

DONNA BERNHARDT

IBLA 83-360

Decided May 27, 1983

Appeal from decision of Idaho State Office, Bureau of Land Management, declaring unpatented mining claim abandoned and void. I MC 24746 and I MC 24747.

Vacated and remanded.

1. 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 office of the Bureau of Land Management within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

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

Where a preponderance of the evidence supports a finding that all documents necessary to effectuate a filing under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), were timely filed, a decision declaring a mining claim abandoned and void for failure to file timely the required documentation will be vacated.

APPEARANCES: Donna Bernhardt, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Donna Bernhardt appeals the Idaho State Office, Bureau of Land Management (BLM), decision of January 4, 1983, which declared the unpatented Lucky 76 and RDRB lode mining claims, I MC 24746 and I MC 24747, abandoned and void because no proof of labor was filed with BLM by 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), and 43 CFR 3833.2-1.

The claims were located in July and August 1976, and were recorded with BLM October 1, 1979.

Appellant states that she mailed the 1979 proof of labor together with copies of the location notices to BLM by certified mail, and has submitted a copy of the return receipt card signed for BLM by Timothy Wiggins, September 28, 1979. She also submitted a copy of the return receipt card from the County Auditor, Boundary County, Idaho, dated September 28, 1979, for the proof of labor recorded in that county.

Review of the case file discloses that BLM issued a decision June 30, 1980, declaring the Lucky 76 and RDRB lode mining claims abandoned and void because no proof of labor was filed with BLM by October 22, 1979, as required by FLPMA. The decision appears to have been served on Mrs. Bernhardt September 9, 1980. In a letter received by BLM September 24, 1980, Mrs. Bernhardt made the same assertion she has now made in her appeal, that is, that she send the 1979 proof of labor together with the copies of the location notices, and the certified mail receipt was signed by Timothy Wiggins. The record is silent as to any response from BLM, which appellant apparently assumed was tacit acquiescence by BLM to her arguments that she had complied with the recordation requirements of FLPMA. Appellant timely submitted proof of labor for 1980, 1981, and 1982.

[1] Section 314 of FLPMA requires the owner of an unpatented mining claim located on public land prior to October 21, 1976, to file in the proper BLM office on or before October 22, 1979, a copy of the location notice and a proof of labor. Failure to file these instruments timely resulted in the conclusive presumption that the claim had been abandoned by the owner.

[2] Although there is a presumption of regularity by public officials in the performance of their official duties, the presumption is rebuttable. Bernard J. Braker, 54 IBLA 332 (1981); L. E. Garrison, 52 IBLA 131 (1981). While appellant has not conclusively established that BLM received her evidence of annual assessment work before October 22, 1979, nevertheless, we believe that a preponderance of evidence before us supports a finding that the required document was timely filed. See L. E. Garrison, *supra*; see also E. Joe Swisher, 44 IBLA 44 (1979). We are moved to this conclusion especially as BLM did not respond to appellant's letter received September 24, 1980, and received proofs of labor for 1980, 1981, and 1982, before taking any adverse action.

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 vacated and the case remanded to BLM for further action not inconsistent with this opinion.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

R. W. Mullen
Administrative Judge

