

Appeal from decision of New Mexico State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. NM MC 48849 through NM MC 48930 and NM MC 49199 through NM MC 49329.

Affirmed as modified.

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

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located before Oct. 21, 1976, must file with the proper office of the Bureau of Land Management, on or before Oct. 22, 1979, a copy of the recorded notice of location and a notice of intention to hold the mining claim or evidence of assessment work performed on the claim. There is no provision for waiver of this mandatory requirement, and where the copy of the location notice or evidence of assessment work is not timely filed, the claim is properly declared abandoned.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- 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 BLM office within the time periods prescribed by statute constitutes an abandonment of the mining claim by the owner. Regulation 43 CFR 3833.1-2(d) requires each location notice

filed for recordation to be accompanied by a service fee of \$5. This is a mandatory requirement, so there is no recordation of a mining claim where the check tendered as payment of the service fee is never honored by the drawer's bank. Therefore, when the location notices are filed with BLM May 14, 1979, but the service fee is not paid with a negotiable check until Dec. 20, 1979, the recordation date of the claims is Dec. 20, 1979. For claims located prior to Oct. 21, 1976, where the effective date of recordation of the location notices with BLM is Dec. 20, 1979, sec. 314 of FLPMA compels the conclusive determination that the claims are abandoned.

3. 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, the conclusive presumption 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: Mel. E. Yost, Esq., Santa Fe, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

By decision of April 30, 1982, the New Mexico State Office, Bureau of Land Management (BLM), declared the unpatented Bolivar Nos. 181 through 396 lode mining claims, NM MC 48849 through NM MC 48930 and NM MC 49199 through NM MC 49329, abandoned and void because no proof of labor or notice of intention to hold the claims was filed with BLM on or before October 22, 1979, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976). All of the claims had been located prior to October 21, 1976.

An amended decision issued by BLM on June 3, 1982, excluded the Bolivar Nos. 217 through 262, NM MC 48885 through NM MC 48930; Bolivar Nos. 263 through 332, NM MC 49199 through NM MC 49263; and Bolivar Nos. 353 through 360, NM MC 49826 through NM MC 49293, because the claimant submitted proof of filing the 1979 assessment work evidence. There is no evidence of such filing in the case record before us.

Appeal has been taken by Midas International, Inc., and by Ron Richards from both decisions.

[1] Section 314 of FLPMA, and the implementing regulations, 43 CFR 3833.2-1, and 3833.4(a), require that evidence of assessment work for each assessment year be filed in the proper office of BLM within the specified time limits, under penalty of a conclusive presumption that the claims are abandoned if the documents are not timely or properly filed for recordation with BLM.

Examination of the case files discloses a more serious deficiency which BLM overlooked. The notices of location for the 213 claims in the Bolivar group were tendered to BLM May 14, 1979. The check in the amount of \$1,065 given for the service fees was returned by the drawer's bank unpaid, with the endorsement "Refer to Maker." A subsequent check, receipted by BLM October 25, 1979, was also returned by the drawer's bank, endorsed "Not Sufficient Funds." A third check, for which receipt No. 068173 was issued December 20, 1979, appears to have been paid by the drawer's bank.

[2] Regulation 43 CFR 3833.1-2(d) states that the location notice for each mining claim filed for recordation with BLM shall be accompanied by a service fee of \$5. As this is a mandatory requirement, the Board has consistently held that there is no recordation where the check tendered as payment of the service fees is never honored by the drawer's bank. Therefore, when location notices are filed with BLM May 14, 1979, but the service fees are not paid with a negotiable check until December 20, 1979, the recordation date of the claims is December 20, 1979. For these claims located before October 21, 1976, recordation with BLM had to be made and completed on or before October 22, 1979. Accordingly, the claims, under the conclusive presumption of section 314 of FLPMA, were abandoned when no proper recordation was effected by October 22, 1979. Cajen Minerals, 64 IBLA 261 (1982); Mrs. George G. Wagner, 63 IBLA 146 (1982); Raymond N. McCool, 60 IBLA 62 (1981); Park City Chief Mining Co., 57 IBLA 346 (1981); D. L. Nielsen, 57 IBLA 114 (1981); Jesse L. Miller, 54 IBLA 187 (1981); Michael G. Commons, 52 IBLA 396 (1981); Philip I. Griner, 52 IBLA 179 (1981); Robert W. Miller, 51 IBLA 364 (1980); John J. Dunsmore, 51 IBLA 297 (1980); Clifford J. Kelch, 50 IBLA 127 (1980); Brewery Hill Mining Co., 49 IBLA 197 (1980); Wilbur Martin, 47 IBLA 370 (1980); Frank Franich, 47 IBLA 332 (1980).

[3] This Board has no authority to excuse lack of compliance with the statutes or the implementing regulations, or to afford any relief from the statutory consequences where the mandatory requirements are not complied with. See Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981). As the Board stated in Lynn Keith:

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 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 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. at 371-72.

The propriety of the \$5 service fee was challenged in Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979). The court stated:

Regarding the objections to the \$5 filing fee, 43 U.S.C. § 1734 authorizes such fees if they are "reasonable." The filing fee, rather than being onerous and unlawful, is in reality modest and moderate. The method of computation was rational, reasonable, and extremely conservative. In short, there is nothing wrong with the fee.

The decisions of BLM are modified to show that the declaration of abandonment of the subject claims was because the service fees were not paid on or before October 22, 1979.

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 as modified.

Douglas E. Henriques
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge