

**Editor's note: 95 I.D. 242; Appealed -- Civ.No. 89-0214 PHX PGR (D.Ariz. Feb. 1, 1989), & appeal filed, Civ.No. 89-1178 PCT PGR (D.Ariz. July 14, 1989), aff'd 89-1178 ( 1991); aff'd No. 91-15061 (9th Cir. Feb. 28, 1992), 960 F.2d 89**

HIRAM WEBB ET AL.

IBLA 86-617

Decided November 8, 1988

Appeal from a decision of the Arizona State Office, Bureau of Land Management, partially rejecting an Affidavit of Labor Performed and Improvements Made for assessment year 1984-1985. A MC 86948, A MC 86949, A MC 86952 through A MC 86958, A MC 86960, A MC 86962, and A MC 86963.

Affirmed in part; reversed in part.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment--Mining Claims: Possessory Right

The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. | 1744 (1982), apply to claims which rely on the provisions of 30 U.S.C. | 38 (1982) to prove location and posting. Where such claims have not been duly recorded, they are a nullity.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment--Mining Claims: Possessory Right

The provisions of 30 U.S.C. | 38 (1982) permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving recording and posting. Where, however, placer rights are asserted under this statute, such rights must be based on an asserted placer location. Placer rights do not, through the working of this statute, ever attach to lode locations.

APPEARANCES: Hale C. Tognoni, Esq., Phoenix, Arizona, for Hiram Webb; David M. Donovan, Esq., Phoenix, Arizona, for Bruce Balls and Everett Warner; Fritz L. Goreham, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

This case involves a group of mining claims situated near Phoenix, Arizona, collectively known as the Turkey Track Granite Quarries. On December 30, 1985, Bruce Balls filed an Affidavit of Labor Performed and Improvements Made (affidavit) for assessment year 1984-1985 with BLM for the 16 mining claims which comprise the Turkey Track Granite Quarries. This filing was made pursuant to the provisions of section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1744(a) (1982). On February 10, 1986, the Arizona State Office, Bureau of Land Management (BLM), issued a decision rejecting the affidavit as to the following 12 claims within the Turkey Tract Granite Quarries:

<u>Name of Claim</u>	<u>Serial Number</u>
Leo #1 Lode	A MC 86952
Leo #2 Lode	A MC 86953
Leo #3 Lode	A MC 86954
Leo #4 Lode	A MC 86955
Alta Vista #1 Lode	A MC 86956
Alta Vista #2 Lode	A MC 86957
Turkey Track #1 Placer	A MC 86958
Turkey Track #3 Lode	A MC 86960
Turkey Track #5 Lode	A MC 86948
Turkey Track #6 Lode	A MC 86949
Minnie Lode	A MC 86962
Victor Lode	A MC 86963

The BLM decision stated it would not accept filings for the 12 claims listed above 1/ for the following reason:

[BLM] recordation records pertaining to the subject claims have been closed as the claims were voided by prior administrative actions. The Affidavit of Labor Performed and Improvements Made was informally returned on January 27, 1986 because the claims referenced herein had been closed out. The filing of the subject Affidavit as it pertains to the mining claims identified in this decision is hereby rejected.

(BLM Decision at 4). The BLM decision then pointed out that "[f]ormal adjudicative action was taken through contest Nos. 10009, A 9700, AR 032789, AR 034090, and AR 10013, which led to the final disposition of these mining claims and the closure of the records" (BLM Decision at 3). Hiram Webb, Bruce Balls, and Everett Warner filed timely appeals from this decision. 2/

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1/ The BLM decision states that for the remaining four claims in the Turkey Track Granite Quarries, the Turkey Track #2, #4, #7, and #8 lode claims, the affidavit had been accepted.

2/ To best understand appellants' respective ownership interests in the claims, a partial conveyance history of these claims is briefly set forth. According to counsel for Webb, in a sale agreement dated Nov. 13, 1978, Webb transferred the Turkey Track #1 and #3, Minnie, and Victor claims to Gerald L. Lomker and Patsy A. Lomker (now Patsy A. Brings). Counsel states that the terms of the sales agreement were not fully met and the "Lomkers are in default," and further reports that on "March 24, 1986 in the Superior Court of Arizona in C-570017, the court granted the Lomkers Turkey Track #1 and forfeited her [sic] out of Turkey Track \* \* \* #3 \* \* \* and the Minnie and the Victor [claims]" (Webb SOR at 9). No further action in this State court proceeding has been reported by appellants to the Board. According to counsel for Balls and Warner, Balls and Warner have an interest in the claims subject to the Webb-Lomkers sales agreement "by virtue of a 'Mining Lease and Option' dated May 15, 1985. The conveyance purports to grant [to Balls and Warner] Mr. Webb's 'interest as seller' under [the sales agreement]" (Balls and Warner SOR at 5). In a notice attached to a memorandum, dated Feb. 11, 1988, to the Board from the BLM acting Deputy State Director, counsel for Balls and Warner stated that "appellants Balls and Warner have no interest in Turkey Track #1 and are not seeking to have the claims with respect to Turkey Track #1 adjudicated in this appeal." No appeal from the BLM decision presently under review was filed by the Lomkers.

