

GOLDEN NONESUCH MINING CORP. ET AL.

IBLA 81-683

Decided January 15, 1982

Appeal from decision of the Montana State Office, Bureau of Land Management, declaring mining claims abandoned and void. M MC 23852 through M MC 23949.

Affirmed.

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

Filing is accomplished only when a document is delivered to and received by the proper BLM office during business hours and depositing a document in the mails does not constitute filing. Mail received in the post office box designated by BLM as its address of record prior to BLM's close of business on a given day is properly considered as received by BLM on that date and failure of BLM to pick up the mail cannot alter this result. However, where the evidence establishes that a document was not placed in the BLM post office box until after the deadline, the filing is not timely.

APPEARANCES: William L. Madden, Jr., Esq., Bozeman, Montana, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Golden Nonesuch Mining Corporation, Earl May, Charles R. Lee, Timothy C. Armstrong, and G. Eldon Roberts appeal the April 20, 1981, decision of the Montana State Office, Bureau of Land Management

(BLM), which declared their unpatented mining claims M MC 23852 through M MC 23949, 1/ abandoned and void because no evidence of assessment work or notice of intention to hold the claims was received by BLM on or before 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 3833.2.

The subject claims were all located prior to October 21, 1976, and were properly recorded with BLM on May 29, 1979, in compliance with FLPMA. However, appellants' evidence of annual assessment work for the assessment year ending at noon, September 1, 1980, required to be filed no later than December 30, 1980, was not received by BLM until January 5, 1981. Accordingly, BLM issued its decision declaring the claims abandoned and void.

Counsel for appellants argues that the date of filing evidence of assessment work under section 314 of FLPMA and the regulations at 43 CFR 3833.2-1 is properly construed to be the date of mailing as determined by the postmark and, thus, that appellants' evidence of assessment work was timely filed. Further, appellants contend that timely delivery of evidence of assessment work to the destination post office where BLM receives mail in its post office box constitutes constructive receipt by BLM notwithstanding failure of Postal Service employees to properly handle the mail and place the document in BLM's post office box by the filing deadline. Finally, counsel alleges that application of the statute and regulations in this case to deem the claims abandoned and void constitutes an unconstitutional taking of property without compensation.

Under section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1976), the owner of a mining claim located on or before October 21, 1976, must file a notice of intention to hold the claim or evidence of performance of annual assessment work on the claim in the proper BLM office on or before October 22, 1979, and prior to December 31 of each calendar year thereafter. This requirement is mandatory, not discretionary, and failure to comply is conclusively deemed to constitute abandonment of the claim by the owner and renders the claim void. Guy A. Matthews, 58 IBLA 246 (1981); Fahey Group Mines, Inc., 58 IBLA 88 (1981); Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981); 43 U.S.C. § 1744(c) (1976).

[1] Although it appears that the requisite assessment work was performed on these claims for the 1980 assessment year, the evidence on the record does not establish that the proof of labor was filed with BLM on or before December 30, 1980, as required by statute and regulation. Filing is accomplished only when a document is delivered to and received by the proper BLM office during business hours. Depositing a document in the mails does not constitute filing. 43 CFR 1821.2-2(d) and (f). If Postal Service error prevents an envelope from reaching

1/ The claims are listed by name, serial number, and date of location in BLM's decision to which reference is here made.

the proper BLM office, that fact does not excuse appellants' failure to comply with the statutory requirements and the regulations. Guy A. Matthews, supra. This Board has held repeatedly that a mining claimant, having chosen the Postal Service as his means of delivery, must accept the responsibility and bear the consequences of loss or untimely delivery of his filing. Guy A. Matthews, supra; Glenn D. Graham, 55 IBLA 39 (1981).

Appellants have provided evidence that their proof of assessment work was sent by certified mail to BLM from Bozeman, Montana, on December 29, 1980. Further, appellants have submitted an affidavit of the postmaster at Bozeman to the effect that the address of BLM in Billings, Montana, is within an "overnight delivery area" which means the evidence of assessment work should have been delivered to the Billings Post Office by 3:30 a.m. on December 30, 1980. Also submitted with the statement of reasons for appeal is an affidavit by an employee of the Billings Post Office regarding procedures for handling items of certified mail addressed to BLM. Affiant swears that all certified mail received in a day that is addressed to BLM is recorded in a logbook prior to pickup by a BLM employee. Certified true copies of the pages of the logbook for the days of December 29, 30, and 31, 1980, and January 2 and 5, 1981, are attached to the affidavit. The certified mail number belonging to appellants' evidence of assessment work appears among the entries for January 5, 1981.

The post office box to which appellants sent the evidence of assessment work is the address of record for the Montana State Office, BLM, where such documents must be filed. 43 CFR 1821.2-1(d). Mail received in the post office box designated by BLM as its address of record prior to BLM's close of business on a given day is properly considered as received by BLM on that date and failure of BLM to pick up the mail cannot alter this result. See Central Paper Co. v. Commissioner, 199 F.2d 902, 904 (6th Cir. 1952); Washington Chromium Co., 60 IBLA 378 (1981). However, this is not established by appellants' evidence in the present case. Despite evidence that Billings is within an "overnight delivery area" so that appellants' evidence of assessment work should have been received at the Billings Post Office on December 30, 1980, the record of certified mail received at the Billings Post Office discloses that this was not the case. Rather, the filing was not received until January 5, 1981.

The Board has held that it is without authority to waive the statutory filing requirement as stated in Lynn Keith, supra:

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, and would operate even without the regulations. See Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management, Civ. No. 78-46 M (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is selfoperative 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 196, 88 I.D. 371-72. See Western Mining Council v. Watt, 643 F.2d 618, 628 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3369 (Nov. 10, 1981) (No. 81-130).

As for the constitutionality of section 314 of FLPMA, appellants' challenge to the statute cannot be sustained here. The Board has consistently held 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. Lynn Keith, *supra*; Alex Pinkham, 52 IBLA 149 (1981). 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, *supra*.

Finally, appellants have requested a hearing on issues of fact. The Board has the discretion under 43 CFR 4.415 to grant a request for a hearing on issues of fact but, in order to warrant such a hearing, an appellant must allege facts which, if proved, would entitle it to the relief sought. Stewart Capital Corp., 53 IBLA 369 (1981); Mardelle M. Smith, 42 IBLA 136 (1979). Appellants' evidence establishes that the evidence of assessment work, sent by certified mail, was not placed in the BLM post office box until January 5, 1981, and, thus, there is no disputed issue of material fact. Accordingly, appellants' 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.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge

