

Editor's note: appeal filed Civ.No. CV-S-93-912 LDG-LRL (D. Nev. Sept. 17, 1993); dismissed as settled (Feb. 3, 1997)

ROBERT L. MENDENHALL ET AL.

IBLA 89-478

Decided July 20, 1993

Appeal from a decision of the State Director, Nevada, Bureau of Land Management, affirming a decision of the District Manager, Las Vegas District, Nevada, Bureau of Land Management, denying a plan of operations with respect to a placer mining claim. N 56-88-13P.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claim Certificates or Notices of Location--Rules of Practice: Appeals: Failure to Appeal

Upon the failure of a mining claimant to appeal from a decision cancelling recordation of a mining claim under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1988), all rights under the location are conclusively deemed to be abandoned and void.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claim Certificates or Notices of Location--Mining Claims: Possessory Right--Mining Claims: Recordation of Certificate or Notice of Location

In light of the adoption of sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1988), the provisions of 30 U.S.C. § 38 (1988) may not be used to establish rights under the mining laws of the United States for claims which have not been duly recorded with BLM under sec. 314(b).

3. Evidence: Presumptions--Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment

While the legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence that the document was received by them, the presumption is not rebutted by the assertion that the document in question was mailed to the appropriate office and an appellant submits no evidence that it was actually received in that office.

APPEARANCES: Hale C. Tognoni, Esq., Phoenix, Arizona, and John Foley, Esq., Elizabeth Foley, Esq., Las Vegas, Nevada, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Robert L. Mendenhall and others have appealed from a decision of the Nevada State Director, Bureau of Land Management (BLM), dated May 9, 1989, affirming a November 10, 1988, decision of the Las Vegas District Manager denying a plan of operations, N 56-88-13P, to the extent that it encompassed proposed operations on the Charleston No. 23 association placer mining claim, N MC 378096, described as embracing 100 acres in the S½ SE¼, S½ NE¼ SE¼ sec. 36, T. 19 S., R. 59 E., Mount Diablo Meridian, Clark County, Nevada. 1/

Pursuant to 43 CFR Subpart 3809, Mendenhall, as President of Las Vegas Paving Corporation (LVPC), filed a proposed plan of operations on August 30, 1988, subsequently supplemented on October 11, 1988, with respect to 18 placer mining claims situated in secs. 35 and 36, T. 19 S., R. 59 E., sec. 2, T. 20 S., R. 59 E., and sec. 31, T. 19 S., R. 60 E., Mount Diablo Meridian, Clark County, Nevada. Listed among these claims was the Charleston No. 23 placer mining claim. 2/ LVPC was designated as the operator.

Under the proposed plan, Mendenhall stated that LVPC intended to continue and expand its existing operations, which consisted of the mining and removal of limestone aggregate by means of dozers, scrapers, and front-end loaders, from the "Lone Mountain Pit," which was then situated on the Omni Chard Nos. 1 and 4 through 6 placer mining claims, "into and across the Omni Chard and Charleston claims" (Mining Plan of Operations at 2). 3/

1/ The State Director's May 1989 decision was expressly addressed to Mendenhall and the Las Vegas Paving Corporation (LVPC) and was duly served on those parties on May 11, 1989. A notice of an appeal by Mendenhall and LVPC from that decision was timely filed with BLM on June 6, 1989. The statement of reasons for appeal (SOR) subsequently submitted

on behalf of Mendenhall and LVPC, however, lists several other appellants, viz., Robert T. Mendenhall, Lori Mendenhall, Paula C. Mendenhall, Marc Mendenhall, and Jay N. Smith, who, along with Robert L. Mendenhall, are the purported co-locators of the amended Charleston No. 23 placer mining claim (N MC 378096). In order to obviate any confusion, we wish to make it clear that references in the text of this decision to "Mendenhall," refer to Robert L. Mendenhall, unless otherwise expressly indicated.

2/ The other mining claims were identified as the Omni Chard Nos. 1 through 15, Charleston No. 27, and Lime Point placer mining claims, N MC 349670 through N MC 349684, N MC 378097, and N MC 390254.

