

BASIC ROCK & SAND, INC. (ON RECONSIDERATION)

IBLA 88-636

Decided July 5, 1989

Appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void for failure to timely file evidence of assessment work performed or notice of intention to hold. N MC 63950 and N MC 63951.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Equitable Adjudication: Substantial Compliance

Where substantial compliance is a prerequisite for the invocation of equitable adjudication, the principle is not applicable to a mining claim deemed abandoned and void for failure to timely submit the annual filing required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), because, as the Supreme Court in Locke v. United States, 471 U.S. 84 (1985), held, there is no possibility of substantial compliance where the claimant has failed to comply with the deadline established by Congress. Further, the fact that Congress made sec. 314 self-operative and did not provide the Department with the authority to waive the statutory consequences for failure to comply, dispels the view that Congress intended for a claim deemed abandoned and void to be eligible for reinstatement under some other avenue.

APPEARANCES: Robert E. McCarthy, Esq., Reno, Nevada, for Basic Rock & Sand, Inc.; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On January 6, 1989, Basic Rock & Sand, Inc. (Basic Rock), filed with the Secretary of the Interior a "petition for reconsideration" of an order of the Board of Land Appeals dated November 17, 1988, affirming a decision of the Nevada State Office, Bureau of Land Management (BLM), declaring unpatented mining claims N MC 63950 and N MC 63951 abandoned and void for failure to file with BLM evidence of assessment work performed or notice

of intention to hold the claims during the filing period ending December 30, 1986. The Secretary forwarded the matter to the Director, Office of Hearings and Appeals, for appropriate action. On January 13, 1989, the Director, in accordance with the provisions of 43 CFR 4.5(a) and (b), instructed the Board to reconsider its November 17, 1988, order, in light of the arguments set forth in Basic Rock's petition to the Secretary.

In its petition, Basic Rock asserts that it has fully complied with the requirement under the General Mining Law of 1872, 30 U.S.C. § 28 (1982), that it annually perform assessment work and with state and Federal requirements that it record annually with the local recording office evidence of the work performed. It contends that, in light of the constructive notice established by its filing with the county, it has substantially complied with the recording requirements of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982). The gravamen of its petition is the argument that the principles of equitable adjudication set forth in 43 CFR 1871.1-1 and 43 U.S.C. §§ 1161 and 1164 (1982) apply here and, with Basic Rock having no remedy at law, that the Board should have considered its request for equitable adjudication.

As grounds for the above, Basic Rock asserts the following equities: (1) The subject mining claims have been worked as a valuable sand and gravel mine since 1941 from which over 1 million tons of sand and gravel was produced during March 1982 through December 1987; (2) Basic Rock depends on the sand and gravel mined from these claims as a supply for its ready-mix concrete operation; (3) the sand and gravel and the ready-mix operations combined employ 66 individuals; (4) these claims have never been "stale"; and (5) Basic Rock substantially complied with the filing requirements and its late filing should be excused because of extenuating circumstances exacerbated by personal hardships befalling one of its employees. Basic Rock submits that a personal tragedy, along with concentration on its business operations, completely distracted the attention of key Basic Rock personnel from filing a copy of the evidence of assessment work performed with BLM.

In its response to the petition, BLM argues that the Supreme Court in United States v. Locke, 471 U.S. 84, 98 (1985), left little doubt that Congress intended an automatic, conclusive forfeiture of all claims for which the filing requirements were not fully satisfied. Locke, BLM states, held that the failure to file in a timely fashion is not, as a matter of law, substantial compliance and, therefore, the provisions of 43 CFR 1871.1-1 and 43 U.S.C. §§ 1161, 1164 (1982) are inapplicable to such declarations of abandonment.

Section 314 of FLPMA and Departmental regulation 43 CFR 3833.2-1 require the owner of an unpatented mining claim located on public land to file evidence of assessment work performed or a notice of intention to hold the mining claim with the proper BLM office prior to December 31 of each year following the year in which the claim is located. Such filing must be made within each calendar year, *i.e.*, on or after January 1 and on or before December 30. Ronald Willden, 97 IBLA 40 (1987); Robert C. LeFaivre, 95 IBLA 26 (1986). Failure to file one of the two instruments within the prescribed

time period "shall be deemed conclusively to constitute an abandonment of the mining claim." 43 U.S.C. § 1744(c) (1982); 43 CFR 3833.4.

The record shows that an affidavit of labor for the filing year in question was recorded with Clark County, Nevada, on September 2, 1986. A copy of the recording was not filed with BLM until April 18, 1988. Because its records did not reflect that appellant's assessment affidavit was timely filed with it, BLM deemed the claims to be abandoned and void. Petitioner does not contest the fact that its filing with the agency was untimely.

The Department's "equitable adjudication" regulation, 43 CFR 1871.1-1, reads as follows:

§ 1871.1-1 Cases subject to equitable adjudication

The cases subject to equitable adjudication by the Director, Bureau of Land Management, cover the following:

(a) Substantial compliance: All classes of entries in connection with which the law has been substantially complied with and legal notice given, but the necessary citizenship status not acquired, sufficient proof not submitted, or full compliance with law not effected within the period authorized by law, or where the final proof testimony, or affidavits of the entryman or claimant were executed before an officer duly authorized to administer oaths but outside the county or land district, in which the land is situated and special cases deemed proper by the Director, Bureau of Land Management, where the error or informality is satisfactorily explained as being the result of ignorance, mistake, or some obstacle over which the party had no control, or any other sufficient reason not indicating bad faith there being no lawful adverse claim.

The statutory basis for this regulation appears in 43 U.S.C. § 1161 (1982),

The Secretary of the Interior, or such officer as he may designate, is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be approved by the Secretary of the Interior, consistently with such principles, all cases of suspended entries of public lands and of suspended preemption land claims, and to adjudicate in what cases patents shall issue upon the same.

and 43 U.S.C. § 1164 (1982):

Sections 1161 to 1163 of this title shall be applicable to all cases of suspended entries and locations, which have arisen in the Bureau of Land Management since the 26th day of June, 1856, as well as to all cases of a similar kind which may hereafter occur, embracing as well locations under bounty-land warrants as ordinary entries or sales, including homestead entries and preemption locations or cases; where the law has been substantially complied

with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or preemptor are prejudiced, or where there is no adverse claim.

Citing Hawley v. Diller, 178 U.S. 476 (1900), Basic Rock argues that the purpose of 43 U.S.C. §§ 1161 and 1164 (1982) was not to limit but to supplement the jurisdiction of land officers "by authorizing them to employ the principles of equity to save from rejection those entries deemed meritorious but which could not be sustained if held to literal compliance with the letter of the law" (Response to Solicitor's Brief at 1). Two past Secretarial decisions involving deficiencies in mining claims and which were referred in the late 1880's to the Board of Equitable Adjudication, are cited for the proposition that "[a] perfected placer mining claim, being an entry under the mining laws, is subject to equitable adjudication" (Petition at 5, citing Mimbres Mining Co., 8 L.D. 457 (1889)); New York Lode & Millsite Claim, 5 L.D. 513 (1887).

That the Secretary's equitable adjudication authority extends to the prevention of forfeiture of "meritorious" mining claims even though statutorily required filings are not met is, according to Basic Rock, established by the history of the Locke case itself. Basic Rock points out that following the Supreme Court's decision in Locke, "the claimant and BLM entered into a stipulation, which the district court approved, whereby the mining claims were reinstated and the litigation terminated" (Response to Solicitor's Brief at 2-3).

[1] In section 314 of FLPMA, Congress mandated that failure to file the proper documents in the proper offices within the time periods prescribed therein will, in and of itself, cause the claim to be lost. The express language of Congress is as follows: "The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim (emphasis added.)" 43 U.S.C. § 1744(c) (1982). The fact that assessment work was done or that timely filings have been made in other years has no effect on the conclusive presumption of abandonment embodied in the statute. As a result, a claim for which timely filings are not made is extinguished by operation of law notwithstanding the claimant's good faith intentions to hold the claim. United States v. Locke, 471 U.S. at 97-100. There can be little doubt that Congress intended to cause a forfeiture of all claims for which the filing requirements of section 314 are not met. 471 U.S. at 98. As Congress expressly provided for the forfeiture of a mining claim for failure to timely file, we cannot accept Basic Rock's contention that a claim, "otherwise meritorious," can be revived on equitable grounds. The old L.D. cases cited by Basic Rock are simply irrelevant to this case, which involves absolute forfeiture provisions enacted by Congress in 1976 and upheld by the Supreme Court.

