

JEAN EMANUEL HATTON  
EVA M. POOL  
PHILLIP EMANUEL

IBLA 87-380

Decided January 27, 1989

Appeal from two decisions of the Arizona State Office, Bureau of Land Management, declaring three mining claims abandoned and void, and a millsite claim abandoned. A MC 44045, A MC 44046, A MC 44050, and A MC 44051.

Affirmed and remanded to allow additional time to make annual filing for millsite.

1. Appeals: Generally--Rules of Practice: Appeals: Timely Filing--Words and Phrases

"Service." A notice of appeal from a decision of the Bureau of Land Management must be filed within 30 days after the person taking the appeal is "served" with the decision from which the appeal is taken. Where BLM mails its adverse decision to an address other than the person's last address of record and the decision is returned by the Postal Service because a forwarding order has expired, the decision has not been constructively "served." In these circumstances, an appeal which is subsequently filed within 30 days of the person's receipt of actual notice of the adverse decision is timely.

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

Under 43 U.S.C. | 1744 (1982), the owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void. Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. | 1744 (1982), and the owner must bear the consequence of filings not

timely made. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements. BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the need to make annual filings required by 43 U.S.C. | 1744 (1982).

3. Millsites: Generally--Mining Claims: Millsites

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite abandoned and void without first according the claimant an opportunity to comply with the notice of deficiency. Where, owing to misdelivery of BLM's decision providing such opportunity and BLM's misstatement of applicable appeal procedures, claimant may not have been aware of such opportunity, the claimant may be provided with an additional opportunity on remand.

APPEARANCES: Stephen P. Shadle, Esq., Yuma, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

By decision dated April 3, 1986, the Arizona State Office, Bureau of Land Management (BLM), declared the Waterhole Nos. 1 and 2 mining claims (A MC 44045 and A MC 44046) and the Little Gem lode mining claim (A MC 44050) abandoned and void for failure to file an affidavit of assessment work or notice of intention to hold the claims during the 1985 calendar year on or before December 30, 1985.

On April 3, 1986, BLM issued a second decision declaring the Pool millsite claim (A MC 44051) abandoned, also for failure to make an annual filing in 1985. However, BLM's decision allowed claimants "30 days from the date of receipt [of the decision] to file a notice of intention to hold the mill site for [1985]."

Both of these decisions were sent to "Jean Emanuel, Bagdad Route, Bagdad, Arizona 86321." Both decisions were returned by the Postal Service marked "UNDELIVERABLE AS ADDRESSED [--] FORWARDING ORDER EXPIRED." As these adverse decisions were not received by the claimants, no appeal was filed by them.

On February 27, 1987, BLM received a notice of intention to hold the claims filed by counsel on behalf of the owners (Eva N. Pool, Jean Emanuel Hatton, Phillip A. Emanuel, Wilda Louise Myrick, Sylvia Marjorie Pool, and Ronald A. Pool). BLM responded on the same date with a letter to the claimants that no assessment credit could be given for these claims for 1987, "because they have been closed out and are therefore inactive." BLM enclosed copies of the April 3, 1986, decisions, discussed above, and also noted in its response that no 1986 annual filings were made on the four claims. Following their receipt of BLM's response, a notice of appeal was

filed by counsel on behalf of Jean Hatton, Eva N. Pool, and Phillip Emanuel on March 23, 1987.

Appellants' mining and millsite claims were part of a group of claims within in the Luke Air Force Gunnery and Bombing Range. The area in which the claims are situated was withdrawn from mineral entry and reserved for continued use as a gunnery and bombing range pursuant to the Act of August 24, 1962, P.L. 87-597, 76 Stat. 399 (1962). However, appellants' claims were located prior to the effective date of the withdrawal and, thus, were not invalidated by it.

In July 1980, BLM, on behalf of the Corps of Engineers, Department of the Army, filed complaints challenging the validity of claims, including these four, situated within Luke Air Force Base. Although other mining claims in the group were found invalid as a result of those contests, the contests against these mining claims and the millsite claim were dismissed. United States v. Pool, 78 IBLA 215 (1984). Nevertheless, appellants have essentially been barred from access to the claims because of military activity since the early 1950's. United States v. Pool, *supra* at 216 n.4. Further, the United States has apparently taken possession of these claims following condemnation proceedings. <sup>1/</sup>

[1] Before reaching the merits of this appeal, we must first consider the timeliness of this appeal. Although styled as an appeal from BLM's notice dated February 27, 1987, appellants actually seek review of BLM's decisions of April 3, 1986, which invalidated their claims.

Departmental regulation 43 CFR 4.411(a) provides: "A person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service." Thus, the 30-day period for filing a notice of appeal does not begin to run until the day after a decision has been "served" upon the appellant in the manner required by 43 CFR 1810.2 and 4.401(c). Further, an appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal. Luella S. Collins (On Reconsideration), 101 IBLA 399, 400 (1988); Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173, 174 (1986).

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<sup>1/</sup> The claims have also been involved in condemnation proceedings initiated by the United States. Appellant refers to various orders and notices in the following proceedings: United States v. 644.155 Acres of Land, No. CIV-84-582-PHX-EHC (D. Ariz. filed Apr. 9, 1984); United States v. 1,739.13 Acres of Land, No. CIV-77-242-PHX-EHC (D. Ariz. filed July 2, 1985); United States v. 933.39 Acres of Land, No. CIV-82-570-PHX-EHC (D. Ariz. filed July 2, 1985); United States v. 644.15 Acres of Land, No. CIV-84-582-PHX EHC (D. Ariz. filed July 2, 1985).

BLM sent the decisions dated April 3, 1986, to the address that appeared on the copy of the notice of location filed with BLM in 1979 (specifically, that of claimant Jean Emanuel, now known as Jean Emanuel Hatton) notwithstanding that appellants informed BLM in 1980 and subsequently via their annual filings that their address was "in care of Westover, Choules, Shadle & Bowen, P.C., 2260 S. 4th Avenue, P.O. Box 5030, Yuma, AZ 85364." A party dealing with BLM is entitled to specify, through proper advance notice, an address of record where BLM may contact him by mail. See Coastal Oil & Gas Corp., 106 IBLA 90 (1988). Under 43 CFR 1810.2, where BLM uses the mails to send a notice to the party, that party will be deemed to have received the communication if it was received at his last address of record, regardless of whether it was in fact received by him. Rick Lee McMullen, Jr., 105 IBLA 80, 81 (1988); J-O'B Operating Co., 97 IBLA 89, 92 (1987). However, this rule, known as "constructive service," does not apply where BLM does not honor a party's designation of a last address of record. Compare Coastal Oil & Gas, *supra*.

Because BLM's April 3, 1986, decisions were not delivered to appellants' last address of record at the time they were issued, and because appellants were not otherwise provided notice of the decisions, there was no service at that time. The 30-day appeal period did not begin to run for these decisions until appellants received notice of them for the first time via BLM's letter dated February 27, 1987. Since appellants' notice of appeal was filed on March 23, 1987, within 30 days of this notice, it was timely filed.

[2] Turning to the merits of the appeal, we note that appellants do not deny that notices of intention to hold their mining claims and millsite were not filed with BLM during 1985 or 1986. They explain the circumstances leading to the failure to file in 1985 as follows:

The attorneys for the Contestees were in litigation during 1985 concerning the property and the Contestees did record Notices of Intention to hold on the claims in question in the local County Recorder's office for 1985. The transfer of the mining claim file from the office of an attorney who left Arizona late in 1985 to practice in Utah to another attorney resulted in some confusion as to which documents had been filed with the BLM in April of 1985. Under the circumstances that existed, there was every reason to believe that since the condemnation case would be concluded in 1985, the matter would be put to rest concerning the requirement of notices and whether the Contestees should be required to file them in subsequent years so long as they had no right to possession of the claims. It is respectfully suggested that any neglect by the Contestees or their agents should be excusable under the circumstances where there existed no question of the parties' intentions to hold the claims.