3/ Mendenhall stated that LVPC had operated the Lone Mountain Pit "since March 6, 1979 when [he] purchased the mineral rights to this area held by Frank L. Sullivan" (Mining Plan of Operations at 2). Further, he stated that a total of 3.6 million tons of limestone aggregate had been produced "at a profit" from this pit during the period from 1979 through June 30, 1988. Id. at 3.

Mendenhall described all of these claims as situated in an alluvial fan at the mouth of Charleston Canyon, a narrow valley in the Spring Mountains near Las Vegas, Nevada, with the mineral deposit occurring at a depth of up to 100 feet.

After a lengthy review of the proposed plan of operations by BLM resource specialists and preparation of an environmental assessment (EA), the Stateline Resource Area Manager, signed a Decision Record on November 2, 1988, providing for approval of the plan, subject to incorporation of various mitigating measures recommended in the EA. In his November 1988 decision, the District Manager, for the most part, formally approved the proposed plan of operations, subject to acceptance by LVPC of attached stipulations. ^{4/} Mendenhall signed the stipulations on behalf of LVPC on November 23, 1988.

However, though largely approving the proposed plan of operations, the District Manager denied the plan to the extent that it proposed operations on the Charleston No. 23 mining claim (N MC 378096). The District Manager based this denial on his conclusion that the "Lone Mountain Community Pit" (N 43006), which had been posted on the relevant master title plat (MTP) on December 31, 1985, prior to the August 20, 1986, location of the claim, constituted a "superior right" to remove the material found on the claim, within the meaning of 43 CFR 3604.1(b). Noting that, while "mining claims may be located over a community pit, * * * the claimant's rights do not attach until the community pit is terminated," the District Manager determined that "all operations proposed within the Charleston No. 23 mining claim are denied."

Pursuant to 43 CFR 3809.4, appellants timely appealed to the State Director from the District Manager's November 1988 decision. They objected to the decision only to the extent that the District Manager had denied the proposed plan of operations with respect to the Charleston No. 23 mining claim. Subsequent thereto, the State Director issued his May 1989 decision, affirming the District Manager's decision to that extent. Thereafter, appellants pursued the instant appeal to this Board.

In their statement of reasons for appeal (SOR), appellants essentially reiterate the arguments contained in their appeal to the State Director. Basically, appellants contend that the Lone Mountain Community Pit is not "superior" to the Charleston No. 23 mining claim on a number of different theories: (1) the claim was originally located in 1954 and there is a continuous chain of title stretching to appellants; (2) the land encompassed thereby has been held and worked since 1954, within the meaning of 30 U.S.C. § 38 (1988), by appellants and their predecessors-in-interest;

^{4/} LVPC modified the original plan of operations on Nov. 4, 1988, to include the addition of an asphalt mixing plant, which would be located on the Omni Chard No. 1 mining claim. By letter dated Nov. 30, 1988, the Area Manager notified LVPC that the modification was approved.

and (3) appellants located an amended claim in June 1985, prior to the designation of the community pit. Thus, appellants assert that the case is controlled not by 43 CFR 3604.1(b), but by 43 CFR 3601.1-1(a), which provides that mineral material disposals "may not be made * * * from public lands where * * * [t]here are any unpatented mining claims which have not been cancelled by appropriate legal proceeding." As explained below, however, the facts of record fail to support any of appellants' assertions.

[1] Initially, appellants advert to the fact that J. W. Handy and others originally located the Charleston No. 23 placer mining claim on February 10, 1954. That claim was described in the 1954 notice of location as encompassing 160 acres of land in the SE¼ sec. 36, T. 19 S., R. 59 E., Mount Diablo Meridian, Clark County, Nevada. While appellants assert that the claim was subsequently transferred to Frank L. Sullivan "[s]ometime in 1959," they admit that "[a]ll records of this transaction have been lost or destroyed" (SOR at 12). In any event, on November 22, 1965, BLM initiated a contest (No. MRN-000373) against the Charleston No. 23 mining claim, asserting that a valuable mineral deposit had not been discovered within the limits of the claim and seeking a declaration that the claim was, therefore, null and void.

Notice of the filing of the contest complaint was personally served on some of the original 1954 locators of the Charleston No. 23 mining claim or their representatives. For the most part, service consisted of publication of that notice in a local newspaper. Sullivan was not named in the contest complaint, nor was he personally served with notice of the filing of the contest complaint. By decision dated February 4, 1966, BLM declared the Charleston No. 23 mining claim null and void since, in the absence of the filing of answers to the complaint, 5/ the allegations of the complaint were taken as admitted. See 43 CFR 1852.1-7(a) (1967). No appeal was taken from the February 1966 BLM decision.

Appellants contend that, not having notice of the 1965 contest of the Charleston No. 23 mining claim or the February 1966 BLM decision, Sullivan continued to hold and work the claim from February 4, 1966, until March 6, 1979, when appellants purchased the claim from Sullivan.

On October 15, 1979, Hale C. Tognoni filed a copy of the 1954 notice of location of the Charleston No. 23 mining claim for recordation with BLM, as required by section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1988). In an October 6, 1979, cover letter accompanying the filing, Tognoni stated that the claim was "owned by Robert L. Mendenhall," having been acquired from Frank L. Sullivan on March 6, 1979. The location notice was given serial number N MC 109348. Thereafter, affidavits of labor with respect to the Charleston No. 23 mining

5/ The Mar. 28, 1966, decision did not name J. W. Handy as a claimant of record since Handy had filed a relinquishment of his interest in the mining claim with BLM on Apr. 26, 1965.

claim (N MC 109348), signed by Mendenhall, were filed timely for each of assessment years from 1979 to 1985.

By notice dated February 5, 1986, the Nevada State Office, BLM, informed Mendenhall that the recordation of the Charleston No. 23 mining claim (N MC 109348) had been cancelled because that claim had earlier been declared null and void in the February 1966 BLM decision, which decision had become final for the Department in the absence of a timely appeal. See Emma Grace Lowe, 87 IBLA 207 (1985). The Board has obtained evidence in the form of a return receipt card that Mendenhall received the February 1986 notice on February 13, 1986. There is nothing in the record to indicate that any appeal was ever taken from the February 5, 1986, determination nor does appellant allege that an appeal was timely filed.

On September 30, 1986, appellants filed a document with BLM entitled "Certificate of Mining Location and/or Notice of Intention to Hold Certain Mineral Rights Through Work and Possession under 30 USCA Section 38." The document explained that it constituted an assertion of mineral rights pursuant to an "original entry" by the parties on March 6, 1979, which was the date they "took possession by quitclaim from Frank L. Sullivan who had held and worked [the Charleston No. 23 placer mining] claim under 30 USCA Section 38 since 1966." In the event that these rights were declared to be void for any reason, the document further declared that it was then to be considered an original certificate of location. Finally, the certificate stated that it was posted on the land on August 20, 1986, and described the claim as encompassing 100 acres of land in the S $\frac{1}{2}$ SE $\frac{1}{4}$ and S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 36, T. 19 S., R. 59 E., Mount Diablo Meridian, Clark County, Nevada.

BLM treated the document as a new certificate of location of the Charleston No. 23 placer mining claim, filed for recordation with BLM pursuant to section 314(b) of FLPMA. It was assigned serial number N MC 378096. Thereafter, either a notice of intention to hold the mining claim or an affidavit of labor was filed timely with respect to the 1987 and 1988 assessment years, pursuant to section 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1988).

It is undisputed, however, that BLM had designated all of the land encompassed by the Charleston No. 23 mining claim (N MC 378096) as part of the Lone Mountain Community Pit (N 43006), pursuant to section 1 of the Materials Act of 1947, as amended, 30 U.S.C. § 601 (1988), and 43 CFR 3604.1, and duly noted the relevant MTP on December 31, 1985. It is clear therefore, that to the extent that the filing for the Charleston No. 23 mining claim (N MC 378096) is treated as a new location, it was located on August 20, 1986, subsequent to designation of the subject land as part of the Lone Mountain Community Pit. In accordance with 43 CFR 3604.1(b), that designation constituted a "superior right" to remove the material over that afforded the claimants under their mineral location.

In their appeal to the State Director, appellants sought to take advantage of the original 1954 location of the Charleston No. 23 claim. They contended that they held mineral rights in the subject land predating the community pit as successors-in-interest to the original locators, by virtue

of a 1959 conveyance to Frank L. Sullivan and the March 1979 conveyance from Sullivan to appellants. See Reasons for Appeal, dated December 12, 1988, at 9. The facts of record, however, fail to establish that Frank L. Sullivan ever owned the Charleston No. 23 mining claim.

Thus, according to a memorandum dated March 17, 1989, from the District Manager to the State Director, a search of the Clark County records for the period from 1958 through 1968 discovered no filings for Frank L. Sullivan relating to the Charleston No. 23 mining claim, including no filings of annual assessment work for that claim. BLM did, however, find recorded copies of quitclaim deeds, dated April 9, 1959, from Ambrose M. Murphy and Fred T. Pine to a Frank R. Sullivan. 6/ But, while A. M. Murphy had been listed as an original co-locator of the Charleston No. 23 claim, the deeds to Sullivan involved only the Charleston and the Charleston Nos. 1 through 22 placer mining claims. Moreover, the records further disclose that Frank R. Sullivan quitclaimed those claims on January 4, 1960, to Charleston Stone Products, Inc. These latter claims became the subject of extended litigation commencing with a Board decision in United States v. Charleston Stone Products, Inc., 9 IBLA 94 (1973) and eventually resulting in a Supreme Court decision styled Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978). There is, however, no record, whatsoever, of a transfer of the Charleston No. 23 to Sullivan from the original locators or, indeed, anyone else.

Appellants assert that, notwithstanding the absence of any record of this transfer, the claim was, in fact, transferred to Sullivan "[s]ometime in 1959" and that he remained in actual possession of the claim from that date until March 6, 1979, when appellants assert it was quitclaimed to them. This assertion, however, is substantially undermined by the testimony which Sullivan gave in the hearing in United States v. Sullivan, 9 IBLA 278 (1973), aff'd sub nom. Mendenhall v. United States, 556 F. Supp. 444 (D. Nev. 1982), aff'd, 735 F.2d 1371 (9th Cir. 1984), cert. denied, 469 U.S. 1209 (1985), which was held on February 18, 1971, and involved the Charleston No. 24/39 and the Charleston Spur/Spur No. 1 mining claims. In the course of testifying as to those two claims, Sullivan was shown a map of the various Charleston claims and asked to identify the claims which he owned. Never once did he assert ownership of either the Charleston No. 23 or the Charleston No. 27. It is also clear that Sullivan could not have acquired the Charleston No. 23 when he acquired the Charleston No. 24/39 and the Charleston Spur/Spur No. 1. Those two claims were originally located by E. H. Browner 7/ in February, 1955, and, according to Sullivan,

6/ Despite appellants' repeated references to Frank L. Sullivan, it seems reasonably clear from the record that the individual who, they argue, was the original source of their title was Frank R. Sullivan, and we shall so assume for the rest of our analysis.

7/ The spelling of this name also appears as E. H. Brawner. See United States v. Charleston Stone Products, Inc., supra.

were acquired by him through "foreclosure" proceedings in 1959. ^{8/} Since there is absolutely no evidence that Browner ever held an interest in the Charleston No. 23, there is no basis for contending that Sullivan acquired an ownership interest in that claim in the course of the judicial proceedings involving Browner.

In fact, the only documentary evidence that Sullivan ever asserted ownership of the Charleston No. 23 appears in the March 6, 1979, quitclaim deed from Sullivan to Mendenhall, wherein Sullivan transferred a one-half undivided interest in certain claims to Mendenhall. ^{9/} We must note, however, that this quitclaim deed not only identifies the claim as located in "[T]ownship 19 South, Range 60 East," rather than T. 19 S., R. ⁵⁹ E., but also lists the Charleston Nos. 1 through 22 claims as among those subject to the conveyance, even though it is a matter of public record that Sullivan had transferred these claims to Charleston Stone Products, Inc., by deed dated January 4, 1960.

^{8/} We recognize that Sullivan's recollection of events in the 1971 hearing was clearly not completely accurate. Thus, he asserted in his testimony that he had acquired the Charleston Nos. 1 through 22 through the same foreclosure proceedings. However, as the record in United States v. Charleston Stone Products, Inc., supra, makes clear, these claims were, in fact, quitclaimed by Murphy and Pine to Sullivan on Apr. 9, 1959. Browner merely held an outstanding lease on those claims at that time, which lease was cancelled by judicial decree on Aug. 13, 1959. Id. at 97-99. In any event, never once in the entire 1971 proceeding did Sullivan assert ownership of the Charleston No. 23 which lay immediately east of the Charleston No. 24/39. ^{9/} Furthermore, since this deed, by its express terms, transferred only a one-half undivided interest in the claim, appellants have failed to explain how they acquired the full interest in the claim which Mendenhall asserted when he recorded the claim. Before the Board, appellants assert that, on Mar. 6, 1979, "for one-half of all of the 'Charleston claims' Robert L. Mendenhall received a quitclaim deed, the other half was purchased by means of a purchase contract" (SOR at 13). This, however, is not what the documentary evidence discloses. Thus, the "Agreement" signed by Sullivan avers that "Sullivan is desirous of obtaining a mining patent or patents," that "Mendenhall possesses a particular degree of knowledge necessary to assist Sullivan in the obtaining of said patent or patents," and that "it is Sullivan's desire to transfer to Mendenhall one-half (1/2) of all his rights, title and interest in those Mining Claims." The agreement then recites that, accordingly, it was agreed that "Sullivan shall transfer to Mendenhall by quitclaim deed a one-half (1/2) interest in the Mining Claims. A copy of the quitclaim deeds executed by Sullivan of even date herewith is attached as Exhibit 'A.'" What is clear from the foregoing is the one-half undivided interest conveyed in the quitclaim deed was not in addition to a one-half undivided interest granted in the sales agreement, but rather was in fulfillment of that agreement.

In any event, appellants' assertion that the "interest" of Sullivan in the Charleston No. 23 survived the failure of the named contestees to answer the contest complaint filed in 1965 because Sullivan was not served with a copy of the complaint not only assumes, contrary to all evidence of record, that Sullivan had an interest in the claim at that time, but ignores as well the fact that the contest complaint was published in the local newspapers and specifically named "all other persons or parties unknown * * * claiming any right, title, lien or interest in the mining claims described herein," a procedure expressly recognized by the District Court in Johnson v. Udall, 292 F. Supp. 738, 751 (C.D. Cal. 1968), as not prohibited by the regulations then in existence. Thus, upon the failure of Sullivan to answer the complaint and assert his "interest" in the claim, the determination of March 29, 1966, that the claim was null and void, was as effective upon him as if he had been personally served and failed to answer. 10/

Finally, even ignoring the foregoing manifest deficiencies, the failure of Robert Mendenhall to appeal from the determination of the Nevada State Office on February 5, 1986, cancelling the recordation of the Charleston No. 23 (N MC 109348), forestalls appellants from asserting any rights emanating from that location.

[2] Appellants argue that, notwithstanding the invalidation of the Charleston No. 23 location made by J. W. Handy and others on February 10, 1954, they have acquired rights in the premises based on the holding and working of the claim under 30 U.S.C. § 38 (1988) by themselves and their predecessors-in-interest. There are, however, numerous flaws in appellants' theory.

The language of 30 U.S.C. § 38 (1988), originally adopted as part of the Placer Act of 1870, 16 Stat. 217, provides, in relevant part, that:

Where such persons or associations, they and their grantors, have held and worked their claims equal to the time prescribed

10/ This situation is readily distinguished from that which this Board reviewed in Patsy A. Brings, 98 IBLA 385 (1987), in which we held that a contest complaint filed against the Turkey Track #1 placer mining claim in 1956 was ineffective to cancel the interest of Brings' predecessor-in-interest Hiram B. Webb, who had not been served. In that case, while Webb had not recorded the quitclaim deed by which he acquired title prior to the filing of the contest complaint, he had filed a proof of annual assessment work for the claim in which he expressly asserted ownership of the claim prior to that date. Based on this fact and other information which should have alerted BLM to his interest in the claim, the Board held that the failure to serve Webb invalidated the declaration of invalidity of the claim as to his interest. See also Hiram B. Webb, 105 IBLA 290, 310-12, 95 I.D. 242, 255-56 (1988), aff'd sub nom. Webb v. Lujan, 960 F.2d 89 (9th Cir. 1992). In this case, however, there is absolutely nothing which would have put BLM on notice of the purported "interest" of Sullivan in the Charleston No. 23.

by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession or working of the claims shall be sufficient to establish a right to a patent thereto * * * in the absence of any adverse claim.

As the Supreme Court noted in Cole v. Ralph, 252 U.S. 286, 305 (1920), this provision was remedial in nature and was designed "to make proof of holding and working for the prescribed period the legal equivalent of proofs of acts of location, recording and transfer." The Court cautioned, however, that nothing in this provision

disturbs or qualifies important provisions of the mineral land laws, such as deal with the character of the land that may be taken, the discovery upon which a claim must be founded, the area that may be included in a single claim, the citizenship of claimants, the amount that must be expended in labor or improvements to entitle the claimant to a patent and the purchase price to be paid before the patent can be issued.

Id. at 306. Pursuant to the language of the statute, an individual seeking to avail himself of its provisions was required to affirmatively show that he "had held and worked his claim in addition to such other showings as required by law." United States v. Haskins, 59 IBLA 1, 52, 88 I.D. 925, 951 (1981), aff'd, Haskins v. Clark, No. CV-82-2112-CBM (C.D. Cal. Oct. 30, 1984) (emphasis in original). It is also important to note that this provision did not provide an independent method of location but rather "prescribe[d] the evidence sufficient to establish the right of one who has possessed and worked a mining claim to a patent." United States v. Midway Northern Oil Co., 232 F.2d 619, 634 (N.D. Cal. 1916).

As is clear from our earlier discussion of the facts surrounding Sullivan's asserted acquisition of the Charleston No. 23 from its original locators, the record is totally devoid of any indication (save for the March 6, 1979, sales agreement with Mendenhall) that Sullivan ever had an interest in the lands embraced by the Charleston No. 23, much less that he "held and worked" the claim in a manner consistent with the requirements of 30 U.S.C. § 38 (1988). Moreover, even if he had been in open and notorious possession of that land, the fact is that, as a single locator, Sullivan could only have asserted title to a claim of 20 acres per location. See United States v. Haskins, supra at 87-90, 88 I.D. at 968-70. Robert Mendenhall only recorded a single location in 1979 under section 314(b) of FLPMA. Even if we ignore the fact that the location which was recorded on October 15, 1979, was clearly that made by the locators in 1954, rather than an asserted 30 U.S.C. § 38 (1988) filing, such a location, itself, would have been limited to only 20 acres. 11/

11/ In this regard, we would point out that, until the filing for recordation of the amended Charleston No. 23 on Sept. 30, 1986, Robert Mendenhall was listed as the sole owner of the claim on the records of the Department.

But, regardless of how appellants now attempt to characterize the claim which was recorded in 1979, the fact is that recordation of that location was cancelled in 1986 and all prior rights under that location, whether based on the 1954 location notice or Sullivan's asserted "holding and working" under 30 U.S.C. § 38 (1988), were terminated upon the failure of Mendenhall to challenge this action.