Historically, the Department has invoked equitable relief in land entry cases only where there has been substantial compliance with the law. See Clifton O. Myll, 71 I.D. 458, 468 (1964); see also James M. Mills, 108 IBLA

155 (1989) (desert land entry). Basic Rock asserts that it has "substantially complied" with the requirements of section 314 although it filed with BLM a copy of the affidavit of labor recorded with the county more than a year after the filing period had ended. Basic Rock argues that performing assessment work and recording evidence thereof with the county constitutes "constructive notice" to BLM of the fact that it intended to hold these mining claims.

The Supreme Court addressed this question extensively in Locke, 471 U.S. at 100-102. The Court recognized that the assessment work requirement of the Mining Law of 1872 and the filing requirements of FLPMA are distinct and independent conditions to holding a mining claim. See Locke, 471 U.S. at 101. It is also well established that filing or recording the required documents with the local recording office alone does not constitute compliance with the requirements that they be filed with BLM. See Fern L. Evans, 88 IBLA 45 (1985). As the Supreme Court in Locke explains, substantial compliance may become an issue where there is latitude to question the claimant's intent to retain a claim, as is the case with the performance of assessment work requirements and the failure to comply therewith. However, in the matter of filing requirements, where a deadline to perform is imposed and the intent to abandon or hold a claim is made irrelevant by the automatic loss of the claim through noncompliance, the requirement cannot be satisfied with, substantially or otherwise, unless the necessary documents are received in the proper office before the stipulated deadline. 1/ The statutory filing requirement under section 314 of FLPMA is an absolute requirement that cannot be waived. Locke, 471 U.S. at 102. Thus, in light of the undisputed fact that no timely filing was made by Basic Rock with BLM for the filing period ending December 30, 1986, we cannot hold that it substantially complied with the statutory filing requirements of FLPMA on any grounds averred. 2/

1/ In this regard, the Board has noted that BLM's regulation permitting an opportunity to cure the failure to file information required of mining claimants, 43 CFR 3833.4(b), has no applicability to the failure to timely file recordation documents required by section 314 of FLPMA. David R. Jacques, 109 IBLA 69 (1989).

2/ In the Supreme Court's words:

"Relying primarily on Hickel v. Shale Oil Corp., 400 U.S. 48 (1970), the District Court held that, even if the statute required a filing on or before December 30, appellees had 'substantially complied' by filing on December 31. We cannot accept this view of the statute.

"The notion that a filing deadline can be complied with by filing sometime after the deadline falls due is, to say the least, a surprising notion, and it is a notion without limiting principle. If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. 'Any less rigid standard would risk encouraging a lax attitude toward filing

Basic Rock states that the principles of equitable adjudication must be applicable to mining claims deemed abandoned and void for failure to timely file required documents as the Department has reinstated such claims in at least one other instance, *i.e.*, the Locke case. The specific matter cited by Basic Rock involved a stipulated dismissal approved by the District Court in Locke v. United States, Civ No. R-82-297 BRT (D. Nev. July 22, 1985) (on remand from U.S. Supreme Court), whereby the Nevada State Office, BLM, reinstated placer mining claims previously deemed abandoned and void. The court-approved dismissal was by unpublished order and no conclusions of law were presented by the court. ^{3/}

fn 2 (continued)

dates,' United States v. Boyle, 469 U.S. at [249]. A filing deadline cannot be complied with, substantially or otherwise, by filing late -- even by one day.

"Hickel v. Shale Oil Co., *supra*, does not support a contrary conclusion. Hickel suggested, although it did not hold, that failure to meet the annual assessment work requirements of the general mining laws, 30 U.S.C. § 28, which require that 'not less than \$ 100 worth of labor shall be performed or improvements made during each year,' would not render a claim automatically void. Instead, if an individual complied substantially but not fully with the requirement, he might under some circumstances be able to retain possession of his claim.

"These suggestions in Hickel do not afford a safe haven to mine owners who fail to meet their filing obligations under any federal mining law. Failure to comply fully with the physical requirement that a certain amount of work be performed each year is significantly different from the complete failure to file on time documents that federal law commands be filed. In addition, the general mining laws at issue in Hickel do not clearly provide that a claim will be lost for failure to meet the assessment work requirements. Thus, it was open to the Court to conclude in Hickel that Congress had intended to make the assessment work requirement merely an indicia of a claimant's specific intent to retain a claim. Full compliance with the assessment work requirements would establish conclusively an intent to keep the claim, but less than full compliance would not by force of law operate to deprive the claimant of his claim. Instead, less than full compliance would subject the mine owner to a case-by-case determination of whether he nonetheless intended to keep his claim. See Hickel, *supra*, at 56-57.

"In this case, the statute explicitly provides that failure to comply with the applicable filing requirements leads automatically to loss of the claim. See Part II-B, *supra*. Thus, Congress has made it unnecessary to ascertain whether the individual in fact intends to abandon the claim, and there is no room to inquire whether substantial compliance is indicative of the claimant's intent -- intent is simply irrelevant if the required filings are not made. Hickel's discussion of substantial compliance is therefore inapposite to the statutory scheme at issue here. As a result, Hickel gives miners no greater latitude with filing deadlines than have other individuals."

471 U.S. 84, 100-102.

^{3/} A stipulated dismissal, unaccompanied by any court rulings or interpretations of law, has no precedential value whatsoever. See Rule 41(a)(1), F.R.C.P.

In any event, the settlement in Locke following remand was not undertaken under the principles of equitable adjudication set out at 43 CFR 1871.1-1 or the statutory provisions of 43 U.S.C. §§ 1161 and 1164 (1982). Instead, the settlement was pursued because the Court's Locke opinion left open the possibility that the Lockes could preclude BLM from invalidating their mining claims based upon a legal claim of equitable estoppel in further proceedings in the district court. Locke, 471 U.S. 84, 90 n.7. Here, Basic Rock has no claim of estoppel against the Government, as is elucidated in Judge Burski's concurrence. Cf. Henry E. Krizman, 104 IBLA (1988).

Accordingly, 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

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While one can sympathize with appellant both as to the consequences attendant upon its failure to make the annual filing required by 43 U.S.C. § 1744(a) (1982) in calendar year 1986, as well as to the personal circumstances which led to this failure, I think it clear that the request that this Board provide equitable adjudication with respect to that failure must be denied. I believe that a reading of appellant's brief evidences a confusion between the principle of equitable estoppel and the ability of the Department to equitably adjudicate cases under 43 CFR 1871.1-1.

Equitable estoppel is a legal concept which bars one party from asserting a position which is inconsistent with a prior position on which another party had relied to his or her detriment. The elements of equitable estoppel with respect to Governmental actions are well-established. Shortly stated, they are:

- (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his detriment.

United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970) (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)).

It is clear that two elements are absolutely essential to an invocation of equitable estoppel: a false statement and subsequent reliance on that statement by another party. In the instant case, neither of these conditions obtains. Appellant does not argue that it was misled by any statement emanating from the Government. Indeed, its entire petition for reconsideration is based on unfortunate mishaps in which the Government took no part. However much this Board may empathize with appellant's predicament, the concept of equitable estoppel is in no way involved in the instant case.

Equitable adjudication, by contrast, is a process by which the Department may adjudicate various entries and land claims under principles of equity and justice. Under the Department's regulations, the sine qua non for equitable adjudication is "substantial compliance" with the law. See 43 CFR 1871.1-1. Far from supporting appellant's position, the decision of the Supreme Court in United States v. Locke, 471 U.S. 84 (1985), makes it abundantly clear that equitable adjudication is not available to cure a failure to timely file the required documents under section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA).

Thus, the claimants in Locke, who had hand-delivered the annual filings one day late, argued, inter alia, that they had substantially complied with the requirements of section 314(a) of FLPMA. In rejecting this contention, the Court expressly held that "[a] filing deadline cannot be complied with, substantially or otherwise, by filing late -- even by one day."

471 U.S. at 101. Inasmuch as equitable adjudication requires, as a prerequisite, a finding of substantial compliance, it is impossible to grant equitable adjudication to a mining claim conclusively deemed abandoned and void under section 314 for the failure to timely file the annual assessment work, since a failure to timely file is, ipso facto, a failure to substantially comply.

Nevertheless, appellant herein suggests that Locke recognizes that principles of equity may be applied to ameliorate the consequences of a failure to timely file required documents. Thus, appellant points out that on remand to the District Court, the Government stipulated to a reinstatement of the mining claims at issue. See Locke v. United States, Civ. No. R-82-297 BRT (D. Nev. July 22, 1985). The present case, however, must be contrasted with the situation in Locke.

In Locke, appellants had expressly argued that they had relied upon a statement of a BLM employee who had informed them that a filing made on December 31 would be timely under section 314. It was in reference to this assertion that the Court noted "the claim that the United States was equitably estopped from forfeiting appellees' claims, given the advice of the BLM agent" had not been considered by the District Court. Id. at 90 n.7. Justice O'Connor, concurring separately, also noted that:

The unusual facts alleged by appellees suggest that the BLM's actions might estop the Government from relying on § 314(c) to obliterate a property interest that has provided a family's livelihood for decades. The Court properly notes that the estoppel issue was not addressed by the District Court and will be open on remand.

Id. at 111 (O'Connor, J., concurring). The subsequent settlement of the case was clearly based not on the theory that appellants had substantially complied with the filing requirements but that the Government had contributed to their failure by its erroneous advice. No such advice was provided in the instant case where appellant admits that its failure to timely file was the result of an inadvertent oversight occasioned by the concatenation of a number of unfortunate events.

Moreover, appellant is also wrong on another premise of its petition. Thus, appellant argues that since it performed the assessment work and duly recorded the same in the county, it substantially complied with section 314(a) of FLPMA. This argument rests on the implicit assertion that the purpose of the annual filing requirement of section 314(a) is enforcement of the annual assessment requirement of 30 U.S.C. § 28 (1982). This is not correct.

In Oregon Portland Cement Co., 66 IBLA 204 (1982), ^{1/} this Board discussed the interrelationship between section 314(a) of FLPMA and the

^{1/} The Board's decision in Oregon Portland Cement Co., *supra*, was subsequently reversed, on different grounds, by the United States District

assessment statute, 30 U.S.C. § 28 (1982). Therein, we noted that, while compliance with the assessment statute is only effectuated by the actual performance of the work, compliance with section 314(a)(2) requires the submission of an annual filing with BLM and can be accomplished even when the assessment work is not performed. Id. at 207-10. Indeed, we expressly rejected a view that one purpose of section 314 was to enforce the performance of assessment work. Id. at 209 n.4.

The separate purposes of these two statutes were implicitly recognized in the Board's decision in Alaskamin Co. (On Reconsideration), 49 IBLA 49A (1981), in which the Board struck language from a prior decision requiring the filing of evidence of assessment work in those situations where performance of assessment work was required by 30 U.S.C. § 28 (1982). Rather than insist upon the filing of evidence of assessment work in such situations, the Board agreed with BLM that the submission of a notice of intention to hold the mining claim would satisfy the requirements of section 314(a) of FLPMA.

It can be seen, therefore, that performance of assessment work is irrelevant to the question of whether timely filings have been made under section 314(a)(1) and (2). The fact that appellant actually performed the required assessment work is of no legal import insofar as its compliance with the annual filing requirements is concerned. And, while appellant complied with section 314(a)(1) by timely filing evidence of assessment work in the county, it totally failed to comply with section 314(a)(2).

Thus, it is clear that the Department is powerless to grant the relief appellant requests. I recognize, of course, that appellant is apparently unable to relocate these two claims because they involve common varieties of sand and gravel removed from location under the Mining Laws by section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982). It would seem, therefore, that appellant's only avenue for relief lies in Congress.

Accordingly, I concur in the denial of the instant petition for reconsideration.

James L. Burski
Administrative Judge.

fn 1 (continued)

Court for Alaska in Oregon Portland Cement Co. v. U.S. Department of the Interior, 590 F. Supp. 52 (1984). See also Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186 (1984). However, as the Board subsequently noted in Buck Wilson, 89 IBLA 143, 146 n.2 (1985), the legal predicates of the District Court's opinion were, themselves, effectively overruled by the Ninth Circuit Court of Appeals in NL Industries, Inc. v. Secretary of the Interior, 766 F.2d 1380 (9th Cir. 1985).

