

RAYMOND N. McCOOL
HAROLD P. HINDS

IBLA 81-288

Decided November 19, 1981

Appeal from decision of California State Office, Bureau of Land Management, declaring Hallelujah Placer Claim, CA MC 79978, abandoned and void.

Affirmed.

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

For mining claims located after Oct. 21, 1976, copies of notices or certificates of location must be recorded with BLM within 90 days after the date of location. 43 CFR 3833.1-2(d) states that a location notice shall be accompanied by a service fee. There can be no recordation unless the notice is accompanied by the stated fee, or until it is paid. Where the filing fee is not paid within 90 days after the date of location for a claim located after Oct. 21, 1976, the claim must be deemed abandoned and void.

2. 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.

APPEARANCES: Raymond N. McCool, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Raymond N. McCool, on behalf of himself and his co-locator Harold P. Hinds, appeals from a decision of the California State Office, Bureau of Land Management (BLM), dated January 2, 1981, declaring the Hallelujah Placer Claim (CA MC 79978) abandoned and void.

The claim was located on September 11, 1980. The location documents were received by BLM for recordation on December 8, 1980. On December 15, 1980, BLM notified McCool that the documents which he submitted for recordation under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), were insufficient for filing purposes. BLM stated that in order to meet the requirements for filing, he must return the documents and submit a \$5 service fee for each claim or site filed. McCool sent the filing fee on December 19, 1980.

On January 2, 1981, BLM issued a decision in which it stated that it was returning the notice of location, together with the filing fee, since it was not filed within 90 days after the date of location of the claim as required by FLPMA, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1-2(b). 1/

In their statement of reasons, appellants contend, inter alia, that they did not intend to abandon their mining claim, and challenge the definition of abandonment as used in the regulations and BLM's interpretation of the law.

[1] For mining claims located after October 21, 1976, copies of notices or certificates of location must be recorded with BLM within 90 days after the date of location. The applicable regulation, 43 CFR 3833.1-2(d), specifically provides: "Each claim or site filed shall be accompanied by a \$5 service fee which is not returnable. A notice or certificate of location will not be accepted if it is not accompanied by the service fee and will be returned to the owner." Payment of the service fee is a mandatory requirement. Without payment of the filing fee, there can be no recordation. Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), aff'd, 649 F.2d 775 (10th Cir. 1981); Philip I. Griner, 52 IBLA 179 (1981); Joe B. Cashman, 43 IBLA 239 (1979). Where the filing fee is not paid within 90 days after the

1/ The last day for recording the claim was Dec. 12, 1980, the 90th day following location of the claim on Sept. 11, 1980. Therefore, at the time BLM notified McCool that a \$5 filing fee was necessary for recordation, it was too late to record the claim and it could have been declared abandoned and void at that time.

date of location for a claim located after October 21, 1976, the claim must be deemed abandoned and void. Fleck Mining & Investment Co., 49 IBLA 187 (1980). This result occurs despite appellants' statement that they did not intend to abandon their claim. See Jerry Cupper, 45 IBLA 215 (1980).

Specifically, appellants contend that "abandonment" as used in the regulations is ambiguous and that BLM's interpretation of the law is rigid, unfair and lends itself to capricious application of the law. The regulation requiring the service fee, 43 CFR 3833.1-2(d), has been upheld by the court in Topaz Beryllium Co. v. United States, *supra*.

[2] As for the interpretation of 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 statute itself, and would operate even without the regulations. A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. Lynn Keith, 53 IBLA 192, 196, 88 I.D. 369, 371-72 (1981).

"Section 1744(c) [of FLPMA] leaves the Secretary no discretion, requiring that the claims be conclusively deemed abandoned when the filing provisions are not met." Western Mining Council v. Watt, 643 F.2d 618, 628 (9th Cir. 1981). 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. Lynn Keith, *supra* at 196, 88 I.D. at 372; United States Energy Corp., 58 IBLA 159 (1981).

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.

Gail M. Frazier
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

