

ZOES ASSOCIATES

IBLA 80-862

Decided September 30, 1980

Appeal from decision of Colorado State Office, Bureau of Land Management, holding 2,018 lode mining claims abandoned and void. C MC 45225 through 46082; 47491 through 47690; 53849 through 53900; 53903 through 54666; 64101 through 64244.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Assessment Work--Mining Claims: Abandonment--Mining Claims: Assessment Work

Under 43 CFR 3833.2-1(c), the owner of an unpatented mining claim located on Federal lands after Oct. 21, 1976, must on or before Dec. 30 of each calendar year following the calendar year in which such claim was located, file in the proper BLM office evidence of annual assessment work performed during the previous assessment year or a notice of intention to hold the mining claim.

APPEARANCES: David Helfant, Esq., New York, New York, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Zoes Associates have appealed the July 10, 1980, decision of the Colorado State Office, Bureau of Land Management (BLM), which held 2,018 unpatented mining claims abandoned and void. The mining claims at issue had been located in 1978, and copies of the location notices had been timely recorded with BLM as required by section 314, Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744

(1976). 1/ The BLM decision was based on the failure of the mining claimants to file with BLM on or before December 30, 1979, affidavits of assessment work, reports of geological, geochemical, or geophysical surveys, or notices of intention to hold each claim as required by FLPMA, supra. The pertinent regulation is 43 CFR 3833.2. 2/

1/ The claims at issue are:

Lake Nos. 1 thru 135 claims	C MC 45225 thru C MC 45359
Oil Nos. 1 thru 46 claims	C MC 45360 thru C MC 45405
Oley No. 1 thru 24 claims	C MC 45406 thru C MC 45429
Peak Nos. 1 thru 194 claims	C MC 45430 thru C MC 45623
Spice Nos. 1 thru 110 claims	C MC 45624 thru C MC 45733
Coal Nos. 1 thru 92 claims	C MC 45734 thru C MC 45825
Owl Nos. 1 thru 250, and 58A, 60A, 99A, 134A, 169A, 213A, 215A claims	C MC 45826 thru C MC 46082
Deb Nos. 1 thru 200 claims	C MC 47491 thru C MC 47690
Jax Nos. 1 thru 52 claims	C MC 53849 thru C MC 53900
55 thru 141 claims	C MC 53903 thru C MC 53989
Elk Nos. 1 thru 171 claims	C MC 53990 thru C MC 54160
Green Nos. 1 thru 179 claims	C MC 54161 thru C MC 54339
Bug Nos. 1 thru 327 claims	C MC 54340 thru C MC 54666
Pat Nos. 1 thru 41, 43 thru 145 claims	C MC 64101 thru C MC 64244

These claims occupy some 41,694 acres in T. 5 N., Rs. 78, 79, 80 W., T. 6 N., R. 80 W., T. 7 N., Rs. 78, 79, 80, 81 W., sixth principal meridian, Jackson County, Colorado.

2/ The relevant portions of this regulation read as follows:

"§ 3833.2-1 When filing required.

* * * * *

"(c) The owner of an unpatented mining claim located on Federal lands excluding lands within a unit of the National Park System, but including lands within a national monument administered by the United States Fish and Wildlife Service or the United States Forest Service, after October 21, 1976, shall, on or before December 30 of each calendar year following the calendar year in which such claim was located, file in the proper BLM office evidence of annual assessment work performed during the previous assessment year or a notice of intention to hold the mining claim.

* * * * *

"§ 3833.2-2 Form -- evidence of assessment work.

"Evidence of annual assessment work shall be in the form of either;

"(a) An exact legible reproduction or duplicate, except microfilm, of the affidavit of assessment work performed which was or will be filed for record pursuant to section 314(a) of the Act in the local jurisdiction of the State where the claim or group of claims is located and recorded setting forth the following additional information:

"(1) The serial number assigned to each claim by the authorized

On appeal it is contended that the required assessment work had been performed for all 2,018 claims and that affidavits of annual assessment work had been duly recorded with respect to each claim on August 1, 1979, in the office of the Jackson County Clerk and Recorder. It is further contended that reports of geological, geochemical, and geophysical surveys of all the claims were filed on August 31, 1979, with the Jackson County Clerk and Recorder. Finally,

fn.2 (continued)

officer upon filing of the notice or certificate of location or patent application in the proper BLM office. Filing the serial number shall comply with the requirement in the act to file an additional description of the claim.

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

"(b) An exact legible reproduction or duplicate, except microfilm, of the detailed report concerning geological, geochemical and geophysical surveys provided for by the Act of September 2, 1958 (30 U.S.C. 28-1) and filed for record pursuant to section 314(a)(1) of the Act in the local jurisdiction of the State where the claim or group of claims is located and recorded setting forth the following additional information:

"(1) The serial number assigned to each claim by the authorized officer upon filing in the proper BLM office of a copy of the official record of the notice or certificate of location or patent application; and

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

* * * * *

"§ 3833.2-3 Form -- notice [of] intention to hold claim or site.

"(a) 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 * * *."

it is alleged that a notice of intention to hold claims with respect to all 2,018 claims was filed with BLM on October 12, 1979, and that BLM lost the said notice through office failure.

