

Editor's note: Motion to strike obiter dicta granted by order dated May 29, 1981 --See 49 IBLA 49A through 49E below.

ALASKAMIN CO.

IBLA 80-547

Decided July 21, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, declaring void 360 mining claims, AA-36562 - AA-36921.

Affirmed.

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

The owner of mining claims located prior to Oct. 21, 1976, must file evidence of annual assessment work performed on the claims during the preceding assessment year, or, where appropriate, notices of intention to hold the claims, no later than on or before Oct. 22, 1979, or the claims are properly declared abandoned and void.

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

"Preceding assessment year." The "preceding assessment year" is the assessment year most recently completed. Thus, the requirement that evidence of annual assessment work completed during the "preceding assessment year" be filed on or before Oct. 22, 1979, concerns the assessment year ending at noon on Sept. 1, 1979.

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

A mining claimant may file a notice of intention to hold its mining claims in lieu of evidence of annual assessment work performed thereon only where the obligation to perform the annual assessment work has been suspended or deferred or has not yet accrued. Where the record indicates no such circumstances and shows to the contrary that the claimant was required to and did perform this work in the preceding assessment year, filing notices of intention will not suffice.

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

A notice of intention to hold a group of mining claims must meet the requirements set out at 43 CFR 3833.2-3(a), and must include, inter alia, a clear statement of the reason why the annual assessment work was not performed. This requirement is impossible of satisfaction where the claimant in fact did the assessment work.

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

A failure to file evidence of annual assessment work for the preceding assessment year is not excused by 43 CFR 3833.4(b), which provides that a filing which complies with FLPMA may not be deemed invalid because of its failure to meet the requirements of other laws.

APPEARANCES: Bruce E. Gagnon, Esq., Phyllis C. Johnson, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On October 22, 1979, the Alaskamin Company filed copies of certificates of location of 360 mining claims, designated AA-36562 - AA-36921, with the Alaska State Office, Bureau of Land Management (BLM). These certificates indicate that these claims were all located prior to October 21, 1976. Alaskamin (appellant) also filed copies of evidence of annual assessment work performed on these claims for the assessment year ending on September 1, 1978.

On March 4, 1980, BLM issued a decision declaring these claims abandoned and void under 43 CFR 3833.4(a) because Alaskamin had not filed evidence of assessment work for the preceding assessment year, that is, the assessment year ending at noon on September 1, 1979. The deadline under 43 CFR 3833.2-1(a) for so doing was October 22, 1979. The Alaskamin Company (appellant) appealed this decision.

Under section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1976), and the corresponding Department regulation, 43 CFR 3833.1-2(a), the owner of unpatented mining claims such as these which were located or relocated on or before October 21, 1976, is required to file copies of the official records of the notices of location of these claims on or before October 22, 1979, in the BLM office having jurisdiction over the lands covered thereby. Appellant complied with this requirement when it filed the copies of the notices of location on October 22, 1979.

[1] However, there is a second, separate requirement which appellant failed to meet. Under section 314(a)(2) of FLPMA, 43 U.S.C. § 1744(a)(2) (1976), and 43 CFR 3833.2-1(a), 1/ the owner of unpatented mining claims located on or before October 21, 1976, in addition to timely filing copies of notices of location, must also file with BLM evidence of annual assessment work performed thereon during the preceding assessment year, or, where appropriate, notices of intention to hold the claims, on or before October 22, 1979, at the latest. Joseph V. Dodge, 49 IBLA (1980); Kenneth K. Parker, 48 IBLA 127 (1980); Alice E. Deetz, 48 IBLA 59, 61 (1980); Jim Adams,

1/ This section provides as follows:

"The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording [recording of the copy of the notice of location with BLM], which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim." (Emphasis supplied.)

47 IBLA 281 (1980). If this requirement is not met, the claims are properly declared abandoned and are void. 43 U.S.C. § 314(c) (1976); 43 CFR 3833.4(a). 2/

[2] Under the Act of February 11, 1875, as amended by the Act of August 23, 1958, 30 U.S.C. § 28 (1976), the assessment year runs from noon on September 1 to noon on the following September 1. The "preceding assessment year" is the assessment year most recently completed. Thus, in this case, the "previous assessment year" ended at noon on September 1, 1979. See Harry J. Phillips, 47 IBLA 252, 255 (1980). Accordingly, the evidence of annual assessment work for the assessment year ending on September 1, 1978, submitted by appellant, did not satisfy the requirement of this section, and BLM properly declared these claims abandoned and void. Joseph V. Dodge, *supra*; Edward P. Murphy, 48 IBLA 211 (1980); A. J. Grady, 48 IBLA 218 (1980); John F. Sherwood, 48 IBLA 180 (1980); Kenneth K. Parker, *supra*; Alice E. Deetz, *supra*; G. H. Monk, 47 IBLA 213 (1980).

