

LINDSAY LEE LEMONS

IBLA 85-933

Decided June 9, 1987

Appeal from a decision of the California State Office, Bureau of Land Management, declaring mining claims abandoned and void. CAMC 042192 through 042195.

Affirmed.

1. Administrative Procedure: Administrative Review -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Regulations: Generally

Departmental regulation 43 CFR 3833.0-5(m), promulgated in December 1982, treats as "timely filed" a mining claim recordation document received by the Bureau of Land Management within 20 days of the statutory deadline for annual mining claim recordation filings if transmitted in an envelope bearing a clearly dated postmark affixed by the United States Postal Service denoting the document was mailed on or before Dec. 30 of the filing year. This regulation took effect Dec. 30, 1982, and in accordance with United States v. Locke, 471 U.S. 84, 102 n.14 (1985), it cannot be applied retroactively.

APPEARANCES: Lindsay Lee Lemons, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Lindsay Lee Lemons has appealed a decision of the California State Office, Bureau of Land Management (BLM), dated August 13, 1985, declaring four placer mining claims abandoned and void for failure to file with BLM on or before December 30, 1981, either evidence of assessment work or a notice of intention to hold the claims as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982).

In presenting his appeal, appellant argues that the decision is in error because proof of labor for 1981 was recorded in Siskiyou County, California, as required by law. Appellant has submitted as part of his appeal a copy of the proof of labor filed with the county.

Appellant's argument on appeal confuses the requirement to annually perform assessment work on a mining claim with the requirement to annually file a copy of the affidavit of assessment work with BLM or, alternatively, to file with BLM a notice of intention to hold the claim. The former requirement is imposed by 30 U.S.C. § 28 (1982), which states in relevant part that "not less than \$ 100 worth of labor shall be performed or improvements made during each year." The latter requirement was imposed when Congress enacted section 314 of FLPMA, which requires the owner of an unpatented mining claim located on public land to file with the proper BLM office, prior to December 31 of each calendar year, a copy of either an affidavit of assessment work or a notice of intention to hold the mining claim. 43 U.S.C. § 1744(a) (1982). See also 43 CFR 3833.2. Until the latter statute was enacted, there was no statute of general applicability requiring mining claim locators to inform the Federal Government of their claims, and the Government had no simple means of ascertaining which public lands were subject to mineral locations. United States v. Locke, 471 U.S. 84, 87 (1985).

While the copy of the affidavit of assessment work submitted by appellant shows that it was recorded August 25, 1981, at Siskiyou County, California, it does not show that it was timely filed with BLM.

The case file for appellant's claims contains a copy of an affidavit of assessment work bearing a BLM datestamp showing that it was received by BLM December 31, 1981, at 7:30 a.m. On its face, this copy of the affidavit of assessment work indicates that it was not received by BLM until after the December 30 deadline established by section 314.

Appellant makes no claim that his affidavit work was delivered to BLM on or before December 30 at a time when its office was open for business. See United States v. Ballas, 87 IBLA 88 (1985). Since the December 31 datestamp stands as an undisputed fact of record that appellant's proof of labor was filed with BLM 1 day late, it is incumbent on the Board to affirm BLM's decision declaring the subject mining claims abandoned and void.

The responsibility for complying with the recordation requirements of FLPMA rests with the owner of the unpatented mining claim. Congress mandated that failure to file the proper documents within the time periods prescribed in section 314 of FLPMA will, in and of itself, cause the claim to be lost. 43 U.S.C. § 1744(c) (1982); see also 43 CFR 3833.2-1. Thus, those claims for which timely recordings are not made are extinguished by operation of law regardless of the claimant's intent to hold the claim. See United States v. Locke, supra. The Department has no authority to excuse lack of compliance, to extend the time for compliance, or to afford any relief from the statutory consequences. Lynn Keith, 53 IBLA 192, 196, 88 I.D. 369, 372 (1981).

[1] Nor is it proper to remand this case to BLM, as the dissent suggests, to ascertain whether Departmental regulation 43 CFR 3833.0-5(m) may be retroactively applied to appellant's benefit. The foregoing regulation, promulgated in December 1982, treats as "timely filed" a mining claim recordation document received by BLM within 20 days of the statutory deadline for annual mining claim recordation filings if transmitted in an envelope bearing a clearly dated postmark affixed by the United States Postal Service denoting that the document was mailed on or before December 30 of the filing year. This regulation was considered by the Supreme Court in its disposition of the Locke case and the Court expressly held that the regulation could not be applied retroactively to benefit the mining claimant:

Since 1982, BLM regulations have provided that filings due on or before December 30 will be considered timely if postmarked on or before December 30 and received by BLM by the close of business on the following January 19th. 43 CFR § 3833.0-5(m) (1983). Appellees and the dissenters attempt to transform this regulation into a blank check generally authorizing "substantial compliance" with the filing requirements. We disagree for two reasons. First, the regulation was not in effect when appellees filed in 1980; it therefore cannot now be relied on to validate a purported "substantial compliance" in 1980. Second, that an agency has decided to take account of holiday mail delays by treating as timely filed a document postmarked on the statutory filing date does not require the agency to accept all documents hand-delivered any time before January 19th. [Emphasis added.]

471 U.S. 84, 102 n.14. In this case the filing in question was made on December 31, 1981. The regulation was not in effect in 1981.