The record shows that on June 10, 1980, BLM received affidavits of assessment work and reports relative to geological, geochemical, and geophysical surveys carried out on the 2,018 mining claims during the assessment year ended September 1, 1979. The affidavits reflected they had been recorded in Jackson County, Colorado, on August 1, 1979, and the reports on August 31, 1979. While such affidavits and reports may have been timely recorded under State law, they were filed with BLM some 5 months after the December 30, 1979, deadline set by 43 U.S.C. § 1744(a) (1976) and 43 CFR 3833.2-1(c).

On June 16, 1980, BLM received a copy of a letter dated October 12, 1979, from Robert J. Hayek, which purported to be a notice of intention to hold the 2,018 mining claims at issue. The letter states that assessment work in excess of \$100 per claim had been performed during the assessment year from September 1, 1978, to September 1, 1979. On June 17, 1980, Hayek filed an affidavit that he had, on October 12, 1979, mailed the original of this letter from Rand, Colorado, to BLM.

The file contains a statement by the Chief, Accounts and Docket Section, Colorado State Office, BLM, dated July 3, 1980, that a thorough search of the subject case files and the unprocessed documents relative to assessment work and/or notices of intention to hold unpatented mining claims had not disclosed any evidence of the original of the Hayek letter of October 12, 1979.

Thereafter, by decision of July 10, 1980, BLM declared the 2,018 unpatented mining claims abandoned and void for failure to file timely the documents required by 43 CFR 3833.2-2 and 3833.2-3.

The regulation governing recordation of mining claims, 43 CFR 3833.1-2(a), defines the word "file" as meaning "being received and date stamped by the proper BLM Office." There is no record that the Hayek letter of October 12, 1979, was received by BLM. In United States v. Lombardo, 241 U.S. 73 (1916), the Supreme Court addressed the concept of filing:

Filing, it must be observed, is not complete until the document is delivered and received. "Shall file" means to deliver to the office and not send through the United States mails. * * * A paper is filed when it is delivered to the proper official and by him received and filed. * * * Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act.

241 U.S. at 76, 77. See also, e.g., Pratt v. First California Co., Inc., 517 F.2d 11, 12 (10th Cir. 1975); In re Nimz Transportation,

Inc., 505 F.2d 177, 179 (7th Cir. 1974); Investor's Funding Corp. of New York v. Jones, 495 F.2d 1000, 1002 (D.C. Cir. 1974); Kirby v. United States, 479 F. Supp. 863, 867 (D.S.C. 1979).

The Department of the Interior has long followed this doctrine. Gary L. Barton, 47 IBLA 386 (1980); H. P. Saunders, Jr., 59 I.D. 41 (1945). As there is no record of receipt of the Hayek letter by BLM, it cannot be considered as having been filed.

Assuming arguendo the timely receipt of the Hayek letter by BLM, it could not have been accepted as adequate compliance with the regulations. The situation confronting us here is almost four-square with that presented in Robert W. Hansen, 46 IBLA 93 (1980). In that case, the Board stated:

The record indicates that on February 13, 1978, the Montana State Office received a letter from appellant Hansen. The letter states:

This is to notify you that H.B. Claims 1 thru 20 or (BLM # Claims M MC 5874 thru 5893) will be held for the calendar year as the assessment work has been completed last fall and they look very favorable. This letter I hope serves notice on you of my intention to hold these claims.

Please let me know what else needs to be done to comply with your new regulations.

Yours Truly,

Robert W. Hansen

Hansen has apparently confused the filing of a notice of intention to hold with the filing of annual assessment work. Unfortunately, the document, as submitted, is insufficient to constitute either. The applicable regulations require that if an individual fails to perform assessment work within the proper calendar year, he or she must file a notice of intention to hold. 43 CFR 3833.2-1(b) (1978). [3/] Inasmuch as appellant avers that he had performed assessment work, he should have complied with the regulations found at 43 CFR 3833.2-2 (1978).

The applicable regulations, 43 CFR 3833.2-2(a) and (b) (1978), required that the mining claimant file either "[a]n

^{3/} This regulation was revised on February 14, 1979, 44 FR 9723, and on April 5, 1979, 44 FR 20430, but is substantially similar to that quoted by Judge Burski in Hansen, supra. This section now appears as 43 CFR 3833.2-1(c)

official copy of the affidavit of assessment work performed filed in the local jurisdiction of the State where the claim or group of contiguous claims are located" or "[a]n official copy of the detailed report concerning geological, geochemical and geophysical surveys filed in the office of the local jurisdiction in which the claim is located." Appellant clearly did not provide the required documents to the Montana State Office.

Then, too, in order to comply with the filing requirements for notices of intention to hold, a mining claimant must file a notice of intention to hold setting forth, inter alia:

(e) The reasons that physical, legal, or other impediments, beyond the control of the owner(s) have prevented his filing an affidavit of assessment work performed * * * (such impediments may include, but are not limited to, deferment of annual assessment work, in which case the notice must be accompanied by a copy of the petition for deferment and the order or decision disposing of such petition); and

(f) As required by section 314(a)(1) of the Act, the date on which a copy of the notice of intention to hold the mining claim was filed in the office of the local jurisdiction in which the claim was located.

