

HENRY D. FRIEDMAN

IBLA 80-446

Decided July 28, 1980

Appeal from decision of the Alaska State Office, Bureau of Land Management, declaring mining claim abandoned and void for failure to timely file certificate or notice of location.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment – Mining Claims: Abandonment – Mining Claims: Location – Mining Claims: Recordation

The owner of an unpatented mining claim located after Oct. 21, 1976, must file a copy of the certificate or notice of location of the claim with BLM within 90 days of the date of location of the claim, failing which BLM properly rejects the untimely tendered document and declares the claim abandoned and void.

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

Copies of mining claim certificates or notices of location which are required to be filed within 90 days of the date of location of a claim are not timely filed where they are placed in the mail prior to the deadline but are not received or date stamped by BLM until after the deadline.

3. Evidence: Presumptions – Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment – Mining Claims: Recordation

Where a mining claimant merely asserts that because of a 9-day difference between the

posting of an envelope and the date received stamp of BLM, BLM may have mishandled notices of location submitted in attempted compliance with the requirements of 43 CFR 3833.1-2(b), allegedly causing them to be date stamped by BLM as untimely, and there is nothing else in the record to support this conjecture he has not met the burden of rebutting the presumption that BLM officials have properly discharged their duties in receiving and promptly date stamping all such notices tendered to them.

APPEARANCES: Henry D. Friedman, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On January 15, 1980, the Alaska State Office, Bureau of Land Management (BLM), received by mail a copy of a location notice for the Wickersham Below Discovery placer mining claim from Henry D. Friedman, the locator of this claim, which notice stated that it was located on October 12, 1979. On February 15, 1980, BLM issued a decision rejecting this proof and declaring the claim abandoned and void under 43 CFR 3833.4(a) for failure to comply with the requirement set out at 43 CFR 3833.1-2(b) that Friedman, as the owner of an unpatented mining claim located on Federal land after October 21, 1976, file a copy of the official record of the notice or certificate of location of his claim within 90 days of the date of location. Friedman (appellant) appealed this decision.

[1] As BLM held, appellant was required by 43 CFR 3833.1-2(b) to "file" a copy of the official record of the notice or certificate of location of the claim with BLM within 90 days of the date of location, in this case, on or before January 10, 1980. This section expressly notes that "file shall mean being received and date stamped by the proper BLM office." Appellant's documents were not received and date stamped by the Alaska State Office, Anchorage, which is the "proper BLM office," until January 15, 1980, 5 days late.

Under 43 CFR 3833.4(a), the failure to file the instrument required by 43 CFR 3833.1-2(b) within the time period prescribed therein is deemed conclusively to constitute an abandonment of the mining claim and to void it. We have consistently applied the statutory requirement for strict enforcement of the 90-day deadline for filing in these circumstances. Arthur W. Schmidt, 47 IBLA 143 (1980); Eric Murray, 47 IBLA 112 (1980); George Toole, 47 IBLA 89 (1980); Jim Spicer, 42 IBLA 288 (1978); and cases cited therein. Accordingly, BLM properly rejected appellant's untimely tendered notice of location and declared the claim abandoned and void.

[2] Appellant notes that he mailed the required papers to BLM from McKinley Park, Alaska, on January 5, 1980, and that the mailing must have been delayed due to circumstances beyond his control. The mailing envelope is in the record and is postmarked as of the morning of January 6, 1980. Thus, it apparently took 9 days for the letter to reach BLM.

However, this fact is of no benefit to appellant, as merely mailing the notice of location within the 90-day period is not timely "filing" where it does not arrive at BLM prior to the deadline. M. J. Reeves, 41 IBLA 92, 93 (1979). It is established that a claimant must bear the consequences of mishandling of mailed instruments by the postal service where he selects that method of transmitting them. Everett Yount, 46 IBLA 74 (1980); James E. Yates, 42 IBLA 391 (1979); Amanda Mining and Manufacturing Ass'n, 42 IBLA 144 (1979).

[3] Appellant also asserts that the fact that they were mailed 9 days before they were date stamped suggests that BLM received these papers timely but delayed date stamping them until after the deadline. Absent any evidence to support this speculation, it is pure conjecture. There is nothing in the record to support such a conjecture. Where a mining claimant merely raises the possibility that BLM officials mishandled notices of location submitted in attempted compliance with the requirements of 43 CFR 3833.1-2(b), causing them to be date stamped as untimely, he has not met the burden of rebutting the presumption that BLM officials have properly discharged their duties in receiving and promptly date stamping all such notices tendered to them. E. M. Koppen, 36 IBLA 379 (1978); see A. G. Golden, 22 IBLA 261 (1975); Amoco Production Co., 16 IBLA 215 (1974).

