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FLPMA AS IT AFFECTS THE MINING INDUSTRY

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THE FEDERAL LAND POLICY AND MANAGEMENT ACT

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IMPACT OF FLPMA
ON THE MINING INDUSTRY

I. WHAT DID CONGRESS DO?

A. Direct impact on Mining Law of 1872--43 U.S.C. § 1732(b) (Section 302 of FLPMA)

1. No effect on mining law with four exceptions:

   (a) Special provisions for mining claims in California Desert Conservation Area (subject to administrative regulation after as well as before patent)

   (b) Special provisions for BLM Wilderness Review Program

   (c) Secretarial power to promulgate regulations so as to prevent "unnecessary or undue degradation of the public lands"

   (d) Provisions implementing a federal registration and recordation system for unpatented mining claims and millsites

B. Indirect impacts (indirect but equally significant):

1. Right-of-way provisions

2. Public land exchange provisions

3. Land management planning provisions

4. Provisions limiting Executive Branch authority with respect to public land withdrawals

II. WHAT DID CONGRESS INTEND TO DO TO OR FOR MINING INDUSTRY?


C. Grew out of 1970 PLLRC Report: 1/3 of Nation's Land

D. Drafted against 1970-76 backdrop:

1. First, Department desire for comprehensive land management planning authority (principal purpose of statute)

2. Second, continual clamor by various groups for repeal of self-initiating 1872 statute in favor of a discretionary leasing system (repeal efforts generally supported by Department)

3. Third, major Department input into statute while Department was anticipating success of efforts to repeal General Mining Law

4. Finally, September 1975 Mining Congress Journal, Bennethum and Lee, "Is Our Account Overdrawn?" (2/3 of public lands effectively withdrawn)

E. Results for Mining Industry

1. Despite opportunity to do so, Congress did not repeal or make major structural changes in 1872 statute, thereby at least temporarily ending repeal debate

2. Congress gave land management planning authority to Department, but also said that land management planning decisions could not close public lands to the mining industry

3. Congress said public lands could be declared off limits to mining industry only through public land withdrawals, but also required a program of revocation of existing unnecessary withdrawals and imposed certain limitations on Executive Branch authority to make future withdrawals

F. Apparent End to Major Repeal Debate

1. To mining industry observers, statute and subsequent lack of further Congressional action ended major public land law debate of decade

2. While statute apparently had this effect, legislative history has very few references to the focus of debate, which was repeal of 1872 statute
3. One of few illuminating references appears in a statement at page 64 of Senate Report No. 94-583. The Senate Committee noted that "one of the most persistent and significant roadblocks to effective planning and management of most federal lands . . . is the status of hardrock mining and mining claims on those lands under the Mining Law of 1872 . . . ." Committee quoted with seeming approval an article stating that the lack of a federal mining claim registration and recordation system "has obviously compromised the ability of public land managers to develop and administer a comprehensive plan which provides, in an even and balanced way, for all uses of the public lands." This was the justification given for what the Senate Committee described as "the federal mining claim recording system so necessary for Federal land planners and managers."

4. Curiously, while elimination of "stale" claims was a universally acknowledged benefit, the Senate Report never says exactly why a continuing annual mining claim recordation system would otherwise aid federal land management planners who were specifically denied the authority to preclude mining through land management planning in the very same statute which created the recordation system.

5. Is it possible that the continuing annual recordation and registration system contained in Section 314 of FLPMA is a "legislative vestige" of the Department's anticipation of substitution of a discretionary leasing system for the General Mining Law of 1872? If the 1872 statute had indeed been repealed in favor of a discretionary leasing system, the continuing mining claim recordation system would have served the obvious and useful purpose of identifying mining claims on public lands where land management plans were under consideration which would preclude mining.

6. I do not know the answer to the question posed immediately above, but I suspect that there is a strong possibility that the true purpose of the recordation system never was and never will be realized, unless and until the General Mining Law is repealed, an unlikely prospect at present.
7. In any event, so far the recordation system has undoubtedly had the most severe impact on the mining industry of any of the multiple provisions of FLPMA. Leaving aside the question of exactly what Congress intended, I will turn to the question of what Congress actually did

III. WHAT CONGRESS DID WITH RESPECT TO REGISTRATION AND RECORDATION

A. Two Classes of Unpatented Mining Claims and Millsites
   1. Located on or before 10/21/76 ("Old")
   2. Located after 10/21/76 ("New")

B. First Requirement: Claim registration by filing with BLM of Location Certificate which initiated the claim when it was recorded in local county records
   1. Old: Registration on or before 10/22/79
   2. New: Registration within 90 days after the date of location (usually the date a notice of location is posted on the ground)

C. Second Requirement: With respect to mining claims (not millsites), annual recordation of claim maintenance evidence in the form of either an Affidavit of Assessment Work or a Notice of Intention to Hold
   1. Annual maintenance evidence must be recorded both in the local records and in the appropriate office of the BLM
   2. Old: Unless two pending decisions are reversed on appeal, maintenance evidence must have been recorded on or before October 22, 1979, and on or before December 30 of each calendar year after 1979
   3. New: On or before December 30 of each calendar year after the calendar year during which the claim was originally located
   4. Interpretations just expressed are result of regulatory revision and litigation; caution you to take to heart the warning which was given by IBLA in the Alaskamin case and which is quoted at Page 2 of your outline:
The entire body of Departmental regulations promulgated for the implementation of Section 314 of the Federal Land Policy Management Act of 1976 is so poorly expressed and obfuscatory as to defy assured comprehension even by competent lawyers, a fact which has been noted repeatedly in commentaries by knowledgeable members of the private bar.

5. Under literal wording of Section 314, failure to comply results in "conclusive presumption" that claim has been abandoned by its owner and it is therefore void

IV. WHAT HAS RESULTED?

A. Claims declared void and property rights lost for failure to file required documents

B. Some void claims could not simply be relocated for various reasons:

1. Affected by public land withdrawal (e.g., Wilderness Act, 12/31/83)

2. After claim location, specific mineral in question made subject to another mineral disposal system (Oil shale and 1920 Leasing Act; common varieties of certain materials such as sand and gravel under the Mineral Materials Sales Act of 1947 as amended in 1955)

3. Intervening third party rights (rival claimants)

C. Close scrutiny of Section 314 by attorneys

1. Long recognition that valid claim is constitutionally protected property right (valid in sense of discovery, and mining law assumes discovery precedes claim location)

2. Due to this constitutionally cognizable property right, it seemed that statute could be attacked on constitutional grounds under various theories, including the "equal protection" rationale which has been read into the 5th Amendment or the same Constitutional amendment's requirements of substantive and procedural due process and its prohibition of the taking of private
property for public purposes without payment of just compensation

3. Because of the liceral wording of Section 314's reference to a "conclusive" determination with respect to abandonment, it seemed most susceptible to constitutional attack in terms of procedural due process requirements

4. At common law, abandonment of a property right is related to the intent of the owner, and intent is a factual issue requiring proof

5. However, Section 314 creates an "irrebuttable presumption" because the failure to record certain documents results in a "conclusive" determination of abandonment. In other words, failure to file creates a presumption that the owner of the claim has actually abandoned it and the claimant is not given a hearing and opportunity to rebut the presumption with factual proof to the contrary

D. Law regarding irrebuttable presumptions

1. Stems from series of decisions by Supreme Court during 1970's

2. There is a violation of procedural due process requirements if a cognizable property right is lost without a hearing on the basis of a statutory irrebuttable presumption if:

   (a) The presumption is not necessarily universally true; and

   (b) The State has a feasible alternative means of making the critical determination

3. Like so many legal doctrines, some later cases appear to limit this standard of scrutiny for statutes effecting irrebuttable presumptions; at least at present, it continues to be used

E. Inevitable Litigation

1. Early frontal attacks

   (a) Western Mining and Topaz Beryllium basically early frontal attacks by trade
organizations arguing constitutional infirmities on the face of the statute (in *Western Mining*) and its implementing administrative regulations (*Topaz Beryllium*)

(b) Here, no actual loss of property right and corresponding refusals to declare Section 314 violative of Constitution under any set of conceivable circumstances

(c) Tenth Circuit decision in *Topaz* led to regulatory revision, and Ninth Circuit decision in *Western Mining* had formative effect on subsequent litigation; its holding of no violation of substantive due process considerations moved constitutional arguments toward the area of procedural due process

2. The "right circumstances" to litigate

(a) "Old Claim" located and presumably valid before the passage of FLPMA

(b) Initially properly registered and subsequent attempts of some sort made to comply with maintenance evidence recordation requirements, so that "substantial compliance" argument is available

(c) Substantial financial investments in actual mining operations on the subject claim for equitable purposes

(d) Inability to relocate the claim for one of the reasons previously mentioned


(a) Not ideal set of factual circumstances; only one of four desirable factual circumstances

(b) Old Claims declared void for failure to adequately comply with registration requirement on or before 10/22/79; claims could have been relocated and decision silent with respect to substantial investment or subsequent attempts to comply with annual recordation requirements
(c) Nonetheless, District Court applied irrebuttable presumption analysis previously discussed and declared registration requirement of Section 314 unconstitutional due to lack of opportunity for hearing before loss of property right.

(d) District Court found that the conclusive presumption of abandonment is not necessarily or universally true in fact, and that it would not be overly burdensome to the Government to allow a hearing before a mining claim invalidated.

(e) Rogers not appealed because Justice Department failed to comply with 28 U.S.C. § 1252, 1292, which require direct appeal to Supreme Court if District Court decision declares federal statute unconstitutional. United States improperly filed appeal in Circuit Court and time to appeal to Supreme Court expired.

4. Locke (10/21/83) (copy in outline)

(a) Seemingly ideal factual circumstances; Old Claims properly registered in 1979, a good faith attempt to comply with the annual maintenance evidence recordation requirement in 1980, a substantial investment in the subject mining claims and mineral production about $4 million in value through what is apparently a "mom and pop operation" and inability to relocate the claims for sand and gravel due to the intervention of the 1955 amendment of the Materials Sales Act regarding "common varieties".

(b) Claims declared void by the BLM because the 1980 annual claim maintenance evidence was recorded with the BLM one day late (statute says "prior to 12/31," so regulations say "on or before December 30").

(c) District Court held that under these circumstances, annual recordation requirement violates procedural due process requirements. In addition, Court found a "substantial compliance" exception in the
statute and held that the claimants had substantially complied by filing their maintenance evidence one day late.

(d) Court based its decision on conclusive presumption analysis; noted that the statutory presumption is not universally true and certainly not true as applied in this case, and agreed with the Rogers decision that an opportunity for a hearing would not be unduly burdensome on the Government. Made additional point that, since Government notifies claimants that their claims have been declared void, how can it be more difficult to notify them of a hearing?

(e) **Locke** has been appealed directly to U. S. Supreme Court. On Monday of this week, Court agreed to hear case and a briefing schedule will soon be established.

(f) Justice Department is going to Supreme Court with Mom and Pop and Mom and Pop will undoubtedly be supported by friend of the court briefs filed by American Mining Congress and various State trade organizations.

F. Non-Constitutional Litigation

1. **ML Industries v. Watt** (March 13, 1984) (copy in outline)

2. **Oregon Portland v. United States** (April 19, 1984) (copy in outline)

3. Sherman & Howard involvement

V. WHAT WILL HAPPEN IN THE FUTURE?

A. **Locke**

1. Outcome of the case

(a) From standpoint of plaintiffs, almost best factual circumstances conceivable; if annual recordation requirements constitutional here, perhaps entire Section 314 is constitutional (application of registration requirements to Old Claims may be
salvageable on basis of no viable alternative in form of hearing). On the other hand, if decision by District Court upheld, all Section 314 requirements are in jeopardy and Department has expressed deep concern about that potential result.

(b) If entire Section 314 is placed in jeopardy because of Supreme Court decision in Locke, corrective legislation should be considered in order to avoid further litigation.

(c) If corrective legislation is warranted, the Department must examine the registration/recordation program and determine whether it is truly useful to land management planners or whether it is simply a legislative vestige of an era of expectations that the General Mining Law would be repealed.

(d) If the recordation and registration requirements are truly useful in some sense to the BLM, then the obvious need is for a hearing requirement before invalidation of claims; the courts seem to be universally in accord that such a requirement would not be unduly burdensome to the Government.

(e) If the registration/recordation requirements are not truly useful to the BLM, or if they are not useful enough to justify the expense of associated hearings, then the entire system should be junked and simply recognized as an unfortunate mistake.

VI. MISCELLANEOUS MATTERS/PREDICTIONS

A. 1982 Regulatory Revision Proposal (in outline)

1. Reagan/Watt


3. Pacific Coast Molybdenum, 75 IBLA 16 (1983)

4. Assessment work proposal

B. Other Areas of FLPMA

1. Surface Management Regulations

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C. Other Speakers

1. Withdrawals and Access
2. Wilderness Program
3. Land Management Planning and Indirect Regulation
generally not to exceed thirty (30) days. The authorized officer shall require immediate suspension of operations if noncompliance is causing environmental damage.

§ 3827.6 Trespass.

Any mining operations conducted on lands within the Area without an approved plan of operations shall constitute a trespass.

PART 3830—LOCATION OF MINING CLAIMS

Subpart 3831—Rights to Mineral Lands

Sec.
3831.1 Manner of initiating rights under locations.

Subpart 3832—Who May Make Locations

3832.1 Qualifications.

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3833.3 Notice of transfer of interest.
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3833.5 Effect of recording and filing.

Subpart 3831—Rights to Mineral Lands

3831.1 Manner of initiating rights under locations.

Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of minerals, by locating the lands upon which such discovery has been made. A location is made by (a) staking the corners of the claim, except placer claims described by legal subdivision where State law permits locations without marking the boundaries of the claim on the ground, (b) posting notice of location thereon, and (c) complying with the State laws, regarding the recording of the location in the county recorder's office, discovery work, etc. As supplemental to the United States mining laws there are State statutes relative to location, manner of recording of mining claims, etc., in the State, which should also be observed in the location of mining claims. Information as to State laws can be obtained locally or from State officials.

[38 FR 24650, Sept. 10, 1973]

Subpart 3832—Who May Make Locations

§ 3832.1 Qualifications.

Citizens of the United States, or those who have declared their intention to become such, including minors who have reached the age of discretion and corporations organized under the laws of any State, may make mining locations. Agents may make locations for qualified locators.

[35 FR 9750, June 13, 1970]

Subpart 3833—Recordation of Mining Claims and Filing Proof of Annual Assessment Work or Notice of Intention to Hold Mining Claims, Mill or Tunnel Sites

Source: 42 FR 5300, Jan. 27, 1977, unless otherwise noted.

§ 3833.0-1 Purpose.

One purpose of these regulations is to establish procedures for the recordation in the proper BLM office of unpatented mining claims, mill sites, or tunnel sites on Federal lands, and for the filing in the same office of evidence of performance of annual assessment work or of a notice of intention to hold an unpatented mining claim. Another purpose is to notify the proper BLM office of the transfer of
§ 3833.0-2

An interest in unpatented mining claims, mill sites or tunnel sites.

§ 3833.0-2 Objectives.

An objective of these regulations is to determine the number and location of unpatented mining claims, mill sites, or tunnel sites located on Federal lands to assist in the management of those lands and the mineral resources therein. Other objectives are to remove the cloud on the title to these lands because they are subject to mining claims that may have been abandoned and to keep the BLM abreast of transfers of interest in unpatented mining claims, mill sites, or tunnel sites. These regulations are not intended to supersede or replace existing recording requirements under State law, except when specifically changed by the provisions of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701), and are not intended to make the BLM office the official recording office for all ancillary documents (wills, liens, judgments, etc.) involving an unpatented mining claim, mill site, or tunnel site.

§ 3833.0-3 Authority.

(a) Subsections (a) and (b) of section 314 of the Act require the recording of unpatented mining claims and the filing of information concerning annual assessment work performed or a notice of intention to hold such a claim in the proper BLM office within specified time periods. Subsection (c) sets forth the consequences of the failure to file such information or documents within the time limits prescribed.

(b) Section 8 of the Act of September 28, 1976 (16 U.S.C. 1901-1912), requires that all unpatented mining claims within the boundaries of the National Park System shall be recorded with the Secretary within one year after the date of the Act and provides penalties for failure to record.

(c) Section 2319 of the Revised Statutes (30 U.S.C. 22) provides that the exploration, location, and purchase of valuable mineral deposits shall be "under regulations prescribed by law," and section 2478 of the Revised Statutes, as amended (43 U.S.C. 1201), provides that those regulations will be issued by the Secretary.

(d) The Secretary has general responsibility and authority concerning public lands under 43 U.S.C. 2 and section 310 of the Act.


§ 3833.0-5 Definitions.

As used in this subpart:


(b) "Unpatented mining claim" means a lode mining claim or a placer mining claim located under the General Mining Law of 1872, as amended (30 U.S.C. 21-54), for which a patent under 30 U.S.C. 29 and 34 CFR Part 3860 has not been issued.

(c) "Mill site" means any land located under 30 U.S.C. 42.

(d) "Tunnel site" means a tunnel located pursuant to 30 U.S.C. 27.

(e) "Owner" means the person who is the holder of the right to sell or transfer all or any part of the unpatented mining claim, mill, or tunnel site. The owner shall be identified in the instruments required by these regulations by a notation on those instruments.

(f) "Federal lands" means any lands or interest in lands owned by the United States, except lands within units of the National Park System, which are subject to location under the General Mining Law of 1872, supra, including, but not limited to, those lands within forest reservations in the National Forest System and wildlife refuges in the National Wildlife Refuge System.

(g) "Proper BLM office" means the Bureau of Land Management office listed in § 1821.2-1(d) of this title as having jurisdiction over the area in which the claims or sites are located.

(h) "Date of location" or "located" means the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill, or tunnel site is situated.

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§ 3833.1-2

(i) "Copy of the official record of the notice of certificate of location" means a legible reproduction or duplicate, except microfilm, of the original instrument of recordation of an unpatented mining claim, mill or tunnel site which was or will be filed in the local jurisdiction where the claim or site is located or other evidence, acceptable to the proper BLM office, of such instrument of recordation. It also includes an exact reproduction, duplicate or other acceptable evidence, except microfilm, of an amended instrument which may change or alter the description of the claim or site.


§ 3833.1-2 Manner of recordation—Federal lands.

(a) The owner of an unpatented mining claim, mill site, or tunnel site located after October 21, 1976, on Federal land shall file (file shall mean being received and date stamped by the proper BLM Office) within 90 days after the date of location of that claim in the proper BLM Office a copy of the official record of the notice or certificate of location of the claim or site filed under state law or, if the state law does not require the recordation of a notice or certificate of location of the claim or site, a certificate of location containing the information in paragraph (c) of this section. Where the claim so recorded lies within a unit of the National Park System, a copy of the documents filed shall be provided to the Superintendent of the appropriate unit by the Bureau of Land Management.

(b) The owner of an unpatented mining claim, mill site, or tunnel site located after October 21, 1976, on Federal land shall file (file shall mean being received and date stamped by the proper BLM Office) within 90 days after the date of location of that claim in the proper BLM Office a copy of the official record of the notice or certificate of location of the claim or site filed under state law or, if the state law does not require the recordation of a notice or certificate of location of the claim or site, a certificate of location containing the information in paragraph (c) of this section. Where the claim so recorded lies within a unit of the National Park System, a copy of the documents filed shall be provided to the Superintendent of the appropriate unit by the Bureau of Land Management.

(c) The copy of the notice or certificates filed in accordance with paragraphs (a) and (b) of this section shall be supplemented by the following additional information unless it is included in the copy:

(1) The name or number of the claim or site, or both, if the claim or site has both;

(2) The name and current mailing address, if known, of the owner or owners of the claim or site;

(3) The type of claim or site;

(4) The date of location;

(5) For all claims or sites located on surveyed or unsurveyed lands, a description shall be furnished. This description shall recite, to the extent possible, the section(s), the approximate location of all or any part of the claim or site to within a 160 acre quadrant of the section (quarter section) or sections, if more than one is involved. In addition, there must be furnished the township, range, meridian and State obtained from an official survey plat or other U.S. Government map showing either the surveyed or pro-
tracted U.S. Government grid, whichever is applicable:

(6) For all claims or sites located on surveyed or unsurveyed land, either a topographic map published by the U.S. Geological Survey on which there shall be depicted the location of the claim or site, or a narrative or sketch describing the claim or site with reference by appropriate tie to some topographic, hydrographic or man-made feature. Such map, narrative description or sketch shall set forth the boundaries and positions of the individual claim or site with such accuracy as will permit the authorized officer of the agency administering the lands or the mineral interests in such lands to identify and locate the claim on the ground. More than one claim or site may be shown on a single map or described in a single narrative or sketch if they are located in the same general area, so long as the individual claims or sites are clearly identified; and

(7) In place of the requirements of paragraphs (c)(5) and (6) of this section, an approved mineral survey may be supplied.

(8) Nothing in the requirements for a map and description found in this section shall require the owner of a claim or site to employ a professional surveyor or engineer.

(d) Each claim or site filed shall be accompanied by a one time $5 service fee which is not returnable. A notice or certificate of location shall not be accepted if it is not accompanied by the service fee and shall be returned to the owner.


§ 3833.1-3 When recordation not required.

If the owner of an unpatented mining claim or mill site had on file in the proper BLM office an application for a mineral patent, as described above, on or before October 22, 1979, the filing of the application shall be deemed full compliance with the recordation requirements of the Act and the owner of that claim or site shall be exempt from the filing requirements of § 3833.1. For purposes of complying with the requirement of § 3833.2-1(a) of this title, upon notification to the claimant, the date of recordation in the proper BLM office shall be October 21, 1976, for claims and sites included in mineral patent applications on file as of that date. The date on which the application was actually filed shall be the date of recordation for all other claims and sites.

[44 FR 9722, Feb. 14, 1979]

§ 3833.2 Evidence of assessment work.

(a) The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

(b)(1) Except as provided in paragraph (b)(2) of this section, the owner of an unpatented mining claim, mill site or tunnel site located within any unit of the National Park System shall file before October 22, 1979, and on or before December 30 of each calendar year after the year of recording (See 36 CFR 9.5), a notice of intention to hold the mining claim, mill site or tunnel site. Such notice shall be in the form prescribed by § 3833.2-3 of this title and shall be filed with the proper BLM office. A copy of each such filing shall be provided to the Superintend-
ent of the appropriate unit by the Bureau of Land Management.

(2) Where a claimant has received a permit under 36 CFR 9.5 to do assessment work on a claim in a unit of the National Park System, the claimant may file with the Bureau of Land Management in lieu of the notice required by paragraph (b)(1) of this section, evidence of assessment work in the form prescribed in § 3833.2-2 of this title. A copy of such filing shall be provided to the Superintendent of the appropriate unit by the Bureau of Land Management.

(c) The owner of an unpatented mining claim located on Federal lands excluding lands within a unit of the National Park System, but including lands within a national monument administered by the United States Fish and Wildlife Service or the United States Forest Service, after October 21, 1976, shall, on or before December 30 of each calendar year following the calendar year in which such claim was located, file in the proper BLM office evidence of annual assessment work performed during the previous assessment year or a notice of intention to hold the mining claim.

(d) The owner of a mill or tunnel site located on Federal lands, excluding lands within a unit of the National Park System but including lands within a national monument administered by the United States Fish and Wildlife Service or the United States Forest Service, shall file in the proper BLM office on or before December 30 of each year following the year of recording pursuant to § 3833.1-2 of this title, a notice of intention to hold the mill or tunnel site.

§ 3833.2-3 Form—notice of intention to hold claim or site.

(a) A notice of intention to hold a mining claim or group of mining claims shall be in the form of either:

(1) An exact legible reproduction or duplicate, except microfilm, of a letter signed by the owner or his agent filed for record pursuant to section 314(a)(1) of the Act in the local jurisdiction of the State where the claim is located and recorded setting forth the following information:

(i) The serial number assigned to each claim by the authorized officer upon filing of the notice or certificate of location or patent application in the proper BLM office. Filing the serial number shall comply with the requirement in the act to file an additional description of the claim.

(ii) Any change in the mailing address, if known, of the owner or owners of the claim or claims; or

(b) An exact legible reproduction or duplicate, except microfilm, of the detailed report concerning geological, geochemical and geophysical surveys provided for by the Act of September 2, 1958 (30 U.S.C. 28-1) and filed for record pursuant to section 314(a)(1) of the Act in the local jurisdiction of the State where the claim or group of claims is located and recorded setting forth the following additional information:

(1) The serial number assigned to each claim by the authorized officer upon filing of the official record of the notice or certificate of location or patent application; and

(2) Any change in the mailing address, if known, of the owner or owners of the claim.


§ 3833.2-2 Form—evidence of assessment work.

Evidence of annual assessment work shall be in the form of either:

(a) An exact legible reproduction or duplicate, except microfilm, of the affidavit of assessment work performed which was or will be filed for record pursuant to section 314(a) of the Act in the local jurisdiction of the State where the claim or group of claims is located and recorded setting forth the following additional information:

(1) The serial number assigned to each claim by the authorized officer upon filing of the notice or certificate of location or patent application in the proper BLM office. Filing the serial number shall comply with the requirement in the act to file an additional description of the claim.

(44 FR 9723, Feb. 14, 1979, as amended at 44 FR 20430, Apr. 5, 1979)
§ 3833.2-4 When evidence or notice not required.

Evidence of annual assessment work performed or a notice of intention to hold a mining claim need not be filed on unpatented mining claims or mill sites for which application for mineral patent which complies with 43 CFR Part 3860 has been filed and final certificate has been issued. (See 43 CFR 3851.5). The filing of an application and issuance of the final certificate will be deemed full compliance with the requirements of section 314(a) of the Act and the owner of that claim or site shall be exempt from the filing requirements of § 3833.2-1.

§ 3833.3 Notice of transfer of interest.

(a) Whenever the owner of an unpatented mining claim, mill site or tunnel site, which has been recorded in accordance with § 3833.1-2, sells, assigns, or otherwise conveys all or any part of his interest in the claim, his transferee shall file in the proper BLM office within 60 days after the completion of the transfer the following information:

(1) The serial number assigned to the claim by the authorized officer upon filing of a copy of the official record of the notice or certificate of location in the proper BLM office; and

(2) The name and mailing address of the person(s) to whom an interest in the claim has been sold, assigned, or otherwise transferred.

(b) Whenever any person acquires an interest through inheritance in an unpatented mining claim, mill site, or tunnel site recorded in accordance with § 3833.1, he shall file in the proper BLM office within 60 days after completion of the transfer the information required by paragraph (a) of this section.

§ 3833.1 Failure to file.

(a) The failure to file an instrument required by §§ 3833.1-2 (a), (b), and 3833.2-1 of this title within the time periods prescribed therein, shall be deemed conclusively to constitute an abandonment of the mining claim, mill or tunnel site and it shall be void.

(b) The fact that an instrument is filed in accordance with other law
permitting filing or recording thereof and is defective or not timely filed for record under those laws, or the fact that an instrument is filed for record under this subpart by or on behalf of some, but not all of the owners of the mining claim, mill site, or tunnel site, shall not be considered failure to file an instrument under this subpart.


§ 3833.5 Effect of recording and filing.

(a) Recordation or application involving an unpatented mining claim, mill site, or tunnel site by itself shall not render valid any claim which would not be otherwise valid under applicable law and does not give the owner any rights he is not otherwise entitled to by law.

(b) Nothing in this subpart shall be construed as a waiver of the assessment work requirements of section 2324 of the Revised Statutes, as amended (30 U.S.C. 28). Compliance with the requirements of this subpart shall be in addition to and not a substitute for compliance with the requirements of section 2324 of the Revised Statutes and with laws and regulations issued by any State or other authority relating to performance of annual assessment work.

(c) Filing of instruments pertaining to mining claims under other Federal law with the BLM or other Federal agency shall not excuse the filings required by this subpart and filings under this subpart shall not excuse the filing of instruments pertaining to mining claims under any other Federal law, except that filing a notice or certificate of location or affidavit of annual assessment work under this subpart which is marked by the owner as also being filed under the Act of April 8, 1948 (62 Stat. 162) or the Act of August 11, 1955 (30 U.S.C. 621-625), will satisfy the recording requirement for O & C lands under 43 CFR Subpart 3821 and Pub. L. 359 lands under 43 CFR Part 3730, or as provided in § 3833.2-1(b) of this title.

(d) In the case of any action or contest affecting an unpatented mining claim, mill or tunnel site, only those owners who have recorded their claim or site pursuant to § 3833.1-2 or filed a notice of transfer of interest pursuant to § 3833.3, shall be considered by the United States as parties whose rights are affected by such action or contest and shall be personally notified. All methods reasonably calculated to ensure that those parties receive actual notice of the action or contest shall be employed. If those methods are not successful, the interested parties shall be notified by publication in accordance with 43 CFR 4.450. Owners who have not recorded a claim or site or filed a notice of transfer shall not be personally served and will be bound by any contest proceeding even though they have not been personally served. This section applies to all unpatented mining claims, mill or tunnel sites located after October 21, 1976, and shall apply to such claims or sites located on or before October 21, 1976, only after they have been recorded pursuant to § 3833.1-2 of this title.

(e) Actual notice of an unpatented mining claim or mill or tunnel site by any employee or officer of the United States shall not exempt the claim or site from the requirements of this subpart.

(f) Failure of the government to notify an owner upon his filing or recording of a claim or site under this subpart that such claim or site is located on lands not subject to location or otherwise void for failure to comply with Federal or State law or regulations shall not prevent the government from later challenging the validity of or declaring void such claim or site in accordance with due process of law.

(g) Any person who files an instrument required by these regulations knowing the same to contain any false, fictitious or fraudulent statement or entry, may be subject to criminal penalties under 18 U.S.C. 1001.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

MADISON D. LOCKE, ROSALIE E. LOCKE, SAM BUCCAMBUSO, and
TONY BUCCAMBUSO,

 Plaintiffs,

vs.

UNITED STATES OF AMERICA, UNITED
STATES DEPARTMENT OF THE INTER¬
IOR, JAMES WATT, Secretary of the
Interior, BUREAU OF LAND MANAGEMENT,
and ROBERT F. BURFORD, Director of
the Bureau of Land Management,

 Defendants.

ORDER, GRANTING SUMMARY JUDGMENT

The primary issue raised by the parties' cross-motions
for summary judgment is the constitutionality of 43 U.S.C. §
1744(a) and (c). This statute creates an irrebuttable presump¬
tion that mining claims are abandoned if the miner fails to timely
file an annual proof of labor (assessment notice). After care¬
ful consideration, we conclude that this statute violates the due
process clause of the Fifth Amendment. In addition, we conclude
that the plaintiffs here have substantially complied with the
statute regardless of its constitutionality.

Plaintiffs, Madison and Rosalie Locke, et al. (Lockes),
are owners of ten unpatented mining claims from which they pro-
duce gravel and building materials. These claims are located in the state of Nevada on public land belonging to the United States Government. The Lockes have successfully earned their livelihood by mining these claims since 1960. During that period these claims have produced approximately $4,000,000 in materials, with over $1,000,000 of that being produced during the 1979-1980 assessment year.

In 1976, the United States enacted the Federal Land Policy and Management Act, Pub.L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-82) (FLPMA) which required the Lockes to register their unpatented claims with the Bureau of Land Management (BLM) by October 21, 1979. They complied fully with this initial filing requirement on October 19, 1979. Each calendar year thereafter, FLPMA further requires a filing of the assessment notice (showing that $100 worth of labor has been performed on the claim during the assessment year) "prior to" December 31. 43 U.S.C. § 1744(a). It is this provision which creates the controversy here.

In an effort to comply fully with this provision, the Lockes sent their daughter, who was working in their business office, to the Ely office of the BLM. There she inquired as to the procedure for filing the assessment notice. She was told that the documents should be filed at the Reno BLM office "on or before December 31, 1980." Affidavit of Laura C. Locke, August 28, 1981, para. 3. (The identity of the federal employee who allegedly gave this advice is unknown. Therefore, we place no reliance on the advice. The uncontradicted evidence of the inquiry is, nevertheless, evidence of lack of intent to abandon).
The Lockes then chose to hand-deliver the documents to assure their delivery and, on December 31, 1980, the assessment notices were filed at the Reno BLM office.

On April 4, 1981, the Lockes received notice that their mining claims were declared "abandoned and void" for failure to comply with 43 CFR § 3833.2-1 (the BLM's regulation promulgated under 43 U.S.C. § 1744 which requires filing the assessment notices "on or before December 30" of each calendar year. 43 CFR § 3833.2-1(a) (1982)). On May 1, 1981, they appealed the declaration of abandonment to the Interior Board of Land Appeals (IBLA). That body ruled on June 25, 1982 that the Lockes had missed the December 30, 1980 deadline and thus their claims were forfeited. The IBLA refused to address the Lockes' constitutional arguments. They then instituted this action to challenge the constitutionality of 43 U.S.C. § 1744 as depriving them of procedural due process under the Fifth Amendment.

In order to establish a deprivation of their due process rights, the Lockes must first show that the laws creating these rights give rise to a "legitimate claim of entitlement." Memphis Light, Gas and Water District v. Craft, 436 U.S. 1, 12 (1978). The Supreme Court has held that unpatented mining claims are a possessory mineral interest in land, as well as "property in the fullest sense of that term." Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 317 (1930); see also, Best v. Humboldt Mining Co., 371 U.S. 334, 335 (1963). Similarly, the Ninth Circuit Court ofAppeals recently concluded that the holder of an unpatented mining claim has a property right: "[b]ecause an unpatented mining claim is a unique form of property which created
in the owners a possessory interest in the land, the loss of such
an interest would constitute a substantial injury." Western
Mining Council v. Watt, 643 F.2d 618, 628 (1981) (citations omit-
ted). Thus, there can be little doubt that the Lockes' un-
patented claims rise to the level of a property interest suffi-
cient to warrant due process protection.

The Lockes contend that the language of 43 U.S.C. §
1744, establishing conclusively that they have abandoned their
claims, is tantamount to declaring a forfeiture of their claims.
They note that, although the BLM has recommended that they re-
locate their claims, it is uncontroverted that they are precluded
from doing so by 30 U.S.C. § 611, the so-called "Common Varieties
Act." Thus, they are prevented from mining their old claims and
at the same time from relocating the claims.

The government, however, contends that the term "aban-
donment" in the statute is not the same as "forfeiture," and thus
an extinguishment of the Lockes' rights does not occur merely by
operation of the presumption. This reasoning is not persuasive.
The American Law of Mining distinguishes between abandonment and
forfeiture in Section 8.2 of Volume 2 by stating:

Although there is a clear distinction between
abandonment and forfeiture, the terms are fre-
quently used as though they were interchangeable.
The resulting confusion is compounded by sta-
tutes which provide that certain acts, unaccompa-
nied by the requisite intent, shall consti-
tute an abandonment. ... To show abandonment,
the intent of the claimant must be determined;
to show forfeiture, only noncompliance with the
requirements of law must be shown.

2 Rocky Mountain Mineral Law Foundation, The American Law of Min-
The statute creates a forfeiture of plaintiffs' rights in the mining claims since they at no time evidenced an intent to abandon those claims. This forfeiture extinguishes their previously valid interests and results in a taking of their property sufficient to trigger the due process protections of the Fifth Amendment.

After establishing the existence and loss of their rights in the subject claims, we turn to what quality of procedural process is "due" the Lockes before their property rights may be extinguished. Some guidance in this regard can be drawn from the law prior to the passage of FLPMA. In 1920, the Supreme Court ruled that the holder of an unpatented mining claim possesses a property right worthy of strong due process protections:

[C]ourse, the land department [BLM] has no power to strike down a claim arbitrarily, but so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void.

Cameron v. United States, 252 U.S. 450, 460 (1920) (emphasis added). Thus, pre-FLPMA miners were entitled at the least to notice and a hearing prior to forfeiture of their claims.

In determining which procedural safeguards must be afforded post-FLPMA miners, this Court would normally consider the extent to which they might suffer grievous loss, the nature of the governmental function involved, and the nature of the private interest affected. Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972). But, where the statute in question creates an irrebuttable presumption, we must instead look to the nature of that
presumption before balancing these factors. Vlandis v. Kline, 412 U.S. 441, 452 (1973). The Supreme Court in Vlandis v. Kline established a two-prong test for the presumption analysis. Id. If "the presumption is not necessarily or universally true in fact and the government has available 'reasonable alternative means of making the crucial determination,'" then due process demands a hearing to rebut the presumption. Rogers v. United States, No. 80-114, slip op. at 10 (D. Mont. June 28, 1982) (quoting Vlandis v. Kline, supra, 412 U.S. at 452); see also, Stanley v. Illinois, 405 U.S. 645, 658 (1972) (due process hearing required to rebut conclusive presumption that unmarried father was unfit as a parent since this presumption not universally true).

The present case perfectly illustrates a presumption that is not necessarily or universally true in fact. The Lockes mined over $1,000,000 worth of materials from their "abandoned" mines during the 1979-80 assessment year. They filed proofs of annual labor with the White Pine County Recorder on August 26, 1980. They filed the proper documents at the Reno office of the BLM on December 31, 1980, one day after the December 30, 1980 deadline. It would be absurd in light of these facts to conclude that the Lockes intended to abandon their claims. Thus, they have met the first prong of the Vlandis test.

The second prong of the Vlandis test concerns the government's ability to make a reasonable determination of whether the fact(s) presumed actually exist. At the outset we note the government's argument that the Supreme Court case of Weinberger v. Salfiti, 422 U.S. 749 (1974), would deny the Lockes a prior
hearing to rebut the conclusive presumption of abandonment. Al­
though at first blush the Saifi case may appear to contradict Vlandis, there is a clear basis for distinguishing the two.

In Vlandis, a student whose address was listed as out of state during the year preceding his enrollment in a Connecti­cut state university was conclusively presumed to be a non­resident. This presumption continued for as long as the student attended Connecticut schools, resulting in a higher tuition for that student throughout his academic career. Vlandis v. Kline, supra, 412 U.S. at 442-44. A rather simple determination of the actual residency of each student would have been feasible. Id. at 451-52.

Conversely, in Saifi, the presumption was that a mar­riage was a "sham" for Social Security purposes if entered into within nine months prior to the death of one spouse. This pres­umption operated to deprive surviving spouses of Social Security payments they would have received had the marriage occurred ten months prior to death. The court upheld the presumption and ruled that no prior hearing was required to rebut it. Writing for the court, Justice Rehnquist noted that, although the statute undoubtedly excluded some deserving claimants, "[it is not] at all clear that individual determinations could effectively filter out sham arrangements, since neither marital intent, life expect­ancy, nor knowledge of terminal illness has been shown by appel­lees to be reliably determinable." Saifi, supra, 422 U.S. at 782-83 (footnote omitted). Thus, a prior hearing could not have reasonably determined the fact presumed in Saifi.

The facts of the present case more closely resemble
those of Vlandis, where individual determinations were clearly possible. Unlike the Saifi case, this objective requirement is easily determinable at a hearing. In addition, we agree with the Montana district court that such a hearing would not be overly burdensome to the BLM. Rogers v. United States, supra, No. 80-14, slip. op. at 10-11. "[I]t is not asking too much of the government to provide the holder of property in the form of an unpatented mining claim a hearing before the BLM upon whether he has abandoned his mining claim." Id.

We therefore conclude that the second prong of Vlandis, the existence of a reasonable alternative means of making the factual determination, is likewise met in this case. Since the Lockes satisfy both parts of the Vlandis test, it follows that they are entitled to a pre-forfeiture hearing. Vlandis v. Kline, supra, 412 U.S. at 452.

In agreeing with the Rogers case concerning procedural due process, however, we note that Rogers dealt with the initial filing requirement of 43 U.S.C. § 1744 instead of the subsequent annual filings at issue here. This important distinction, which strengthens the Lockes' right to a hearing, is highlighted by the legislative history of Section 1744 and the Act of which it is a part.

The mining provisions of FLPMA trace their original roots to a report prepared in 1970 by the Public Land Law Review Commission (PLLRC). The PLLRC report established the need for a uniform system of mining claim recordation. "The General Mining Law currently requires compliance with location and discovery requirements of state law. State laws on this subject vary widely
and many are obsolete or archaic in light of modern technology."

PLLRC, *One Third the Nation's Land* at 130 (1970). The purpose for establishing this new uniform system was to clear abandoned claims from public lands. "Congress should establish a fair notice procedure (a) to clear the public lands of long-dormant mining claims. . . . Clearing the record of an estimated 5.5 million long-dormant claims would assist in achieving more efficient land planning and management by Federal agencies." Id.