Before considering further BLM's rationale for rejecting the filing and the arguments against the decision asserted by appellants, we will first review the history of the claims at issue. These claims are all situated in secs. 21 and 22, T. 4 N., R. 3 E., Gila and Salt River Meridian in Maricopa County, Arizona. <sup>3/</sup> Because the Turkey Track #1 lode and placer claims raise issues distinct from those presented by the other 11 claims, they will be discussed separately below.

Lode mining location notices were filed in the Maricopa County Recorder's Office by Webb on July 1, 1954, for the Minnie claim, on April 2, 1954, for the Victor claim, on August 12, 1954, for the Leo #1 through #4 claims, on October 7, 1954, for the Turkey Track #3 claim, and on April 25, 1955, for the Alta Vista #1 and #2 claims. These nine lode claims, together with the Turkey Track #1 lode claim (discussed separately below), were the subject of mineral contest AR 10013 in 1957. By decision dated December 23, 1957, the hearing examiner found the Turkey Track #1 lode and the Minnie and Victor lode claims null and void. The complaint was dismissed with respect to the other seven lode claims. No appeal was taken from the decision of the hearing examiner.

Recordation of amended notices of lode mining location for the four Leo, the Turkey Track #3, and the two Alta Vista claims was made with the county recorder on February 14, 1961. In 1963, these seven claims were

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<sup>3/</sup> The land in question was segregated from mineral entry on Apr. 26, 1973, by the filing of Recreation and Public Purposes Act application A 6390 by the City of Phoenix.

part of a patent application made by Webb. As a result of the patent application, BLM initiated another contest against these claims on May 17, 1965, under contest Nos. AR 032789 and AR 034090. The hearing examiner declared the lode mining claims null and void and rejected the mineral patent applications on March 29, 1967. This decision was ultimately affirmed by the Board in United States v. Webb, 1 IBLA 67 (1970). Webb did not seek judicial review of this decision when it became final in 1970. <sup>4/</sup>

For the Turkey Track #5 and #6 claims, lode mining location notices were allegedly posted on the claims on October 4, 1958. However, these claims were not recorded with the county until August 27, 1976. Relying on a classification of the lands as suitable for purchase by the City of Phoenix, under the Recreation and Public Purposes Act, 43 U.S.C. | 869 (1982), BLM declared these lode claims null and void by decision dated October 5, 1976. This decision was affirmed by the Board in H. B. Webb, 34 IBLA 362 (1978). No appeal was taken from this final administrative decision.

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<sup>4/</sup> In 1978, the Government brought an action against Webb seeking recovery of possession of the land within the claims found to be void in contest Nos. AR 032789 and AR 034090, and a judicial declaration that Webb was without right, title or interest in the property. In 1979, after the Government filed a motion for summary judgment 12 months after the original pleadings, Webb sought leave of the court to amend his pleadings to allege valid placer claims and to request judicial review of the 1970 Board decision. The district court denied Webb's motion for leave to amend his pleadings and granted full summary judgment for the Government. On appeal, the Ninth Circuit vacated the district court's ruling on the motion and remanded for further consideration of Webb's request to amend his pleadings. The court also held that there was no statute of limitations for judicial review of an administrative decision of the Board finding mining claims null and void. United States v. Webb, 655 F.2d 977 (9th Cir. 1981). Counsel for Webb reports that on remand, the district court "separated the placer mining rights out of the proceedings, left Webb in possession, but granted the BLM's new motion for summary judgment" on the lode claims found to be void in the Board decision (Webb SOR at 21).

We turn now to certain notices and documents that Webb filed with BLM on October 22, 1979, pursuant to the recordation provisions in section 314(b) of FLPMA. This section required the owner of a mining claim located before October 21, 1976, to file, on or before October 22, 1979, a copy of the claim's location notice with the proper office of BLM. Section 314(c) further provides that failure to comply with section 314(b) would

"be deemed conclusively to constitute an abandonment of the mining claim." 43 U.S.C. | 1744(c) (1982).

The constitutionality of these provisions was upheld in United States v. Locke, 471 U.S. 84 (1985).

On October 22, 1979, Hale C. Tognoni filed with BLM copies of the official record of all notices and amended notices of these lode mining claims that had been filed in the Maricopa County recorder's office. These filings were made in two separate groups. Thus, Tognoni filed documents for 10 claims consisting of the Turkey Track #5 through #8, the Leo #1 through #4, and the Alta Vista #1 and #2 lode, on behalf of a Ronald

Linderman, "under a purchase contract from Hiram B. Webb." <sup>5/</sup> These claims were assigned serial numbers A MC 86948 through A MC 86957. The second group consisted of six claims, the Turkey Track #1 and #2 placers, the Turkey Track #3 and #4, and the Minnie and the Victor lodes, which were filed on behalf of Gerald L. Lomker and Patsy A. Lomker (the Lomkers), "under a purchase contract from Hiram B. Webb."

<sup>6/</sup> These claims were assigned serial numbers A MC 86958 through A MC 86963.

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<sup>5/</sup> We note that the Turkey Track #7 and #8 are not involved in the instant appeal.

<sup>6/</sup> Neither the Turkey Track #2, which is a placer claim, nor the Turkey Track #4, which is a lode claim, is involved in this appeal. With respect

In addition to filing the various location notices, for the Leo #1 through #4, Alta Vista #1 and #2, and Turkey Track #3 lode claims, Tognoni submitted copies of a "Notice of Intention to Hold Mining Claim through Work and Possession (Pedis Possessio) Title 30, Section 38, USCA" which had been filed with the county recorder's office on November 9, 1976. These documents were placed in the BLM records according to each claim's respective BLM claim file number. The effect of this filing is central to the issues in this appeal.

In its February 10, 1986, decision partly rejecting the 1985 affidavit of assessment work, BLM addressed the issue of the recordation filings submitted by Webb in October 1979. The decision stated that "[i]f it was the intent of the mining claimant to amend some of the prior void [lode] locations \* \* \* and record them under the recordation statute," then Jon Zimmers, 90 IBLA 106 (1985), the Board precedent holding that amendments of void locations may not properly be considered amended locations would apply. BLM thus concluded that, because of the prior decisions invalidating the claims at issue, the filings made by Webb in 1979 to comply with section 314 of FLPMA were without legal effect.

On appeal, appellants claim that BLM, in rejecting the affidavit, completely failed to consider their entitlement to the claims through the statutory provisions of 30 U.S.C. | 38 (1982). This statute provides:

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fn. 6 (continued)

to the Turkey Track #1, it is important to note that appellant had located two Turkey Track #1 claims, one as a lode and the other as a placer. The relevance of this point is discussed infra in our discussion of the Turkey Track #1 placer.

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto \* \* \*.

Appellants assert placer rights under 30 U.S.C. | 38 (1982) and claim that these rights "remain valid existing mineral rights that have not been contested" in any of the decisions cited by BLM as dispositive of the mining claims' validity (Webb Statement of Reasons (SOR) at 2).

Appellants' argument that they are entitled to the claims in question under 30 U.S.C. | 38 (1982) is necessarily intertwined with BLM's conclusion that appellants' recordation filings made with BLM on October 22, 1979, did not preserve appellants' asserted placer rights. As will be more fully explained below, the filings which appellants made are fatally flawed insofar as the preservation of any asserted placer rights flowing from the lode claims is concerned.

[1] Initially, we note that, section 314(b) and (c) of FLPMA provide in pertinent part:

(b) The owner of an unpatented lode or placer mining claim or mill or tunnel site located prior to [October 21, 1976,] shall, within the three-year period following [October 21, 1976,] file in the office of the Bureau designated by the Secretary a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim \* \* \* sufficient to locate the claimed lands on the ground.

(c) The failure to file such instruments as required by sub-sections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner.

The Board has had occasion in the past to consider the applicability of these provisions to claims asserted under 30 U.S.C. | 38 (1982), beginning with its decision in Philip Sayer, 42 IBLA 296 (1979). The appellant in Sayer had filed copies of recorded, amended location certificates with BLM on July 21, 1977, which stated that the claims were originally located in 1908 and that the official records were "imperfect, incomplete or nonexistent." 42 IBLA at 298. The Alaska State Office, BLM, rejected the filings and declared the claims null and void because, among other reasons, copies of the original recorded location notices were not filed as required by the language of section 314(b) and the regulations then in effect.

On appeal, Sayer asserted that BLM's decision was improper since the regulations promulgated to implement section 314(b) of FLPMA did not specifically address the situation where a claimant intends to rely on 30 U.S.C. | 38 (1982). In reviewing appellant's allegations, the Board explained that where a claimant was attempting to record claims being held under 30 U.S.C. | 38 (1982), the problem becomes what must be shown to meet the FLPMA recordation requirements. In reversing BLM, the Board found:

Because there is a gap in the recording statute and the regulations currently concerning proof that a claim is being held under this provision of the mining laws, BLM should liberally consider attempts by claimants to record evidence of such claims. We agree with appellant that it was premature for BLM to take the action it did in rejecting the notices filed by claimant where BLM had been informed claimant was relying on 30 U.S.C. | 38 (1976).

Id. at 301.

In light of this regulatory hiatus, the Board then addressed the issue of what was necessary to meet the recordation requirements:

[T]he purpose of the recording provisions in FLPMA is essentially to give notice to BLM of the existence of mining claims on Federal lands so that this information may be considered in the land use planning and management of those lands. To serve this purpose then, there is some essential information that would be necessary where a claimant cannot show proof that a notice of location was recorded. This would include the following: (1) the name under which the claim is presently identified and all other names by which it may have been known to the extent possible; (2) the name and address of the present claimants; (3) an adequate description of the claim; (4) type of claim; (5) information concerning the time of the state's statute limitations and a statement by the claimant as to how long the claim had been held and worked, giving, if possible, the date (or at least the year) of the origin of the claimant's title and facts as to continuation of possession of the claim; and (6) any other information the claimant would have showing the chain of title to him and bearing upon the possession and occupancy of the claim for mining purposes. Other information which BLM deems essential to meet its purposes may also be required. The above information would set the minimal requirements to be satisfied \* \* \*. [Emphasis supplied, footnote omitted.]

Id. at 302-03. As noted in Sayer, recording with BLM under section 314(b) was necessary to establish an official Federal record of all extant mining claims. The types of information outlined by the Board in that case ensured that any filing made for a claim held under section 38 met the statutory intent of the recording provisions, namely, identification of the mining claims. Thus, to ensure that the statutory requirement has been met, all filings made to record claims asserted under section 38 by appellants with BLM must be judged by the "minimal requirements" set forth in Sayer.

The necessity that some filing be made within the statutory deadline was reemphasized in United States v. Haskins, 59 IBLA 1, 88 I.D. 925 (1981),

aff'd, Haskins v. Clark, No. CV-82-2112-CBM (C.D. Cal. Oct. 30, 1984). In that decision, which dealt with a fact situation similar in certain respects to the instant case, we expressly noted that "[t]he recordation provisions of FLPMA required the recordation of all claims located prior to Oct. 21, 1976, no matter how located, on or before Oct. 22, 1979, or the claims would be deemed conclusively to be abandoned and void." Id. at 105, 88 I.D. at 978 (emphasis supplied).

In another Board decision, Paul Vaillant, 90 IBLA 249 (1986), BLM declared six unpatented lode mining claims null and void ab initio because the claims had been located in 1978 after the lands therein had been withdrawn from mineral entry on February 27, 1975. Appellants, while acknowledging that the withdrawal negated four of their claims, asserted that the remaining two lode claims found invalid by BLM were 1978 amendments of an earlier placer claim located in 1970. Rejecting this argument, the Board initially pointed out that "[a] miner cannot amend a placer location by filing a lode location. The two claims are located for altogether different reasons." Id. at 253, citing R. Gail Tibbets, 43 IBLA 210, 86 I.D. 538 (1979). Accord Cole v. Ralph, 252 U.S. 286 (1920); United States v. Haskins, supra. Thus, the 1978 locations were treated as relocations or new locations. As a result, the Board concluded the "appellants' lode locations made in 1978 were invalid because they were located upon land previously withdrawn from location under the mining law." Id. at 253. As to the placer mining claim located in 1970, the Board explained that it was abandoned in 1979 "since appellants failed to comply with FLPMA mining claim recordation requirements on or before October 22, 1979." Id. at 253.

The appellants in Vaillant, however, sought to "avoid total invalidation of their claims by another possible theory." Thus, they alleged that they had worked their claims diligently since 1970, developing their dis-covery and determining the extent of the minerals claimed. The Board noted that "their arguments indicate they may be asserting what amounts to a claim of right under provision of 30 U.S.C. | 38 (1982)," but this argument was also rejected. Relying on the holding in the Supreme Court decision United States v. Locke, supra, that "Congress intended in | 314(c) to extinguish those claims for which timely filings were not made," the Board reasoned:

This analysis applies equally to the claims held in this case by appellants. The Locke claims also were being actively prosecuted up until the time they were declared invalid, and were in fact the basis for a going business. While section 314 had not repealed the provisions of 30 U.S.C. | 38, it is now clear that in order to have a valid claim under 30 U.S.C. | 38, a claimant must also have complied fully with section 314 of FLPMA. In this case, there was an abandonment of the placer claim as a matter of law when the appellants failed to make timely filings for their placer claim under the recording provisions of section 314 of FLPMA. The void lode locations, made after the lands upon which the placer was first located were withdrawn, could not be considered to be valid as amendments of the placer claim \* \* \*. As a consequence, the placer claim was extinguished. [Emphasis supplied.]

Id. at 254. Thus, the law is clear that all claims asserted under 30 U.S.C. | 38 (1982), were subject to the recordation requirements of FLPMA.

Finally, we wish to address appellants' contention that there was "no provision under FLPMA providing for recording rights claimed under 30 USCA 38 for the preservation or loss of 30 USCA 38 rights." It is true, as pointed out in Philip Sayer, supra at 300, that the regulations as originally promulgated to implement section 314 of FLPMA did not "specifically

[address] the situation where a claimant intends to rely on 30 U.S.C. | 38." However, the definition of the term "copy of the official record" was amended to permit filing of "other evidence, acceptable to the proper BLM office, of such instrument of recordation." 43 CFR 3833.0-5(i) (1979); 44 FR 9722 (Feb. 14, 1979). In Cleo May Fresh, 50 IBLA 363, 365 (1980), when an appellant sought to invoke this definition to include the filing of a copy of a quitclaim deed as a copy of the "official record," the Board pointed out that the "provision of the regulations concerning the submission of 'other evidence' only applies when the notice of location is no longer obtainable or when a claimant purports to hold a claim under 30 U.S.C. | 38." (Emphasis supplied.) Accord Marvin E. Brown, 52 IBLA 44 (1981). Thus, there is no basis for an assertion by appellants that there was no mechanism by which they could record a claim based on 30 U.S.C. | 38 (1982).

From the foregoing, it can be seen that any claim asserted under the provisions of 30 U.S.C. | 38 (1982), must have been recorded pursuant to section 314(b) of FLPMA, 43 U.S.C. | 1744(b) (1982), or it will be deemed conclusively to be abandoned and void. Appellants assert that they recorded their placer "rights" in 1979. Thus, counsel for appellant Webb asserts that Webb

complied with the recordation requirements of FLPMA by filing either copies of the notices of intention to hold or previously recorded notices of mining locations and obtained a BLM serial number for each claim of right under 30 USCA 38 and Affidavits of Labor have been filed with the BLM for every year required by FLPMA.

Webb filed notices of intention to hold for the Leo #1-4, Alta Vista #1 and 2, and the Turkey Track #3, declaring his intention to hold under 30 USCA 38. The BLM assigned the intentions to hold the same BLM serial numbers as the lode claims.

Webb filed previously recorded lode notices of mining location of the Minnie, Victor and Turkey Track #5 and 6 lode mining claims, giving the BLM notice of its intention to hold the remaining placer rights. The lode rights under these notices of mining location had been previously invalidated by Department (ALJ and IBLA) decisions, but the placer rights under 30 USCA 38 remain intact unless they fail for lack of discovery under Cole v. Ralph, 252 U.S. 286. The recording of the notices of mining location with the BLM merely established "color of title" for the 30 USCA 38 rights held by Webb and notice to the BLM that Webb claimed 30 USCA placer mining rights. In fact, there is no provision under FLPMA providing for recording rights claimed under 30 USCA 38 or for the preservation or loss of 30 USCA 38 rights. [Emphasis supplied.]

(Reply Brief at 3-4).

A close examination of the foregoing discloses that appellants' arguments do not withstand analysis. Appellants refer variously to "each claim of right," "remaining placer rights," and "color of title," in relation to 30 U.S.C. | 38 (1982). As we shall show, the use of these terms displays a fundamental misconception of the nature of that statute.

Not a single court decision, including both United States v. Haskins, 505 F.2d 246 (9th Cir. 1974) and United States v. Webb, 655 F.2d 977 (9th Cir. 1981), on which appellants purport to rely, has ever suggested that placer "rights" can flow from invalid lode locations. As the Supreme Court noted long ago in Cole v. Ralph, *supra* at 295, "[a] placer discovery will not sustain a lode location nor a lode discovery a placer location." Moreover, to the extent that appellants are contending that placer "rights"

can inure to a lode location through the auspices of 30 U.S.C. | 38 (1982), they are equally wrong.

What the Ninth Circuit Court of Appeals ruled in United States v. Haskins, *supra*, was not that a claimant could assert placer "rights" to a lode location by showing compliance with the provisions of 30 U.S.C. | 38 (1982), but rather that a claimant, upon such a showing, "may assert placer locations without proof of recording and posting." Id. at 251 (emphasis supplied). This is consistent with a long train of Supreme Court decisions which have noted that "the right to possession comes only from a valid location." Belk v. Meagher, 104 U.S. 279, 284 (1881) (emphasis supplied).

