$5 with the initial and timely filing of the location notices should satisfy all the regulatory requirements as to one claim of the Donavon group. Although the record before us does not reflect the tender of any payments, such tender is adverted to in the letter which accompanied the documents. If such tender, in fact, was made to BLM with the papers received by BLM on October 22, 1979, appellants indeed may resubmit that payment to the Utah State Office of BLM and designate which claim of the Donavon group they wish the payment to be applied to as the service charge for recordation. Cf. Robert L. Steele, 46 IBLA 80 (1980); Ann M. Warnke, 45 IBLA 305 (1980). In addition, appellants should submit proof of the original tender.

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 as modified.

Douglas E. Henriques
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Joan B. Thompson
Administrative Judge

