

UNITED STATES
v.
RICHARD R. BALLAS

IBLA 81-892, 83-102

Decided May 30, 1985

Appeals from separate decisions of Administrative Law Judge John R. Rampton, Jr., and Arizona State Office, Bureau of Land Management, declaring lode mining claims invalid. AZ 9843 and A MC 89433 through A MC 89439.

Decision of Arizona State Office affirmed; appeal from decision of Administrative Law Judge Rampton dismissed as moot.

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: Abandonment

Failure to file evidence of annual assessment work in calendar year 1981 for a mining claim located before Oct. 21, 1976, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), and 43 CFR 3833.2-1(a) (1981), constitutes abandonment of the claim and renders it void. Personal delivery of such evidence after regular business hours on Dec. 30, 1981, does not constitute compliance with the recordation requirement where the document is deemed by 43 CFR 1821.2-2(d) to have been filed on the next business day, Dec. 31.

2. Administrative Practice -- Regulations: Generally

While, as a general rule, amendments to regulations or administrative procedures may be applied to a pending appeal where to do so would benefit an appellant, such amended regulations or procedures may not be applied where third-party rights would be adversely affected.

APPEARANCES: John V. Riggs, Esq., Phoenix, Arizona, for appellant; Ray M. Jensen, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Richard R. Ballas has appealed from a decision of Administrative Law Judge John R. Rampton, Jr., dated June 25, 1981, declaring seven lode mining claims invalid for lack of discovery of a valuable mineral deposit and from a decision of the Arizona State Office, Bureau of Land Management (BLM),

dated September 30, 1982, declaring the same mining claims abandoned and void for failure to file timely evidence of annual assessment work or notices of intention to hold the claims pursuant to section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982), and its implementing regulations, 43 CFR Subpart 3833. 1/

On September 28, 1977, BLM, on behalf of the Bureau of Indian Affairs, U.S. Department of the Interior, filed a contest complaint charging in part that: "Valuable minerals have not been found within the limits of the Midas, Dandy, Peggy Ryan, St. Patrick, St. Patrick No. 2, Jackson, and Dixie lode mining claims so as to constitute a valid discovery within the meaning of the mining laws." Appellant filed a timely answer and a hearing was held before Judge Rampton on March 10, 1981, in Phoenix, Arizona. In his June 1981 decision, Judge Rampton concluded that the Government had presented a prima facie case of the lack of discovery of a valuable mineral deposit and that appellant had not overcome that case by a preponderance of the evidence.

Appellant had not been represented by counsel at the hearing. Subsequent to the filing of the notice of appeal, however, counsel was retained. Various extensions of time were then sought to allow counsel to familiarize himself with the record. These extensions were duly granted. During this period of time, however, events occurred which directly affect the outcome of this appeal. These relate to the filing of annual assessment work for the 1981 calendar year.

[1] The instant claims had been located between 1914 and 1930 and had been recorded with BLM pursuant to section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1982), on October 22, 1979. Included with these submissions was a proof of labor for the seven claims as required by section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1982). Another annual filing was duly made on December 22, 1980.

On December 30, 1981, an "affidavit of Labor Performed and Improvements Made" for the seven mining claims was "left at the Arizona State Office at 4:20 p.m." (Decision at 1). The document was date-stamped the next business day, December 31, 1981, because it was received after the close of business. BLM states that the Arizona State Office was "open to the public for the filing of documents from 7:45 a.m. to 4:15 p.m." Id. Because both the statute and the regulations require the annual filing to be made prior to December 31 of each calendar year, 2/ the State Office declared the subject claim abandoned and void pursuant to section 314(c) of FLPMA, 43 U.S.C. § 1744(a) (1982).

1/ This case involves the following lode mining claims: Dandy (A MC 89433), Dixie (A MC 89434), Peggy Ryan (A MC 89435), St. Patrick No. 1 (A MC 89436), St. Patrick No. 2 (A MC 89437), Jackson (A MC 89438), and Midas (A MC 89439). The claims are situated in unsurveyed T. 15 S., R. 2 E., Gila and Salt River meridian, Arizona, within the Papago Indian Reservation. A notice of appeal and statement of reasons relating to the decision of Judge Rampton have also been filed by Ray M. Jensen, appellant's lessee.

2/ Actually, the regulation attempted to clear up any possible misconception by expressly noting that the filing must be made "on or before December 30 of each calendar year." 43 CFR 3833.2-1(a) (1981).

In his statement of reasons for appeal, appellant contends this case should fall within the general rule that an agency has discretion to relax internal procedural rules in the interest of justice and that his affidavit should be considered timely filed. In the alternative, appellant argues that the filing fell within the 20-day "grace period" provided by the current regulations, published in the Federal Register on December 15, 1982, and expressly made applicable to cases then pending.

