

FRANCIS SKAW ET AL.

IBLA 82-231

Decided April 19, 1982

Appeal from decision of Idaho State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. I MC 34735 through I MC 34749.

Appeal dismissed; decision affirmed.

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

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

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 the authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.

2. Constitutional Law--Federal Land Policy and Management Act of 1976: Generally--Regulations

The Department's mining claim filing regulation providing for filing of information by owners of unpatented mining claims on public domain, and providing consequences for failing to file, does not

violate any provision of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

3. Administrative Procedure: Hearings--Constitutional Law: Due Process--Hearings: Generally--Rules of Practice: Appeals: Effect of--Rules of Practice: Hearings

Due process does not require notice and a right to be heard in every case where a person is deprived of an asserted property right so long as the individual is given notice and an opportunity to be heard before the adverse Bureau of Land Management decision becomes final. Appeal to this Board satisfies the due process requirements.

APPEARANCES: Thomas W. Frizzell, Esq., and Raymond P. Tipp, Esq., Missoula, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

By decision of November 13, 1981, the Idaho State Office, Bureau of Land Management (BLM), declared the unpatented Ruby Nos. 1 through 6 and Nos. 10 through 15, and the Joe Nos. 1 through 6 and Nos. 8 through 10 placer mining claims, I MC 34735 through I MC 34749, abandoned and void because no evidence of assessment work or notice of intention to hold the claims had been filed with BLM on or before December 30, 1980, as required by 43 CFR 3833.2. The decision, addressed to Francis Skaw, et al., was served only on Thomas W. Frizzell, Esq., of the firm of Tipp, Haven, Skjelset, and Frizzell, Missoula, Montana.

In a telegram received by BLM December 17, 1981, and in a confirmation letter received by BLM December 21, both dated December 16, 1981, and styled "Notice of Appeal," Frizzell stated that he represents the claimants of the claims at issue in an entirely different matter and that he is not authorized to accept service in this proceeding.

On December 28, 1981, BLM transmitted the case file to this Board, under the apparent assumption that the "Notice of Appeal" from Frizzell required such action. Based on the declaration by Frizzell in his telegram and letter of December 16, 1981, that he did not represent the claimants in this proceeding, Frizzell's self-styled "Notice of Appeal" should have been dismissed by BLM and not transmitted to the Board. We now dismiss that "Appeal." 43 CFR 4.410; cf. United States v. Johnson, A-30828 (Jan. 29, 1968).

Following receipt of the "Appeal" from Frizzell, BLM, on December 28, 1981, reissued its decision of November 13, 1981, and transmitted it to each of the several claimants of record. Thereafter, on January 29, 1982, Raymond F. Tipp, Esq., timely submitted a notice of appeal on behalf of all the claimants. Tipp is also a member of the firm of Tipp, Haven, Skjelset, and Frizzell.

The appeal asserts

1. The matter is not capable of administrative decision without hearing for the reason that the claims to be abandoned first must be held by the claimants. The claims were taken from the claimants by the United States Government in November, of 1978, through Congressional action and the United States has been in possession of same. Whether or not this is true requires a factual hearing by the Court with proper jurisdiction, which is the Court of Claims in Washington, D.C., in Cause #79-79L.

2. The regulation is not supported by Congressional statute or intent, particularly as applied to these claimants since they cannot do any assessment work whatsoever.

3. There also may be a dispute as to whether sufficient notice of intent was given to the Bureau of Land Management on or before December 30, 1980, which likewise requires a factual hearing.

The appellant here first requests that a factual determination be determined by the Court with proper jurisdiction, the Court of Claims, in Cause #79-79L which is presently pending.

The claims were located in 1961 and 1962, and amended in March and September 1976. They were recorded with BLM October 19, 1979, and given serial numbers I MC 34735 through I MC 34749.

[1] Section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), requires the owner of an unpatented mining claim located on public land before October 21, 1976, to record in the proper office of BLM a copy of the location notice as recorded in the local jurisdiction, and evidence of assessment work or a notice of intention to hold the claim within 3 years, and prior to December 31 of each calendar year thereafter to record both in the county recording office and with BLM evidence of assessment work performed that year or a notice of intention to hold the claim.

Appellant contends the claimants lost possession of the claims by passage of section 708 of the National Parks and Recreation Act of 1978, P.L. 95-625, Act of November 10, 1978, 92 Stat. 3467, 3529-30, 16 U.S.C. § 1274(a)(23) (Supp. II 1978), and that the question of such taking is presently before the United States Court of Claims, in a proceeding styled Francis Skaw et al. v. United States, No. 79-79L. That Act prohibited dredge or placer mining within the banks or beds of the main stem of the St. Joe and its tributaries above the confluence of the main stem and the north fork of the river. Appellants contend that this effectively prohibits the mining of their claims. Thus, they contend that section 314 of FLPMA was not applicable to them.

The situation presented here appears to be analogous to one arising under the Mining in the Parks Act of 1976, P.L. 94-429, September 28, 1976. Section 8 of the Act, 16 U.S.C. § 1907 (1976), requires that all mining claims situated within any unit of the National Park System must be recorded with the National Park Service (NPS) within 1 year after the date of the Act. Such recording excused the claimants from performance of annual assessment

work until they were given a permit by NPS to do so. In addition, under the requirements of FLPMA, the claimants had to file with BLM either a notice of intention to hold the claims or evidence of assessment work prior to October 21, 1979, and prior to December 31 of each calendar year after the initial filing of either evidence of assessment work or a notice of intention to hold. Owners of unpatented mining claims within any unit of the National Park System who did not file either of the required instruments with BLM were adjudged to have abandoned their claim. See R. Gail Tibbetts, 62 IBLA 252 (1982); Riter Ekker, 58 IBLA 251 (1981); Uranus, Inc., 58 IBLA 139 (1981); W. LeRoy Ewell, 58 IBLA 121 (1981); Abram H. Kreider, 57 IBLA 68 (1981).

In this case, the mining claimants could or should have recorded a notice of intention to hold the claims both in the records of Shoshone County, Idaho, and with BLM in 1980, and thereby satisfied the requirements of FLPMA. The purpose of FLPMA is not to ensure the performance of assessment work each year but rather to ensure that there is a record of continuing interest or activity on mining claims so that the agencies administering the Federal lands will know which mining claims are being currently maintained and which have been abandoned. Philip Brandl, 54 IBLA 343 (1981); see Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), aff'd, 649 F.2d 775 (10th Cir. 1981). As there was no filing of either a proof of labor or a notice of intention to hold the claims with BLM in 1980, BLM correctly held the claims to be abandoned and void. Michael J. Fabisiak, 58 IBLA 243 (1981); Robert R. Eisenman, 50 IBLA 145 (1980). Responsibility for complying with the recordation requirements of FLPMA rested with the claimants. This Board has no authority to excuse lack of compliance with the mandatory requirements of the statute or to afford any relief from the statutory consequences. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981).

The Board has been advised that the Court of Claims has deferred action on the case of Skaw v. United States, supra, until the validity of the mining claims here at issue has been determined by the Department of the Interior. A contest proceeding, United States v. Story, Idaho 15674, 1/ was initiated by BLM in a complaint issued January 15, 1981. The claims involved were the Ruby Nos. 1 through 6 and Ruby Nos. 10 through 15, and the Joe Nos. 1 through 6 and Joe Nos. 8 through 10, I MC 34735 through I MC 34749. The complaint charged, inter alia, that no discovery of a valuable mineral deposit had been made or exists within the limits of any of the claims, and the land within the claims is nonmineral in character. The Forest Service had requested that BLM issue the complaint, as the lands within these claims are situated within the Saint Joe National Forest. Following a prehearing conference, the Administrative Law Judge set January 18, 1982, as the date on which a hearing should commence. Thereafter, upon being advised of the action by BLM in

1/ The claimants upon whom the BLM decision of Dec. 28, 1981, was served are: James Click, Sr.; Vernon Hoven; Evelyn and Francis Skaw; Kenneth V. Shelton; and Raymond Tipp. Each of these persons was named as a contestee in the complaint Idaho 15674. Also named in the complaint as contestees were: Marie Story; Jack Sheldon; Mabel Bixby; H. H. Shelton; W. W. Shelton; N. S. Shelton; Betty Crane, a.k.a. Betty Shelton; Carol I. M. Shelton; James Click, Jr.; Loretta Click, a.k.a. Loretta Ann Gunn; Hazel Jaquette, a.k.a. Hazel Click; Leon Hurley; Clara Alna Skaw; Ashlee Boyd Skaw; Gene Skaw, deceased; Judy Kasola; Gerald Ray Skaw; Francis Earl Skaw; Jerome Skaw; Eva Skaw; Ronald Watson; Rita Watson; Pat Shelton; and Herschel Shelton.

the decision of November 13, 1981, declaring the claims abandoned and void because of failure to comply with the recordation requirements of FLPMA, the judge dismissed the contest proceeding without prejudice to either party. By copy of this decision, the United States Court of Claims is being advised that the Department of the Interior now considers the claims to be abandoned and void.

[2] The argument of appellants that there is no congressional statute supporting the regulations applied by the BLM decision has no merit. The requirements of FLPMA for recordation of unpatented mining claims have been construed by the courts as being neither arbitrary or unreasonable, nor in violation of the Fifth Amendment due process clause. Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981); see also Topaz Beryllium Co. v. United States, supra.

[3] The charge that a factual hearing is required to ascertain if notice of intention to hold the claims was given to BLM prior to December 30, 1980, has no merit. There is nothing in the case record to support the allegation, nor have appellants asserted they did file any such instrument within the prescribed time period, either with BLM or in the records of Shoshone County, Idaho. Under the requirements of FLPMA, both recordings are necessary to satisfy the statutory requirement. No hearing is required where the record is blank and no assertion has been made that the statutory and regulatory requirements were met.

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., 58 IBLA 88 (1981); 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.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

James L. Burski
Administrative Judge