(Statement of Reasons at 12). No explanation has been offered for the failure to file in calendar year 1986.

The circumstances of this appeal concerning the three mining claims and the arguments raised by appellants are similar to those that were before us in Gordon B. Copple, 105 IBLA 90, 95 I.D. \_\_\_ (1988), appeal filed, Copple v. United States, No. CIV 88-1886 PHX (D. Ariz. Nov. 16, 1988). In Copple, we affirmed BLM's decision declaring mining claims abandoned and void, holding that, under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1744 (1982), the owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the mining claim prior to December 31 of each year; *i.e.*, on or after January 1, and on or before December 30 of each year. Following United States v. Locke, 471 U.S. 84 (1985), we held that failure to file within the prescribed period automatically results in the claim being deemed abandoned and void, and that, although a mining claimant may have filed a document with the local recording office, the statutory requirement is not satisfied if no copy has been filed with BLM.

Despite appellants' arguments on appeal, discussed below, we reaffirm our holding in Copple and apply it here. As no evidence of annual assessment work or notice of intention to hold the three mining claims was filed either in 1985 or 1986, BLM properly declared these claims abandoned and void. The filing of documents in Yuma County, Arizona, does not satisfy the requirements of FLPMA. Copple, 105 IBLA at 95, 95 I.D. at \_\_\_\_; Fern L. Evans, 88 IBLA 45 (1985); Charlene Schilling, 87 IBLA 52 (1985).

Like the claimants in the Copple appeal, appellants argue that the pendency of the contest and condemnation proceedings relieved them of the filing obligation for several reasons. In Copple, we considered and rejected the argument that BLM had both actual and constructive notice of their intention to hold these claims by virtue of the contest and condemnation proceedings instituted against them:

Claimants' equitable argument that BLM had both actual and constructive notice of their intention to hold these claims by virtue of the contest and condemnation proceedings is not cognizable by the Board under the statute and regulations. Congress provided no relevant exceptions to the filing requirement in 43 U.S.C. | 1744 (1982). The regulations in 43 CFR 3833.2-4 excuse a mining claimant from filing evidence of annual assessment work or a notice of intention to hold the claim only if a proper application for a mineral patent was filed and the final certificate issued. In United States v. Ballas, 87 IBLA 88 (1985), the Board dismissed as moot an appeal involving a contest against certain mining claims because the claims had become abandoned and void as a result of the claimant's failure to file the required instruments during the pendency of the contest proceedings. In Robert C. LeFaivre, 95 IBLA 26 (1986), we noted that 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).

Under the clear provisions of 43 U.S.C. | 1744(c) (1982), the automatic consequence of failure to file the required instruments is a finding that the claim has been abandoned and is null and void. See United States v. Locke, *supra*. As the Supreme Court made clear in the Locke decision, it is the failure to file the required notice that results in the abandonment of the claim; neither the mining claimant's subjective intent nor even the Government's general awareness of such intent is sufficient to avoid the effect of the statute. [Footnotes omitted.]

105 IBLA at 94-95, 95 I.D. at \_\_\_\_\_. We see no reason to depart from this holding.

In Copple, we also considered and rejected an argument similar to appellants' assertion here that they had no obligation to file because the United States Government had exclusive possession of the claims by virtue of eminent domain proceedings (see note 1, *supra*) and had thus assumed the obligation to maintain them in as good condition as they were when they were taken over (Statement of Reasons at 8). We held as follows in Copple, quoting from our decision in Comstock Tunnel & Drainage Co., 87 IBLA 132, 134 (1985), a case in which a lessee of the mining claims failed to make the required filings on behalf of the claims' owner:

In Comstock Tunnel & Drainage Co., [*supra*], we observed:

In section 314 of FLPMA, Congress assigned the owner of the claim the responsibility for making the required filings; the owner must bear the consequence of filings not timely made. Cf. United States v. Boyle, [469 U.S. 241], 105 S. Ct. 687 (1985) (penalty properly imposed on taxpayer whose attorney filed a late return on tax-payer's behalf).