[1] As we have noted in numerous decisions, section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1976), requires the owner of an unpatented mining claim located before October 21, 1976, to file with BLM "prior to December 31 of each year" either evidence of annual assessment work or a notice of intention to hold the claim. Failure to file timely is deemed conclusively to constitute an abandonment of the claim and renders it null and void. 43 U.S.C. § 1744(c) (1976); William C. Niederer, 70 IBLA 55 (1983). Indeed, the United States Supreme Court has recently affirmed that not only are the recordation provisions constitutional, but also that the annual filing must be on or before December 30 of each calendar year. See United States v. Locke, 105 S. Ct. 1785 (1985).

Accordingly, appellant was required to file either evidence of annual assessment work or notices of intention to hold his claims prior to close of business on December 30, 1981. See 43 CFR 3833.2-1(a) (1981). Appellant's affidavit of assessment work was left in the BLM State Office on that day. However, it was left after regular business hours. The regulations expressly note that "[a]pplications and other documents cannot be received for filing by the authorized officer out of the office hours, nor elsewhere than at his office." See 43 CFR 1821.2-1(b). Indeed, 43 CFR 1821.2-2(d) clearly provides that a document delivered after regular business hours must be deemed to have been filed on the next business day. See M.D.C., Inc., 57 IBLA 35 (1981). The Board is invested with no discretion to overlook the clear import of the regulation. See Altex Oil Corp., 61 IBLA 270 (1982). Appellant's affidavit of assessment work must be deemed to have been filed on December 31, 1981. M.D.C., Inc., supra. Thus, the filing was untimely and the claims must be conclusively presumed to be abandoned and void. United States v. Locke, supra.

Appellant notes that on December 15, 1982, the Department published in the Federal Register various amendments to the regulations regarding the filing of affidavits of assessment work or notices of intention to hold claims. See 47 FR 56300 (Dec. 15, 1982). These amendments took effect December 30, 1982. They provide, in part, that "timely filed" as that term is used in 43 CFR 3833.2-1, shall mean "being file[d] within the time period prescribed by law, or received by January 19th after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law." 43 CFR 3833.0-5(m) (47 FR 56305 (Dec. 15, 1982)) (emphasis added). Appellant suggests that we should apply this amended regulation to his case.

This regulation is not applicable to appellant's situation by its own terms. The 20-day grace period applies only in instances where the appropriate document was mailed on or before December 30, as evidenced by a dated

postmark. The amended regulation simply has no bearing, even if it were to be applied retroactively, where the relevant document was hand delivered to a BLM office.

[2] We are also aware, however, that on November 19, 1982, the Acting Associate Director, BLM, issued Instruction Memorandum (I.M.) No. 83-110, which bears directly on this appeal. After recounting the basic factual situation of the instant appeal, 3/ the I.M. directed:

All State Offices will operate on extended hours on December 30, 1982, for the purpose of receiving annual filings. All State Offices will stay open to at least 7:00 p.m. but no later than 9:00 p.m. on that date. Each State and District Office public affairs unit shall issue a news release to this effect immediately so that the mining community is informed of the extended hours of operation at least a month in advance of the December 30 deadline.

While this practice was discontinued the next year because of a lack of public response and the change in the regulations relating to the definition of timely filing discussed above (see I.M. 84-156, December 7, 1983), it is clear that, had it been in effect in calendar year 1981, appellant's filing would not have been untimely.

We have noted on numerous occasions that we can apply an amended version of a regulation to a pending case where, to do so, would benefit appellant and not adversely affect any intervening rights. See, e.g., James E. Strong, 45 IBLA 386, 388 (1980). The instant case, however, clearly discloses the existence of such intervening rights.

As noted above, the instant claims are located on the Papago Indian reservation. Upon the failure of appellant to timely file his proof of labor, the claim was conclusively deemed abandoned and void. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981). Coincident thereto, the right to any and all minerals embraced by the claims revested in the Papago Tribe. The Department could not, consistent either with rights of the Papago Tribe or its own fiduciary obligations to the tribe, apply an amended regulation or office procedure so as to revitalize rights of the mining claimant which

3/ The I.M. also opined that "[t]his behavior is not consistent with our stated good neighbor policy or our stated position of easing the regulatory burden on the public at large." We are unable to understand the basis for this implicit criticism of the actions of the State Office since such actions were clearly compelled by the applicable regulation, 43 CFR 1821.2-2(d) (1981), which expressly provides that:

"Any document required or permitted to be filed under the regulations of this chapter, which is received in the proper office, either in the mail or by personal delivery when the office is not open to the public, shall be deemed to be filed as of the day and hour the office next opens to the public."

Thus, contrary to any intimation of the I.M., the actions of the State Office not only comported with Departmental requirements, but the regulations made such actions mandatory.

had already been extinguished. Thus, the Board cannot retroactively apply the extended office hours which were in effect in 1982 to make acceptable appellant's late filing in calendar year 1981. We hold, therefore, that the State Office correctly rejected appellant's late filing of assessment work and affirm its finding that the claims must conclusively be deemed abandoned and void.

In light of our disposition of the recordation issue, appellant's appeal from the decision of Administrative Law Judge Rampton is moot and must be dismissed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Arizona State Office, BLM, is affirmed, and the separate appeal from the decision of Administrative Law Judge John R. Rampton, Jr., is dismissed as moot.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Franklin D. Arness
Administrative Judge.