Appellants assert that they have been in actual possession of the land since 1979 and have held and worked the claim since that time. Thus, they apparently seek to argue that this occupancy resulted in the vesting of rights to the land under 30 U.S.C. § 38 (1988) prior to the appropriation effected by the designation of the land as a community pit. However, even assuming, arguendo, that appellants' occupancy 12/ could establish that they "held and worked" the land in conformity with the historical construction which has been applied to that phrase (see generally United States v. Haskins, supra), the fact remains that, since the adoption of section 314 of FLPMA, 43 U.S.C. § 1744 (1988), it is not possible, as a matter of law, to resort to the provisions of 30 U.S.C. § 38 (1988) to establish rights in a location which was not timely recorded under the provisions of section 314 of FLPMA.

The procedures for the recordation of mining claims which Congress adopted in section 314 made provision both for the recordation of prior locations, however initiated, and the recordation of all claims made subsequent to its adoption. Insofar as the pre-FLPMA claims were concerned, Congress required that all such claims be recorded within 3 years following FLPMA's enactment (i.e., on or before October 22, 1979), failing in which the claims were conclusively deemed to be abandoned and void. 43 U.S.C. § 1744(b) and (c) (1988). For claims located subsequent to FLPMA, the Act required that the owner of the mining claim file a copy of the record of

fn. 11 (continued)

Thus, when the 1954 location was recorded in 1979, the covering letter declared that "This claim is owned by Robert L. Mendenhall and acquired by him from Frank L. Sullivan on March 6, 1979, by Deed." It is clear, therefore, that if Mendenhall believed he was acquiring multiple claims based on Sullivan's "holding and working" of the lands, he would, himself, have been required to record multiple claims and submit the appropriate recordation fees therefor. See generally Webb v. Lujan, supra at 91-94. This, he did not do. 12/ Insofar as the appellants other than Robert L. Mendenhall are concerned, we would note that, from the records now before the Board, it appears that the initial assertion of any interest in the Charleston No. 23 did not occur until the filing of an "Amended Notice of Mining Location," dated June 14, 1985, in the county records. See SOR, Exh. B. Indeed, the various affidavits of labor invariably described "Robert L. Mendenhall, dba Las Vegas Paving Co." as the "owner of the claims." As explained subsequently in the text of this decision, this amended notice was never filed with BLM.

the notice of location within 90 days after the date of location of such claim, failing in which the claim would be conclusively deemed to be abandoned and void. Id.

That the recordation provisions applied to claims initiated under 30 U.S.C. § 38 (1988) is clear. Thus, in Webb v. Lujan, 960 F.2d 89 (1992), the Court of Appeals for the Ninth Circuit specifically affirmed the requirement that claims assertedly initiated prior to FLPMA through the aegis of 30 U.S.C. § 38 (1988) must be recorded under section 314, or they would be conclusively presumed abandoned and void. Id. at 92-93. And, an analysis of the language of section 314 makes the conclusion ineluctable that 30 U.S.C. § 38 (1988) is no longer available to establish rights under the mining laws of the United States subsequent to FLPMA's adoption for claims which have not been duly recorded with BLM.

As noted above, section 314(b) of FLPMA requires that all locations be recorded with BLM within 90 days of the date of location. The "holding and working" provisions of 30 U.S.C. § 38 (1988), on the other hand, operated, consistent with the general rules relating to adverse possession, so that, upon completion of the holding and working period applicable under state law, 13/ the location was presumed to have been made at the date of the initiation of the "holding and working" period. 14/ Thus, as a matter of chronology, it would be impossible to timely record any such location assertedly initiated subsequent to FLPMA, because any recordation could only occur after more than 90 days had elapsed following the date of location, unless the statute of limitation prescribed by the State was less than 90 days. No such statute exists.

Moreover, since, as noted above, 30 U.S.C. § 38 (1988) did not provide an independent method of location but merely prescribed a means by which proof of the acts attendant to location could be established, the mere "holding and working" of the claim under section 38 could not erase the conclusive presumption that the claim was abandoned and void arising out of

13/ This period is 2 years under Nevada law. See Nev. Rev. Stat. Ann. § 11.060 (Michie 1987); Lombardo Turquoise Milling & Mining Co. v. Hemanes, 430 F. Supp. 429, 437-38 (D. Nev. 1977), aff'd, 605 F.2d 562 (9th Cir. 1979).

14/ That the rights of the claimant tendering proof of location pursuant to 30 U.S.C. § 38 (1988) related back to the initiation of the holding and working period was clear both from the required showing that assessment work had been performed during the period as proof of the "working" requirement (see United States v. Haskins, supra at 52-54, 88 I.D. at 951-52), and further by the fact that money expended during the period of "holding and working" could be applied to the statutory requirement that \$500 worth of labor be expended on each claim prior to the issuance of a patent (see Annual Assessment Work and Acceptable Patent Improvements Performed for the Benefit of Mining Claims During the Period of Time When the Right to Patent Accrues Under Section 2332, Revised Statutes (1875), M-36388 (Nov. 13, 1956)).

the failure to timely record the location under section 314 of FLPMA. In view of the foregoing, it is clear that, to the extent appellants seek to establish rights to the lands arising subsequent to the adoption of FLPMA and prior to the date of location specified in a duly recorded notice of location, these assertions must be rejected.

[3] Appellants advert to an "Amended Notice of Location," dated June 14, 1985, and filed with Clark County on July 10, 1985. They assert that, following filing with the Clark County Recorder, "[t]his Amended Certificate of Location was then sent to the BLM to be filed in BLM file N MC 109348," though they admit, however, that "it is not now found in the file" (SOR at 14). While appellants have submitted a copy of this "Amended Notice of Location" (see SOR, Exh. B), there is nothing on either the copy they submitted or within case file N MC 109348 which would indicate that it was filed with BLM.

As the Board has noted on a number of occasions in the past, there is a legal presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. See, e.g., Legille v. Dann, 644 F.2d 1 (D.C. Cir. 1976); H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981). Thus, the fact that a document cannot be found in the public records of BLM raises a presumption that the document was not filed with it. See Wilson v. Hodel, 758 F.2d 1369 (10th Cir. 1985). The mere assertion by an appellant that the document was mailed to BLM does not overcome this presumption since it is the receipt of the documents which is critical. See generally Bernard S. Storper, 60 IBLA 67 (1981), aff'd, Civ. No. 82-0449 (D.D.C. Jan. 20, 1983).

Moreover, if appellants had intended the 1985 "Amended Notice of Location" to serve as a notice of location under section 314(b) of FLPMA, they would have been required to submit a \$5 filing fee therewith (see 43 CFR 3833.1-3 (1986)) as, indeed, they did with the 1986 "Certificate of Mining Location," which was filed with BLM on September 30, 1986. 15/ If BLM had received the 1985 "Amended Notice of Location," it would have presumably negotiated the check, and submission of the cancelled check by appellants would be sufficient to overcome the presumption of regularity. Appellants, however, have not submitted such a cancelled check and we must conclude that the 1985 filing was not timely submitted for recordation with BLM and, therefore, no rights can emanate from that notice even if treated as an initial notice of location.

15/ Appellants have suggested in their SOR that BLM improperly assigned new serial numbers to their 1986 filing, which related to both the Charleston No. 23 and the Charleston No. 27. See SOR at 16. If it was not appellants' intent to record new locations, it is difficult to understand why they tendered money in connection with these filing since, at the time the submissions were made, a filing fee was only assessed for the initial recordation of a claim and was not collected for any subsequent filings. See generally 43 CFR Subpart 3833 (1986).

It is clear from the foregoing that the only rights in the premises which appellants can assert are those based on the August 20, 1986, "Certificate of Mining Location" which was filed with BLM on September 30, 1986. Any rights arising therefrom, however, are clearly subordinate to the designation of the land as the "Lone Mountain Community Pit" on December 31, 1985. See 43 CFR 3604.1(b). Thus, BLM properly rejected the proposed plan of operations to the extent it included the land embraced by the Charleston No. 23.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

