

JOHN H. BLACKWOOD

IBLA 83-876

Decided November 22, 1985

Appeal from a decision of the California State Office, Bureau of Land Management, holding abandoned and void the Indiana Placer Mine mining claim CA MC 48170.

Appeal dismissed.

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

Constructive service of a Bureau of Land Management decision sent by certified mail to an applicant's address of record is made when the post office returns the decision to the Bureau stamped "unclaimed." The 30-day period for filing a notice of appeal from the decision commences at that time, and is not tolled, extended, or the constructive service vitiated, by actual receipt of the decision thereafter.

2. 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 only by probative evidence to the contrary.

APPEARANCES: Joy O'Clock, Esq., Santa Ana, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

John H. Blackwood appeals from a decision of the California State Office, Bureau of Land Management (BLM), dated June 3, 1983, holding the Indiana Placer Mine mining claim to be abandoned and void. BLM's decision was based on its finding that no evidence of assessment work or notice of intention to hold this claim for calendar year 1981 was received in the State Office. Citing section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982), BLM stated that appellant's failure to file either of the aforementioned documents was deemed conclusively to constitute an abandonment of the Indiana Placer Mine mining claim.

Section 314(a) requires an owner of an unpatented lode or placer mining claim located prior to FLPMA's enactment (Oct. 21, 1976) to file with BLM within the 3-year period following the date of approval of the Act and prior to December 31 of each year thereafter one of three documents: a notice of intention to hold the mining claim, an affidavit of assessment work, or a detailed report provided by the Act of September 2, 1958, 30 U.S.C. § 28-1 (1982). The constitutionality of this statute was recently upheld by the United States Supreme Court in United States v. Locke, 105 S. Ct. 1785 (1985). In that decision the Court addressed the effect of a failure to file:

Congress intended in § 314(c) to extinguish those claims for which timely filings were not made. Specific evidence of intent to abandon is simply made irrelevant by § 314(c); the failure to file on time, in and of itself, causes a claim to be lost. See Western Mining Co. v. Watt, 643 F.2d 619, 620 (CA 9 1981).

105 S. Ct. at 1795-96.

Appellant does not dispute the effect of a failure to file, but contends that a copy of his proof of labor for the Indiana Placer Mine was personally delivered, with a request that it be filed, to the State Office during the last week of December 1981 by one Joseph R. De Marco. An affidavit by De Marco to this same effect is offered in support of this contention. Appellant further states that his proof of labor was first filed with the Placer County Recorder on October 1, 1981, and includes with his statement of reasons a photocopy of this document.

Following receipt of appellant's statement of reasons, an inquiry was made to the California State Office seeking a response to appellant's contentions. The Associate State Director, by memorandum of October 17, 1983, responded in this way:

We have researched our records again, by every cross-reference method possible, and still do not find a record of the appellant's 1981 assessment filing.

The declaration states that the assessment notice was hand delivered to this office. Our standard procedure during that time period was to immediately receipt all over-the-counter assessment filings. The method was to give the customer a completed gold acknowledgment postcard as shown on the enclosed sample.

Further action on this case was suspended at that time, however, pending the Supreme Court's consideration of the constitutionality of section 314 of FLPMA in United States v. Locke, *supra*. Subsequent to that decision, a copy of the Associate State Director's response and our inquiry was served on appellant by order of April 19, 1985. This order invited appellant to respond, but no response was received.

Although the record is sufficiently complete to adjudicate this appeal on the merits, there appears a procedural defect that prevents this Board

from exercising jurisdiction and requires that the instant appeal be dismissed with prejudice. The file reveals that BLM mailed its decision of June 3, 1983, to John and Margaret Blackwood at 391 Clipper Gap Road, Auburn, California 95603, return receipt requested. A post office claim check attached to the envelope bearing this decision indicates the post office gave its first notice of attempted delivery on June 14, 1983, and its second on June 20, 1983. In a space designated "Return" on the claim check, the post office has inserted the date "6/30/83." The decision was eventually returned to BLM on July 12, 1983, and resent by regular mail on July 13, 1983, and was apparently delivered to appellant some time thereafter. The file is silent as to the date of actual receipt.

The procedural defect referred to above becomes apparent upon examining the notice of appeal. This document, dated August 12, 1983, was received by the State Office on August 15, 1983. The applicable regulation, 43 CFR 4.411(a), requires that a person wishing to appeal must file a notice of appeal within 30 days after the date of service. Thus, if service must be deemed to have been effected upon the return of the original decision to the State Office, i.e., on July 12, 1983, appellant's notice of appeal would be untimely.