The recommendations of the PLLRC were later incorporated in Senate Bill 507 (94th Cong., 2nd Sess.), which finally was amended and passed as FLPMA. The Senate report from the Committee on Interior and Insular Affairs regarding S 507 further demonstrares that the purpose of 43 U.S.C. § 1744 was to clear long-dormant claims:

[T]he Committee did address a particular procedural problem concerning the registration of mining claims - a problem which is particularly frustrating to the public land manager. The source of this problem is what is often termed "stale claims". There is no provision in the 1872 Mining Law, as amended, requiring notice to the Federal government by a mining claimant of the location of his claim. The mining law only requires compliance with local recording requirements, which usually means simply an entry in the general county land records. Consequently, Federal land managers do not have an easy way of discovering which Federal lands are subject to either valid or invalid mining claim locations. According to some estimates, there are presently more than 6,000,000 unpatented claims on the public lands, excluding national forests, and more than half of the units of the National Forest System are reputedly covered by mining claims. Of course, the vast majority of these claims will never be pursued, and do not directly interfere with land management. They do, however, create significant uncertainty regarding the actual extent of valid locations.

In order to clear these abandoned claims, Congress used the conclusive presumption of 43 U.S.C. § 1744, since giving notice to individual miners would have involved the awesome task of searching every local title record.

In this case, the initial filing has occurred. There is no longer a burden on the government to ascertain the identity of the miner since they already have a file with his name on it. An inquiry as to whether the miner intends to abandon his claim could easily occur by letter. In fact, the BLM presently notifies by mail each miner failing to file the annual assessment notice that their claim has been declared "abandoned and void." Why then would it be more difficult to notify them that they have failed to comply with 43 U.S.C. § 1744 prior to forfeiture? And, if abandonment is in dispute, how difficult would it be for the BLM to offer miners a pre-forfeiture hearing on whether they have performed the minimum assessment work necessary to keep their claim(s) active? Without these procedural safeguards, 43 U.S.C. § 1744 no longer serves its intended purpose of clearing public lands of abandoned claims. Instead, it becomes a convenient device for the government to reclaim established mines for profit at the expense of unprotected and unwary miners. This is true even though those miners have attempted in good faith to comply with every letter of the statute.

In addition, even if the requirement of a pre-forfeiture notice and hearing did increase the steps necessary for the BLM to reclaim public lands, the Supreme Court has held that "the
Constitution recognizes higher values than speed and efficiency.' The [government's] interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the [government's] objective is premised."

Vlandis v. Kline, supra, 412 U.S. at 451 (quoting from Stanley v. Illinois, supra, 405 U.S. at 656) (citation omitted). It seems clear that in this case there are other reasonable and practicable methods for establishing whether a miner intends to abandon his claim by not timely filing his assessment notice. It also seems clear that the Lockes have not intended to abandon their claims by filing one day late.

We therefore grant the Lockes' motion for summary judgment and hold that 43 U.S.C. § 1744 is an unconstitutional violation of procedural due process insofar as it creates an irrebuttable presumption of abandonment for failure to timely file the annual assessment notice.

Even if we concluded that the Lockes had not been deprived of their due process rights, we would still grant their motion for summary judgment based on the legislative history of 43 U.S.C. § 1744 as outlined above. Although that statute seems to create a conclusive presumption of abandonment where the assessment notice is not timely filed, this construction does

1/ "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. . . ." 43 U.S.C. § 1744(c).
not comport with a reasonable reading of the statute's legislative history or the law prior to FLPMA. As Judge Learned Hand stated: "it is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). The Supreme Court has also held that "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

It seems abundantly clear from the history of Section 1744 that it was designed to clear the land of "stale" and "long-dormant" claims. In order to do this, miners were given three years to file their location notices with the BLM. Once this occurred, and those failing to file lost their claims, the purpose of the statute was met. There is no evidence in FLPMA's voluminous history that Congress intended to utilize the annual filings to clear these long-dormant claims. Instead, the evidence indicates that the annual filings were designed to maintain a current index of non-patented claims merely for the convenience of federal land managers. S.Rep. No. 94-583, 94th Cong., 2nd Sess. 65 (1975). In essence, 43 U.S.C. § 1744 simply added a federal recording requirement to the existing General Mining Law provision mandating local recordation of assessment notices. In fact, to satisfy the assessment notice regulations, miners file the exact same documents with both the county recorder's office and the BLM. 43 C.F.R. § 3833.2-1 (1982).

The General Mining Law assessment provision, codified
at 30 U.S.C. § 28, has been the subject of several Supreme Court cases. The more significant of these have held that "substantial compliance" with the assessment notice requirement was sufficient to satisfy the statute, since "the 'possessory title' of the claimant, granted by 30 U.S.C. § 26, [may] not be disturbed on flimsy or insubstantial grounds." Hickel v. Shale Oil Co., 400 U.S. 48, 57 (1970); see also, Wilbur v. Krushnic, 280 U.S. 306 (1930), and Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935). After Hickel v. Shale Oil Corp., the language of the BLM's assessment work regulation was amended to read that substantial compliance was all that was required.

2/ Before 1972, the regulation provided:

§ 3841.3 Failure to perform assessment work.

Failure to make the expenditure or perform the labor required upon a location made before or since May 10, 1872 will subject a claim to relocation unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation.

After 1972, the regulation provided, and still provides:

§ 3851.3 Effect of failure to perform assessment work.

(a) Failure of a mining claimant to comply substantially with the requirement of an annual expenditure of $100 in labor or improvements on a claim imposed by section 2324 of the Revised Statutes (30 U.S.C. 28) will render the claim subject to cancellation.

(b) Failure to make the expenditure or perform the labor required upon a location will subject a claim to relocation unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation.
It seems to us anomalous that the government should insist upon the strict forfeiture declared by 43 U.S.C. § 1744 and at the same time retain the regulations under 30 U.S.C. 28 recognizing substantial compliance as the standard.

The history of FLPMA, the stated purpose of 43 U.S.C. § 1744, and the Supreme Court precedent of Hickel, all indicate that the standard to be applied to assessment notice requirements is substantial compliance. Measured against this, the Lockes have satisfied their statutory duties under Section 1744 by filing their notices one day late.

In consideration of the premises,

IT HEREBY IS ORDERED that plaintiffs' motion for summary judgment is hereby granted and defendants' motion for summary judgment is hereby denied.

DATED October 19, 1983.

[Signature]

UNITED STATES DISTRICT JUDGE
Instruction Memorandum No. 84-248
Expires 9/30/85

To All SD's, DSC

From Director

Subject: Issuance of Abandoned and Void Decisions for Late Annual Filings under 43 CFR 3833.2-1(a) and (b), (43 USC 1744(a))

On October 21, 1983, the Federal District Court for Nevada (Locke v. United States, Civil No. R-82-297 BRT) found Section 314(c) of FLPMA unconstitutional as to the conclusive abandonment of a mining claim for untimely filing of evidence of annual assessment work. On November 23, 1983, the United States appealed this ruling directly to the Supreme Court. Oral arguments will probably be heard this spring, and the Supreme Court may decide the case by mid-summer of 1984. Our main reason for the appeal is our desire to have a nationwide decision on the matter which will bring uniformity to the way the State and Federal Courts apply the law.

In view of the current uncertainty as to the constitutionality of Section 314(c) of FLPMA (43 USC 1744(c)), we are instructing all Field Offices not to issue decisions declaring mining claims abandoned and void for failure to timely file evidence of annual assessment work or a notice of intent to hold. Decisions declaring mining claims null and void for locating on land closed to mineral entry or for missing the 90 day recordation limit are still to be issued. Interim decisions issued for curable defects and missing information are to be issued as in the past.

Owners of millsites and tunnel sites that fail to file a notice of intent to hold are to be sent a decision calling for the required notice under 43 CFR 3833.2-1(c). Final decisions declaring delinquent millsites and tunnel sites abandoned and void are not to be issued until further notice.

All annual filings are to be processed and the computer records updated as usual. Acknowledgements are to be issued as in the past.
Pending the outcome of the appeal, continue to process all documents relating to recordation and annual filing of unpatented mining claims and sites. However, for untimely annual filings, process the filing only up to the point of issuing a decision. All abandoned and void decisions will be held in a pending status until the Supreme Court rules on the constitutionality of 314(c) of FLPMA.

We will issue further instructions at that time as to how to dispose of the pending abandoned and void decisions. If you have any questions, please contact Roger Haskins, Division of Mining Law and Salable Minerals, at FTS 343-8537.
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

NL INDUSTRIES, INC., a New Jersey corporation,

Plaintiff,

vs.

JAMES A. WATT, Secretary of the Interior of the United States of America,

Defendant,

and

ALL MINERALS CORPORATION, a Nevada corporation,

Intervenor.

ORDER GRANTING AND DENYING SUMMARY JUDGMENT
I. FACTS


The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701, et seq. ("FLPMA") became effective on October 21, 1976, repealing a number of outdated statutes and mandating the recording of unpatented mining claims with the federal government. Section 1744 provides:

(a) The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work),
an affidavit of assessment work performed thereon, on a detailed report provided by section 25-1 of Title 30, relating thereto.

(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

Additional filing requirements

(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 or mill or tunnel site sufficient to locate the claimed lands on the ground. The owner of an unpatented lode or placer mining claim or mill or tunnel site located after October 21, 1976, shall, within ninety days after the date of location of such claim, 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 or mill or tunnel site sufficient to locate the claimed lands on the ground.

Failure to file as constituting abandonment; defective or untimely filing

(c) 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 or mill or tunnel site by the owner; but it shall not be considered a
failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site.

The plaintiff NL filed location certificates and copies of affidavits of assessment work for its mining claims with the Nevada State Office of the Bureau of Land Management ("BLM") in December 1977. In September 1979 NL filed affidavits of annual assessment work with the same office. BLM records show no evidence of the filing of affidavits of assessment work in calendar year 1978. The Nevada State Office of the BLM declared NL's claims abandoned and void for failure to file the required documents in 1978.

On appeal the Interior Board of Land Appeals ("IBLA") of the Department of the Interior affirmed the Nevada State Office's decision. N.L. Harold Services, 60 IBLA 90 (1981). The IBLA reasoned that the plaintiff NL's filing of maintenance evidence in 1977 triggered section 1744's annual filing requirement, thereby requiring NL to file maintenance evidence every year thereafter. Accordingly, because NL failed to file in
1978 the IBLA deemed the claims abandoned and void under section 1744(c).

The plaintiff NL takes issue with the BLM’s decision regarding the claims. NL interprets section 1744 so as to allow owners of unpatented claims prior to October 1976 to achieve compliance by filing the required documents anytime within the three-year period ending October 22, 1979. It further contends that only after the three-year "grace period" ends is it required to make the annual assessment filings. NL therefore alleges that it did comply with the statute by its filings of 1977 and 1979 and was not required to begin filing annual maintenance evidence until after the end of the period provided by the statute.

NL asks this court to overturn the IBLA’s decision and to declare that the NL mining claims are valid under FLPMA. NL has moved for summary judgment. Cross motions for summary judgment have been filed by the government and by All Minerals Corporation which was allowed to intervene in this action. For the reasons mentioned below and fully explained in NL’s pleadings on file in this case, NL's motion for summary judgment must be granted and the defendants' motions must be denied.
II. ANALYSIS

The issue is whether the IBLA erred in ruling that NL's mining claims were deemed abandoned and void for failure to comply with the governing statute. More specifically, this court's inquiry concerns the purposes behind the passage of FLPMA and the proper interpretation, if one exists, of the word "thereafter" in § 314 of the Act, 43 U.S.C. § 1744, which provides that the owner of mining claims like NL's "... shall within the three-year period following the date of the approval of this Act [enacted Oct. 21, 1976] and prior to December 31 of each year thereafter, file the instruments required ...." 43 USCS § 1744(a) (Law. Co-op. 1980)(emphasis supplied).

Defendants assert that "thereafter" refers to the initial filing in the three-year period, so that from the time of the first filing the annual maintenance evidence filing requirement is in effect. Therefore, NL's 1977 filing of assessment work necessitated yearly filings in 1978, 1979, 1980 and so on. Defendants rely on administrative decisions interpreting the statute and contend that the IBLA should be given deference by this court.
The department's regulations themselves, though, have no bearing on this decision as evidenced by the pleadings and oral arguments of all counsel.  

The plaintiff NL maintains that "thereafter" refers to October 22, 1979, the end of the three-year grace period which Congress provided in which to comply with FLPMA. Under NL's interpretation the annual filing requirements do not take effect until after October 1979, regardless of when, and how often, filings are made within the three-year period. Thus, it contends that it fully complied with the statute.  

It has been admitted by various administrative law judges within the Department and by government counsel Fish that the statute can reasonably be read in a number of ways. This court agrees, but is of the opinion that the most reasonable interpretation of the statute is plaintiff NL's reading. This is reason enough to rule for NL, and even if this court did not agree with NL's reading it still would be forced to rule for NL because forfeiture provisions must be construed narrowly. Alarmingly, the IBLA has construed FLPMA broadly to invalidate NL's claims.  

One of the purposes behind the enactment of FLPMA was to assist federal land managers in their responsibilities by removing "stale claims" on federal land. Topaz Beryllium Co. v. United States, 479 F.Supp. 309, 313
provided a three-year grace period for claimants to become apprised of, understand, and achieve compliance with the new law, FLPMA. This would protect the property rights of claimants while establishing a system of informing the federal government of active claims. The forfeiture provision supplied motivation to comply initially within the three-year period and to stay in compliance thereafter by making the annual filings.

NL's claims were not stale as evidenced by NL's filings with Nye County and the State BLM Office. It is unreasonable to contend that the Congress intended to invalidate claims similar to NL's in light of the legislative history. NL did comply initially with FLPMA by its 1977 filings, and was not required to file evidence of maintenance work again until after October 22, 1979. Its 1979 filing did not change this. Any other application of the law to this case would cause inequitable and illogical results.

A comparison of the results in N.L. Baroid, the IBLA's decision which NL is presently challenging, with the results in Harvey A. Clifton, 60 IBLA 29 (1981) and other IBLA decisions reveals the incongruity of the IBLA's and defendants' position in this case. The IBLA rulings
establish an unwarranted distinction between filing location certificates and maintenance evidence and the resultant triggering of annual filing requirements. The decision in *NL Baroid* is arbitrary, capricious, and an abuse of discretion. Furthermore, the IBLA's interpretation of filing requirements under FLPMA exceeds the statutory authority granted by Congress. The IBLA's decision in *NL Baroid* is therefore reversible notwithstanding the deference customarily accorded agency rulings. 5 U.S.C. § 706 (1976); see also *Baker v. United States*, 613 F.2d 224 (9th Cir. 1980).

III. ORDER

Plaintiff NL Industries Inc.'s motion for summary judgment is granted. The motions for summary judgment of defendant United States and defendant-in-intervention All Minerals Corporation are denied. The decision of the IBLA in *N.L. Baroid Petroleum Services* is reversed and remanded with orders to set aside its ruling and to reinstate the NL claims.

DATED: March 13, 1984

[Signature]

DISTRICT JUDGE
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

OREGON PORTLAND CEMENT COMPANY, a Nevada corporation,
Plaintiff,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; JAMES G. WATT, Secretary of the Interior;
BUREAU OF LAND MANAGEMENT;
ROBERT F. BURFORD, Director of Bureau of Land Management,
Defendants.

THIS CAUSE comes before the court on cross-motions for summary judgment. The basis of this action is a complaint for review, under the Administrative Procedure Act, of a decision by the Interior Board of Land Appeals (IBLA). In that decision, the IBLA affirmed a decision of the Alaska State Office, Bureau of Land Management, declaring certain of plaintiff's placer mining claims abandoned and void. See Oregon Portland Cement Co., 66 IBLA 204 (1982). Since the facts of this case are undisputed, it is ripe for summary judgment.

The issue in this case is whether the IBLA and the Bureau of Land Management (BLM) correctly interpreted and applied Section
Section 314 of the Federal Land Policy and Management Act of 1976 (hereinafter FLPMA), 43 U.S.C. § 1744 (1976). Section 314 of FLPMA required owners of unpatented lode or placer mining claims to file information relating to those claims with the BLM. The purposes of this filing include (1) ridding federal lands of stale mining claims, and (2) assuring that federal land managers have ready access to current information on active claims. See Topaz Beryllium Co. v. United States, 479 F. Supp. 309, 313 (D. Utah 1979) (quoting S. Rep. No. 94-583, 94th Cong., 2d Sess. 64-65 (1975)), aff'd 649 F.2d 775 (10th Cir. 1981). ¹ For owners of unpatented placer mining claims located prior to the passage of FLPMA (Oct. 21, 1976) Section 314 required, first, that owners file certain "locating" information with BLM once prior to October 21, 1979, see 43 U.S.C. § 1744(b), and, second, that owners file either an affidavit of assessment work or a notice of intention to hold prior to October 21, 1979 and prior to each December 31 thereafter. See id. § 1744(a). This second group of reports must be filed with both BLM and the official state recording office (generally the county public land records). Under Section 314, an owner who fails to meet the above filing requirement is deemed conclusively to have abandoned his or her claim. Id. § 1744(c).

I. Factual Background

The claims at issue are 40 unpatented limestone placer mining claims at View Cove on Dall Island in the Alexander Archipelago of Southeastern Alaska. Oregon Portland Cement Co. (OPCC) originally located and recorded these claims in 1965. After the passage of FLPMA, in June 1978, OPCC filed copies of its official Ketchikan Recording District placer location certificates with BLM in June 1978 pursuant to 43 U.S.C. § 1744(b). At the request of BLM, OPCC amended this filing in January, 1979 to include legal descriptions of the land on which the claims were located and a USGS map showing the claim locations. There is no dispute that through these filings OPCC complied with the "locating" requirements of 43 U.S.C. § 1744(b). See also 43 C.F.R. § 3833.1-2 (1982) (regulations implementing this subsection).

On November 8, 1978, pursuant to 43 U.S.C. § 1744(a), OPCC filed affidavits of assessment work for the assessment year ending September 1, 1978 and for the assessment year ending September 1, 1979. Thus, plaintiff's affidavit of assessment work for the assessment year ending September 1, 1979 was on file with the BLM throughout the entire 1979 calendar year. Nevertheless, the IBLA held that OCPP's claims were abandoned and void for failure to file assessment work during the 1979 calendar year.

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2 The mining assessment year is defined in 30 U.S.C. § 28 (1976). Under this section, if a miner fails to do annual assessment work on a claim, the claim is subject to forfeiture if the claim is then relocated by another miner.
year. The IBLA reasoned that because OPCC filed proof of
assessment work during 1978, Section 314(a) required an annual
filing during the 1979 calendar year. Since OPCC's 1979 report
was filed early, namely in November 1978, no proof of assessment
work was filed during 1979 and therefore OPCC's claims were
"abandoned." As can be seen, OPCC's only error was filing a
required report too early!

OPCC argues that the IBLA's decision is inconsistent with
the statutory language of Section 314 in two areas. First, OPCC
maintains that the statute only requires annual reports of
assessment work to be filed after October 21, 1979, and not after
the initial filing of assessment work. Therefore, because no
annual filing was required in 1979, no abandonment occurred.
Second, OPCC maintains that the statute's words "prior to
December 31 of each year thereafter" should not be read to
require calendar year filing. According to this argument, OPCC's
1979 filing of November 1978 was "prior to December 31" and
therefore timely. These challenges to the IBLA decision are also
a challenge to BLM's regulations implementing Section 314 for the
reason the IBLA grounded its decision in part on those regula-
tions.

II. Standard of Review

This court's review of an IBLA decision is limited to an
examination of whether it was arbitrary, capricious, an abuse of
its discretion, unsupported by substantial evidence, or not in
accordance with law. 5 U.S.C. § 706 (1982); Baker v. United
States, 613 F.2d 224, 226 (9th Cir.), cert. denied 449 U.S. 932 (1980). The court need not affirm the administrative decision if the decision is inconsistent with a statutory mandate or frustrates the policy underlying the statute. NLRB v. Brown, 380 U.S. 278, 291 (1965); Schade v. Andrus, 638 F.2d 122 (9th Cir. 1981). As was stated by the Ninth Circuit elsewhere:

The Administrative Procedure Act mandates that the reviewing court decide all relevant questions of law [and] interpret constitutional and statutory provisions .... " 5 U.S.C. § 706. We must nonetheless give due deference to the interpretation of statutes and regulations by the agency charged with their administration. Loma Linda University v. Schweiker, 705 F.2d 1123, 1126 (9th Cir. 1983); Committee for an Independent P-I, 704 F.2d at 472. Our task, then, is not to interpret the statutes as we think best, but rather to inquire whether the Coast Guard's construction was "sufficiently reasonable" to be accepted. FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39, 102 S. Ct. 38, 46, 70 L. Ed. 2d 23, 34 (1981). "To satisfy the standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Id.

Western Pioneer, Inc. v. United States, 709 F.2d 1331, 1335 (9th Cir. 1983).

The amount of deference required and the standard of review for agency decisions reached by rulemaking, i.e., regulations, is similar to that required when agency decisions are reached by adjudication. See id. Thus, implementing regulations are valid if they implement the mandate of Congress, as expressed in the statute in some reasonable way. Rowan Cos. v. United States, 452 U.S. 247, 252-53 (1981). "In determining whether a regulation
carries out the congressional mandate in the proper manner, [a
court must] look to see whether the regulation harmonizes with
the plain language of the statute, its origin, and its purpose.
Id. at 253; First Charter Financial Corp. v. United States, 669
F.2d 1342, 1348 (9th Cir. 1982). See also Committee for an
Independent P-I v. Hearst Corp., 704 F.2d 467, 473 (9th Cir.) ("A
court is obliged to accept the administrative construction of a
statute only so far as it is reasonable ... and consistent with
the intent of Congress in adopting the statute."); cert. denied

While the court must treat the agency decision with deference in this case, the nature of the review required here tempers
the amount of deference due. The statutory mandate in
Section 314 regarding recording and abandonment is detailed and
specific, not broad and general. This is unlike the situation
where Congress has left the agency a mandate to define a general
term or implement a broad policy, in which case agency discretion
would be at its greatest. Here, Congress constrained the BLM's
discretion by use of specific statutory language. Deference is
therefore less appropriate. See First Charter Financial Corp.,
669 F.2d at 1348.

In a similar situation, the Supreme Court stated:

The framework for analysis is refined by
consideration of the source of the authority to
promulgate the regulation at issue. The
Commissioner has promulgated Treas. Reg. §
1.1563-1(a)(3) interpreting this statute only
under his general authority to "prescribe all
needful rules and regulations." 26 U.S.C. §
7805(a). Accordingly, "we owe the interpreta-
tion less deference than a regulation issued
under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision." Rowan Cos. v. United States, 101 S. Ct. 2288, 2292, 68 L. Ed. 2d 814 (1981). In addition, Treas. Reg. § 1-1563-1(a)(3) purports to do no more than add a clarifying gloss on a term -- "brother-sister controlled group" -- that has already been defined with considerable specificity by Congress. The Commissioner's authority is consequently more circumscribed than would be the case if Congress had used a term "so general . . . as to render an interpretive regulation appropriate." National Muffler Dealers Assn. v. United States, 440 U.S. 472, 476, 99 S. Ct. 1304, 1306, 59 L. Ed. 2d 519 (1979), quoting Helvering v. R.J. Reynolds Co., 306 U.S. 110, 114, 59 S. Ct. 423, 83 L. Ed. 536 (1939). See also Rowan Cos. v. United States, supra.

The situation facing this court is identical to that described by the Vogel Fertilizer Court. The BLM, in promulgating the regulation, was acting under a general, not a specific, grant of authority. See 43 U.S.C. § 1740 (1976). Further, in regards to setting filing dates, the BLM was merely clarifying specific statutory language rather than interpreting a general term. For both these reasons, in reviewing the regulations the court must closely scrutinize them and give them less than maximum deference.

III. Are Annual Assessment Reports Required Prior to October 21, 1979?

The filing requirements of FLPMA on assessment work are contained in Section 314(a).

§ 1744. Recordation of mining claims

(a) Filing requirements
The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after October 21, 1976 shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on a detailed report provided by section 28-1 of Title 30, relating thereto.

(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.


BLM's regulations implementing this section are located at 43 C.F.R. § 3833.2-1(a) (1982); 3

3833.2-1 When filing required.

(a) The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever

3 The BLM regulations have been revised substantially since the time of the IBLA decision. The current version of this regulation is now located at 43 C.F.R. § 3833.2-1(b)(1) (1983). Because this case involves a challenge to the regulations in effect in 1979, the court will only refer to the version of this regulation appearing in the 1982 Code of Federal Regulations.
date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

In order to review the basis and legality of this "abandonment" it is important to understand that there are two sets of rules creating filing requirements, one statutory and one regulatory, and that these are inconsistent with one another. Failure to comply with either set may cause a miner to lose his or her claim. As noted above, Section 314 requires miners to file (1) a recording of location once prior to October 22, 1979 (see § 314(b)), and (2) according to IBLA, affidavits of assessment at least once prior to October 22, 1979 and annually after the initial affidavit of assessment has been filed. BLM's regulation, 43 C.F.R. 3833.2-1(a) (1982), requires filing of (1) a recording of location once prior to October 22, 1979 and (2) according to IBLA, affidavits of assessment at least once prior to October 22, 1979 and annually after the certificate of location is filed for record. See Oregon Portland Cement Co., 66 IBLA at 206 n.2; Harvey A. Clifton, 60 IBLA 29, 33 (1981). Given the conflict between IBLA's interpretation of the statute and its interpretation of the regulations, it becomes possible to meet statutory but not regulatory filing requirements, see, e.g., Harvey A. Clifton, supra, or to meet regulatory but not statutory
requirements, as may have occurred in this case.

The IBLA based its decision in this case on statutory, not regulatory grounds. See 66 IBLA at 206-07. Therefore, the major emphasis of this court's review will be whether the IBLA interpreted the statute correctly. Nevertheless, BLM's regulations must be reviewed as well. The BLM interpreted the phrase "and prior to December 31 of each year thereafter" to require annual calendar year filings during the three year 1976-1979 grace period. Because the IBLA presumably relied on this interpretation of the statute in its determination that OPCC was required to file in 1979, the court must question the validity of BLM's interpretation as well.

As noted above, the IBLA interpreted Section 314 to require proof of assessment work be filed annually within each calendar year following the year initial filing of assessment work occurred. OPCC contends, however, that the phrase "thereafter" refers to the phrase "within the three year period" and that consequently annual filings are only required after October 21, 1979. On the other hand, the government argues that BLM's interpretation of the statute as requiring annual filing after the initial filing of assessment work is reasonable and must be accepted by this court. The court finds, for the reasons stated

Assuming, arguendo, that the recording of location did not occur until all documents were submitted in 1979, then OPCC would have met regulatory but not statutory requirements. The court, however, declines to address the issue whether the final filing relates back to the initial filing for purposes of triggering the annual reporting requirement. See Marion Birch, 53 IBLA 366 (1981).
below, that the IBLA interpretation and BLM regulation are inconsistent with the plain language of the statute and therefore the administrative decision must be reversed.

First, a common-sense reading of the statute indicates that "thereafter" must modify the words "within the three-year period." There is no other phrase or word that thereafter could possibly modify. OPCC's interpretation of the statute is the only reasonable interpretation available. This conclusion is buttressed by an analogy to a settled rule of statutory construction, the "doctrine of last antecedent." "[U]nder the 'doctrine of last antecedent,' qualifying words, phrases, and clauses are to be applied to the words or phrase immediately proceeding, and are not to be construed as extending to and including others more remote." Azure v. Horton, 514 F.2d 897, 900 (9th Cir. 1975); accord, First Charter Financial Corp., 669 F.2d at 1350. Similarly, the word "thereafter" should be read as referring to the immediately antecedent phrase, "within the three year period."

Had Congress intended that reports be filed annually after the initial filing, it would have required that in plain language, as it did with claims located after October 21, 1976. In the sentence immediately following the one under discussion, Congress required owners of claims located after October 21, 1976 to file proof of assessment work "prior to December 31 of each year following the calendar year in which said claim was located." 43 U.S.C. § 1744(a). This comparison of congressional
treatment of claims located before October 21, 1976 and those located after that date shows that Congress was aware of the problem of when to require annual filings and chose not to require them, at least for claims located prior to 1976, until after the initial three year filing period.

This result is logical as well. For claims located prior to 1976, the statute allows owners to file their initial proof of assessment work any time before October 1979. Thus, some owners would initially file assessment work in 1977, and some not until October 20, 1979. Because of the presence of this three-year grace period, BLM could not expect to have a complete record of mining claims until October 21, 1979. Little, if any, useful purpose is served by requiring annual filings prior to that date for the reason that BLM could not reasonably rely on their mining claim records until after the close of the three-year grace period. It is only at the close of the grace period, when the records would be complete, that the need to keep the records current arises. Consequently, no congressional purpose or policy is served by BLM's claim of abandonment. See also NL Industries, Inc. v. Watt, No. CIV-LV 82-176, RDF (D. Nev. Mar. 13, 1984) (finding BLM's position on annual filings to be inequitable and illogical).

The logic of this interpretation is supported by examining the structure of the whole section. Section 314(b) requires that information on the mining claim's location be filed prior to October 22, 1979. The statute does not require, contrary to
Judge Stuebing's suggestion in his dissent to Clifton, "that the recodarion of the notice of location must precede (or be made simultaneous with) the filing of one of the other documents described in [Section 314(a)]." 60 IBLA at 41. However, while the statute does not require this, logic certainly does. See id. at 41-42. The only way to harmonize the filing requirements of 314(a) and (b) is to interpret 314(a) as requiring annual reports after the three-year grace period. To read 314(a) otherwise leads to the anomalous result, noted by Judge Stuebing, of requiring annual assessment reports before a claim is officially recorded and located with the BLM. Such annual reports would be of little, if any, use to BLM because information on the location of the claim would not also be available.

Finally, the court notes that forfeiture provisions must be construed narrowly. See Saratoga Vichy Spring Co. v. Lehman, 625 F.2d 1037, 1044 (2d Cir. 1980). BLM has construed Section 314 broadly to create forfeiture in questionable situations. For this reason, and the other reasons stated above, the court finds that Section 314 only requires that one proof of assessment work or notice of intent to hold and one recordation of location be filed prior to October 22, 1979. IBLA's decision below is contrary to law and must be reversed.

IV. Must Affidavits of Assessment be Filed After January 1?

OPCC also argues that the IBLA and BLM erred in requiring affidavits of assessment to be filed after January 1 rather than any time after the assessment work was completed. Because the
statute merely requires affidavits be filed "prior to December 31 of each year thereafter", OPCC claims that its November 1978 affidavit, having been filed "prior to" December 31, met statutory requirements.

