

HARRY J. PIKE

IBLA 80-685

Decided August 6, 1981

Appeal from decision of the Alaska State Office, Bureau of Land Management, declaring Rapids No. 1 placer mining claim, AA 27372, abandoned and void.

Reversed and remanded.

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

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

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: Assessment Work

Where a mining claimant files timely an affidavit of assessment work with the Bureau of Land Management as required by sec. 314 of the Federal Land Policy and Management Act of 1976, which is not the affidavit of assessment required to be filed under 43 CFR 3833.2-1, it is a curable defect, and a mining claimant is entitled to notice and a reasonable opportunity to submit the precise instrument.

Failure to do so will result in the Bureau of Land Management declaring the claim abandoned and void.

APPEARANCES: Robert G. Mullendore, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Harry J. Pike appeals from the decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 23, 1980, declaring the Rapids No. 1 placer mining claim, AA 27372, abandoned and void for failure to file evidence of assessment work for the assessment year ending September 1979 on or before October 22, 1979.

The claim was located in May of 1954 and recorded with BLM on August 1, 1979. On September 8, 1979, BLM sent appellant the following letter:

Our records indicate that you have recorded the following unpatented mining claims with the Bureau of Land Management. Please study the enclosed timetable carefully to determine when you must file a copy of your evidence of assessment for 1979 or notice of intention to hold your claims. If you have any doubt as to which filing deadline you need to meet, you should plan to file assessment with BLM by October 22, 1979. There is no filing fee for assessment affidavits; however, if you do not file in the proper BLM office on time, your claims will be considered abandoned.

You should refer to the serial numbers listed below when you file. Assessment for these claims must be filed in the proper BLM office, which is located at the address given above. If you have already filed your 1979 assessment or notice of intent with us, you may disregard this notice.

On September 18, 1979, BLM received a copy of appellant's affidavit of assessment work performed during the assessment year 1978. No further documents were received from appellant and on May 23, 1980, BLM issued its decision declaring the claim abandoned and void. By letter dated May 29, 1980, appellant stated that he filed the 1979 affidavit of assessment with BLM in August of 1979 and enclosed a copy of the 1979 affidavit of assessment which was filed with the county recorder's office in August of 1979. ^{1/}

^{1/} Appellant also submitted the affidavit of assessment for 1980 which was filed Apr. 20, 1980, with the county.

In his statement of reasons, appellant states that the evidence of annual assessment work was timely filed as evidenced by a BLM computer printout which indicates the evidence of annual assessment was received by BLM on September 18, 1979; 2/ and that section 314(c) of the Federal Land Management and Policy Act of 1976, 43 U.S.C. § 1744(c) (1976) (FLPMA) and 43 CFR 3833.4 are unconstitutional as applied. Appellant also requested a hearing before an Administrative Law Judge. 3/

[1, 2] Section 314(a) and (c) of FLPMA, 43 U.S.C. § 1744(a) and (c) (1976), provide:

(a) Filing requirements

The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode of placer mining claim located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on a detailed report provided by section 28-1 of title 30, relating thereto.

(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this

2/ In his statement of reasons appellant states that the following three exhibits are attached: "Exhibit A: A copy of a BLM computer printout which shows evidence of assessment was received September 18, 1979[;] Exhibit B: A copy of the 1979 affidavit of assessment[; and] Exhibit C: A copy of appellant's letter dated May 29, 1980." None of these exhibits were attached to the statement of reasons submitted to this Board by appellant's counsel. However, we were able to consider the appeal because copies of exhibits B and C were contained in the BLM file, and the record shows that exhibit A, the evidence of assessment received by BLM on Sept. 8, 1979, was not the evidence of assessment which was required under the regulations.

3/ The request is denied. See Dorothy Smith, 44 IBLA 25, 29 (1979).

subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

* * * * *

(c) Failure to file as constituting abandonment; defective or untimely filing

The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site.

The regulations implementing section 1744 are found in 43 CFR Subpart 3833. 43 CFR 3833.2-1(a) states:

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, whichever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

43 CFR 3833.4(a) provides that "[t]he 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."

A comparison of the statutory and regulatory language reveals that 43 U.S.C. § 1744(a) merely requires the timely filing of an affidavit of assessment, while the Departmental regulation, 43 CFR 3833.2-1, specifically requires the timely filing of an affidavit of assessment for the preceding assessment year. Appellant timely filed the instrument required under the terms of the statute when he filed the 1978 affidavit of assessment, but BLM declared the claim void for failure to file the 1979 affidavit of assessment. In light of Topaz Beryllium Co. v. United States, No. 79-2255 (10th Cir. filed May 21, 1981), we reverse.

In Topaz Beryllium Co., *supra*, the court of appeals considered the regulations in Subpart 3833 and recognized that certain parts, specifically, the filings related to notices of location, require more than does section 1744. With respect to these further filings, the court said:

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, emphasis in original.]

We consider this holding by the court of appeals to encompass the situation before us. Thus, we hold that where a mining claimant files with BLM an affidavit of assessment work within the prescribed time period which is not the affidavit of assessment for the preceding assessment year, BLM should notify the claimant of the deficiency and allow him an opportunity to submit the precise instrument required by the regulation. Failure to do so will result in the claim being declared abandoned and void. See Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981).

Accordingly, 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 to BLM.

Gail M. Frazier
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Bruce R. Harris
Administrative Judge