[1] In John Oakason, 13 IBLA 99 (1973), this Board held that a person who failed to receive a decision by certified mail had nevertheless been constructively served on that date when the post office returned to BLM the decision it had correctly, although unsuccessfully, sought to deliver. ^{1/} The facts in Oakason bear a marked similarity to those disclosed in the instant case. Thus, in Oakason, after the decision had been returned to the State Office, actual service was effected on appellant when he visited the State Office approximately 1 week later. Ultimately, Oakason's notice of appeal was filed within 30 days of the date of actual service but more than 30 days after the date of constructive service. In dismissing this appeal, the Board expressly held that subsequent actual service does not nullify the effect of earlier constructive service. Thus, the Board stated:

While the regulation sets forth alternative methods for effectuating service of a decision upon a person, this does not mean that when constructive service has been effectuated in accordance with the regulations, the constructive service is vitiated when actual notice is given thereafter. Duncan Miller, [A-31054 (August 21, 1969)]. See also Arthur M. Moylan, Jr., A-28237 (March 29, 1960). The party being served does not have the right to elect the method service is to be made upon him by ignoring the fact a constructive service has already been made and thereby attempt to extend the period within which an appeal may be taken.

^{1/} The rule in Oakson is based on two assumptions: first, that BLM's decision was sent to appellant's last address of record, and second, that the Postal Service properly performed its duties. There is no indication that either assumption does not obtain in the instant case. See Michele M. Dawursk, 71 IBLA 343 (1983).

Id. at 104-105. Moreover, the Board also rejected Oakason's argument that BLM employees should have informed him of the earlier attempted delivery when he actually received the decision, noting that constructive receipt implicitly imputes actual receipt and the knowledge which actual receipt will provide to those who have not, in fact, received the document. Thus, Oakason would be presumed to know the real state of the facts. 2/

Similarly, in the instant case, the fact that BLM, as an additional courtesy, sent appellant another decision after already effecting service does not serve to waive the initial service or otherwise extend the time limit for filing a notice of appeal. Accordingly, we hold that service occurred on July 12, 1983. Thus, the notice of appeal was due no later than August 11, 1983. Inasmuch as it was not received until August 15, 1983, it was clearly untimely. Moreover, we can not apply the grace provisions of 43 CFR 4.401(a) to this case. That regulation permits a waiver of a late filing if it is received within 10 days of the due date and it can be shown that the document was transmitted or probably transmitted "before the end of the period in which it is required to be filed." In this case, inasmuch as the notice of appeal was not dated until after the 30-day period had expired, it is clear that the grace period can not be applied.

The consequences of a failure to timely file a notice of appeal are well established. The timely filing of the appeal is jurisdictional, and, absent such a filing, the Board has no authority to entertain the appeal. See George Schultz, 81 IBLA 29 (1984).

[2] Even were we to consider Blackwood's appeal on its merits, BLM's decision would nevertheless be affirmed. A legal presumption of regularity supports the official acts of public officers in the proper discharge of their duties. Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); Phillips Petroleum Co., 38 IBLA 344 (1978). In H. S. Rademacher, 58 IBLA 152, 155, 88 I.D. 873, 875 (1981), we stated: "It is presumed that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing."

Appellant alleges that the statement of a disinterested third party that he had personally hand-delivered the necessary filings is exactly the type of probative evidence that should be deemed to overcome this presumption. Admittedly, the averments made by De Marco represent a substantially greater showing than is normally presented in cases where the presumption of regularity is under challenge. Nevertheless, the present record leaves two critical questions unanswered.

First, what was the relationship of De Marco to appellant? De Marco's affidavit states that he has no interest in the claim but that he had agreed to file the proof of labor "as an accommodation to the owners." Obviously, De Marco was acquainted with appellant but whether or not this was based on a

2/ As the Board noted, subsequent attempts of delivery are but "a courtesy" afforded the individual and in no wise affect the legal consequence flowing from constructive receipt.

familial relationship, business dealings, or was simply a casual acquaintance is unexplained. Furthermore, De Marco's affidavit is silent on the question whether he made other filings at that time, either for himself, Blackwood, or other parties. These questions are relevant not only because they go to the ultimate credibility of De Marco but the answers also might establish either inadvertent misfiling by BLM or an equally inadvertent failure to file by De Marco.

Even more critical, however, is the question of the receipt for the filing. Did De Marco receive the gold acknowledgement card and, if so, what happened to it? Submission of such a proof would virtually ensure reversal of the decision below. Yet, when this Board sought further comments from appellant by our order of April 19, 1985, none was forthcoming. If De Marco asserts that he did not receive such an acknowledgment, appellant is essentially alleging two separate and discrete errors by the State Office: first, that the State Office misfiled the document; and second, that the State Office failed to follow its procedures and issue a receipt for the filing when it was made. Inasmuch as the issuance of these receipts is designed to afford a claimant with independent proof of filing should the document be misfiled, the failure to present such a proof on appeal must weigh quite heavily against a claimant who alleges that BLM did, in fact, receive the document.

In light of these considerations, we would be constrained to conclude, were we vested with jurisdiction over this appeal, that appellant had failed to overcome his burden of showing that the filing was made. However, as noted above, the notice of appeal was not timely filed and hence this Board is without jurisdiction in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge

