

**Editor's note: appealed - reversed, Civ. No. 82-510 (D. Alaska April 19, 1984) 590 F.Supp. 52 (D.Alaska 1984); Vacated on judicial remand -- See Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186 (Dec. 21, 1984)**

OREGON PORTLAND CEMENT CO.

IBLA 81-564

Decided August 13, 1982

Appeal from decision of Alaska State Office, Bureau of Land Management, declaring placer mining claims abandoned and void. AA-17423 through AA-17462.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Assessment Work--Mining Claims: Assessment Work

Where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in a mining claim being declared abandoned and void.

APPEARANCES: Frank E. Nash, Esq., and Richard A. Canaday, Esq., Portland, Oregon, for appellant; Richmond F. Allan, Esq., Washington, D.C., for the Sealaska Corporation, intervenor; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Oregon Portland Cement Company has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 20, 1981, declaring the Oswego No. 1 through the Oswego No. 8, the Oswego No. 11 through the Oswego No. 14, and the Oswego No. 19 through the Oswego No. 46 placer mining claims, AA-17423 through AA-17462, abandoned and void for failure to file either proof of assessment work or notices of intention to hold the claims within calendar year 1979.  
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1/ At the time of the March 1981 BLM decision, appellant's mining claims were the subject of a pending appeal before the Alaska Native Claims Appeal Board (ANCAB), in which appellant had challenged a prior BLM decision to issue a conveyance to the Sealaska Corporation, a Native village corporation, of certain land, including the mining claims. Subsequently, the Regional

Appellant's mining claims were located in May and September 1965 and filed for recordation with BLM on June 19, 1978. On November 22, 1978, appellant filed affidavits of performance of assessment work with BLM for the assessment years ending September 1, 1978, and September 1, 1979. No affidavits were filed within calendar year 1979.

In declaring appellant's mining claims abandoned and void, BLM relied on the Board's holding in James V. Joyce, 42 IBLA 383 (1979), that 43 CFR 3833.2-1(a) requires the filing of proof of assessment work or a notice of intention to hold a claim in the year following the year of recording. 43 CFR 3833.2-1(a) provides that the owner of an unpatented mining claim located on or before October 21, 1976, shall file proof of assessment work or a notice of intention to hold the claim "on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner." (Emphasis added.) In this case, appellant failed to file in the year following the year of recording, i.e., 1979.

In its statement of reasons for appeal, appellant contends that section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1976), requires that the owner of an unpatented mining claim file proof of assessment work or a notice of intention to hold the claim only once prior to October 22, 1979. Appellant points to language in the statute that a mining claimant is required to file "within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter." (Emphasis added.) Id. Appellant states that the word "thereafter" in the statute means after October 22, 1979. Appellant

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fn. 1 (continued)

Solicitor filed a motion to have the case remanded as the decision had prematurely issued. Normally, a pending appeal would deprive BLM of authority to take any further action with regard to the subject matter of the appeal until jurisdiction over the case was restored by Board action, and any action taken would be considered a nullity. Sierra Club, 57 IBLA 288 (1981), and cases cited therein. However, in the present case, BLM's decision was based on section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), which imposes a conclusive presumption of abandonment, which 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, 372 (1981). Thus, a decision that a claim is abandoned and void merely describes what has already occurred and does not represent action necessarily inconsistent with the well established rule that the pendency of an appeal deprives the BLM State office of jurisdiction to formally act on the subject of the appeal.

In any event, ANCAB issued a decision in the case before it on Aug. 25, 1981, styled Oregon Portland Cement Co., 6 ANCAB 65 (1981). In light of this, the Regional Solicitor has filed a request to withdraw its Motion for Remand. No rational purpose would be served by remanding this case so that BLM could repromulgate its original decision. Accordingly, the motion of the REgional Solicitor to withdraw its request for a remand is hereby granted. In any event, ANCAB has been abolished and its jurisdiction has been transferred to the Board of Land Appeals.

concludes that 43 CFR 3833.2-1(a) has obscured the clarity of the statute by substituting the phrase "following the calendar year of such recording" for the word "thereafter."

Further, appellant argues that section 314(a) of FLPMA, supra, permits a mining claimant to perform assessment work and file proof thereof at any time after the start of an assessment year, which begins at noon on September 1 of each year, as long as the filing is no later than December 30 following the end of the assessment year. Appellant states that there is no statutory requirement that a filing be made after January 1. Appellant concludes that such a procedure satisfies the purpose of section 314(a) of FLPMA, supra, of providing "periodic" written notice of the performance of assessment work.

Moreover, appellant argues that BLM may not declare its mining claims abandoned and void because, in accordance with the district court's reasoning in Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), BLM had actual knowledge of the existence of the claims and the performance of assessment work for the 1979 assessment year. Appellant cites the following language in Topaz Beryllium Co. v. United States, supra at 315: "[A] claim which is 'filed' upon cannot as a matter of law be 'deemed abandoned.' The statutory or regulatory clean broom cannot sweep such a claim from existence. It exists and the United States knows of its existence." Appellant concludes that James V. Joyce, supra, has been effectively overruled by Topaz Beryllium.

Sealaska Corporation (Sealaska) has filed a petition to intervene in the proceedings, alleging that the lands embraced by the subject claims are included in a decision to issue conveyance entered by BLM on April 30, 1979, pursuant to the Alaska Native Claims Settlement Act, Act of December 18, 1971, 85 Stat. 688, as amended, 43 U.S.C. § 1601 (1976). Sealaska has also submitted a brief in support of BLM's decision. In light of Sealaska's interest in the subject of the appeal, its petition to intervene is granted.

[1] Appellant first argues that section 314(a) of FLPMA, supra, requires that a mining claimant file proof of assessment work or a notice of intention to hold the mining claim only once prior to October 22, 1979. It is true that a mining claimant may wait until October 22, 1979, i.e., the end of the 3-year period "following October 21, 1976," to file. 43 U.S.C. § 1744(a) (1976). However, a filing made in 1977 or 1978 does not abrogate a claimant's obligation to make additional filings in subsequent years under the statute. As we said in Harvey A. Clifton, 60 IBLA 29, 33 (1981): "The act of filing one of these instruments [either proof of assessment work or a notice of intention to hold a mining claim] within the 3-year time limit initiates the requirement that one of these documents be filed prior to December 31 of each year 'thereafter.'" 2/ (Emphasis added.) Accordingly,

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2/ This differs from the requirement of 43 CFR 3833.2-1(a) that proof of assessment work or a notice of intention to hold a mining claim be filed with BLM by Dec. 30 of each calendar year following the calendar year in which the notice of location is filed for record with BLM. See Harvey A. Clifton, supra at 33. Under the regulation, the act of filing the notice of location initiates the subsequent annual filing requirement. However, failure to conform to the requirement of 43 CFR 3833.2-1(a), where the statutory requirement of section 314(a) of FLPMA, supra, has been met, will be treated as a "curable defect." Harvey A. Clifton, supra

when appellant filed its affidavit of assessment work on November 22, 1978, it was required to file either proof of assessment work or notices of intention to hold its mining claims "prior to December 31 of each year thereafter." 43 U.S.C. § 1744(a) (1976).

Appellant next argues that there are three purposes animating section 314: (1) To give the United States notice of the existence and location of unpatented mining claims (section 314(b)); (2) to inform the United States by periodic written notice of the performance of annual assessment work as required by 30 U.S.C. § 28 (1976) (section 314(a)); and (3) to clear the public lands of "long-dormant claims" (section 314(c)). Based on this analysis of the statute and its purposes, appellant argues that since it did file the assessment work for the 1979 assessment year, though it filed it in calendar year 1978, it has fulfilled the purposes of the Act. Moreover, it contends that these are clearly not "long-dormant claims." The problem with appellant's argument is that it misperceives the intent behind both section 314(a) and section 314(c). In addressing this issue it will be necessary to briefly examine both the assessment and the recordation statute.

The purpose behind the statutory requirement that a mining claimant perform assessment work (30 U.S.C. § 28 (1976)) has been a desire to insure that claims are diligently developed and to prevent the locking up of land by claimants who have no present intent to develop the minerals located therein. See Powell v. Atlas Corp., 615 P.2d 1225 (Utah 1980). Until FLPMA, there was no general Federal requirement that assessment work be recorded; requirements of recordation were a matter of state law. The Federal law merely required that work be performed. Failure to perform the assessment work, however, did not result in an "abandonment" of the claim. On the contrary, failure to perform the required annual work simply subjected the claim to "forfeiture" upon the subsequent occurrence of certain events. Thus, the failure of a mining claimant to perform annual assessment work would permit a rival claimant to enter upon the land and "relocate" the original claim for his benefit. See 30 U.S.C. § 28 (1976). So, too, where the land was withdrawn from subsequent mineral location and the original locator failed to "substantially satisfy" the assessment work requirements, this failure might work a forfeiture of the claim to the Government. See Hickel v. The Shale Oil Corp. (TOSCO), 400 U.S. 48, 56-57 (1970), United States v. Bohme, 48 IBLA 267, 300-22, 87 I.D. 248, 264-76 (1980). But where neither the land nor the mineral had been withdrawn, and where no other claimant had appropriated the ground embraced by the claim, the original claimant could, even after the lapse of many years, reenter upon his claim and perform assessment work. Such action would cure any deficiency occasioned by his prior failure to perform and, from that point on, his claim would be as valid as it would have been had the claimant dutifully performed assessment work in each year during the intervening period.

