

Appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring placer mining claim abandoned and void. N MC 127437.
Reversed.

1. 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

A party seeking judicial review of a Departmental decision holding the party's mining claim to be abandoned and void for failure to satisfy the requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), need not continue to satisfy the annual filing requirements of sec. 314 while judicial review is in progress.

APPEARANCES: John W. Bonner, Esq., Las Vegas, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

J. L. Block has appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated November 13, 1985, declaring the Community #3 placer mining claim abandoned and void for appellant's failure to timely file affidavits of assessment work for the assessment years 1980 through 1982. BLM's decision was based on section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982), requiring the owner of an unpatented mining claim located prior to the date of FLPMA's enactment 1/ to file in the proper BLM office either a notice of intention to hold the mining claim or evidence of assessment work within 3 years of the date of FLPMA's approval (October 21, 1976). Of particular importance to this appeal, the statute also requires this filing to be made prior to December 31 of each year thereafter. See also 43 CFR 3833.2-1.

1/ The record indicates the Community #3 placer claim was located on Feb. 20, 1946.

The record shows that appellant filed affidavits of assessment work with BLM for the 1980 through 1982 assessment years on September 9, 1983, well beyond the deadline set by section 314. This tardy filing caused BLM to invoke the provisions of section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1982), which provides: "The failure to file such instruments * * * shall be deemed conclusively to constitute an abandonment of the mining claim * * * by the owner." See also 43 CFR 3833.4.

In response to an Order to Show Cause issued by the Board on October 31, 1983, appellant offers an explanation for his September 9, 1983, filings: "Respondent could not have filed said documents prior to said date for the reason that said Reno office on December 19, 1979, returned to said Respondent, the \$5.00 check, previously paid, the map, the notice of location and the proof of labor for 1979." 2/ An understanding of appellant's statement requires the history of the claim to be set forth in some detail.

A summary of the claim history is set forth in an Order of this Board dated April 29, 1985:

On April 28, 1972, Administrative Law Judge Dean F. Ratzman issued a decision declaring the Community No. 3 placer mining claim, held by J. L. Block and, later, by Nevada Pacific Company, Inc., null and void because there was no substantial evidence in the record to establish that the sand and gravel deposit on the claim was marketable at a profit prior to July 23, 1955. Block appealed Judge Ratzman's decision to this Board, which docketed the appeal as IBLA 72-428 and subsequently affirmed it by decision dated August 28, 1973. United States v. Block, 12 IBLA 393 (1973).

By Memorandum dated March 29, 1977, the United States Court of Appeals for the Ninth Circuit vacated the Board's decision and remanded the case to the Department for further proceedings. J. L. Block v. Andrus, No. 75-2928 (9th Cir. March 29, 1977). The matter was returned to this Board for further action in September 1979. On December 8, 1980, the Board requested that the parties provide it with recommended procedures to be followed on remand, as provided in 43 CFR 4.29. The Board also noted that, on March 24, 1980, it had affirmed a decision by the Nevada State Office, Bureau of Land Management (BLM), declaring the Community No. 3 mining claim abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976) because required documents were not filed along with a filing fee on or before

2/ Appellant's reference to "the \$5.00 check" in his statement of reasons refers to the filing fee that should have, but did not, accompany his recordation of the Community #3 placer claim on Oct. 18, 1979, pursuant to section 314. Said fee was received by BLM on Nov. 7, 1979, beyond the statutory deadline of Oct. 22, 1979.

October 22, 1979. Nevada Pacific Co., Inc., 46 IBLA 208 (1980) (docketed as Nevada Pacific Company, Inc., IBLA 80-297).

On December 22, 1980, BLM through counsel, recommended that the contest of the validity of the Community No. 3 claim be dismissed as moot, since the Community No. 3 claim had been declared abandoned and void by a final Departmental decision, i.e. Nevada Pacific Co., Inc., *supra*. On January 5, 1981, Block responded that this decision was under judicial review and that the validity of the claim was therefore still at issue. The Board took no action on these requests, but awaited the results of the judicial review of its decision on the FLPMA recordation question.

On June 30, 1983, the United States District Court for the District of Nevada issued a decision reversing the Board's decision in Nevada Pacific Co., Inc., *supra*, and holding in favor of the claim holder. Nevada Pacific Company v. Andrus, Civ-LV-80-431, HEC (June 30, 1983). [3/] No appeal was taken.

* * * * *

Where a decision of this Board affirming a determination that a mining claim was abandoned and void is reversed on appeal and the case is remanded to the Board, the decision of the Court constitutes the law of the case and the Board will vacate its prior decision and reinstate the claim. Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186 (1984). Thus, we hereby vacate our decision concerning the recordation of this claim (Nevada Pacific Co., Inc., *supra*) and rule that the claim has been reinstated.

It is apparent from this summary that the period during which Block refrained from filing the instruments required by section 314 was the period (1980 through 1982) that he was seeking reinstatement of his claim in district court. The question posed by the appeal is, therefore, whether appellant was obliged by section 314 to continue to file either a notice of intention to hold or an affidavit of assessment work during the period that the Department held the Community #3 placer claim to be abandoned and void. We hold that appellant was not so obliged.

When on March 24, 1980, this Board affirmed BLM's decision declaring the claim at issue abandoned and void, the claim ceased to exist. Block's filing

3/ The district court adopted the recommendation of the magistrate, dated Apr. 26, 1983, that BLM was estopped to invalidate the Community #3 placer claim. The basis for the magistrate's recommendation appears to be a BLM letter dated Nov. 2, 1979, informing Block that his 1979 filings were unaccompanied by a \$5 filing fee. This letter directed appellant to submit such fee within 15 days or his claims would be declared null and void. Although this fee was received by BLM on Nov. 7, 1979, BLM nevertheless declared the claim null and void by decision of Dec. 19, 1979, and "rejected" the filing fee.

of a suit for judicial review did not alter this fact. See Ark Land Co., 97 IBLA 241, 248 (1987). In Andrew Freese, 50 IBLA 26, 87 I.D. 395 (1980), this Board reviewed a decision by BLM denying a petition for deferment of assessment work on mining claims that had been previously held by the Department to be invalid. The petition at issue was filed during the pendency of appellant's suit for judicial review of the Department's decision holding the claims invalid. Therein at 50 IBLA 35, 87 I.D. 399, we said:

While it is possible that a Federal court may subsequently determine that the Department's decision invalidating a claim was erroneous, until such a decision is rendered there is no cognizable claim against the Government. In the absence of a timely appeal, the decision of the Department is final and of immediate effect. The effect of a court reversal is to reinstate a claim, on a nunc pro tunc basis. But until such action occurs, there is no claim extant. Thus, there is no assessment work obligation, and no possibility for obtaining a deferment of assessment work.

To hold otherwise would require that the Government grant a deferment of assessment work for a claim whose existence the Government denies.

We find the above-quoted language offers a logical approach to the facts at hand. There being no claim recognized by the Department during the period March 24, 1980, through June 30, 1983, BLM could not require appellant to satisfy the filing requirements of section 314 for the 1980, 1981, or 1982 years.

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 Nevada State Office is reversed.

John H. Kelly
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Franklin D. Arness
Administrative Judge

