

INTERIOR BOARD OF LAND APPEALS

United States

v.

John J. Herr, et al.

130 IBLA 349 (September 15, 1994)

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Editor's note: 101 I.D. 113; Reversed, Cliffs Synfuel Corp. v.Babbitt, Civ. No. 2:99CV- 133ST (D. Utah, Nov. 7, 2000).

UNITED STATES
v.
JOHN J. HERR ET AL.

IBLA 92-448

Decided September 15, 1994

Appeal from a decision by Administrative Law Judge John R. Rampton, Jr., declaring 64 oil shale placer claims invalid for failure to perform annual assessment work. Colorado 747, CMC-133269 through CMC-133332.

Affirmed as modified.

1. Mining Claims: Assessment Work

30 U.S.C. § 28 (1988) calls for the expenditure of \$100 in assessment work on or for the benefit of a mining claim each year until patent. Before patent can be obtained the claimant must have made improvements valued at \$500 or more (30 U.S.C. § 29 (1988)), but the expenditure of \$500 does not terminate the ongoing requirement in 30 U.S.C. § 28 (1988), for expenditure of \$100 each assessment year.

2. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1988), and the

Department has jurisdiction to challenge the validity of a mining claim for failure to substantially comply with the assessment work requirement. The forfeiture of a mining claim for failure to do annual labor must be established by clear and convincing proof that the owner has failed to have performed the required work or made the necessary improvements.

3. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

The purposes of the assessment work requirement are to assure that a claimant undertakes a diligent good faith effort to develop the mining claim, and to prevent the location of mining claims for speculative purposes. The requirement that the claimant expend \$100 in annual labor each assessment year is not absolute in the same sense as the requirement that a claimant file a notice of intent to hold or affidavit of assessment work pursuant to 43 U.S.C. § 1744 (1988), but the claimant's compliance with the assessment work requirement must be sufficiently substantial to demonstrate a diligent good faith effort to develop the mining claim.

4. Mining Claims: Assessment Work

Assessment work may be performed by a party other than the claimant, and when there is privity between the party doing the assessment work and the claimant, the assessment work will inure to the benefit of the claims.

5. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

The cost of road construction can qualify as assessment work. If the construction of an access road qualifies as assessment work, improvement of the access road will as well. In turn, a road improvement which reduces the frequency or cost of maintenance is as legitimate as an improvement making the road more accessible.

6. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

Evidence of a bona fide intent to develop a claim and use the mineral resources is paramount when determining whether the claimant has made a good faith attempt to comply with 30 U.S.C. § 28 (1988). Evidence that the claimant had no knowledge of the nature or amount

of the assessment work allegedly performed; testimony that the claimant relied on representations made by third parties; admissions that the claimant did nothing to confirm those representations for a period of several years; and the absence of any testimony or other evidence from the parties filing affidavits on behalf of the claimant regarding the work allegedly performed will support a conclusion that the claimant was attempting to assert a continuous right to a mining claim for speculative purposes. There is no evidence of a diligent good faith effort to develop the claims.

7. Mining Claims: Assessment Work--Mining Claims: Determination of Validity

If a claimant fails to do necessary annual labor, but resumes work before the rights of a third party intervene, nothing is lost by allowing the claimant to revive the claim with his labor rather than by relocating the claim. However, if a third party right attaches during the period of inactivity, the third party intervention deprives the claimant of the ability to regain the claim by resuming work. The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1988), and the resumption doctrine is no longer applicable to oil shale claims.

APPEARANCES: John K. York, Esq., Orange, California, for appellants; Lowell L. Madsen, Department Counsel, Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

John J. Herr (d.b.a. Aguila Energy Company), James M. Larson, Jean M. Larson, Neil S. Mincer, and John K. York have appealed an April 30, 1992, decision by Administrative Law Judge John R. Rampton, Jr., declaring 64 oil shale mining claims located in Garfield County, Colorado, invalid for

failure to perform \$100 worth of assessment work per year on each of the claims during the years 1981 and 1983 through 1989. 1/

In July and August 1989, Bureau of Land Management (BLM) geologist and supervisory mineral specialist Rodney C. Herrick conducted a 12-day field examination to verify the performance of assessment work (Tr. 33). 2/ During his field examination Herrick observed old cuts and pits which had slumped and filled with vegetation, but saw nothing indicating physical work on the claims more recently than 1979 (Tr. 38-39).

Ed Ginouves, who is also a BLM employee, inspected the claim area, both alone and with Herrick. 3/ Ginouves testified that the manner in which he and Herrick examined the claims allowed them to see each claim, and they observed no cuts, pits, or other excavations that could have been dug more recently than 1979 (Tr. 79-80). A photographic record of the Herricks/ Ginouves 1989 claim examination (Exh. G-11) includes summary remarks regarding their findings.

Dave Trappett, of BLM's minerals staff, testified that he was on the claims once a year every year since 1980 and had never seen any evidence of assessment work such as core holes, cuts, or pits (Tr. 324, 326).

1/ The claims are the Black Prince Nos. 6, 7, 8, 10 through 19, Black King Nos. 3, 4, 5, 7 through 20, Black Diamond Nos. 10 through 27, Yule, Zoan, Aurora, Dado, Merlin, Thelma, Sirius, Cameo, Baron, Mariner, Archeus, Micon, Canopees, Capella, Aura, and Argosy, as amended, oil shale placer mining claims. The claims have been assigned serial numbers CMC-133269 through CMC-133332.

2/ Herrick marked the inspection route he traveled on the claims in green on Exh. G-1.

3/ His inspection routes are depicted in purple on Exh. G-1.

BLM's evaluation of the observations and other findings is contained in a December 13, 1989, memorandum from the Grand Junction District Manager to the Colorado State Director. The District Manager noted that affidavits of assessment work had been filed for every year since 1979. The affidavit for the 1978-79 assessment year, describing the work as geologic field work and resource estimates, was documented by a report by George Pipiringas. The 1979-80 assessment work, verified in the field by BLM, consisted of road construction and the core drilling. Referring to the other affidavits the District Manager stated that "the work performed is unspecified for every year except 1987, and no evidence, in the record or found in the field, leads us to believe this work was ever done" (Exh. A).

The Colorado State Office, BLM, initiated contest No. 747 by issuing a complaint dated March 1, 1990, alleging the claims to be invalid because they had "not been maintained by the annual expenditure of \$100 per claim in labor or improvements upon or for the benefit of each claim for the purpose of developing valuable mines." In a January 8, 1991, prehearing conference, BLM stipulated that the allegation was for failure to do assessment work during the assessment years 1974 through 1991. ^{4/}

In July 1991, Ginouves participated in a joint examination of the claims with Herr, Neil, and Lawrence Mincer, counsel John K. York, and Department counsel Lowell L. Madsen. The claimants had been asked to attend and present evidence of mining-related activities, but the requested

^{4/} Prehearing Conference Order, Jan. 22, 1991.

information was not tendered and no improvements or other signs of mining-related activities were observed (Tr. 80-81).

On September 10 and 11, 1991, a hearing was held before Judge Rampton in Glenwood Springs, Colorado. In his decision Judge Rampton noted that the Government had carried its burden of proving by clear and convincing evidence that the required assessment work had not been done in the assessment year 1981 and the assessment years 1983 through 1989. 5/ He based this conclusion on failure to find any evidence of any work having been performed during the 1989 BLM examination of the claims and other supporting testimony.