"Abandonment," of course, is a concept well known to mining law, but its basis is the traditional law of abandonment--relinquishment of possession together with the subjective intent to abandon. Failure to perform assessment work might be evidence of an abandonment but it is not the abandonment. United States v. Bohme, *supra*; Del Giorgio v. Powers, 81 P.2d 1006, 1013 (Cal. App. 1938). Moreover, courts have long recognized that an abandonment may occur even where the assessment work has been performed or has not yet accrued. Farrell v. Lockhart, 210 U.S. 142, 147 (1908); Fortuna Consolidated

Mining Co. v. Miller, 239 Pac. 789, 791 (Ariz. 1925); Swanson v. Keuler, 105 Pac. 1059, 1064 (Idaho 1909), aff'd sub nom. Swanson v. Sears, 224 U.S. 180 (1912).

As we noted above, prior to FLPMA, all that was required under 30 U.S.C. § 28 (1976) was that the assessment work be performed. Save for specified circumstances, such as claims located on Oregon and California Railroad and Reconveyed Coos Bay Grant Lands (O&C) lands under the Act of April 8, 1948, 62 Stat. 1162, there was no requirement that the mining claimant file an affidavit of assessment work with the Federal Government. Such requirements as did exist were based originally in local mining custom and subsequently in positive State law. Failure to record an affidavit of labor under State law, however, did not ipso facto, subject the claim to forfeiture. On the contrary, while the recording of assessment work was normally treated as prima facie evidence that the work had been performed and, in Oregon at least, the failure to record was treated as prima facie evidence that it had not, the question which determined the right of possession between rival claimants was whether or not the work had been performed. See generally PLRRC Report entitled Legal Study of the Nonfuel Mineral Resources at 602-05. Failure to record an affidavit of assessment work under State law, when the work had been performed, would not constitute either an abandonment or a forfeiture of the claim.

Thus, in those situations in which the assessment work had been performed, failure to record the assessment work, even in the local county office, would not give rise to rights in either the Federal Government or other third parties. Even where the assessment work was neither performed nor recorded, no rights would inure to the Government absent a withdrawal of the land or the mineral concerned from location. The penalty for nonperformance of assessment work under 30 U.S.C. § 28 (1976) is not invalidation of the claim. Such nonperformance merely subjects the land embraced by such claim to the possible initiation of adverse third party rights. This was clearly the status of the law prior to the enactment of FLPMA. We find nothing in either the language of the Act or the legislative history of section 314 which might evidence an intent to alter these substantive rules.

It is clear from the language of section 314(a) relating to notices of intention to hold that the recordation provisions of FLPMA were not intended to effect a change in the assessment work provisions. "Notices of intention to hold" had been a term of art prior to FLPMA. These documents had historically been required to be filed at various times when Congress had suspended the assessment statutes during the war or the Depression. In the absence of actual performance of assessment work, a "notice of intention to hold" served to inform the public of the intention of the claimant to maintain his claim and the proper filing thereof excused performance of the assessment work for that year.<sup>3/</sup> Thus, the filing of a notice of intent was only efficacious to prevent the initiation of third party rights where the requirement to perform assessment work had been waived. Had Congress, therefore, merely required the filing either of an affidavit of assessment work or a "notice of intent

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<sup>3/</sup> A list of the suspension statutes are set out in the Appendix to the Board's decision in United States v. Bohme, supra, at 327-28. We note that the statutes quite frequently used the expression a "notice of desire to hold" but this language, of course, is indistinguishable from a "notice of intent to hold."

to hold" where authorized under a different statute, there might well be a basis on which to contend that Congress was seeking to use the recordation provision as a tool to enforce the assessment requirement, since the only time the traditional "notice of intent" could be used would be where a waiver of assessment work had occurred. Congress however, expressly authorized notice of intent "including but not limited to such notices as are provided by law to be filed where there has been a suspension or deferment of annual assessment work." 43 U.S.C. § 1744(a) (1976). Thus, it is impossible to maintain that the purpose of section 314(a) is to enforce the assessment statute since the scope of the authorization to file a notice of intent to hold obviates any necessity to annually file evidence of assessment work.

We recognize that it is a common practice for mineral claimants to work over the end of an assessment year and thereby fulfill the labor requirements for 2 years. The fact that such actions may fulfill the requirements of 30 U.S.C. § 28 (1976), however, has no bearing on the question whether the requirements of 43 U.S.C. § 1744(a) (1976) have been met.

As pointed out above, it is performance of the work and not recordation thereof which determines compliance with 30 U.S.C. § 28 (1976). Compliance with 43 U.S.C. § 1744(a) (1976) is only accomplished by annual filing. In addition, failure to perform assessment work may subject the claim to "forfeiture," but it does not render the claim abandoned. United States v. Bohme, supra, at 301-02. Failure to record under section 314(a), however, conclusively establishes the "abandonment" of the claim.

