

Editor's note: Reconsideration denied by Order dated Feb. 19, 1987

ROBERT C. LeFAIVRE

IBLA 85-720

Decided December 12, 1986

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, declaring mining claims abandoned and void. WMC 210250, WMC 210251.

Affirmed.

1. Administrative Procedure: Generally--Appeals--Rules of Practice:
Appeals: Dismissal--Rules of Practice: Protests

Where BLM issues a notice holding mining claims for rejection (that is, where BLM provides the claimant 30 days in which to supply certain information, failing in which his mining claims will be finally declared abandoned and void without further notice), the 30-day period during which an appeal may be initiated with the Board of Land Appeals does not commence until the expiration of the 30-day compliance period allowed by the notice. During the 30-day compliance period, BLM's decision is interlocutory, so that a notice of appeal filed during the compliance period is premature. BLM should treat a notice of appeal filed during the compliance period as a protest and then issue an appealable decision.

However, where a notice of appeal is filed prematurely from an interlocutory decision and the matter is forwarded to the Board of Land Appeals, the Board has discretion whether to remand the case to BLM to be treated as a protest or, instead, to adjudicate the merits of the matter. The Board will reach the merits where there is no practical benefit in remanding the case, such as where the appellant's statement of reasons to the Board makes it clear that he has no information to supply to BLM that will establish that his claims should not be declared void.

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

Where the requirement of annually filing proof of assessment work or a notice of intention to hold

year, i.e., 1983, and filing must be made on or before December 30, calendar

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

The submission of a plan of operations pursuant to 43 CFR 3809 does not satisfy the requirement of filing an affidavit of assessment work or notice of intention to hold a claim imposed by 43 U.S.C. § 1744 (1982).

APPEARANCES: Robert C. LeFavre, pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Robert C. LeFavre has appealed from a notice issued June 4, 1985, by the Wyoming State Office, Bureau of Land Management (BLM), declaring the Flow Lava No. 1 and Pumice No. 6A placer mining claims abandoned and void for failure to file an affidavit of annual assessment work or notice of intention to hold the mining claims. The notice advised appellant as follows:

Many claimants intentionally drop their claims each year without notifying our office, and it is assumed that this was your intent. If this is not the case, AND you did file the required documents for the 1982-1983 and 1983-1984 assessment years, you must present proof or evidence of your filing to this office within thirty (30) days of your receipt of this Notice. Failure to do so within the time period allowed will result in this Notice becoming a final decision and appropriate notations made to our records as to the claims being "abandoned and void" by operation of law. [Emphasis in original.]

The notice also advised appellant of his right to appeal.

In response to a telephone inquiry by appellant, BLM by letter dated June 20, 1985, advised appellant as follows: "A check of the case files of all your claims and sites did not turn up any filing in the calendar year 1983 for either the Flow Lava No. 1 or the Pumice No. 6A." The letter further stated that the claims would be deemed abandoned and void by operation of law unless appellant furnished contrary evidence or filed an appeal on or before July 7, 1985.

[1] As an initial matter, we note that BLM's June 20 letter incorrectly advised LeFavre that his notice of appeal was due on or before July 7, 1985. Although not captioned as such, BLM's June 4 notice was an example of the decisionmaking practice known as "holding for rejection": this notice provided LeFavre with 30 days in which to supply certain information, failing in which his mining claims would be finally declared abandoned and void without further notice. The Board has approved this procedure, with some reservations, and has expressly held in these circumstances that the

30-day period during which an appeal may be initiated does not commence until the expiration of the 30-day compliance period. Randall J. Gerlach, 90 IBLA 338, 339 (1986); Carl Gerard, 70 IBLA 343, 346 (1983). In Gerard, we stated as follows:

We note that BLM has long followed the practice of issuing decisions "holding for rejection" an offer or application for some perceived deficiency, but allowing a stated period of time within which such deficiency might be corrected, failing in which the offer or application will be rejected without further notice. It is our view that, where such a decision clearly contemplates that rejection will occur upon the running of the prescribed period, such a decision is interlocutory. * * * In such a case, the 30-day appeal period commences upon the expiration of the 30-day compliance period. [Emphasis supplied; footnote omitted.]

Thus, in this case, the time for filing the notice of appeal did not commence until July 7, 1985, 30 days after LeFaivre received the June 4 notice. However, LeFaivre filed his notice of appeal on June 24, 1985, prior to the start of the appeal period. At the time the appeal was filed, BLM's notice was interlocutory in nature and was not subject to appeal. Accordingly, BLM should have treated LeFaivre's appeal as a protest and issued a decision on his objections that provided a right of appeal. Kenneth W. Bosley, 91 IBLA 172, 175 (1986); Randall J. Gerlach, supra at 340.