The Ninth Circuit decision in United States v. Webb, *supra*, which actually dealt with the claims involved herein, is clearly in accord with this analysis. Thus, the Court noted:

In 1979, after the Government filed a motion for summary judgment twelve months after the original pleadings, Webb sought leave to amend his pleadings to allege valid placer claims (as contrasted with lode claims) and to request judicial review of the 1970 administrative decision that his lode claims were null and void. The district court denied Webb's motion for leave to amend his pleadings and granted full summary judgment for the Government. [Emphasis supplied.]

Id. at 979.

The Court of Appeals vacated the District Court's refusal to permit Webb to amend his pleadings because the absence of a finding by the District Court that either bad faith was involved or that prejudice would result

prevented the Court of Appeals from determining whether the District Court's actions were an abuse of discretion under Fed. R. Civ. P. 15, which covers permissive amendment of pleadings. Thus, the Court of Appeals directed the District Court to reconsider its ruling that appellant could not amend his pleadings by alleging valid placer claims. By no means, however, did the court countenance appellant's assertion herein that placer rights could flow from the lode locations, themselves. Indeed, if such were the case, there would have been no need for Webb to attempt to amend his pleadings since he had originally asserted lawful possession of the property under the lode mining claims, and would have, perforce of appellants' present theory, been able to assert placer rights as an incidence of those lode mining claims.

The importance of this point is not merely theoretical. While the provisions of 30 U.S.C. | 38 (1982) do permit the assertion of a location without proof of posting or recording, appellant is still required to comply with all other substantive provisions of the mining laws, including recordation of the claim under FLPMA. Appellants' repeated reference to rights and color of title is simply a smokescreen designed to obscure the fact that appellants never recorded placer locations with BLM for these 11 claims.

For four of the claims at issue, the Minnie, Victor, and Turkey Track #5 and #6, the only documents submitted were copies of the lode location notices which had been filed with the Maricopa County Recorder's Office. As indicated above, this was clearly inadequate to record any placer claims asserted under 30 U.S.C. | 38 (1982). With respect to the remaining claims under discussion, appellant filed, in addition to the lode notices of

location, 7/ an additional document for each claim, captioned "Notice of Intention to Hold Mining Claims through Work and Possession (Pedis Possessio) [8/] Title 30, Section 38, USCA." Because of the arguments which appellants premise on the contents of this document, an example of the form, this one filed for the Leo #3, is reproduced below:

TO ALL WHOM IT MAY CONCERN:

This mining claim, which was named Leo #3, situate on lands belonging to the United States of America, and being a form of valuable mineral deposit, was entered upon by Rachelle Lora Landriault on the 12th day of August, 1954 for the purpose of working and producing Gold and other valuable minerals from the same through acquisition of the mineral rights of previous owners and through work and possession have acquired the right to patent, subject to the discovery of an economic mineral deposit, under Title 30, Sections 22, 23 & 35 thru 38, USCA.

Hiram B. Webb as the (purchaser, \* \* \*) from Rachelle Lora Landriault, who relocated a previously existing mining claim on the same ground, hereby gives notice that he and said owners or locators and as locator himself have held and worked the Leo #3 for a period equal to the time prescribed by the statute of limitations for mining claims of the State of Arizona, where the same is situated.

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7/ We note that for the Turkey Track #3, no copy of the lode location notice was submitted. Only a copy of the "Notice of Intention to Hold Mining Claims through Work and Possession (Pedis Possessio)" was filed for that claim.

8/ As pointed out by counsel for BLM, the doctrine of "pedis possessio," has no relevance to the application of 30 U.S.C. | 38 (1982). Pedis possessio applies only to pre-discovery locations (see generally Union Oil Company of California v. Smith, 249 U.S. 337 (1919); United States v. Haskins, 59 IBLA at 53 n.36, 88 I.D. at 951 n.36). Therefore, any rights which were based solely on pedis possessio would have been terminated by the withdrawal of the land in 1973, since pedis possessio does not apply against the United States and only claims supported by a discovery of a valuable mineral deposit would have been protected from the effect of the withdrawal. See Cameron v. United States, 252 U.S. 450, 456 (1920).

The Leo #3 mining claim is located in the Winifred Mining District, County of Maricopa, State of Arizona approximately 2 miles East of Deer Valley Airport and is more particularly described as follows:

BEGINNING at the corner of sections 15, 16, 21 & 22, T4N, R3E, G&SRB&M, thence S 87°45' E, 600 feet to corner No. 2, thence S 0°45' E 1500 feet to corner No. 3, thence N 87°45' W, 600 feet to corner No. 4, thence N 0°45' W, 1500 feet to corner No. 1.

The original location notice of abovesaid claim is recorded in Book 1413 Page 491 in the Maricopa County Recorder's Office.

All done under the provisions of Chapter 6 of Title XXXII of the revised statutes of the United States and Title 30, Sections 22, 23 & 35 thru 38, USCA.