[3] Appellant argues that the cover letter accompanying its submission ought to be regarded as a notice of intention to hold the claims, and that, as such, it satisfies the requirements of 43 CFR 3833.2-1(a). The argument is unpersuasive. Even if we could overlook the deficiencies in appellant's purported notice of intention, it would still not prevail, as appellant was not justified in filing a notice of intention to hold these claims in lieu of evidence of annual assessment work here. Filing such a notice may substitute for filing this evidence only where the obligation to perform the annual assessment work has been suspended or deferred, or has not yet accrued. 43 U.S.C. § 1744(a)(1); 43 CFR 3833.2-3(a); Joseph V. Dodge, *supra*; Robert W. Hansen, 46 IBLA 93 (1980); Silvertip Mining & Exploration, 43 IBLA 250, 252 (1979); Juan Munoz, 39 IBLA 72 (1979); and Donald H. Little, 37 IBLA 1 (1978). The record shows that appellant was required to do annual assessment work on these claims as usual in the assessment year ending on September 1, 1979, that this obligation had not been suspended or deferred, and that it actually accomplished this

---

2/ 43 CFR 3833.4 provides as follows:

"(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.

"(b) The fact that an instrument is filed in accordance with other laws permitting filing or recording thereof and is defective or not timely filed for record under those laws, or the fact that an instrument is filed for record under this subpart by or on behalf of some, but not all of the owners of the mining claim, mill site, or tunnel site, shall not be considered failure to file an instrument under this subpart."

work. Thus, appellant was not allowed to file a notice of intention to hold the claims in lieu of evidence of the annual assessment work.

[4] In any event, even were we to disregard the foregoing, appellant's submission did not meet the requirements in effect since February 14, 1979, establishing the form which a notice of intention must follow. Under 43 CFR 3833.2-3(a), 3/ a notice of intention to hold a mining claim must set out clearly the reason that the annual assessment work has not been performed, and must include statements that the owner(s) are holding and claiming the lands for the valuable mineral deposits contained therein and that the owner(s) intend to continue development of the claim. The cover letter filed by appellant clearly fails to meet these requirements. Moreover, it was impossible for appellant to satisfy the requirement that it set out the reason that annual assessment work was not performed, as it appears that appellant in fact actually did this work, and as it does not appear that there would have been any excuse for its not having done so. See Robert W. Hansen, supra.

---

3/ This section provides as follows:

"A notice of intention to hold a mining claim or group of mining claims shall be in the form of either (1) an exact legible reproduction or duplicate, except microfilm, of a letter signed by the owner of a claim or his agent filed for record pursuant to section 314(a)(1) of the Act in the local jurisdiction of the State where the claim is located and recorded setting forth the following information:

"(i) The serial number assigned to each claim by the authorized officer upon filing in the proper BLM office of a copy of the notice or certificate of location. Filing the serial number shall comply with the requirement in the act to file an additional description of the claim;

"(ii) Any change in the mailing address, if known, of the owner or owners of the claim;

"(iii) A statement that the claim is held and claimed by the owner(s) for the valuable mineral contained therein;

"(iv) A statement that the owner(s) intend to continue development of the claim; and

"(v) The reason that the annual assessment work has not been performed or an affidavit of assessment work performed or a detailed report of geological, geochemical, or geophysical survey under § 3833.2-2, has not been filed or

"(2) The decision on file in the proper BLM office which granted a deferment of the annual assessment work required by 30 U.S.C. 28, so long as the decision is in effect on the date required for filing a notice of intention to hold a mining claim under § 3833.2-1 of this title or a petition for deferment, a copy of which has been recorded with the appropriate local office, which has not been acted on by the authorized officer.