In the past, the Board has dismissed as premature appeals such as this one that are filed during the compliance period, and remanded them to BLM to consider the matters raised in the appeal as a protest. See, e.g., Randall J. Gerlach, supra; James M. Chudnow, 89 IBLA 361 (1985); Raton Basin Partnership, IBLA 86-23 (Nov. 13, 1985). However, dismissal by the Board is not mandatory in these circumstances. Rather, the Board will examine such cases to determine whether there is any practical benefit in dismissing the appeal as premature and remanding the matter to BLM. In this case, there would be no useful purpose in dismissing LeFaivre's appeal as premature and remanding it to BLM, despite the fact that it was filed prior to the commencement of the 30-day appeal period. Procedural principles notwithstanding, cases should not be remanded to BLM where doing so would amount to an unreasonable administrative exercise in futility. Julie Adams, 45 IBLA 252, 254 (1980); see Kenneth W. Bosley, supra; California Ass'n of

^{1/} In our order in Raton Basin Partnership, IBLA 86-23 (Nov. 13, 1985) at 2, we expressed the Board's view that there is less chance for confusion when BLM issues two decisions. The first decision would require compliance with a request for further information (or a request for signing oil and gas stipulations) and state expressly that it was interlocutory and not subject to immediate appeal. The second decision would be issued if there were no compliance, and it would notify the person that his claim had been voided (or his oil and gas lease offer finally rejected) and advise him of his right to appeal. However, BLM has adopted an official policy of issuing just one decision, stating its view that the "two decision process is confusing to the applicant and is wasteful and inefficient." BLM Instruction Memorandum No. 85-194, Change 1, May 16, 1986. While it is for BLM to decide how it wishes to proceed, the Board still favors the dual decision approach.

Four Wheel Drive Clubs, 30 IBLA 383, 387 (1977). The material that LeFaivre has submitted to us in this case makes it clear that he has no information to submit to BLM that will establish that his claims should not be voided. Thus, if the case were remanded to BLM, it would simply issue a decision declaring the claims abandoned and void, resulting in needless delay. Accordingly, in lieu of remanding this matter to BLM, we shall consider its merits.

[2] The two claims at issue were located on January 2, 1981. On March 22, 1981, appellant filed copies of the notices of location with BLM as required by 43 U.S.C. § 1744(b) (1982). An additional filing requirement is imposed by 43 U.S.C. § 1744(a) (1982):

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, on [sic] 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.

In James V. Joyce (On Reconsideration), 56 IBLA 327 (1981), we held that where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after January 1 and on or before December 30. Accord J. E. Stevens, 86 IBLA 291 (1985).

Because appellant's claims were located in 1981, he had until December 30, 1982, to file an affidavit of assessment work or notice of intention to hold the claims. Appellant however filed affidavits of assessment work for these claims with BLM on December 23, 1981, for the 1981-82 assessment year. On December 17, 1982, appellant filed his affidavit of annual assessment work for the claims for the 1982-83 assessment year. He made no filing in 1983. Appellant filed according to the assessment year as opposed to the calendar year. Had appellant made each of these filings one year later, or, indeed, only one month later, he would have complied with the statutory recordation requirement.

Appellant contends that he made his early filing "to provide as positive demonstration of good faith holding as possible." Nevertheless, no filing was required during 1981. The requirements of the law would have been satisfied had appellant submitted his evidence of assessment work performed for the 1981-82 assessment year between January 1, and December 30,

1982, inclusive. See James V. Joyce, supra. Appellant recognizes that the evidence of assessment work to be filed on or before December 30 of each calendar year is the evidence of assessment work performed during the previous assessment year. Appellant's Statement of Reasons notes the overlapping features of the assessment year beginning in one calendar year and ending in the next. The filing made in 1982 was for the current assessment year, 1982-83. Appellant contends he made this filing "to demonstrate intention to hold (in complement to previous filings perhaps unnecessarily made in advance) as well as to cover demonstrated intentions in view of amendment affecting [43 CFR 3833.2-1] When filing is required EFFECTIVE December 30, 1982." (Emphasis in original.) The effective date refers to the effective date of regulatory amendments, 47 FR 56305 (Dec. 15, 1982). Appellant continues:

Upon change of regulation, the color of timely filing changed; however, neither former regulation nor new denounced either early filing or such filing as was made at the point of transition or regulatory camelianism [sic]. Note 43 CFR 3833.2-1(d) specifically and especially the last sentence. 2/ Also see 47 FR 56304, Dec. 15, 1982. Response forward of effective date of December 30, 1982 become mandatory. Your attention is drawn to subsequent filing of October 22, 1984; whereas, the 1983-1984 assessment year stands as testimonial to possessory rights in advance of the close of the assessment year and prior to the then

2/ The full text of subsection (d) reads as follows:

"Section 314 of the Act (43 U.S.C. 1744) requires that the owner of an unpatented mining claim shall file, prior to December 31st of each year following the calendar year in which the claim was located, either a notice of intent to hold the claim, or evidence of annual assessment work. The General Mining laws (30 U.S.C. 28) allow the required annual assessment work to be initiated in the assessment year following the assessment year in which the claim was located. Therefore, in order to comply with the filing requirements of section 314 of the Act, claimants of mining claims located after 12 o'clock noon on September 1st of that same year, shall file with the proper BLM office, a notice of intent to hold the mining claim in the first calendar year following its location. This does not apply to the claimant who elects to perform his assessment work early and wishes to record the assessment work."

If appellant had located his claims between Sept. 1, 1981, and the end of that calendar year, the regulation recognizes that the mining laws would require no assessment work until Sept. 1, 1982, through Sept. 1, 1983, the evidence of which must be filed on or before Dec. 30, 1983. FLPMA, however, requires that evidence of assessment work or a notice of intention to hold the claim be filed on or before Dec. 30, 1982. Because the owner of such a claim is not required to perform assessment work before Dec. 30, 1982, only a notice of intention to hold is required. The last sentence, however, allows the owners of such claims who perform their assessment work at the beginning of the assessment year to record this with BLM. It does not excuse such a claimant from the requirement to make another filing on or before Dec. 30, 1983.

Because this regulation relates only to claims located between noon on Sept. 1 and the end of a calendar year, it has no relevance to appellant's claims, because they were located on January 2.

current December 30th deadline as result of the re-colored regulation. Current calendar year filing with BLM must be made by December 30, 1985. [Emphasis in original.]

It appears that appellant is contending that neither the former nor amended regulations prevented early filings, so his early filing made it unnecessary to make a filing during calendar year 1983. Mining claimants made a similar argument which was rejected by the Board in 1981 in James V. Joyce (On Reconsideration), supra at 330:

Finally, a construction of the statute which permitted the early filing of proof of assessment work would also, by the same logic, permit the early filing of notices of intent to hold the claim. 4/ If we assume, as has been argued to the Board, 5/ that claimants have an election to file either proof of assessment or a notice of intent to hold, regardless of whether the necessity of performing assessment work under 30 U.S.C. § 28 (1976) has accrued, adoption of a system which would permit the early filing of the assessment work proofs would establish a procedure which would clearly nullify the animating rationale of the recordation provisions. Because of the nonsynchronized nature of the assessment and calendar year, an individual might be able to effectively skip filing proof of assessment every other year under such a system. The filing of notices of intent, because they would relate to purely subjective considerations, however, could theoretically obviate the need for filing in 5 or 20 years.

Thus, an individual claimant could file in one year separate documents manifesting an intent to hold the claim for each of the next 5 years. Each filing would clearly be made prior to the end of the year which it referenced. No document would violate the proscriptions of 18 U.S.C. § 1001 (1976), since, at the time of making each, the claimant did indeed have the subjective intent to hold the claims. Such a system, however, would clearly thwart the purpose of the Recordation Act, viz., keeping the Department informed of those claims which continue to be actively pursued. And what would be true for 5 years must, perforce of logic, be true for 20. Indeed, individuals would be well advised to make such multiple filings in view of the exacting and unavoidable consequences that accompany a failure to file timely. It is inconceivable that Congress meant to foster a system which would actually deprive the Department of the information that recordation is supposed to supply and we expressly refuse to adopt such an interpretation.

4/ This is not to say that the filing of evidence of assessment work performed during the current assessment year is prohibited. However, such a filing will not relieve the claimant from any filing at all during the subsequent calendar year, for which he must file a notice of intent or refile evidence of the work done during the previous assessment year.

5/ See Alaskamin Co., 49 IBLA 49A (order issued May 29, 1981).

The regulatory amendment cited by appellant did not modify the Board's holding in this decision.

We have no doubt that appellant had no subjective intent to abandon these claims, but as the Supreme Court noted in United States v. Locke, 469 U.S. , 105 S. Ct. 1785, 1795-96 (1985), a mining claimant's subjective intent is irrelevant. Although appellant notes that the Locke decision was issued after the location of his claims, the decision sustained the statutory requirement that was enacted on and effective since October 21, 1976.

[3] Finally, appellant in his Statement of Reasons contends that a "Plan of Operations submitted in July of 1983 remains (under 43 CFR 3809) effective in lieu of State Office BLM Notice of Intent to Hold." (Emphasis in original.) No such plan is contained in the record before us. ^{3/} Even so, nothing in 43 CFR Subpart 3809 indicates that the filing of a plan of operations satisfies the requirement of filing proof of annual assessment work or a notice of intention to hold the claim under 43 U.S.C. § 1744 (1982). Under 43 CFR 3833.2-4, a mining claimant need not file evidence of annual assessment work or a notice of intention to hold his claim only if a proper application for a mineral patent has been filed and the final certificate issued.

Therefore, 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.

Gail M. Frazier
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

John H. Kelly
Administrative Judge

^{3/} The record establishes that as of Sept. 27, 1983, no plan of operations had been submitted to BLM by appellant. (BLM letter dated Sept. 27, 1983, to Honorable Richard Cheney at 2). In his letter dated September 3, 1983 to BLM, appellant states that on 21 July, 1983, he submitted a plan of operations to the Director, Wyoming Department of Environmental Quality.

