

Appeal from decision of Montana State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. M MC 58565 through M MC 58590.

Affirmed as modified.

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

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on or before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

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

The recordation requirement of sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1976), that evidence of assessment work or notice of intention to hold mining claims be filed both in the office where the notice of location of the claim is recorded and

in the proper office of the Bureau of Land Management is mandatory, not discretionary. Filing of evidence of assessment work only in the county recording office does not constitute compliance either with the recordation requirements of the Federal Land Policy and Management Act of 1976 or those in 43 CFR 3833.2-1.

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

The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.

4. Administrative Authority Generally--Constitutional Law: Generally--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining claims: Recordation

Department of the Interior, as an agency of the executive branch of the Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

5. Administrative Procedure: Hearings--Constitutional Law: Due Process--Rules of Practice: Hearings

Due process does not require notice and a right to be heard prior to the initial decision in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

APPEARANCES: James A. Cumming, Esq., Columbia Falls, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Enterprise Mines, Inc., appeals the July 28, 1981, decision of the Montana State Office, Bureau of Land Management (BLM), which declared the unpatented Waylett #2 through #13, and #28 through #41 lode mining claims, M MC 58565 through M MC 58590, abandoned and void because no notice of intention to hold the claims or evidence of assessment work performed on the claims was filed either by October 22, 1979, or December 30, 1980, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and 43 CFR Subpart 3833. 1/ The claims were located in September 1970. Copies of the official record of the notices of location had been filed with BLM October 17, 1979, but no notice of intention to hold or evidence of assessment work was filed, either at that time or later.

[1] Section 314 of FLPMA, supra, requires the owner of unpatented mining claims located prior to October 21, 1976, in addition to filing with BLM a copy of the official record of the notice of location, to file with BLM a copy of evidence of the assessment work performed on the claim or a notice of intention to hold the claim within 3 years after the date of the Act, i.e., on or before October 22, 1979, and before December 31 of each calendar year thereafter. The statute also provides that failure to file such instruments within the time periods prescribed shall be deemed conclusively to constitute an abandonment of the mining claim by the owner. 43 U.S.C. § 1744(c) (1976). The statutory requirements and consequences are replicated in 43 CFR 3833.1-2, 3833.2-1, and 3833.4.

Appellant states it has performed more development work than the law requires on the claims at issue, and it has recorded proof of such work in the office of the clerk and recorder of Lincoln County, Montana, *viz.*, for the 1978 assessment year on December 28, 1978, in Book 55 at page 358, and for the 1979 and 1980 assessment years, on August 29, 1980, in Book 67 at page 948. Appellant argues against the conclusive presumption of abandonment where no notice or opportunity to be heard was given by BLM. Appellant contends that the summary forfeiture which BLM imposed on the claims at issue is not sanctioned by the 1872 mining laws and is unauthorized and unconstitutional. Appellant asserts a due process hearing on its intent to abandon should be held.

[2] Section 314 of FLPMA, supra, specifies that the owner of a pre-FLPMA unpatented mining claim must file evidence of assessment work or a notice of intention to hold the claim on or before October 22, 1979, and prior to December 31 of every calendar year thereafter. Such filing must be made both in the office where the notice of location is

1/ The BLM decision is modified to show only that no evidence of assessment work was filed with BLM on or before October 22, 1979.

recorded, *i.e.*, the county recorder's office, and in the proper office of BLM. These are separate and distinct requirements. Compliance with the one does not constitute compliance with the other. Accomplishment in the proper county of a proper recording of evidence of assessment work or a notice of intention to hold the mining claim does not relieve the claimant from recording a copy of the instrument in the proper office of BLM under FLPMA and the implementing regulations. Johannas Soyland, 52 IBLA 233 (1981). Indeed, in this case the claimant did not timely record its 1979 proof of labor in the county during calendar year 1979. The filing requirements of section 314, FLPMA, *supra*, are mandatory, not discretionary. Failure to comply is conclusively deemed to constitute an abandonment of the claim by the owner and renders the claim void. Fahey Group Mines, Inc., 58 IBLA 88 (1981); Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981); James V. Brady, 51 IBLA 361 (1980); 43 U.S.C. § 1744(c) (1976); 43 CFR 3833.4(a). Congress imposed that consequence in enacting FLPMA. The responsibility for complying with the recordation requirements of FLPMA rests with appellant. This Board has no authority to excuse failure to comply with the statutory requirements of recordation or to afford any relief from the statutory consequences. Lynn Keith, *supra*.

[3] Arguments similar to those here presented were considered by the Board in Lynn Keith, *supra*. There we held

[t]he conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. See Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management, Civ. No. 78-46 (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Thomas F. Byron, 52 IBLA 49 (1981).

53 IBLA at 192, 88 I.D. at 371-72.

[4] As to the constitutionality of FLPMA, this Board adheres to its earlier holdings that the Department of the Interior, being an agency of the executive branch of the Government, is not the proper forum to decide whether an Act of Congress is constitutional. William O. Bahny, 56 IBLA 190 (1981); Lynn Keith, *supra*; Alex Pinkham, 52 IBLA 149 (1981), and cases cited therein. Jurisdiction of such an issue is reserved exclusively to the judicial branch. However, to the extent that the recordation section of FLPMA has been considered by the courts, it has been upheld. See Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981); Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981).

[5] Due process does not require notice and a right to be heard prior to the initial decision in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final. Appeal to this Board satisfies due process requirements. Fahey Group Mines, Inc., *supra*; George H. Fennimore, 50 IBLA 280 (1980); Dorothy Smith, 44 IBLA 25 (1979); H. B. Webb, 34 IBLA 362 (1978). The request for a hearing is denied.

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 affirmed as modified.

Douglas E. Henriques

Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