43 CFR 3833.2-3(e) and (f) (1978). It is clear, inasmuch as appellant avers that the assessment work was actually performed and filed in the local office, that there was no deferment of annual assessment work herein. Moreover, inasmuch as appellant states that he filed the assessment work with the State, no document exists purporting to justify the failure to perform assessment work, and it is clear that no such explanatory document was filed with the State.

We realize that appellant has attempted, albeit unsuccessfully, to comply with the recordation provisions of FLPMA. We are also aware that, in promulgating the February 1979 amendments to the recordation regulations, the Assistant Secretary, Energy and Minerals, noted:

The Bureau of Land Management will continue to check recordation filings to determine if they meet the minimum requirements of the law and the regulations. If the filing fails to meet the minimum requirements of the law and the regulations and there is sufficient time before the filing deadline to allow correction, the claimant will be

notified of the deficiencies and requested to correct the deficiencies. If, however, a recordation filing fails to meet the requirements of the law and the regulations and there is insufficient time to allow correction of the deficiencies, the recording will be rejected. The Bureau of Land Management will, in those instances where it finds a recordation filing meets the minimum requirements of the law and regulations, accept the filing for recording and contact the claimant for any additional information that might be desired. [Emphasis supplied.]

44 FR 9721-22 (Feb. 14, 1979).

The immediate question before us is whether the filings of the appellant comply with the "minimum requirements of the law and regulations."

The applicable provisions of the statute, 43 U.S.C. §§ 1744(a)(1) and (a)(2) (1976), require that the mining claimant "file for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim[,] * * * an affidavit of assessment work performed thereon, on [sic] a detailed report provided by section 28-1 of Title 30, relating thereto" and "file in the office of the Bureau * * * a copy of the official record of the instrument filed or recorded." Thus, the regulatory requirements applicable to the instant appeal were mere replications of the statutory provisions, and appellant was required to timely comply therewith. 3/

When appellant failed to file either a copy of the evidence of annual assessment work performed in the BLM State Office, or a notice of intention to hold in the local jurisdiction where the claims were located, the State Office

3/ In James E. Strong, 45 IBLA 386 (1980), this Board adverted to the 1979 amendments to these regulations and held that "[i]n the absence of countervailing public policy reasons or intervening rights, it may be appropriate to apply the amended version of a regulation to a pending matter where it benefits the affected party to do so." Id. at 388. While the amendments changed in certain details the requirements for filing herein, the present regulations still require, as does the statute, that the mining claimant file with BLM a copy of either the assessment work or notice of intention to hold which the mining claimant filed with the local jurisdiction. Thus, even under the amended regulations, appellant's filings are still deficient.

properly held the claims to have been abandoned and declared them void. See Donald H. Little, 37 IBLA 1 (1978); Ronald L. Nordwick, 36 IBLA 238 (1978); Paul S. Coupey, 35 IBLA 112 (1978).

So in this case, the letter of Hayek, even if it had been received timely by BLM, would not have satisfied the regulatory requirements. As the BLM decision stated:

Whether the letter would have accomplished its purpose is doubtful in any case. As a notice of intention to hold the claims, the letter was defective because it did not state in accordance with 43 CFR 3833.2-3(a)(1)(v) why an affidavit of assessment work had not been filed. As an affidavit of assessment work, the letter was defective because it had not been sworn to in accordance with Colo. Rev. Stat. 1973, Sec. 34-43-114, by a person authorized to administer oaths. Moreover, no evidence has been submitted that the letter or an exact copy of it was ever recorded in the office of the Jackson County Clerk and Recorder, as required by 43 CFR 3833.2-2(a) and 3833.2-3(a).

The BLM decision was proper and it must be affirmed.

We note in closing that appellant may relocate these claims and file the appropriate notices 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.

Douglas E. Henriques
Administrative Judge

I concur:

Frederick Fishman
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur that the claims must be declared abandoned and void under 43 U.S.C. § 1744 (1976). Even assuming that the October 12, 1979, letter was filed with the Department as asserted, there is no indication that it was ever intended to be filed with the Jackson County recorder or that it was ever so filed. Section 1744(a)(1) requires that an affidavit of assessment work be filed with the County recorder. This having been done on August 1, 1979, section 1744(a)(2) required that a copy of the recorded affidavit be filed with BLM prior to December 31, 1979. Section 1744(c) mandates that failure to timely file is an abandonment.

It is therefore not necessary to rule on whether the October 12, 1979, letter was ever received. Donna L. Lord, Chief Accounts and Dockets Section, in a written statement has averred (1) that on June 16, 1980, she told Zoes Associates, "I vaguely remember receiving a letter from them," and (2) no such letter can be located. Because the letter concerned 2,018 claims, and was not in the specified form, it is not unlikely that she would remember something about it. The statement is at present incomplete for it does not contain any conclusion as to whether or not she now believes that the letter was timely filed as claimed.

Joseph W. Goss
Administrative Judge