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

I concur:

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

Appellant states the copy of the location notice was mailed January 5, 1980, from McKinley Park post office to Anchorage. The envelope is postmarked January 6. The deadline for receipt of the papers was January 10. Appellant asserts there is daily service between the Park and Anchorage and that the papers were received in the State Office by January 10. BLM states the papers were received on January 15, but the record does not set forth specific factual evidence. Neither does the record show that the mail service was interrupted by inclement weather.

The Supreme Court reiterated the postal presumption rule in Schutz v. Jordan, 141 U.S. 219 (1890):

The rule is well settled that if a letter properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.

Evidentiary facts are required to overcome the presumption. In Arkansas Motor Coaches v. Commissioner of Internal Revenue, 198 F.2d 189, 191-93 (8th Cir. 1952), the Court stated:

While the [postal] presumption is a rebuttable one it is a very strong presumption and can only be rebutted by specific facts and not by invoking another presumption. ^{1/}

* * * * *

In the instant case there was a strong presumption that this petition was received in Washington, D.C., on the 31st day of January, 1951. What evidence is there that it was not received by the addressee on that date? There is the docket entry. The clerk did not testify that he in fact received the petition on that date and the correctness of the docket entry is bottomed on the presumption that an officer properly performs his duty but this is simply a presumption and not the kind of evidence sufficient to overcome the strong presumption that the mail was received by the addressee on January 31, 1951, which was several days before the expiration of the ninety day period within which it should have been filed. Certainly there is no semblance of evidence to

^{1/} This statement from Arkansas Motor Coaches was quoted by Senior Circuit Judge Fahy, in a dissent to Legille v. Dam, 544 F.2d 1, 11-13 (D.C. Cir. 1976). On the evidence therein, he argued that the postal presumption should be controlling.

indicate that it was not received by the Post Office authorities in Washington, D.C., on January 31, 1951, because there was a presumption that it was transported in the United States mails in due course. If, then, the addressee did not receive the notice on the 31st of January, 1951, it was either the fault of the employees of the Post Office or the employees of the Clerk's office. The government, through its Collector of Internal Revenue, is seeking to collect taxes due. The government, through the Post Office Department, is engaged in transporting mail for a consideration. The petitioner here has done everything in its power that could reasonably be done and is entirely without fault. The fault and negligence was manifestly that of government employees – whether employees in the mail service or employees in the Internal Revenue Department would seem to be immaterial. They were government employees and we think the government should not be permitted to take advantage of the negligence or fault of its own employees to defeat this taxpayer in its efforts to have its day in court. The government in carrying the mail is not acting in its sovereign capacity and to hold in the circumstances here disclosed that the government should not be permitted to interpose as a defense the negligence of its own employees would not frustrate the purpose of the law nor thwart public policy.

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We are of the view that the delay caused by the negligence of government employees should be deducted from the date when the petition was actually filed and the court should direct the clerk to file the petition as of date January 31, 1951, so that that will have been done which ought to have been done, and assume jurisdiction of the case.

A similar problem was considered by the Board of Land Appeals in Donald E. Jordan, 35 IBLA 290 (1978). In Jordan, although there was an initial question as to the date of mailing, the Board cited Legille v. Dann, *supra* n.1, and ordered a hearing to determine whether a lease rental payment was timely received by BLM.

It would appear that appellant herein has exercised reasonable diligence. *Cf.* 43 CFR 3108.2-1(c)(2). I doubt that a court would rule appellant has abandoned the claim. Under Arkansas Motor Coaches, *supra*, unless further facts are obtained from BLM, the Department would be held to have timely received the filing. A property right is involved. Where material facts are in dispute, a claimant is entitled to a hearing before he can be deprived of his property interest. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

Rather than incur the expense of a hearing, I would hold that appellant has taken every action reasonably necessary to a tender of the filing. He has substantially complied with statute and regulation. Ross W. Mathews, 48 IBLA 71, 75 (1980) (dissent). A mining claimant should be able to rely on the reasonably expected operations of United States agencies in the sense that a failure therein should not be the basis for a forfeiture to the Government. ^{2/} As the Supreme Court has held: "The Government does not deal at arm's length with the settler or locator and whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proofs." ^{3/}

Joseph W. Goss
Administrative Judge

^{2/} Arkansas Motor Coaches, *supra*.

^{3/} El Paso Brick Co. v. Knight, 233 U.S. 250, 258 (1914).