Appellant suggests that it was impossible for it to submit to BLM copies of the evidence of annual assessment work filed with the State recorder, emphasizing that even if it had immediately filed this evidence with the State, it would not have received stamped file copies thereof back from the State in time to meet the October 22 deadline. Accordingly, appellant states, it concluded that it could not be reasonably required to submit evidence of assessment work for the assessment year ending on September 1, 1979, and submitted such evidence from the preceding assessment year instead.

Were this truly a case where administrative restraints made it impossible to record satisfactory evidence of annual assessment work, we would not hesitate to recognize as adequate the filing of a notice of intention to hold in lieu thereof. See James E. Strong, 45 IBLA 386 (1980). However, appellant has overlooked the fact that the regulations, 43 CFR 3833.0-5(i) and 3833.2-2(a) (1979), no longer require a claimant to file a stamped copy of the evidence of annual assessment work filed with the State. <sup>4/</sup> Rather, a claimant is now allowed to file a copy of the evidence "which has or will be filed" with the local recorder. Harry J. Phillips, supra at 254. Thus, appellant could have complied here simply by preparing the evidence which it wished eventually to file with the State recorder, duplicating it, and filing these duplicates with BLM. It had over 50 days in which to do so, which was ample time to comply without inconvenience.

Nor, as appellant argues, was its failure to meet the October 22, 1979, FLPMA deadline excused because the State's deadline to file this evidence was not until November 29, 1979. The requirement of filing with BLM is independent of similar State requirements. Joseph V. Dodge, supra. As discussed above, the regulations expressly provide for a claimant's legitimately filing copies of such evidence in advance of its being filed in the State, so that the State's deadline is irrelevant.

[5] We expressly reject appellant's argument that the defect in its filing should not be considered a failure to file under section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1976). This section, as applied by 43 CFR 3833.4(b), <sup>5/</sup> concerns the situation where a claimant does

---

<sup>4/</sup> Prior to the promulgation of this provision, the regulations required that the claimant file a copy which had been stamped as received by the State. This resulted in some claimants being unable to meet the deadlines for Federal filing, as the delay attendant on the State's stamping and returning this information to the claimant sometimes extended past the deadline for filing this information with BLM. See James E. Strong, supra. <sup>5/</sup> See n.2, supra.

file the information as required by FLPMA, but does so in a manner which is defective or untimely under other laws governing filing. In these circumstances, this section provides that the filing may not be deemed invalid because of its failure to meet the requirements of the other laws, if it is proper under FLPMA. Silvertip Mining & Exploration, supra at 252. Such is not the situation here.

The consequence of failure to file timely, i.e., that it "shall be deemed conclusively to constitute an abandonment of the mining claim(s)" is statutory, and may not be waived.

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:

---

Anne Poindexter Lewis  
Administrative Judge

---

James L. Burski  
Administrative Judge

ALASKAMIN CO. : Mining Claim Recordation  
: :  
49 IBLA 43 (1980) : Motion to Strike Obiter Dicta  
: :  
: Granted

ORDER

The Office of the Solicitor (Movant) has moved this Board to strike certain language appearing as obiter dicta in the case in caption and in other Board decisions. 1/

The essence of the dicta in question in the several decisions is expressed in the following quotations from the Alaskamin decision, supra:

A mining claimant may file a notice of intention to hold its mining claims in lieu of evidence of annual assessment work performed thereon only where the obligation to perform the annual assessment work has been suspended or deferred or has not yet accrued. Where the record indicates no such circumstances and shows to the contrary that the claimant was required to and did perform this work in the preceding assessment year, filing notices of intention will not suffice.

Syllabus (headnote 4) at 49 IBLA 44.

Even if we could overlook the deficiencies in appellant's purported notice of intention, it would still not prevail, as appellant was not justified in filing a notice of intention to hold these claims in lieu of evidence of annual assessment work here. Filing such a notice may substitute for filing this evidence only where the obligation to

---

1/ The Office of the Solicitor did not attempt to list in the motion those "certain other decisions" to which it alludes. However, we have identified the following cases containing dictum similar in substance to that which appears in Alaskamin Co., supra. Robert W. Hansen, 46 IBLA 93 (1980); Silvertip Mining and Exploration, 43 IBLA 250 (1979).

perform the annual assessment work has been suspended or deferred, or has not yet accrued. 43 U.S.C. § 1744(a)(1); 43 CFR 3833.2-3(a); Joseph V. Dodge, *supra*; Robert W. Hansen, 46 IBLA 93 (1980); Silvertip Mining & Exploration, 43 IBLA 250, 252 (1979); Juan Munoz, 39 IBLA 72 (1979); and Donald H. Little, 37 IBLA 1 (1978). The record shows that appellant was required to do annual assessment work on these claims as usual in the assessment year ending on September 1, 1979, that this obligation had not been suspended or deferred, and that it actually accomplished this work. Thus, appellant was not allowed to file a notice of intention to hold the claims in lieu of evidence of the annual assessment work.

