

Editor's note: Reconsideration denied by Order dated Sept. 20, 1983

MACKAY BAR CORP.

IBLA 83-465

Decided August 5, 1983

Appeal from decision of Idaho State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. I MC 49448 through I MC 49455.

Affirmed.

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 after Oct. 21, 1976, must file in the local office where the location notice is recorded and in the proper office of the Bureau of Land Management a notice of intention to hold the claim or evidence of performance of annual assessment work on the claim prior to Dec. 31 of each year after the calendar year in which the claim was located. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

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

3. Administrative Procedure: Adjudication--Evidence:
Generally--Evidence: Presumptions--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

Although at common law, abandonment of a mining claim can be established only by evidence demonstrating that it was the claimant's intention to abandon it and that he in fact did so, in enacting the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), Congress specifically placed the burden on the claimant to show, by his compliance with the Act's requirements, that the claim has not been abandoned and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon his claim may not be considered.

4. Evidence: Presumptions--Evidence: Sufficiency--Rules of Practice: Evidence

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, the presumption is not overcome merely by the submission of an affidavit that the document was mailed. Rather, BLM's denial of its receipt can be rebutted only by substantial countervailing evidence, as an instrument is not "filed" by depositing it in the mail, but only when it is delivered to and received by the proper BLM office.

APPEARANCES: E. Don Copple, Esq., Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Mackay Bar Corporation appeals the decision of the Idaho State Office, Bureau of Land Management (BLM), dated February 22, 1983, which declared the unpatented RVH One through RVH Eight placer mining claims, I MC 49448 through I MC 49455, abandoned and void for failure to file on or before December 30, 1981, evidence of performance of annual assessment work or a notice of intention to hold the claims, 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.

Appellant states that it has complied with all requirements of the mining laws; that it never had any intention to abandon these claims; and that it has done and recorded the annual assessment work of 1981 in Idaho County, Idaho. Copies of the proofs of labor for the claims, as recorded in Idaho County, December 10, 1981, accompanied the appeal. Appellant states that a copy of each proof of labor was transmitted by mail to BLM on December 21, 1981. The claims were located March 1, 1980.

[1] Under section 314(a) of FLPMA, the owner of a mining claim located after October 21, 1976, must file notice of intention to hold the claim or evidence of the performance of annual assessment work on the claim in the local state office where the location notice is recorded and in the proper office of BLM on or before December 30 of every calendar year after the year of location. This requirement is mandatory, not discretionary. Failure to comply is conclusively deemed to constitute an abandonment of the claim by the owner and renders the claim void. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981); James V. Brady, 51 IBLA 361 (1980).

[2, 3] The Board responded to arguments similar to those presented here in Lynn Keith, *supra*. With respect to the conclusive presumption of abandonment and appellant's argument that the intent not to abandon was manifest, we stated:

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).

* * * Appellant also argues that the intention not to abandon these claims was apparent * * *. At common law, evidence of

the abandonment of a mining claim would have to establish that it was the claimant's intention to abandon and that he in fact did so. Farrell v. Lockhart, 210 U.S. 142 (1908); 1 Am. Jur. 2d, Abandoned Property §§ 13, 16 (1962). Almost any evidence tending to show to the contrary would be admissible. Here, however, in enacted legislation, the Congress has specifically placed the burden on the claimant to show that the claim has not been abandoned by complying with the requirements of the Act, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon may not be considered. [Emphasis in original.]

53 IBLA at 196-97, 88 I.D. at 371-72.

[4] In the first instance there is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. See, e.g., Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); Phillips Petroleum Co., 38 IBLA 344 (1978). On the other hand, we have recognized the existence of another presumption that mail properly addressed, stamped, and deposited in an appropriate receptacle is duly delivered. See generally Donald E. Jordan, 35 IBLA 290 (1978). When these two presumptions have come into conflict, we have traditionally accorded greater weight to the former. See David F. Owen, 31 IBLA 24 (1977). This choice has been predicated on considerations of public policy and supported by burden of proof analysis. Bernard S. Storper, 60 IBLA 67, 70 (1981), aff'd, Storper v. Watt, No. 82-0449 (D.D.C. Jan. 20, 1983).

Therefore, when an appellant asserts that a document was sent to BLM, and BLM has no record of receiving it, the presumption of regularity militates against a finding that it was, in fact, received by BLM and subsequently lost through mishandling without any record or recollection of it by BLM personnel. Glenn W. Gallagher, 66 IBLA 49, 51 (1982).

In this case appellant submitted on appeal the affidavit of its corporate accountant stating that on December 21, 1981, she mailed the requisite affidavits of assessment work to the proper BLM office. Appellant also submitted a copy of a letter addressed to BLM, dated December 21, 1981, and signed by the accountant which stated in its entirety, "Please find enclosed are the 1981 mining claims Proof of Labor which are to be recorded by you for your records." The letter did not identify the mining claims in any manner.

While the Board has held that the presumption of regularity may be rebutted by probative evidence (see, e.g., Bernard L. Baker, 55 IBLA 55 (1981); L. E. Garrison, 52 IBLA 131 (1981), the presumption is not overcome by a self-serving affidavit that the missing document was mailed to BLM. Glenn W. Gallagher, *supra* at 52, and cases cited therein.

Appellant's submissions do not overcome the presumption of regularity. At best, they establish that the proofs of labor were timely mailed. It is receipt of those documents, however, which is critical. Depositing a document in the mail does not constitute filing. 43 CFR 1821.2-2(f). Filing is accomplished only when a document is delivered to and received by the proper BLM office. Evidence of mailing alone is insufficient to overcome the presumption of regularity.

Appellant has requested a hearing before an Administrative Law Judge. That request is denied.

Appellant may wish to consult with BLM about the possibility of relocating these claims.

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.

Douglas E. Henriques
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Gail M. Frazier
Administrative Judge

