

RALPH C. MEMMOTT

IBLA 84-107

Decided September 27, 1985

Appeal from a decision of the Utah State Office, Bureau of Land Management, declaring the Grass Valley #1 through Grass Valley #8 unpatented placer mining claims (U MC 232706 through U MC 232713) abandoned and void.

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: Abandonment -- Mining Claims: Assessment Work

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings 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 the claim being extinguished, and therefore abandoned and void.

2. 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 -- Mining Claims: Assessment Work

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

3. Constitutional Law: Generally -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim

The Supreme Court has definitively established in United States v. Locke, 105 S. Ct. 1785 (1985), that the provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, which provide that, upon the failure

of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, are constitutional, and do not result in a deprivation of due process of law.

4. Mining Claims: Lands Subject to -- Patents of Public Lands: Effect

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are void ab initio.

APPEARANCES: Ralph C. Memmott, Fillmore, Utah, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Ralph C. Memmott has appealed from a July 15, 1983, decision of the Utah State Office, Bureau of Land Management (BLM), which declared the Grass Valley #1 through Grass Valley #8 unpatented lode mining claims (UMC 232706 through UMC 232713) abandoned and void because no evidence of annual assessment work or notice of intention to hold the claims had been filed in 1981 (1980/81 assessment year). The decision also stated that appellant

may wish to relocate subject mining claim(s) \* \* \* providing that there are no intervening third party rights and the lands are open to mineral entry. The SW 1/4 SW 1/4 sec. 26, T. 19 S., R. 2 W., SLM was patented January 28, 1916 (H.E. 510385) with no reservation of minerals to the United States. [Emphasis in original.]

On May 5, 1984, notice was given that this Board was suspending consideration of this appeal pending a decision by the United States Supreme Court in United States v. Locke. On April 1, 1985, the Supreme Court rendered an opinion (United States v. Locke, 105 S. Ct. 1785 (1985)), and this case once again became ripe for review.

The record discloses that the claims were located by appellant and three co-locators on November 18, 1980. Copies of the location notices were filed with the Millard County Recorder's Office on November 19, and with BLM on December 23, 1980. BLM subsequently assigned mining claim recordation numbers U MC 232706 through U MC 232713 to the claims. No notice of intention to hold the claims, affidavit of assessment work, or detailed report (as provided for in 30 U.S.C. § 28-1 (1982)) relating to the claims was filed by appellant or his co-owners in 1981. An affidavit of assessment work was filed by appellant on December 30, 1982.

[1] The law applicable to this case can be found at 43 U.S.C. § 1744 (1982) which provides in pertinent part:

§ 1744. Recordation of mining claims

(a) Filing requirements

\* \* \* The owner of an unpatented lode or placer mining claim located after October 21, 1976 shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, or a detailed report provided by section 28-1 of Title 30, relating thereto.

(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

\* \* \* \* \*

(c) Failure to file as constituting abandonment; defective or timely filing

The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site. [Emphasis added.]

In his statement of reasons, appellant states that, since the claims were located in the assessment year commencing September 1, 1980, and ending September 1, 1981, no affidavit of annual labor is required for 1981. Appellant notes that section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1732 (1982), provides that: "No provision of this section or any other section of this act shall in any way amend the Mining Law of 1872, or impair the rights of any locators or claims under the Act \* \* \*." <sup>1/</sup> Appellant also notes that 43 U.S.C. § 1744 (1952) had

<sup>1/</sup> Appellant's quotation omits the critical qualifying language at the beginning of the quoted sentence which reads: "Except as provided in section 1744 [mining claim recordation provisions] \* \* \* no provision \* \* \* of this Act shall in any way amend the Mining Law of 1872 \* \* \*." 43 U.S.C. § 1732(b) (1982).

been found to be unconstitutional in Locke v. United States, 573 F. Supp. 472 (D. Nev. 1983). <sup>2/</sup>

[2, 3] As previously noted, this matter was suspended pending a Supreme Court determination in United States v. Locke, *supra*. In Locke the Supreme Court found that 43 U.S.C. § 1744 (1982) was constitutional and that it was the intent of Congress to extinguish those claims for which timely filings were not made. The Supreme Court further found that failure to file on time, in and of itself, causes claims to be lost. Locke, *supra* at 1795-96. Appellant's failure to file a notice of intent to hold, an affidavit of assessment work performed, or a detailed report related thereto, as required by 43 U.S.C. § 1744(a)(1) (1982), caused appellant's claims to be abandoned and void. The BLM decision is affirmed. The fact that appellant was not required to do assessment work did not relieve appellant of the duty to file a notice of intent to hold during the calendar year 1981. To the extent that the decision refers to the "assessment year 1980/81," it is modified to reflect that no filing was made prior to December 31, 1981.

[4] Appellant also contends the BLM decision that the lands in HE 510385 were unavailable for mineral entry was in error. The basis for this contention is the fact that a patent to lands under the Stock-Raising Homestead Act of 1916, 43 U.S.C. §§ 291-301 (1976), reserved minerals to the United States. However, an examination of the patent to HE 510385 discloses that this tract was patented pursuant to the Act of May 20, 1862, 43 U.S.C. §§ 161-164, 173, 175, 183, 184, 201, 211, 255 (1976), without reservation of minerals. <sup>3/</sup>

Mining claims may be located only on lands open to the operation of the United States mining laws. Lands which are patented without reservation of minerals to the United States are not available for the location of mining claims. <sup>4/</sup> Mining claims located on such lands are null and void ab initio. *E.g.*, Paul S. Coupey, 33 IBLA 178 (1977); Floyd W. McCarthy, 28 IBLA 246 (1976); Montana Copper King Mining Co., 20 IBLA 30 (1975). As no minerals were reserved in the patent of HE 510385, the lands contained therein are not available for mineral entry.

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<sup>2/</sup> As previously noted, this case was appealed to the United States Supreme Court, *sub nom.* United States v. Locke.

<sup>3/</sup> The Stock-Raising Homestead Act of 1916 and the Act of May 20, 1862, were repealed by FLPMA, 90 Stat. 2789 (1976).

<sup>4/</sup> It was not until 1909 that Congress provided for separation of the mineral estate and mandatory reservation thereof in public land patents. *See generally* United States v. Union Oil Co. of California, 549 F.2d 1271, 1275 (9th Cir. 1977), *cert. denied*, 434 U.S. 930 (1978) (discussion of history and rationale for separation of the estates in patents).

Accordingly, 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 hereby.

R. W. Mullen  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