The filing obligation thus clearly rests with the mining claim owner, regardless of the status of any other property interests in the land at issue.

105 IBLA at 93-94, 95 I.D. at \_\_\_\_\_. Again, we adhere to this holding here.

Appellants also contend that their failure to file was a result of excusable neglect by the contestees or their agents which should not result in the loss of the claims, and that BLM breached an affirmative duty to them because it failed to mail a reminder notice to the address furnished in prior years, but instead mailed the notice to an obsolete address not listed on the 1983 and 1984 notices. As we held in Copple:

[C]ontrary to claimants' assertion, it is well established that BLM has no affirmative obligation to send a reminder notice. Although noting in Locke, *supra* at 109 n.18, that BLM had chosen "[i]n the exercise of its administrative discretion" to send reminder notices, the Court in no way suggested that such notices were required by the statute or that once BLM sent such notices, a

right to receive them in the future was created. The following observation from Locke, supra at 108, is equally pertinent to claimants' contentions:

In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements. \* \* \* [E]very claimant in appellees' position already has filed once before the annual filing obligations come due. That these claimants already have made one filing under the Act indicates that they know, or must be presumed to know, of the existence of the Act and of their need to inquire into its demands.

Thus, the loss resulting from claimants' failure to make the required filings cannot be attributed to the United States.

105 IBLA at 95-96, 95 I.D. at \_\_\_; accord, Thurman Oil & Mining Co., 90 IBLA 342 (1986); Good Hope Development Co., 87 IBLA 341 (1985).

Appellants also claim that their counsel received conflicting oral information from BLM in 1980 with respect to the filing requirement, and that they sought to clarify the matter in writing with a letter to the Office of the Field Solicitor dated November 18, 1980 (Statement of Reasons at 3, Exh. D). Appellants believe there are conflicting accounts as to the outcome of the conversations which took place, but assert that their position continued to be that notices of intention to hold would be recorded but need not be furnished to the United States, which had taken possession of the claims (Statement of Reasons at 4, Exh. E). However, appellants did file notices of intention to hold the claims from 1980 through 1984, "as an abundance of caution" (Statement of Reasons at 4).

Appellants do not allege that any Departmental official affirmatively misadvised them that they did not have to file notices of intention to hold these claims with BLM. Even if appellants had been given such misadvice, it does not follow that it would affect our resolution of this appeal, as erroneous advice cannot operate to vest any rights not authorized by law. 43 CFR 1810.3; Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); United States v. California, 332 U.S. 19, 39 (1947); Clair R. Caldwell, 42 IBLA 139, 141 (1979); Paul S. Coupey, 35 IBLA 112, 116 (1978); see Burton/Hawks, Inc. v. United States, 553 F.Supp. 86, 92 (D. Utah 1982); Hiko Bell Mining & Oil Co. (On Reconsideration), 100 IBLA 371, 397-98, 95 I.D. 1, 15 (1988).

[3] We now turn our attention to appellants' millsite claim. BLM's decision dated April 3, 1986, concerning the millsite noted that no notice

of intention to hold the millsite had been filed for 1985, as required by 43 CFR 3833.2-1(c), and that failure to file constitutes abandonment of the millsite under 43 CFR 3833.4(b). The decision established a 30-day compliance period from claimants' receipt of the decision in which to file the missing notice of intention to hold the millsite for 1985. The record does not indicate that claimants ever complied.

In Feldslite Corp. of America, 56 IBLA 78, 88 I.D. 643 (1981), we held that section 314 of FLPMA, 43 U.S.C. | 1744 (1982), requires only the filing of notices of location for millsite and tunnel site claims: there is no statutory requirement for the annual filing of notices of intention to hold such claims. The annual filing requirement is imposed only by a Departmental regulation, 43 CFR 3833.2-1. In Feldslite, we noted that "a failure to comply timely and scrupulously with the express statutory requirements cannot be waived by the Department," but held that a claimant's "failure to comply promptly with those requirements based on purely regulatory language is subject to curative action." 56 IBLA at 82, 88 I.D. at 645. The Board has subsequently held that owners of millsites must be given notice of a deficiency and an opportunity to correct it before their millsites may be deemed void for failure to comply with FLPMA's filing requirement. Red Top Mercury Mines, 96 IBLA 391 (1987), aff'd, Red Top Mercury Mines v. United States, A 87-326 Civ. (D. Alaska, filed Sept. 19, 1988). By allowing claimants an opportunity to comply prior to declaring the millsite abandoned, BLM's decision of April 3, 1986, correctly followed these requirements for millsites.

However, BLM's mailing of the April 3, 1986, decision to an expired address led to confusion as to what claimants could do to preserve their millsite. Claimants did not receive the April 3, 1986, decision allowing an opportunity for compliance until March 1987, at which time they were also expressly advised that the millsite had been "closed out," thus indicating that it was too late to comply.

The situation was further confused because BLM's April 3, 1986, decision did not correctly describe the applicable appeal procedure. BLM's decision (although not styled as such) is an example of the decisionmaking practice of "holding for rejection." That is, the decision provided claimants with 30 days in which to file additional information (to-wit, a notice of intention to hold the millsite), failing in which their millsite would be deemed abandoned (rejected) without further notice:

You are advised that you have 30 days from the date of receipt hereof to file a notice of intention to hold the mill site for the above-stated year(s). \* \* \* [I]f no compliance is made, this decision constitutes final administrative action of the Department affecting the above-named mill site. No appeal, protest or petition for reconsideration will be entertained from this decision after the 30 day period. No further notice will be issued and the mill site will be void. Accordingly, the subject case file will be closed of record. [Emphasis supplied.]

When claimants finally received the decision in March 1987, it reasonably appeared to them that it was too late for them to comply with the directive to make an annual filing for the millsite. 2/

In these circumstances, we cannot fault claimants for failing to comply with the annual filing requirement for the millsite, and we deem it appropriate to remand the case to BLM to allow claimants an opportunity to make an annual filing for the millsite.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision declaring appellants' mining claims invalid is affirmed, the decision allowing appellants an opportunity to file the missing 1985 notice of intention to hold the millsite is affirmed, and the case is remanded to allow appellants an additional opportunity to file the missing notice of intention to hold the millsite.

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David L. Hughes  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

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2/ It was not correct for BLM to state in its decision that, if no compliance was made, its decision would be final for the Department and that no appeal would be entertained if filed after the expiration of the 30-day compliance period. It is established that, where (as in this case) BLM issues a decision holding an application or claim for rejection because of some deficiency, but allowing a stated period of time within which such deficiency might be corrected, there is, nevertheless, a right of appeal to this Board. Robert C. LeFaivre, supra at 27-28; Beard Oil Co., supra at 67-68; Randall J. Gerlach, 90 IBLA 338, 339 (1986); Carl Gerard, supra; see 43 CFR 4.410. In such cases, the 30-day period under 43 CFR 4.411(a) for filing a notice of appeal commences at the expiration of the compliance period. Id. Thus, directly contrary to the statement in BLM's decision, any appeal was required to be filed after the 30-day period.

This is because, where a BLM decision contemplates that invalidation of a claim will not occur until the compliance period expires, the decision is merely an interim determination affording a party an opportunity to correct a problem prior to cancellation of his interest. The decision is interlocutory, that is, the party is not adversely affected (and therefore may not file an appeal) until the interest is actually canceled. The interest is not canceled until the compliance period expires, at which time the cancellation is then subject to review by this Board. Contrary to BLM's decision, it is not final for the Department at that point.