

ABNER WEED

IBLA 80-655

Decided September 26, 1980

Appeal from decision of the California State Office, Bureau of Land Management, rejecting for purposes of recordation appellant's placer mining claim the M Bar. CA MC 67673.

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

Where a person has located a mining claim on or before Oct. 21, 1976, the requirement of 43 U.S.C. § 1744 (1976) and 43 CFR 3833.1-2(a) concerning claims located prior to the enactment of FLPMA apply, and the owner has until Oct. 22, 1979, to record the location notice with BLM.

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

Under 43 U.S.C. § 1744 (1976) and 43 CFR 3833.4, the failure to file timely with the proper office of the Bureau of Land Management a copy of the notice or certificate of location of a mining claim is deemed conclusively to constitute an abandonment of the mining claim by the owner.

3. Administrative Authority: Generally--Constitutional Law: Generally--Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment--Mining Claims: Location--Mining Claims: Recordation

The Department of the Interior, as agency of Executive Branch of Government, is not proper forum to decide whether or not as to mining claims the recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

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

#### OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Abner Weed, hereinafter appellant, appeals from the April 17, 1980, decision of the California State Office, Bureau of Land Management (BLM), returning the copy of appellant's notice of location of M Bar placer mining claim and declaring the claim abandoned and void.

The claim in question was located on July 1, 1948. On April 10, 1980, appellant submitted the notice of location and filing fee which were returned by BLM with the stated reason that since it was not filed on or before October 22, 1979, as required by the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. § 1744 (1976) and the implementing regulations 43 CFR 3833.1-2(a) and 43 CFR 3833.4(a). Appellant presented a timely appeal from the decision. We affirm.

[1] Section 314(b) and (c), 43 U.S.C. § 1744(b) (1976), state in part as follows:

(b) The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to the date of approval of this Act shall, within the three-year period following the date of approval of this Act file in the office of the Bureau designated by the Secretary 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 site sufficient to locate the claimed lands on the ground. \* \* \*

(c) The failure to file such instruments as required by subsections (a) and (b) shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner \* \* \*.

43 CFR 3833.1-2(a) provides in part:

[§] 3833.1-2 Manner of recordation -- Federal lands.

(a) The owner of an unpatented mining claim, mill site or tunnel site 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, 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. If state law does not require the recordation of a notice or certificate of location containing the information in paragraph (c) of this section shall be filed.

Where a person has located a mining claim on or before October 21, 1976, the requirements of 43 CFR 3833.1-2(a) concerning claims located prior to the enactment of FLPMA apply and the owner had until and including October 22, 1979, to record the location notice with BLM. Joe Ropic, 48 IBLA 255 (1980); Lowell Becker, 48 IBLA 203 (1980); H. L. Smith, 46 IBLA 62 (1980).

[2] 43 U.S.C. § 1744(c) (1976), as indicated previously, mandates the holding of a claim as abandoned and void where inter alia, there has been a failure to file timely with BLM a copy of the location notice of the mining claim.

The corresponding regulation, 43 CFR 3833.4(a), "Failure to file," provides: "(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."

Where the owner of an unpatented mining claim located prior to October 22, 1976, fails to file a location notice with BLM by October 22, 1979, his claim is properly deemed conclusively to be abandoned and to be null and void. H. L. Smith, supra.

Appellant in his statement of reasons of appeal contends that the Federal Land Policy and Management Act of 1976 violates the United States Constitution, more specifically the due process clause of the Fifth Amendment.

[3] The Board adheres to its earlier holdings that the Department, as an agency of the Executive Branch of the Government, is not the proper forum to decide whether a statute enacted by Congress is constitutional. 1/ Alaska District Council of the Assemblies of God, 8 IBLA 153 (1972); Masonic Homes of California, 4 IBLA 23, 78 I.D. 312

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1/ See my concurring opinion in Don Sagmoen, IBLA 80-611.

(1971). If an enactment of Congress were to be in conflict with the Constitution, it is within the authority of the Judicial Branch, not the Executive Branch, to so declare. Charlie Canal, 43 IBLA 10 (1979); Al Sherman, 38 IBLA 300 (1978), reconsideration denied, March 28, 1979.

Neither FLPMA nor the regulations provides for any leeway in the application of the penalty for failure to file this information. William L. Rucinski, 42 IBLA 56 (1979).

We note in closing that appellant may relocate these claims and file notice of this as provided in 43 CFR 3833.1 subject to any intervening rights of third parties, and assuming no intervening closure of the land to mining location.

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.

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Frederick Fishman  
Administrative Judge

We concur:

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Douglas E. Henriques  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