Thus, the simple purpose of section 314(a) was to keep the Department informed of the continued interest by the mining claimant in his claim. In order for the claimant to do this, he or she was required to make an annual filing in both the local offices of the State and with BLM. Not once, in either the language of the statute or the legislative history is there mention of the assessment year. Not once is there any indication that the filing with BLM was somehow to be synchronized with the assessment year. Congress intended to permit the use of assessment work affidavits as a means of showing the "continued interest" but it clearly did not intend to utilize recordation to "enforce" the assessment statute. 4/

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4/ Indeed, it becomes difficult to ascertain how recordation could be used to enforce the assessment law, to any type of rational effect. Assuming that a notice of intent to hold could only be filed under section 314(a) where the obligation to perform assessment work had either been suspended or deferred or where it had not yet accrued, an individual's claim could be deemed abandoned and void even if he or she filed a notice of intent to hold where the assessment obligation applied. The failure to perform the assessment work, however, had already subjected the claim to forfeiture either to another locator or, in the case of a withdrawal, to the United States. But, under 30 U.S.C. § 28 (1976), if neither of these eventualities transpired the claimant could reenter the claim and cure past failures by performing assessment work. This avenue would be foreclosed by the recordation act, under which the claim would be abandoned and void, and the resumption of annual labor would not serve to resuscitate the claim. See Hartman Gold Mining Co. v. Warning, 11 P.2d 854, 856 (Ariz. 1932). Thus, recordation would not "enforce" the assessment statute, it would dramatically "alter" the statute. Failure to do assessment work would not merely subject the claim to forfeiture, it would work an abandonment. There is no shred of legislative history to support so so marked a change in adjudications under 30 U.S.C. § 28 (1976).

This being the case, the assessment year simply has no relevance to recordation. As we stated in James V. Joyce (On Reconsideration), 56 IBLA 327, 329 (1981), the legislative history of section 314 of FLPMA, *supra*, indicates that filing of proof of assessment work or a notice of intention to hold a mining claim is to be on an annual basis. We concluded that to permit a mining claimant to file proof of assessment work in the last 4 months of the calendar year preceding the calendar year in which it should be filed, albeit within the assessment year, would permit a mining claimant "to effectively skip filing proof of assessment work every other year." James V. Joyce (On Reconsideration), *supra*, at 330. For instance, a mining claimant could file in November 1978 for the 1979 assessment year and file in December 1980 for the 1980 assessment year, effectively skipping any filing in 1979. This would clearly subvert the congressional intent of an annual notification to BLM of a mining claimant's continued interest in his claim. Accordingly, we held in James V. Joyce (On Reconsideration), *supra*, at 331, "that where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after January 1, and on or before December 30."

Moreover, contrary to appellant's assertions, James V. Joyce (On Reconsideration), *supra*, was not effectively overruled by Topaz Beryllium Co. v. United States, *supra*. There is nothing in that decision which is inconsistent with our holding in Joyce. The language cited by appellant merely refers to the provision in section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1976), that "it shall not be considered a failure to file if the instrument is defective." This case, however, does not involve a defective filing, it involves a situation where a statutorily required filing was not made. Moreover, it does not involve a situation where a mining claimant has not complied with a filing requirement imposed only by regulation. This would, likewise, be treated as a defective filing. See Topaz Beryllium Co. v. United States, 649 F.2d 775, 778 (10th Cir. 1981); see, e.g., Harvey A. Clifton, *supra*, at 34.

Appellant's argument that the purpose of the conclusive presumption of abandonment mandated by section 314(c), is only to remove "long dormant claims," runs afoul of the language of that provision. If, indeed, Congress intended to so limit the scope of the conclusive presumption, section 314(c) would only apply to section 314(b) concerning recordation of the notice of location. The statute, however, clearly applies not only to the recordation of the notice of location, but to the annual filings as well. Thus, Congress has directed that the failure to file within 1 year manifests a sufficient lack of interest to give rise to a conclusive presumption of abandonment. This Board has no alternative but to abide by that congressional determination. Lynn Keith, *supra*. Where appellant has failed to comply with the statutory requirement for filing proof of assessment work or a notice of intention to hold a mining claim, its mining claims are conclusively presumed to be abandoned. 43 U.S.C. § 1744(c) (1976). BLM properly declared the claims void. 5/

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5/ At one point in its decision, the State Office indicated that the documents were due by Oct. 22, 1979. This was erroneous. Since appellant had filed evidence of assessment work during calendar year 1978, the next filing was due on or before Dec. 30, 1979. The Oct. 22, 1979, date is only relevant for the initial filing of assessment work or notice of intent to hold.

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.

James L. Burski  
Administrative Judge

I concur:

C. Randall Grant, Jr.  
Administrative Judge

I concur in the result:

Edward W. Stuebing  
Administrative Judge

