

JAMES J. KOHRING

IBLA 84-270

Decided November 14, 1985

Appeal from decision of the Anchorage, Alaska, District Office, Bureau of Land Management, declaring two millsite claims abandoned and void. AA-14631, AA-23394.

Reversed.

1. Federal Land Policy and Management Act of 1976: Assessment Work--Mining Claims: Generally--Millsites: Generally

The failure of a holder of a millsite claim which has been properly recorded under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), to file an annual notice of intention to hold the millsite is a curable defect. Where the Bureau of Land Management fails to notify a millsite claimant of a defective filing, and to request curative data prior to the time annual notices are submitted in subsequent years, BLM has effectively waived the defective filing and may not declare the millsite claim abandoned and void because of the absence of that document from the file.

APPEARANCES: James J. Kohring, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

James J. Kohring appeals from a decision of the Anchorage District Office, Bureau of Land Management (BLM), dated December 23, 1983, declaring the Alpha Millsite claim, AA-14631, which had been recorded with BLM on September 30, 1977, and the Canyon Creek Millsite claim, AA-23394, which had been recorded with BLM on December 12, 1978, to be abandoned and void because appellant failed to file notice of intention to hold the millsite locations for 1979 in response to a show cause order issued on July 5, 1983.

The order reads in part:

The regulations at 43 CFR 3833.2-1(c) requires [sic] the owner of a millsite to file a notice of intention to hold the millsite with BLM. [1]

The owner of a mill site or tunnel site located on Federal lands, excluding lands within a unit of the National Park System established on or before September 28, 1976, but including lands within a national monument administered by the National Park Service or the United States Forest Service shall have filed or caused to have been filed in the proper BLM office on or before December 30th of each year following the year of recording pursuant to 3833.1-2 of this title, a notice of intention to hold the mill site or tunnel site.

A notice of intention to hold a mill site or tunnel site or a group of mill sites or tunnel sites, shall be in the form of a letter or other notice signed by the owner(s) of such sites or their agent(s) setting forth the following information:

The Bureau of Land Management serial number assigned to each site upon filing in the proper BLM office of a copy of the official record of the notice or certification of location;

Any change in the mailing address, if known, of the owner(s) of the site(s).

The claimant is hereby ordered to show cause why his millsites should not be deemed abandoned and void for failure to comply with the statutory and regulatory requirements for annual filings.

Further action is being withheld for 30 days to allow the claimant an opportunity to provide evidence of the notice of intention to hold for 1979. If sufficient evidence is not received within 30 days of receipt of this order, action must be taken to declare the millsites abandoned and void in accordance with 43 CFR 3833.4(a).

Appellant did not respond and BLM declared the millsites abandoned and void.

Appellant asserts in his statement of reasons it was his understanding that the millsites did not require filings of notices of intent to hold prior

1/ The following language is not a complete or accurate quotation of the requirements of 43 CFR 3833.2-1(c) or 3833.2-3(c) (1983).

to December 1978, providing that their associated lode claim 2/ remained in good standing. Since appellant filed an affidavit of assessment in 1979 for the lode claim, he contends that BLM should have deemed the two millsites "valid." Further, he claims his actions clearly exhibited "intent" to hold the millsite claims, as the 1979 lode claim affidavit indicates use of one of the millsites and, in addition, he asserts he filed affidavits of intent to hold the millsites and mining claim for the 1980, 1981, 1982, and 1983 assessment years.

The applicable regulation, 43 CFR 3833.2-3(c), does not specify that the notices to be filed take any particular form. It requires only certain minimal information be submitted. Thus, each year a millsite claimant is required to submit a document which includes his (or his agent's) signature, the BLM serial number, and any change of address.

The question presented by this appeal is whether millsite claims may be declared null and void where the holder fails to comply with a 1983 BLM request to cure a 1979 defective filing when, during the interim, annual filings were made. We think not.

[1] Section 314(a) and (b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) and (b) (1982), clearly disclose an intent to differentiate among mining claims, millsites, and tunnel sites. Section 314(a), relating to proof of assessment work and notices of intention to hold, is directed to "the owner of an unpatented lode or placer mining claim;" whereas section 314(b), relating to notices of location, is directed to "the owner of an unpatented lode or placer mining claim or mill or tunnel site." (Emphasis added.) Although we noted in Feldslite Corporation of America (Feldslite), 56 IBLA 78, 81, 88 I.D. 643, 645 (1981), that with reference to millsites, FLPMA must be read as only requiring the filing of notices of location, we further stated, "But it is also clear that Departmental regulations require the filing of notices of intention to hold" for millsites. (Emphasis added.)

This Board found in Feldslite, supra, however, that there is a difference between the consequences which attend a failure to comply with a statutory recordation requirement and one which, as here, is purely regulatory. We concluded that failure to comply promptly with those requirements based on purely regulatory language is subject to curative action, and held that

upon the failure of a millsite claimant to file an annual notice of intention to hold, BLM should notify the claimant of this deficiency and afford the claimant a period of time in which to comply with the regulatory requirement. Should compliance not then occur, the millsite will properly be declared abandoned and void.

2/ Appellant recorded lode mining claim Alpha #1, AA-14632, on Sept. 30, 1977. We note that the Alpha #1 mining claim was declared null and void by BLM in a decision dated Nov. 8, 1984. The basis for that decision was the failure to respond to a contest complaint dated Aug. 31, 1984. No appeal was taken from that BLM decision.

Feldslite, *supra* at 83, 88 I.D. at 646. 3/

The Department's purpose in adopting the regulatory requirement that notices of intention to hold be filed for millsites was to insure that BLM was informed of the status of the sites. See footnote 3, Feldslite, *supra*, where we quoted Assistant Secretary Martin as follows:

"One comment pointed out that the statute did not require the annual filing of a notice of intent to hold a mill or tunnel site and the requirement should be deleted. However, the section is needed so the Bureau can keep informed as to the status of sites and has been retained."

44 FR 9721 (Feb. 14, 1979).

By the time BLM notified appellant of the defective 1979 filing, the records show he had filed annually with BLM notices of intention to hold the millsites in 1980, 1981, 1982 and 1983.

In Feldslite, *supra*, we recognized that BLM could properly extinguish a millsite where the holder did not cure a defective filing after notice to do so. In that case, however, when the BLM decision was issued no interim annual filing had been made. Thus, we did not have the occasion in Feldslite to consider, as we do here, the effect of subsequent annual filings made prior to the BLM notice to cure a defective filing.

Considering the amount of information required to be submitted under the regulation, and the Departmental purpose for which it was intended, we think the consequences resulting from strict application of 43 CFR 3833.4(b) under the circumstances herein are too harsh and totally unwarranted. We conclude therefore that where BLM fails to notify a millsite claimant to cure a defective filing prior to the time a subsequent annual filing is made, BLM has effectively waived the defective filing and may not declare a millsite claim abandoned and void based on absence of that document from the file.

3/ Subsequent to the issuance of Feldslite, the Department amended the regulation at 43 CFR 3833.4(b) to provide:

"(b) The failure to file the information required in §§ 3833.1-2(b), 3833.2-1(c), 3833.2-2(a) and (b) or 3833.2-3(b) and (c) shall not be deemed conclusively to constitute an abandonment of the claim or site, but such information shall be filed within 30 days of receipt of a decision from the authorized officer calling for such information. Failure to file such information within the time allowed by decision shall cause the filing to be rejected by a decision appealable under the procedures of Part 4 of this title. Final affirmance of such rejection for failure to file such information shall be deemed conclusive evidence of abandonment of the mining claim, mill or tunnel site and such mining claim, mill or tunnel site shall be void. 47 FR 56307 (Dec. 15, 1982).

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 reversed.

Gail M. Frazier
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