After noting the provision of Colorado law (Colo. Rev. Stat. § 34-43-114 (Supp. 1988)) that assessment affidavits are prima facie evidence that assessment work was performed, Judge Rampton held that there was no reliable evidence that the claimants had performed annual assessment work in 1981 or the years 1983 through 1988, and noted that none of the witnesses called by the claimants could describe the work allegedly performed or offer any other supporting evidence that it had been done. After citing the evidence that the parties filing the assessment work affidavits had contracts with the claimants for the development of the claims, Judge Rampton stated that in almost all cases the claimants were unable to identify or describe any of the work they had allegedly performed and

5/ Judge Rampton stated that, for the purpose of his decision, he assumed but did not decide that the claimants had met the assessment work requirements for the years 1974 through 1980 and 1982.

apparently had no idea of the nature of the work that might have been performed. 6/ Referring to those times that the claimants' witnesses described the work as surveying, mapping, sampling, and other geological services, Judge Rampton noted that, for this work to qualify a claimant must file detailed reports describing the work with the county. 30 U.S.C. §§ 28-1 and 28-2 (1988); 43 CFR 3851.2. He then held that "[g]iven the strength of [BLM's] case and the failings of the [claimants'] case, I must conclude that [BLM] has shown by clear and convincing evidence that [the claimants] failed to perform qualifying assessment work for the year 1981 and 1983 through 1988" (Decision at 6).

Judge Rampton found that roadwork done in the assessment year 1989 did not reasonably facilitate access to the claims and could not qualify as assessment work. He further held that even if it were assumed that the pipeline work qualified as assessment work, the claims were still invalid because no annual assessment work was performed "for 6 consecutive years and for 7 out of the last 9 years." Thus, the "resumption" of assessment work by virtue of the pipeline right-of-way project could not negate the absence of assessment work in the previous years to preserve the claims (Decision at 9-10).

Finally, Judge Rampton held that the one time performance of \$500 worth of assessment work did not forever preclude a Government challenge and that _____
6/ Judge Rampton voiced concern regarding the repute and veracity of the parties filing the assessment affidavits. Other documents prepared by those parties clearly support the conclusion that his concern was very well founded.

under governing statute and case law, \$100 worth of assessment work was an annual requirement.

On appeal appellants argue that Judge Rampton erred by failing to find that they had substantially complied with the annual assessment work requirement, and refer to core drilling, the core analysis, geologic survey work, roadwork, and the "operation of the oil shale retort" between 1979 and 1988 as evidence of substantial compliance (Statement of Reasons (SOR) at 19). Appellants further contend that when they expended a total of \$500 doing assessment work they substantially satisfied the statutory assessment work requirements.

Appellants also take issue with Judge Rampton's finding that roadwork in connection with the pipeline right-of-way project did not qualify as assessment work. Citing Standard Shales Products Co., 52 L.D. 522 (1928), appellants contend that Judge Rampton impermissibly substituted the judgment of the Department for that of the claimants, and the roadwork associated with the pipeline project constituted maintenance and improvement of the claims sufficient to withstand a contest (SOR at 16). They argue at length that the roadwork in connection with the pipeline right-of-way in 1989 was "resumption" of assessment work capable of overcoming any previous failure to perform assessment work (SOR at 20-24).

BLM responds by urging a finding that Judge Rampton's decision is supported by the preponderance of the evidence.

[1] The governing statutory provision, 30 U.S.C. § 28 (1988), calls for the expenditure of \$100 in assessment work on or for the benefit of a mining claim each year until patent. Before patent can be obtained a claimant must have made improvements valued at \$500 or more (30 U.S.C. § 29 (1988)), but the expenditure of \$500 does not terminate the ongoing requirement for expenditure of \$100 each assessment year specified in 30 U.S.C. § 28 (1988). Andrus v. Shell Oil Co., 446 U.S. 657, 658 n.1 (1980). In United States v. Energy Resources Technology Land, Inc., 74 IBLA 117 (1983), we observed that the requirements of 30 U.S.C. § 29 (1988) (performance of \$500 worth of assessment work as a prerequisite to the issuance of patent) and 30 U.S.C. § 28 (1988) (yearly performance of \$100 worth of assessment work) are only tangentially related. We stated at page 122:

[W]hile it is true that the requirement of section 29 can be satisfied by the performance of annual labor pursuant to section 28, the reverse is not possible. If it were, a claimant could do \$500 worth of improvement on his claim during the first year of location--before the obligation to perform assessment work had even accrued--and then hold the unpatented claim for the next 50 years without ever performing any of the annual assessment work required by section 28. Clearly the 1872 Act did not contemplate that once a claimant had accomplished \$500 worth of work he would thereafter be excused from any further work. The Congress must have been aware that many claims would not be patented within 5 or 6 years after their location, and yet it required in section 28 that the annual labor be performed on each claim, "until a patent has been issued therefore * * * during each year." Nothing could be more plainly stated.

Id. at 122. Appellants' contention that \$500 worth of assessment work on the claims in the 1920's constitutes substantial compliance with 30 U.S.C. § 28 (1988) was correctly rejected.

[2] In Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), the Supreme Court recognized that the United States is the beneficiary of oil shale mining claims invalidated for failure to "substantially satisfy the requirements of 30 U.S.C. § 28 [1988]." Id. at 57. The Department has jurisdiction to challenge the validity of a mining claim for failure to substantially comply with the assessment work requirement. As noted in Judge Rampton's opinion, forfeiture of a mining claim for failure to do annual labor must be established by clear and convincing proof that the former owner has failed to have performed the required work or made the necessary improvements. Hammer v. Garfield Mining & Milling Co., 130 U.S. 291 (1889); Featherston v. Howse, 151 F. Supp. 353 (W.D. Ark. 1957).

[3] The purposes of the assessment work requirement are to assure that a claimant undertakes a diligent good faith effort to develop the mining claim, and to prevent the location of mining claims for speculative purposes. See Chambers v. Harrington, 111 U.S. 350, 353 (1884). The requirement that the claimant expend \$100 in annual labor each assessment year is not absolute in the same sense as the requirement that a claimant file a notice of intent to hold or affidavit of assessment work pursuant to 43 U.S.C. § 1744 (1988), but the claimant's compliance with the assessment work requirement must be sufficiently substantial to demonstrate a diligent good faith effort to develop the mining claim. ^{7/} With this in mind, we _____

^{7/} For example, if a claimant who was diligently working on the claims at the end of the assessment year had not expended the full \$100 required by the Act, but continued to work until the required amount is expended, the claim would not be deemed forfeited. Anderson v. Robinson, 126 Pac. 988 (Ore. 1912); Emerson v. McWhirter, 65 Pac. 1036 (Cal. 1901). Similarly,

will outline the evidence presented at the hearing, commencing with the year 1979.

A company called Envirotechnics, Inc., had leased the claims in 1979, and apparently core drilled a test hole through the oil shale structures, recovered the core, and conducted bench scale retort tests (Exh. N). The location of that hole could not be identified with any certainty, but the drilling was believed to be "somewhere around the Black Prince 16 [claim]" (Tr. 181). Herr, the principal owner of the claims and the person who had acted on behalf of the owners during the entire period in question, had no knowledge of any other hole having been drilled since the 1920's (Tr. 262).

The affidavit filed for the 1979-80 assessment year states that \$29,000 had been spent between June 1 and August 30, 1980, building an access road and drilling a core hole (Exh. EE). Herr testified that a core sample he believed to have come from the 1979-80 drill hole was later retrieved from a storage yard and shipped to the Colorado School of Mines for analysis (Tr. 196-97). ^{8/} In 1980, the Department of Energy sent an assay result to Envirotechnics (Exh. O). This assay was allegedly of a sample taken

footnote 7 (continued)

wrongful adverse possession of the claim has been found to be sufficient grounds to excuse the rightful owner from the assessment work requirement during the period of adverse possession. Mills v. Fletcher, 34 Pac. 637 (Cal. 1893).

