

Appeal from decision of Utah State Office, Bureau of Land Management, deeming unpatented mining claim abandoned and void. U MC 82332.

Reversed.

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

Pursuant to 43 CFR 3833.4 and 36 CFR 9.5(d), unpatented mining claims located on lands within any unit of the national park system which were timely recorded in accordance with 16 U.S.C. § 1907 (1976), may not conclusively be deemed abandoned and void if a notice of intention to hold is not filed in 1978 for record in the unit of the national park system where the location notice is recorded, as the filing requirement is not statutory, but only regulatory, so the defect is curable. Notice of such defect should be given and the claimant allowed 30 days within which to correct the defect. An unpatented mining claim located before Oct. 21, 1976, on land within a unit of the national park system and timely recorded under the Mining in the Parks Act, 16 U.S.C. § 1907 (1976), may not be deemed abandoned and void where a copy of the recorded instrument showing evidence of assessment work is filed with the proper office of BLM on or before Oct. 22, 1979, and on or before Dec. 30 of each year thereafter, as required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

APPEARANCES: Morrill A. Nielson, pro se; Adrian F. Perry, pro se; Orean Barney, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Morrill A. Nielson and others ^{1/} have appealed the December 11, 1981, decision of the Utah State Office, Bureau of Land Management (BLM), which deemed the unpatented Terry No. 1 lode mining claim, U MC 82332, abandoned and void pursuant to 43 CFR 3833.4 and 36 CFR 9.5(d) because a notice of intention to hold the claim was not filed in 1978 as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and section 8 of the Mining in the Parks Act (MIPA), 16 U.S.C. § 1907 (1976).

Appellants refer to a "protest" they recorded in Garfield County, Utah, on July 26, 1976, in book 231 at 202-03. Essentially, the protest objects to withdrawal by NPS of the land in their claim from public entry, and they state that they have been prevented from going on the land to perform the required annual assessment work.

Regulations of NPS at 36 CFR 9.5, 42 FR 4838 (Jan. 24, 1977), required the owner of an unpatented mining claim situated within any unit of NPS to file a copy of the location notice with the superintendent of the NPS unit within 1 year after September 28, 1976, or the claim would be conclusively deemed to be abandoned and void. NPS would provide a copy of the location notice to BLM to satisfy the recording requirement of FLPMA. The NPS regulation stated that the mining claimant also must file with NPS annually the instruments required by section 314 of FLPMA, and NPS would so inform BLM. The regulation was amended at 44 FR 20427 (Apr. 5, 1979), to require the annual filing of the notice of intention to hold the claim or evidence of assessment work with BLM in accordance with 43 CFR 3833.2, and to provide that failure to file the instruments required by 36 CFR Subpart 9 and 43 CFR Subpart 3833 would be considered abandonment of the claim under 43 CFR 3833.4.

Section 314 of FLPMA, 43 U.S.C. § 1744 (1976), provides that the owner of an unpatented mining claim located prior to October 21, 1976, shall file notice of intention to hold the claim or evidence of assessment work in the local office where the location notice is recorded and in the proper office of BLM on or before October 22, 1979, and before December 31 of each year thereafter.

The case record does not show that claimants filed either a notice of intention to hold the claim or a proof of assessment work for calendar year 1978, either with NPS or BLM, although there are proofs of labor filed with BLM October 22, 1979, August 25, 1980, and November 30, 1981, as required by FLPMA.

^{1/} This appeal is signed by Morrill A. Nielson, Adrian F. Perry, and Orean Barney.

[1] The Mining in the Parks Act did not require the owner of an unpatented mining claim within a unit of the national park system to file other than a copy of the notice of location within 1 year after passage of the Act, on September 28, 1976. The requirement to file a notice of intention to hold the claim or evidence of assessment work after such recordation of the location notice with NPS is regulatory only.

FLPMA required the owners of mining claims located prior to October 21, 1976, to file a notice of intention to hold the claim or evidence of assessment work in the proper office of BLM within 3 years after the date of the Act, or before October 22, 1979.

In Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981), the court held that where the Secretary of the Interior is on notice of an unpatented mining claim, he cannot deem the claim abandoned merely because supplemental filings required only by regulation, and not by statute, were not made. The court stated that the failure to file the supplemental information required only by regulation is a curable defect and the claimant is entitled to notice of the deficiency and 30 days within which to cure the defect. Failure to respond to such notice will result in rejection of the claim by an appealable decision.

In this case, owners of the Terry No. 1 mining claim recorded a copy of the notice of location with the superintendent of the Capitol Reef National Park, as required by MIPA, and thereafter timely filed proofs of assessment work with the proper office of BLM, as required by FLPMA. If the failure to file a notice of intention to hold the claim or proof of the assessment work in 1978 was construed as a defect by NPS, the claimants should have been notified and given 30 days to comply.

As there has been no violation of any requirement of FLPMA or MIPA relative to the Terry No. 1 mining claim, the decision of BLM deeming the claim abandoned and void must be reversed.

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 and the case remanded to BLM for further appropriate action.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Gail M. Frazier
Administrative Judge

