

BUCK WILSON

IBLA 84-122

Decided October 1, 1985

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, declaring various mining claims abandoned and void for failure to file evidence of assessment work or notice of intention to hold the claims. NM MC 84078, NM MC 90246 through NM MC 90279, NM MC 103315 through NM MC 103324, NM MC 104540 through NM MC 104542, and NM MC 110612 through NM MC 110739.

Affirmed in part; reversed in part.

1. Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Timely Filing

The characterization of a submission as an appeal or request for reconsideration is not dispositive of how it should be treated. Even though an individual has not characterized a submission as an "appeal," where the effect of such submission is to challenge either the conclusion or the factual predicates of an adverse decision, it should be treated as an appeal.

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

Under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), a holder of a claim located prior to Oct. 21, 1976, must file evidence of assessment work or a notice of intention to hold the claim no later than Oct. 22, 1979, and each year following the initial filing, and the holder of a claim located after Oct. 21, 1976, must make a similar filing commencing in the calendar year following the date of location and within each calendar year thereafter.

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

"Timely filed." Under 43 CFR 3833.0-5(m), for the purpose of determining whether the annual filing mandated by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), is timely filed,

the phrase "timely filed" is defined to mean "being filed 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."

APPEARANCES: Buck Wilson, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Buck Wilson seeks to appeal from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated July 18, 1983, declaring certain mining claims null and void for failure to file evidence of annual assessment work as required by section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1982). ^{1/} Before turning to the substance of the appeal, however, it is first necessary to ascertain whether or not the July 18, 1983, decision was timely appealed.

On various dates in 1976 and 1979 through 1981, Wilson located the subject mining claims in New Mexico, which aggregate 176 claims in number. Notices of location for these claims were duly filed with BLM. However, by letter of April 8, 1983, the New Mexico State Office directed appellant to provide evidence that either proofs of labor or notices of intent to hold the recorded claims had been filed with BLM. The decision attempted to explain the statutory filing requirements as follows:

Section 314(a) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744), requires that the owner of an unpatented mining claim shall file, prior to December 31 of each calendar year following the assessment year in which the claim was located, either a notice of intent to hold the claim, or evidence of annual assessment work. The assessment year is defined as September 1-August 31. Therefore, in order to comply with the filing requirements of Section 314 of the Act, claimants of mining claims located after 12:00 noon on September 1, will have to file prior to December 31 with the proper BLM office, a notice of intent to hold the mining claim or evidence of annual assessment work performed on the claim. Similar information must be filed for each successive calendar year. A copy of the regulation is enclosed.

You are hereby requested to submit the required evidence of assessment work or notice of intent to hold the claims for the specific calendar years as shown on Enclosure No. 1. In order

^{1/} Consideration of this appeal was stayed pending judicial review of the mining claim recordation provision of FLPMA. The constitutionality of these provisions was recently upheld by the United States Supreme Court in United States v. Locke, 105 S. Ct. 1785 (1985).

for this information to be acceptable it must contain proof of previous timely filings with the Bureau of Land Management.

As will be made clear infra, the decision of the State Office was replete with substantive errors and statutory misinterpretations. At the present juncture, suffice it to note that appellant submitted no response to this missive. By decision dated July 18, 1983, the State Office declared the subject claims abandoned and void.

On August 9, 1983, BLM received a letter from appellant, dated August 5, clearly in response to the July 18 decision, explaining that he was having difficulties in submitting the request documents because "the proof of labor was sent from the office without my signature being notarized." On August 22, 1983, appellant submitted copies of his 1983 assessment filings. By letter dated September 7, 1983, the State Office returned the proofs of labor and the August 5 letter "because they are invalid." This letter further provided that "our decision of July 18, 1983, declaring your mining claims abandoned and void remains in effect." Since the State Office did not treat the August 5 letter as a notice of appeal, it subsequently closed the case files and it was only after inquiry from this Board that the files were eventually transmitted to us for review.

[1] Thus, the timeliness of this appeal is dependent upon whether or not we treat appellant's letter of August 5 as a notice of appeal. Admittedly, nowhere in that letter does Wilson ever state that he wishes to appeal. But no talismanic significance has ever been attached to the actual language used in submissions directed to BLM. Thus, in Duncan Miller (On Reconsideration), 39 IBLA 312 (1979), this Board noted that the characterization of a submission as a "protest" or as an "appeal" is not binding upon a State Office, pointing out that it is only by reference to the nature of a submission that a determination can be made as to whether the submission is properly treated as an appeal or protest or something else.

In the instant case, the State Office had determined that the subject claims were abandoned and void because of Wilson's failure to provide evidence that he had filed the required documents with BLM. Wilson responded by adverting to his efforts to obtain documents which he thought were relevant as an explanation for his delay. To the extent, therefore, that the State Office decision was occasioned by his failure to timely comply with its earlier request, Wilson was clearly challenging the decision. We must conclude that appellant did timely file an appeal, even though we grant that it was obscurely phrased.

Before determining whether the necessary affidavits of labor were filed, it is incumbent to correctly state the filing requirements embodied in section 314 of FLPMA. We note at the outset that they bear scant resemblance to the theories advanced by the State Office in the decision below. For purposes of this analysis we must differentiate between claims located prior to the adoption of FLPMA and those located thereafter.

[2] For pre-FLPMA claims the statute required that each claim be recorded with BLM no later than October 22, 1979. See 43 U.S.C. § 1744(b) (1982). In addition to mandating the recordation of each claim, however, section 314 of FLPMA further required the filing of an affidavit of assessment work or a notice of intention to hold the claim by the October 22, 1979, deadline, and each year thereafter commencing with the initial filing under section 314(a), 43 U.S.C. § 1744(c) (1982). See NL Industries, Inc. v. Secretary of the Interior, 766 F.2d 1380 (9th Cir. 1985).

With respect to claims located subsequent to the adoption of FLPMA, the statute required that a mineral locator provide BLM with a copy of the official record of the notice or certificate of location within 90 days after the date of the location. Section 314 further required a claimant to file annual proofs of labor or notices of intention to hold commencing prior to December 31 following the calendar year in which said claim was located. See 43 U.S.C. § 1744(a) (1982).

As is readily apparent, the annual requirements of section 314 have absolutely nothing to do with the assessment year, which presently runs from September 1 to September 1. In fact, section 314 does not even mention the assessment year, a point to which we have expressly alluded. See Oregon Portland Cement Co., 66 IBLA 204 (1982). ^{2/} Thus, the statement rendered in the April 8, 1983, decision that "in order to comply with the filing requirements of Section 314 of the Act, claimants of mining claims located after 12:00 noon on September 1, will have to file prior to December 31 with the proper BLM office, a notice of intent to hold the mining claim or evidence of annual assessment work performed on the claim," has no basis in the statute, the implementing regulations, or the decisions of this Board. Moreover, as our review of the subject filings will make clear, the State Office erred, as a matter of law, in determining that certain of these claims were abandoned and void.

For purposes of our review, it will be necessary to differentiate between certain claims and groups of claims. Thus, the John David No. 1 (NM MC 84078) is the only claim located prior to the enactment of section 314 of FLPMA. While the notice of location was duly recorded with BLM on October 18, 1979, the statute further required that either a notice of intention to hold the claim or proof of assessment work be filed no later than October 22, 1979, and each year after that filing. As of the date of the decision by the New Mexico State Office, not a single annual filing had

^{2/} This decision was substantially reversed by a decision of the Alaska District Court reported as Oregon Portland Cement Co. v. United States Department of the Interior, 590 F. Supp. 52 (1984). See also Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186 (1984). While no appeal was taken from the decision of the District Court of Alaska, the subsequent decision of the Ninth Circuit Court of Appeals in NL Industries, Inc. v. Secretary of the Interior, supra, which was, itself, premised on the Supreme Court decision in United States v. Locke, supra, effectively overruled the legal predicates of the District Court for Alaska.

been made, nor does appellant allege that any was sent to BLM. The decision declaring this claim abandoned and void must be affirmed.

Thirty-four claims were located on October 18, 1979. These were the MLW Nos. 1 and 2, and the Lone Well Nos. 1 through 32 (NM MC 90246 through NM MC 90279). These claims were recorded on January 15, 1980. Thus, under the statute, appellant was required to file a notice of intent to hold or evidence of annual assessment work prior to December 31, 1980, and each year thereafter. ^{3/} On December 10, 1980, appellant filed proof of labor for these claims. Though not without certain problems ^{4/} these proofs were placed in the subject case files.

On January 3, 1983, the State Office received another proof of labor for these claims. Unlike the previous year's filing this one contained various recordation numbers. They were, unfortunately, the wrong numbers for these claims, relating instead to others claims filed by appellant.