Certain observations are in order. Appellants assert that the intent of this document was to record their placer "rights." As we discussed above, however, absent the assertion of a placer claim under 30 U.S.C. | 38 (1982), appellants had no placer rights to the land. Moreover, their contention that the entire purpose of this document was to assert placer rights is undermined by the fact that the document cites not only 30 U.S.C. | 35 (1982), which deals with location of placer claims, but also 30 U.S.C. | 23 (1982), which authorizes the location of lode mining claims. A perusal of the document makes it clear that, rather than attempting to assert a placer claim based on 30 U.S.C. | 38 (1982), the claimants were reasserting their mistaken view that placer rights could attach to a lode claim by virtue of 30 U.S.C. | 38 (1982).

Appellant Webb's belated attempt to suggest that BLM erroneously assigned these documents the same recordation numbers as the lode claims does not bear scrutiny. Viewing the record in the light most favorable to

appellants, the claimants were attempting to record seven placer claims in addition to their seven lode claims. 9/ Thus, under the filing which counsel for Webb made on behalf of Ronald Linderman, which listed the Turkey Track #5 through #8, the Leo #1 through #4 and the Alta Vista #1 and #2, appellant would have been recording 10 lode claims and 8 placer claims, since "Notices" were submitted for all of these claims except the Turkey Track #5 and #6. Yet, appellant submitted only \$50 in filing fees, sufficient funds (at the rate of \$5 per claim, see 43 CFR 3833.1-2(d) (1979)) to record only 10 mining claims. Appellant's tender of \$50 at the time he recorded these claims is inconsistent with any present contention that he intended to record both lode and placer claims in 1979.

With respect to the second group of filings made on behalf of the Lomkers, six claims (Turkey Track #1 through #4, Minnie and Victor) were listed. Of these, two were actually located as placers (Turkey Track #1 and #2), 10/ and of the remaining four claims, a "Notice of Intention to Hold

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9/ That the claimants intended to record their lode claims cannot be gainsaid. Thus, when counsel for appellant Webb argues that "BLM assigned the intentions to hold the same BLM serial numbers as the lode claims," he implicitly recognizes that claimants were intending to record the lode claims in 1979. Indeed, since Webb was, at that time, litigating the correctness of the Department's invalidation of the lode claims in Federal court, it was essential that he record them in order to maintain his challenge to the Department's determination of invalidity, since a failure to comply with section 314(a) and (b) would result in a conclusive finding of abandonment. See United States v. Locke, supra; Andrew L. Freeze, 50 IBLA 26, 87 I.D. 396 (1980).

10/ Actually, counsel submitted both a lode location notice and a placer location notice for the Turkey Track #1. This is a matter of some confusion since the Turkey Track #1 lode mining claim had been invalidated in contest AR 10013, which decision had never been appealed. In this appeal, appellants have essentially abandoned any arguments that the Turkey Track #1 lode claim has any validity. The Turkey Track #1 placer mining claim is discussed separately infra.

\* \* \* (Pedis Possessio)" was submitted only for the Turkey Track #3. This claim, however, presents an unusual problem. As discussed above at foot- note 8, no location notice was submitted for this claim. In the papers accompanying the filing made on behalf of the Lomkers, there was a document, denominated as Exhibit A, which listed the six claims involved in the agreement between Webb and the Lomkers, together with the date of filing of each notice of location and also including various recording data. The entry adjacent to the Turkey Track #3 is as follows:

<u>DATE</u>	<u>TYPE NOTICE</u>	<u>RECORDING BOOK</u>	<u>DATA PAGE</u>
10/7/54	Original - Placer	1443	72
2/14/61	Amended - Placer	3616	398
11/9/76	Notice of Intent To Hold . . . Work and Possession	11938	725

This document asserts that the Turkey Track #3 was originally located as a placer claim. This is not correct. Both the original and amended notice of location related to lode claims. See United States v. Webb, 1 IBLA at 74; Appellant Webb's SOR at 12. Moreover, since the Turkey Track #3 was part of the ongoing litigation leading to the decision in United States v. Webb, 655 F.2d 977 (9th Cir. 1981), it is clear that the claimant intended, consistent with the approach utilized for all of the other claims, to record the lode claim and assert placer rights as an incidence of that lode claim (see note 9, supra). Had the claimant intended to record both a lode and a placer claim for the area covered by the Turkey Track #3, a total of seven claims would have been involved in the Lomker

filing. <sup>11/</sup> The \$30 filing fee submitted was sufficient to record only six claims. This lends further support to our conclusion that, in line with the consistent course of conduct of the claimants herein, placer rights deriving from holding and working under 30 U.S.C. | 38 (1982) were viewed as accruing to the lode locations and, therefore, only the lode claims were being recorded. But, as we have explained above, placer rights emanating from holding and working under 30 U.S.C. | 38 (1982) can only be asserted in the context of a placer claim.