This portion of the controversy arises in part because the mining assessment year does not coincide with the calendar year. In order to avoid forfeiting their claims, miners must do assessment work each assessment year. See 30 U.S.C. 28 (1976). For purposes of this forfeiture statute, the assessment year runs from noon September 1 until noon September 1. 30 U.S.C. § 28. As is a common industry practice, OPCC scheduled their assessment work to overlap both ends of the September 1, 1978 new assessment year. See 66 IBLA at 209. This allowed them to save substantial time and expense, given the remote location of the claim. OPCC then prepared affidavits of assessment for both the 1978 and 1979 assessment years and filed these with the local authority as required by 49 U.S.C. § 49(e) (1976) and Section 314(a)(1) and with the BLM pursuant to 314(a)(2).

The court finds strong evidence it was Congress' intent to accommodate the mining practices followed by OPCC. First, Congress clearly was aware of the assessment year concept in passing Section 314. It referred to 30 U.S.C. § 28-1, which requires local filing of work on an assessment year basis. It also made specific reference to "calendar" years elsewhere in Section 314, i.e., in its discussion of claims filed after October 21, 1976. Given congressional awareness of the assessment
year and mining practices, it becomes significant that the statute does not specifically require calendar year filing. When Congress wanted action based on the calendar year elsewhere in the statute, it specifically required it. Second, Congress only set a closing date for filing. Viewed in light of the statute's background, it is reasonable to assume that the purpose of the phrasing is to accommodate assessment practices, namely to allow filing any time after assessment work is completed. Third, the requirement of a December 31 filing deadline is at least as consistent with congressional intent to create a four-month grace period between the end of the assessment year and the filing deadline as it is with intent to create calendar year filing.

The court therefore concludes it is reasonable to interpret Section 314 to allow early filing of assessment work. Because deference must be given to an agency's interpretation of a statute, this court must nevertheless accept BLM's interpretation so long as it is reasonable and consistent with statutory mandate.

The court agrees with the IBLA that the statute is amenable to the interpretation given it by the BLM. See James V. Joyce, 56 IBLA 327, 329 (1981) (on reconsideration). However, because no reasonable administrative purpose is furthered by BLM's interpretation of Section 314, the agency interpretation places

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5 Congress acknowledged these practices and shaped a statute to accommodate them elsewhere. See 30 U.S.C. § 28-1 (1976) (allowing one survey of a mining claim to be applied as assessment labor for two consecutive years).
additional administrative burden on mine owners without justification. In addition, the agency's disregard of established mining practices in establishing a calendar year filing system is arbitrary and capricious. Because the agency was arbitrary in ignoring established mining practices and because no justification supports BLM's use of the calendar year in establishing filing requirements for filing proof of assessment work, the agency's interpretation of the statute is unreasonable.

The government claims that if BLM is not allowed to use a calendar year system, a major purpose of Section 314, keeping BLM informed of the continued interest of claimants in claims will be frustrated. The court agrees that keeping BLM records current is important. However, it cannot agree with the government's protestations of impending doom if BLM is required to recognize filings of assessment work of the type that occurred in this case. Under a calendar year system, federal land managers must look back in the claim file twelve months to determine if there is continued interest in the claim (from Dec. 30 to Jan. 1). If mine owners are allowed to file assessment work any time after it is performed, the only change would be that land managers would be required to look back in the file sixteen months (from Dec. 30 to the previous Sept. 1). This change of four months should not impair the usefulness of the records to federal officials.
The IBLA stated in *James V. Joyce, supra*, that if early filing were allowed for assessment work, the same logic would require early filing of notices of intent to hold claim.6 "Thus, an individual could file in one year separate documents manifesting an intent to hold for each of the next 5 years." 56 IBLA at 330. This argument lacks merit, however. There is no language in the statute that requires notices of intention to hold to be treated identically with affidavits of assessment work. BLM easily could have created different filing dates for different types of filing.7 In other words, the logic that supports allowing affidavits be filed within the four-month period prior to a calendar year does not support allowing notices to be filed 10 years in advance, as IBLA contends.

The government also argues that

to permit a mining claimant to file proof of assessment work in the last 4 months of the calendar year in which it should be filed, albeit within the assessment year, would permit a mining claimant to effectively skip filing proof of assessment every other year. . . . For instance, a mining claimant could file in November 1978 for the 1979 assessment year and file in December 1980 for the 1980 assessment year, effectively skipping any filing in 1979.

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6 According to the statute and regulations, mine owners may file a notice of intention to hold claim as a substitute for proof of assessment work. See, e.g., 43 C.F.R. § 3833.2-3(a) (1983).

7 Or else, BLM could require both notices of intention to hold and affidavits of assessment be filed within the sixteen month September to December period. The statute does not forbid BLM from setting an opening date for filing. However, the opening date set by BLM must be reasonable.
See Oregon Portland Cement Co., 66 IBLA at 210. The court agrees this result is possible, but doubts requiring annual filing will lead to a markedly different result. In the government's hypothetical, 25 months elapse between filings. Under a calendar year filing system, the November 1978 filing could be filed January 1979 instead and the 1980 filing in December, 1980, as before. Thus, the result of requiring calendar year filing is merely to reduce the complained of gap between filings from 25 to 23 months. The court does not find that the statute's purposes or congressional intent will be furthered by reducing the gap between filings by two months.

In the decision below, the IBLA spent considerable effort analyzing the concept of a "notice of intention to hold" and whether Congress intended that Section 314 work to enforce the assessment requirements of 30 U.S.C. § 28 and 28-1. The court does not argue with the IBLA's analysis on these points. However, there is no logical connection between this analysis and the IBLA's conclusion, namely "the assessment year simply has no relevance to recordation." 66 IBLA at 210. The mere fact that the assessment year is a mining practice of long standing is sufficient to make it relevant. As the IBLA admitted: "We recognize that it is a common practice for mineral claimants to work over the end of an assessment year and thereby fulfill the labor requirements for 2 years." Id. at 209. In promulgating regulations under Section 314, BLM was not writing on a blank slate. It was working in the context of well-established mining
industry practices, practices of which Congress was aware. For IBLA to say that industry practices should have no relevance to agency regulations is simply wrong. Rather, the agency's failure to consider an existing statutory scheme (30 U.S.C. §§ 28 and 28-1) and industry practices in promulgating regulations is both arbitrary and capricious.8

Finally, the facts of this case speak for themselves. For an agency to declare mining claims abandoned because proof of assessment work was filed two months too early is inherently unreasonable. The arguments offered by the government and the IBLA in support of the IBLA decision do not offer reasonable support for the government's position or show why this inherently unreasonable decision should be considered reasonable.

Accordingly, the court holds that the agency's decision to disregard the November 1978 filing was arbitrary, capricious, and, because the regulation does not interpret the statute in a reasonable manner, contrary to law.9

Accordingly, IT IS ORDERED:

(1) THAT plaintiff's motion for summary judgment is granted;

8 One relevant and important consideration is convenience of the miners. For the reasons stated above, no significant government interest is furthered by requiring miners to make two separate trips to the BLM, one prior to December 31 and one in January, when all papers are presumably prepared and ready to be filed at one time.

(2) THAT defendants' motion for summary judgment is denied;
(3) THAT the decision of the IBLA in Oregon Portland Cement Co., 66 IBLA 204, is reversed and this case is remanded;
(4) THAT the IBLA take such further actions as are required by this opinion.

DATED at Anchorage, Alaska, this 19th day of April, 1984.

cc: Richard E. McCann
U.S. Attorney

United States District Judge
This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to hearing before the Court with the judge (Magistrate) named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

(1) THAT plaintiff's motion for summary judgment is granted;
(2) THAT defendants' motion for summary judgment is denied;
(3) THAT the decision of the IBLA in Oregon Portland Cement Co., 66 IBLA 204, is reversed and this case is remanded;
(4) THAT the IBLA take such further actions as are required by this opinion.

APPROVED:

James A. von der Heydt
Chief Judge, U.S. District Court

cc: McCann
U.S. Attorney
DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 3710, 3720, 3730, 3740, 3800, 3810, 3820, 3830, 3840, 3850, 3860 and 3870

Intent to Propose Rulemaking

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent to propose rulemaking.

SUMMARY: As part of the Department of the Interior's ongoing effort to
streamline existing regulations, the Bureau of Land Management is considering the revision of regulations found at 43 CFR Groups 3700 and 3800 dealing with acquisition of rights and development of mineral resources under the mining laws, 30 U.S.C. 22 et seq., and other special Acts of Congress. Public comment is invited as to how the regulations found at 43 CFR Groups 3700 and 3800, other than Subparts 3702, 3809, and 3833, could be improved, whether by elimination of unnecessary or burdensome provisions, by the clarification or amplification of ambiguous provisions, or by the inclusion of standards or procedures not now found in the regulations. In furtherance of the Department of the Interior's policy of seeking public input, the public is invited to arrange meetings with representatives of the Director, Bureau of Land Management, to discuss, for the record, their comments.

DATE: Comments should be submitted by February 1, 1983. Comments received or postmarked after that date will be considered if it is practical to do so, but assurance cannot be given that any comments except those received or postmarked on or before this date will be given consideration.

ADDRESS: Written comments should be addressed to: Director (140), Bureau of Land Management, 18th and C Streets, NW, Washington, D.C. 20240. Comments will be available for public review in Room 5555 of the above address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday.

Those wishing to arrange meetings to present comments should contact the Assistant Director, Mineral Resources at (202) 343-5354 to schedule their presentation. A record will be made of all meetings, will be made part of the comment docket, and will be available for public review. The record will include the name, address and organizational affiliation of any individual participating in the meetings concerning this proposal.


SUPPLEMENTARY INFORMATION: The public is invited to submit comments on, but not limited to, the following issues:

1. Procedures for patenting mining claims and mill sites under the mining laws;
2. Definition, consistent with existing case law, of discovery of a valuable mineral deposit (including the concepts of the prudent man rule and marketability);
3. Definition of the term "valid mining claim";
4. Clarification of the distinction between an amended location and a relocation;
5. Method of showing a patent applicant's title to a claim; and
6. Definition of the showing to be made to support a mining claimant's allegation of discovery.

Because of their special interest, members of the public who conduct mining activities that may be affected by the regulations in 43 CFR Groups 3700 and 3800, other than Subparts 3702, 3809 and 3833, are asked to give careful consideration to these parts and submit their comments for consideration.

Because the regulations found at 43 CFR Subparts 3802, 3809, and 3833 have been the subject of recent rulemaking and proposed rulemaking, the Bureau of Land Management will review those regulations separately from this notice of intent. Accordingly, comments on those parts are not specifically solicited.

List of Subjects