49 IBLA at 46-47.

A modification of such statements would not operate to alter the result in any of the appeals in which they have appeared, as each of the several cases were decided on other grounds.

The motion alludes to the amendment of 43 CFR 3833.2-3(a)(v), published as final rulemaking in 44 FR 9721 (Feb. 14, 1979), and urges that this change allows the claimant to make an unconditional election to file either evidence of the performance of annual assessment work or notice of intention to hold the claim "at least where the claimant has not performed the assessment work" (Motion at 7).

The question is not susceptible to easy, glib, or even satisfactory resolution. The entire body of Departmental regulations promulgated for the implementation of section 314 of the Federal Land Policy and Management Act of 1976 is so poorly expressed and obfuscatory as to defy assured comprehension even by competent lawyers, a fact which has been noted repeatedly in commentaries by knowledgeable members of the private bar. See, e.g., D. Sherwood, "Mining Claim Recordation and Prospecting Under the Federal Land Policy and Management Act of 1976," 23 Rocky Mt. Min. Law Inst. 1 (1977).

The motion filed by the Office of the Solicitor tracks the history and analyzes the language employed in the original regulations and their subsequent amendment. Movant acknowledges that based upon the original final rules and preamble discussion published in 42 FR 5299, 5302 (Jan. 27, 1977), "the statement in Alaskamin would have been entirely proper." However, it is contended that in the course of proposing and finalizing the amendment of 43 CFR 3833.2-2(a) and (b) and 3833.2-3(a), the Department manifested its intention to authorize a claimant to make an election to file either evidence of performance of annual assessment work or notice of intention to hold the claim, or a detailed report of geological, geochemical, or geophysical survey, whichever is chosen."

Unfortunately, the amendment was premised upon an absolutely erroneous conclusion of law, which was expressed in the preamble to the

final rulemaking and published at 44 FR 9721 (Feb. 14, 1979) as follows: "One comment suggested that § 3833.2-3(a)(v) be amended to make it clear that assessment work was not required by law. We agree and the section has been changed accordingly."

The performance of annual assessment work is expressly required by statute, 30 U.S.C. §§ 28, 49e (1976). The claimant's obligation to comply--absent a legal suspension or deferral--has been recognized by the Supreme Court. Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). See United States v. Bohme, 48 IBLA 267 (1980). While in certain circumstances the consequences of a failure to fully perform the required work may yet be in question, the law clearly imposes the requirement to perform it.

This Board has often held that it is without jurisdiction to declare duly promulgated regulations invalid. See, e.g., Exxon Co., U.S.A., 45 IBLA 313 (1980). Although the amendment of 43 CFR 3833.2-3(a)(v) was based upon a misconception of what the law required, we nevertheless regard it as having been duly promulgated. The challenge, then, is to interpret the regulation in a way which will give it meaning and effect, but neither be in direct conflict with the law nor sanction disregard of claimants' obligations under the law. This was what was attempted in the Alaskamin dicta. That interpretation recognizes what the law requires and the Federal interest in a claimant's compliance therewith, but preserves his regulatory right to make an election of which document to file in certain circumstances where the statutory requirement does not dictate his action at the date of filing. Thus, under the Alaskamin interpretation, because the "assessment year" spans both sides of the December 30 filing date, a claimant might find himself in a position to choose either to perform the work early in the assessment year and file evidence of such work, or put it off until after December 30 and simply file his notice of intention on or before that date.

Because the Supreme Court had recognized the Federal interest in whether a claimant maintains his claim through performance of his annual assessment work, and because of one of the objects of 43 U.S.C. §§ 1744 (1976), was to provide the Department with information regarding the current status of unpatented claims, it was the Board's attitude that if a claimant has actually accomplished the assessment work prior to filing, as in Alaskamin, 2/ he should not be authorized to conceal that fact by electing to file a notice of intention rather than evidence of performance of the work. This view is reinforced by the requirement that one who files a notice of intention to hold must state "the reason that the annual assessment work has not been performed." One could hardly give a reason for nonperformance if he has, in fact, performed. The Office of the Solicitor is in apparent agreement with the Board's

---

2/ Contrary to Movant's statement in n.4 of the motion, the Board's decision in Alaskamin specifically stated, "The record shows that appellant actually accomplished this work" (49 IBLA at 46).

statement on this point, as indicated in n.5 of the motion and again in n.6 on page 4 of the motion. (A second footnote is also designated "6/" on page 6 of the motion.)

Clearly, then, circumstances can have a bearing on the scope of a claimant's choice of what documents he may file. For example, as discussed in the preceding paragraph, if he has actually performed his assessment work prior to the time of filing, "then he must file an affidavit of assessment work done" (Motion, at 4, n.6). In another example, if he had not performed a geological, geochemical, or geophysical survey he would obviously be precluded from electing to file "a detailed report" of such work in accordance with 43 CFR 3833.2-2 and 30 U.S.C. § 28-1 (1976). Further, although Movant says, at page 7 of the motion, "The present regulations allow the claimant to elect which form to file--at least where the claimant has not performed the assessment work," certainly this was not what was intended to be said. It could never be asserted that if a claimant had not performed any assessment work his choices included the right to file a false affidavit that he had done so. In that circumstance he would have no other legitimate choice but to file a notice of intention to hold, and to give the reason why he had not performed his assessment work. This, then, is a third example of a claimant's choice (or "election to file") being strictured by circumstance.

As noted above, 43 CFR 3833.2-3(a)(v) requires that one who files a notice of intention to hold must include a statement of the reason why the annual assessment work had not been done. It has been suggested by a concerned member of the private bar that any reason will serve, not only those reasons which are legally exculpatory, such as where the need to do the work has been suspended or deferred, or has not yet accrued, as indicated by the Alaskamin language. But if the author of the regulation intended that any reason would be sufficient, e.g., "I didn't feel like doing the work," one must wonder why it was required that the reason be stated at all. Since the Department has promulgated a regulation, having the force and effect of law, which requires a claimant to explain the reason for his noncompliance with a statute, it must be assumed that the Department has some legally cognizable interest in what reason is given. The entire spectrum of reasons which might be offered are divisible into two classes; those which are legally exculpatory and those which are not. If whatever reason given is a matter of indifference to the Department, then the regulatory requirement is meaningless. This Board, however, is not in a position to treat Departmental regulations--particularly newly amended ones--as meaningless.

Notwithstanding the foregoing commentary, we fully recognize that it is not a function of this Board to formulate Departmental policy outside the scope of resolving interpretative issues actually presented on appeals within the Board's jurisdiction. The Alaskamin dicta were not intended as a formulation of policy, but, rather, merely expressed our understanding of what the regulations required. Inasmuch as Movant has indicated that this language is not fully in accord with Movant's

understanding of what is required to implement the several statutes and regulations concerned, this Board has no objection to striking the Alaskamin dicta, and it is so ordered.

However, as set out in the discussion above, considerable uncertainty and confusion remain with regard to precisely what is intended and required. The diversity of views is widespread and the confusion is apparently shared by claimants, the private bar, and internally by those within the Department who are charged with different aspects of the administration of the law and regulations.

This Board would expect that the Office of the Solicitor, having herein succeeded in expurgating the Board's concept of the matter, would promptly assume the initiative in bringing some order to the chaos which it has helped to create. This could be accomplished by publication of a formal Solicitor's Opinion, or by extensive and thoughtful revision of the regulations, or by a Secretarial declaration of policy. 3/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion dated February 19, 1981, by the Office of the Solicitor is hereby granted.

---

Edward W. Stuebing  
Administrative Judge

We concur:

---

James L. Burski  
Administrative Judge

---

Anne Poindexter Lewis  
Administrative Judge

---

3/ The sense of the Board is that the problem can only be exacerbated by further publication of BLM Organic Act Directives on this subject. OAD No. 80-22 (Feb. 28, 1980), for example, is regarded by the Board as a policy statement which is in total disharmony with the provisions of the regulation concerning what a notice of intention must contain in order to be efficacious. Efforts to amend regulations by publication of internal OAD's which clearly contradict the regulatory language inevitably are ineffective, generate appeals, result in inconsistent field office administration, and compel this Board to reconcile differences which are inherently irreconcilable.