We hold, therefore, that appellants' affidavits of labor were properly rejected as to the Turkey Track #3, #5, and #6, the Leo #1 through #4, the Alta Vista #1 and #2, the Minnie, and the Victor lode mining claims on the ground that those claims had been declared null and void. Further, these affidavits were correctly rejected in reference to appellants' assertion of placer rights appertaining to these lode locations as no such rights exist. Finally, these affidavits were also properly rejected insofar as any asserted placer claims based on the provisions of 30 U.S.C. | 38 (1982) are concerned, since such claims were not recorded as required by section 314(b) of FLPMA, 43 U.S.C. | 1744(b) (1982), and must be conclusively deemed to be abandoned and void.

We turn now to consideration of the Turkey Track #1 placer and lode claims. The BLM decision noted that, for these claims, Webb filed with BLM on October 22, 1979, copies of the following documents:

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<sup>11/</sup> We are leaving aside for the present the problems associated with the Turkey Track #1 claim, wherein the claimant actually submitted both lode and placer location notices, see note 10, supra.

Notice of Mining Location Placer, recorded September 1, 1954;  
Notice of Mining Location Lode, recorded January 30, 1957;  
Notice of Mining Location, Amended Placer Claim, recorded  
January 30, 1957;  
Notice of Mining Location, Amended Placer Claim, recorded  
February 14, 1961.

As an initial matter, we note that while counsel for appellant filed both lode and placer notices of location for the Turkey Track #1, he accompanied the submission with only enough money (considering the other claims for which recordation was sought) to record one claim. BLM, clearly proceeding in the view that there was only one claim involved, assigned a single recordation number. The question arises, therefore, as to which claim was recorded since appellant by his actions clearly did not intend to record both. The nature of appellant's subsequent actions and the arguments presented both in this appeal and that of Patsy A. Brings, 98 IBLA 385 (1987), a decision which is examined in detail, infra, leads necessarily to the conclusion that counsel intended to preserve the placer mining claim and recorded the lode location (which had already been declared void in contest AR 10013) for informational purposes. Therefore, we will treat the Turkey Track #1 placer claim as duly recorded.

On appeal, Webb asserts that the default decision in contest No. 10009 should be set aside since the mining claim had not been abandoned, and Webb, as owner of the claim at the time the contest issued, did not receive notice of the contest or the result thereof until 1985. The record indicates that the contest complaint was served only upon Webb's predecessor-in-interest, Rachelle Lora Landriault, who had transferred the Turkey Track #1 placer claim to Webb by quitclaim deed on February 29, 1956.

In fact, the issue of whether the default judgment in contest No. 10009 was binding on Webb or his successors-in-interest was resolved in the Board decision Patsy A. Brings, supra. In Brings, the appellant, a successor-in-interest to Webb, 12/ had filed a mining plan of operations with BLM for the Turkey Track #1 claim. BLM rejected the plan of operations on the grounds that the default judgment in contest No. 10009 had rendered the claim null and void. Appellant on appeal raised essentially the same argument Webb raises herein. After reviewing the circumstances surrounding the issuance of the contest complaint and the default judgment, the Board agreed that

BLM should have served Webb with the complaint and that its failure to do so was fatally defective to contest No. 10009. The default judgment in that contest is, therefore, not binding on Webb or his successors-in-interest, and BLM's null and void determination in contest No. 10009 may not be utilized as a basis for rejecting the mining plan of operations \* \* \*.

98 IBLA at 390. Because, therefore, the issue concerning the validity of contest No. 10009 has been finally resolved, the reasoning and holding of the Board in Brings is controlling in this case. Just as BLM could not use contest No. 10009 as the basis for rejecting a plan of operations, it likewise cannot serve as the basis for rejecting the filing of the affidavit of assessment work performed. BLM's rejection of the affidavit must be reversed since as explained above, a properly filed affidavit was filed in order to preserve the validity of the claim. 13/

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12/ The ownership interest of Patsy Brings in the Turkey Track #1 placer claim is discussed in note 2, supra.  
13/ This result is mandated regardless of who presently holds the ownership interest in this claim. A timely filing of the affidavit must be on record in order to preserve the claim itself.

In light of our finding that the rejection of the affidavit as to the Turkey Track #1 placer claim was in error, we need not further consider the validity of this claim, since, nothing in the BLM decision appealed from put the substantive validity of the claim at issue.

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 reversed as to the Turkey Track # 1 placer claim and affirmed as to all other claims for the reasons stated herein.

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James L. Burski  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge