

PERRY L. JOHNSON ET AL.

IBLA 80-725

Decided August 6, 1981

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declaring the Hillside Nos. 1 to 4 mining claims abandoned and void. AA 29913 to 29916.

Reversed.

1. Federal Land Policy and Management Act of 1976: Assessment Work  
-- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim

Where, on or before Oct. 22, 1979, a mining claimant files proof of assessment work for a claim located prior to Oct. 21, 1976, which proof had been duly filed in the local offices of the state wherein the notice of location was filed, but such assessment work was not performed in the assessment year preceding the filing, the claimant has complied with the statutory requirements and should be afforded an additional opportunity to comply with the regulatory requirements prior to a finding of abandonment.

APPEARANCES: Perry L. Johnson and Doyle O. Gray, pro sese.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Perry L. Johnson and Doyle O. Gray appeal from a June 6, 1980, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring appellant's four mining claims, the Hillside Nos. 1 to 4, abandoned and void under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976); 43 CFR 3833.1-2 and 3833.4.

The four Hillside claims were located on January 15, 1973. Appellants filed the notices of location on September 27, 1979. Accompanying these documents were proofs of assessment work for the 1974, 1975, 1976, 1977, and 1978 assessment years. No affidavit for the 1979 assessment year was received by BLM on or before October 22, 1979. Its June 6, 1980, decision declared the Hillside claims abandoned and void for failure to file proof of assessment work for the 1979 assessment year. We reverse.

[1] As we noted in our recent decision in Harry J. Pike, 57 IBLA 15 (1981), the statute, 43 U.S.C. § 1744(a) (1976), provides:

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 \* \* \* [f]ile 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, or a detailed report provided by section 28-1 of Title 30, relating thereto.

Thus, appellants' submissions did, indeed, meet the statutory dictates. The regulation, however, fleshes out this statutory requirement in more specific terms. Thus, 43 CFR 3833.2-1 provides:

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, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim. [Emphasis added.]

The underlined portion of this regulation is not part of the statutory language. The statute only requires that a proof of assessment work be filed; it does not speak to which assessment year the proof must be for. In any event, the language of the regulation is itself susceptible to differing interpretations.

It is crucial to remember that the assessment year, unlike the calendar year, runs from September 1 to September 1. Thus, an assessment year which runs from September 1, 1978, to September 1, 1979, is normally referred to as the 1979 assessment year. The difficulty with this regulation can be seen where an individual files his claim for recordation in June of 1979. If he seeks to file his assessment work at this time, the preceding assessment year is the 1978 assessment year, since he is presently in the 1979 assessment year. Then, if, pursuant to the statute and regulations, he files his assessment work in November of 1980, the preceding assessment year is the 1980 assessment year.

Thus, this individual, who has literally followed the filing requirements, has never filed proof of assessment work for the 1979 assessment year. <sup>1/</sup>

This Board has had occasion to note in prior decisions the different consequences which flow from a failure to comply with the statutory provisions vis-a-vis a failure to comply with regulatory requirements. Thus, in Robert W. Hansen, 46 IBLA 93 (1980), we noted that compliance with the express statutory provisions constitutes compliance with "the minimum requirements of the law and regulations." Moreover, as we recently noted in Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981), the Tenth Circuit Court of Appeals has recently indicated its approbation for this bifurcated approach in Topaz Beryllium Co. v. United States, 649 F.2d 775 (1981).

Appellants, herein, complied with the statutory provisions by filing with BLM copies of assessment work that had been filed with the State of Alaska. While appellants had not complied with the regulatory requirement, since at the time of their filings the preceding assessment year was the 1979 assessment year, this failure does not, ipso facto, require a finding that their claims are abandoned and void. Rather, they should have been afforded an opportunity to file proof of labor for the "preceding" (1979) assessment year. Inasmuch as appellants did make such a filing upon notification by the State Office, the decision of the State Office declaring their claims abandoned and void was erroneous.

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.

James L. Burski  
Administrative Judge

We concur:

Bernard V. Parrette  
Chief Administrative Judge

Edward W. Stuebing  
Administrative Judge

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<sup>1/</sup> However, as we noted recently in James V. Joyce (On Reconsideration), 56 IBLA 327 n.4 (1981):

"This is not to say that the filing of evidence of assessment work performed during the current assessment year is prohibited. However, such a filing will not relieve the claimant from any filing at all during the subsequent calendar year, for which he must file a notice of intent or re-file evidence of the work done during the previous assessment year."

