

MRS. OTIS TEAFORD

IBLA 81-756

Decided August 3, 1981

Appeal from decision of California State Office, Bureau of Land Management, declaring an unpatented millsite claim abandoned and void. CA MC 45210.

Reversed and remanded.

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

The failure of a holder of a millsite claim which has been properly recorded under 43 U.S.C. § 1744(b) (1976), to file an annual notice of intention to hold the millsite, is a curable defect and the millsite may not be deemed to have been abandoned absent a failure to comply with a notice of deficiency.

APPEARANCES: William Seabury, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Mrs. Otis Teaford has appealed from the decision of the California State Office, Bureau of Land Management (BLM), dated May 26, 1981, which declared the unpatented Detroit millsite claim, CA MC 45210, which had been recorded with BLM October 11, 1979, to have been abandoned because of a failure to file a notice of intent to hold the claim prior to December 30, 1980, as required by 43 CFR 3833.2-1.

Appellant states that a proof of labor was transmitted to BLM for the Detroit placer mining claim on November 13, 1980, and it was her understanding that the information regarding the millsite had to be filed only once, as no annual assessment work is required to hold a millsite.

As pointed out in Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981), the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), must be read as only requiring the filing of notices of location for millsite claims. It is clear, however, that the Department's implementing regulations do require the filing of notices of intent to hold, see 43 CFR 3833.2-1(d); and it is beyond dispute that no such filing was made for the subject millsite in 1980. The question for resolution concerns the effect of such a failure to file where the necessity for filing is established by the regulations only and not by the statute.

In Feldslite, *supra*, it was stated that this Board has, in the past, noted that there is a difference between the consequences which flow from failure to comply with a statutory requirement versus one that is purely regulatory. We have recognized that a failure to comply with express statutory requirements, both punctually and punctiliously, cannot be waived by the Department. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981). But where the failure to comply is with requirements imposed only by regulation, the deficiency is subject to curative action. See Robert W. Hansen, 46 IBLA 93 (1980).

As pointed out in Feldslite, *supra*, this approach has received judicial approbation by the Tenth Circuit Court of Appeals in Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981). Therein the court reviewed the various recordation provisions of FLPMA and the implementing regulations, and noted:

We conclude that the Secretary has not ignored § 1744(c) which assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833--and not by the statute--are not made. This is also the Secretary's view: failure to file the supplemental information is treated by the Secretary as a curable defect. A claimant who fails to file the supplemental information is notified and given thirty days in which to cure the defect. If the defect is not cured, "the filing will be rejected by an appealable decision." [Footnote omitted.]

[1] In our opinion, the logic of the court has applicability to the instant situation. Appellant satisfied the statutory requirements for the initial recordation of the unpatented millsite claim by filing the notice of location prior to October 22, 1979. Accordingly, we hold that upon failure of a millsite claimant to file an annual notice of intent to hold, BLM should notify the claimant of this deficiency and afford the claimant a period of time within which to comply with the regulatory requirement. Should compliance not then occur, the millsite may properly be declared abandoned and void.

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 reversed and the case file is remanded for further action not inconsistent herewith.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Bruce R. Harris
Administrative Judge