However, even assuming these filings could be credited to the Lone Well and MLW claims for calendar year 1982 (see discussion infra) there is no indication in any of the case files that an annual filing was made for calendar year 1981. Nor has appellant submitted any evidence that such a

^{3/} There is another troubling aspect of the instant case that bears comment. In its Apr. 8, 1983, notice, BLM included a separate sheet purporting to describe the year for which appellant was required to show that he had made an annual filing. As originally typed, this list included the requirement that appellant show an annual filing for the year of location for all claims located after FLPMA. This, of course, was erroneous, as the annual filing requirement does not commence until the year following the date of location. However, at some undetermined point in time, someone crossed off these years for all of these claims. Of particular note, with respect to certain claims located in July 1981, the year 1981 was crossed off and the year 1982 was added.

What is most distressing about this is that, on appeal, Wilson has submitted various documents in an attempt to show his compliance with the law, including what seems to be the original copy of the Apr. 8 enclosure. This document contains no cross outs nor does it indicate that appellant was required to show that he had tendered evidence of assessment work for calendar 1982 insofar as the July 1981 locations were concerned. There is no indication that a corrected copy of the enclosure was ever sent to appellant. If this is the case, the State Office, in effect, retroactively changed the basis of its decision without notice to appellant. This is not acceptable adjudicative practice.

^{4/} These proofs did not contain the original recordation numbers and further confused matters by referring to the "Lone Well Mining Claims Nos. 1 through 32 located in sections 24 and 25, Range 20 W., Township 9 S.," and also to the "Lone Well Mining Claims Nos. 21 through 32 located in unsurveyed territory, Range 19 W., Township 9 S." A review of the case file shows that some of the Lone Well claims were in secs. 24 and 25, T. 9 S., R. 20 W., whereas others were in unsurveyed parts of T. 9 S., R. 19 W. Nevertheless, BLM apparently treated this filing as valid as to all of the Lone Well claims.

filing was submitted to and received by BLM. Accordingly, we must find that no filing for these claims was made in calendar year 1981, and therefore, these claims must be deemed abandoned and void. The State Office decision on these claims is affirmed.

The next group of claims consists of the Jack Rabbit Nos. 1 and 2 and the Black Bird Nos. 1 through 8. These claims were located on October 14 and 15, 1980, and recorded on January 13, 1981 (NM MC 103315 through NM MC 103324). Under the statute, therefore, evidence of assessment work or a notice of intent was required to be filed no later than December 30, 1981. No such filing appears in the case files nor does appellant allege that he sent proofs which were received by the State Office. The decision declaring these claims abandoned and void is affirmed.

The Devil's Diggins Nos. 1 through 3 were located on January 20, 1981, and recorded on March 23, 1981 (NM MC 104540 through NM MC 104542). A proof of labor with the assigned numbers was filed on January 3, 1983. However, the claims described in the proof of labor were the Jim Bob claims Nos. 1 through 8, which are located in a different county. Such a filing could only be properly credited to the Jim Bob claims, since it is clear from the terms of the affidavit that the recordation numbers added by appellant are simply erroneous. ⁵/ Therefore, the decision below finding these three claims abandoned and void is affirmed for a failure to file evidence of assessment work or a notice of intent to hold for calendar year 1982.

[3] Finally, we come to the Big Black Bird claims Nos. 9 through 136. These claims were located on July 14 and 15, 1981, and recorded on September 25, 1981 (NM MC 110612 through NM MC 110739). Under the statute, the initial proof of labor was due on or before December 30, 1982. On January 3, 1983, appellant filed proof of labor for these claims. The envelope was postmarked December 29, 1982. Under the applicable regulations, 43 CFR 3833.0-5(m), for the purposes of determining whether the annual filing is timely filed, the phrase "timely filed" is defined to mean "being filed 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." (Emphasis supplied.) Appellant's submission falls within the underlined language.

It seems reasonably clear that BLM's decision with respect to the Big Black Bird claims resulted not from a failure to apply 43 CFR 3833.0-5(m), but rather flowed from its erroneous view that appellant was required to submit an annual filing prior to December 31, 1981. As noted above, for a post-FLPMA claim the claimant must make his initial filing prior to December 31 of the calendar year following the year of location. Thus, BLM's decision finding the Big Black Bird claims Nos. 9 through 136 abandoned and void must be reversed.

⁵/ Inasmuch as the Jim Bob claims are not part of the instant appeal, we assume that the proofs of labor were duly credited to those claims.

Accordingly, 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 New Mexico State Office finding various claims abandoned and void is reversed as to the Big Black Bird Nos. 9 through 136, and affirmed as modified as to all other claims.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Franklin D. Arness
Administrative Judge