The Board has held that new or amended regulations may be applied to a pending case where such provisions will benefit an appellant, in the absence of prejudice to third parties or countervailing considerations of public policy. See, e.g., Bruce Anderson, 80 IBLA 286, 91 I.D. 203 (1984). However, where the Supreme Court has said that a specific agency regulation may not be applied retroactively, it behooves the Board to follow that pronouncement in similar cases. 1/

1/ The Locke case involved a filing that was hand delivered on Dec. 31. The Court declined to regard hand delivery 1 day late as sufficient under statutory filing requirements. In eschewing "the substantial compliance" argument made by the Lockes, the Court's opinion at footnote 14, supra, also notes that under the regulations in effect in 1980, the only way a proper filing could be obtained was through receipt of the subject document by BLM on or before Dec. 30, no matter how transmitted. Under the circumstances, the only remedy available to appellant in this case is the right of relocating his claim if the lands are still available for mining claim location.

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.

Wm. Philip Horton
Chief Administrative Judge

We concur:
James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

John H. Kelly, Administrative Judge.

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

The majority opinion adopts an unnecessarily broad reading of footnote 14 in United States v. Locke, 471 U.S. 84, 102 (1985), to conclude that retroactive application of 43 CFR 3833.0-5(m) cannot be permitted in this case or any case like it. Certainly, the Bureau of Land Management believed the regulation could -- and should be -- applied retroactively when it proposed and later approved these regulations. By an addition to its regulations effective December 30, 1982, BLM adopted the following definitions:

"Filed or file" means being received and date stamped by the proper BLM office. For the purpose of complying with § 3833.2-1 of this title, "timely filed" means being file[d] 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.

47 FR 56300, 56305 (Dec. 15, 1982), 43 CFR 3830.0-5(m). Previously, the regulations defined "file" in regard to filing copies of location certificates, but not in regard to filing copies of affidavits of assessment work or notices of intention to hold mining claims. Compare 43 CFR 3833.1-2(b) (1981) with 43 CFR 3833.2-1.

In proposing the changes in its rules BLM announced this policy: "These regulations are intended to apply retroactively where to do so would be to the benefit of the claimant, would not injure the interest of the United States or interfere with third party rights." 47 CFR 19298, 19299 (May 4, 1982). In promulgating its final regulations, BLM again noted its intention to retroactively apply the regulations and stated:

This final rulemaking will significantly reduce the burden of compliance with the requirements for the recordation of mining claims. The change made by the final rulemaking in the definition of the term "timely filed" will save a large number of mining claimants from the loss of their claims due to delays in the mails over the holiday season.

47 FR 56300 (Dec. 15, 1982). The Board of Land Appeals has also held that an amended regulation may be applied to benefit an appellant if doing so would not adversely affect any intervening rights. United States v. Ballas, 87 IBLA 88, 91 (1985); James E. Strong, 45 IBLA 386, 388 (1980).

In the case on appeal, no envelope bearing a postmark appears in the case file. This is not surprising since, until the regulations were changed in 1982, there was no need for BLM to retain in its files the envelope in

which an affidavit of work was mailed. Nevertheless, the receipt time indicated by the date stamp raises a question as to whether, in finding appellant's claims abandoned and void, BLM gave consideration to the policy stated in promulgating the additions to the regulations. Unless the Sacramento BLM office was open to the public at or before 7:30 a.m. on December 31, 1981, so that appellant's affidavit of assessment work could have been hand-delivered, ^{1/} then it would appear that appellant's affidavit was either received by BLM before December 30, but not date stamped until December 31, or was received on December 31 in an envelope bearing a postmark within the period subsequently authorized by law. Cf. Washington Chromium Co., 60 IBLA 378 (1981). If either of the latter is true, the policy of retroactive application of the regulation could be applied to benefit appellant, if doing so would neither injure an interest of the United States nor interfere with third-party rights. If BLM were to conclude that Lemon's filing was indeed hand-delivered on December 31, the current regulation would be of no benefit to appellant. The regulation only provides a grace period for filings transmitted by mail "bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law." 43 CFR 3833.0-5(m). The majority prematurely conclude that footnote 14 to the Locke opinion has application to this case when it is not yet known whether or not this case involved personal delivery by appellant of the 1981 proof of labor which is the focus of our inquiry, unlike the situation in Locke, where, as the Supreme Court observed, Locke personally delivered the late-filed document.

More importantly, it seems most unlikely that the discussion by the Locke Court of the substantial compliance argument advanced by the Lockes has any relevance to the Department's policy that it will give retroactive effect to later promulgated regulations where to do so will benefit a claimant and will not injure other parties. But even assuming that footnote 14 has relevance to this situation, to hold in the manner we believe to be correct would merely place upon BLM the burden of showing how the proof of labor came into the official agency file. Clearly, if the document was delivered by mail, prior Departmental practice requires us to apply the provisions of 43 CFR 3833.0-5(m).

Moreover, it was BLM's stated intention that this rule be given retroactive effect. It seems most unlikely that the Supreme Court would ever tell an administrative agency that it could not give such effect to its own regulations, when doing so would not affect the rights of others or impede the discharge of the agency's statutory duties. Certainly, no such intention is readily discernible in footnote 14 of Locke.

^{1/} The record does show that proofs of labor were filed with BLM for two other years at "7:30 a.m.," i.e., 1980 and 1982.

Accordingly, I dissent.

Franklin D. Arness
Administrative Judge

We concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

R. W. Mullen
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge.