^{8/} Exhibit T is a sample analysis report by the Colorado School of Mines Research Institute, dated Sept. 24, 1982. Ginouves testified that there had been sufficient study of drill cores from the plateau and basin to predict the oil content of various strata within the Greenriver formation, but that the result of the assay was very low and that it "does not seem to match up with the geologic section which you would anticipate for that section of core" (Tr. 374).

from the Black Prince 13 claim, but does not appear to be a section of core. Herr testified that he was not present when the sample was taken, and could not state its source (see Tr. 187-88).

Herr stated that he did not know what work was done on the claims between 1981 and 1986 (Tr. 247). During the assessment years 1983 through 1986 Envirotechnics submitted affidavits of assessment work for the claims (Tr. 200). There is no evidence that Envirotechnics ever submitted any report or other document indicating the nature or extent of any work that may have been conducted by it to the claimants, and there is no evidence that anyone with Envirotechnics was ever in the area of the claims during that period or that Envirotechnics did anything other than file the affidavits. In each of 5 assessment years 1980-81 through 1984-85 the affidavits state that "\$6,500 worth of work or improvements were performed or made upon" the claims, but they do not state how or where the work was performed (Exh. EE). Herr testified that for the years 1981 through 1986 "we relied on [Martin] saying that the assessment work had continued." Herr had no idea of what kind of work Martin might have performed (Tr. 247). Herr testified that he had never attempted to verify that any work was actually done or determined the nature of that work (Tr. 201-02). Martin could not be located and was not available to testify. Herr stated that by 1987 Martin appeared to have become another "oil shale casualty" (Tr. 203, 261).

A man named Berridge filed the affidavit for the assessment year 1986-87, stating that \$6,500 worth of geochemical sampling, aerial geologic

mapping, and surface geologic mapping was conducted between August 14 and 24, 1987. Berridge was apparently hired by Burton (Tr. 208) who was alleged to have a retorting process for oil shale and was extended an opportunity to lease the claims. Herr never met Berridge and did not know if he actually did anything or even went on the claims (Tr. 208-09). Berridge submitted a \$6,975 bill, dated October 23, 1987, for geological services (Exh. W). The bill charges an hourly fee and gives a number of hours spent, but there is absolutely no other indication in the record of what work was performed or where it was performed. No report was submitted, and neither Herr nor Burton had any other document or evidence that Berridge actually performed any work (Tr. 208-11).

Berridge also submitted an affidavit asserting that \$6,500 worth of assessment work was done between September 1, 1987, and August 31, 1988. Herr testified that he thought the assessment work for that period consisted of "roadwork" (Tr. 226-27). However, he admitted that he could not state the nature or location of any work that was actually conducted in 1988 (Tr. 211).

A large portion of the testimony at the hearing involved the question of performance of assessment work in 1989. BLM employee, Trappett, testified that in either December 1988 or January 1989, Resources Natural Gas, Inc. (Resources), approached BLM, seeking a right-of-way for a natural gas pipeline along a route that would cross the claims (Tr. 313). During negotiations, Resources was advised any right-of-way grant would contain a stipulation that Resources was responsible for making whatever arrangements it

deemed necessary with the mining claimants regarding the portion of the right-of-way crossing the mining claims (Exh. 12).

Resources notified the claimants that it was contemplating laying a pipeline across the claims in the spring of 1989. In response, Herr's counsel advised Resources that the "improvements which you contemplate performing on the subject property qualifies as assessment work" and asking Resources' representative to execute an enclosed affidavit of assessment work. Resources agreed to sign the affidavit of assessment work in exchange for a right-of-way across the claims (Exh. GG; Tr. 213, 268-69). The terms of this agreement were not disclosed to BLM.

On July 5, 1989, BLM granted a right-of-way. Stipulations regarding mining claims and reclamation of the access road and pipeline route were attached to the right-of-way grant (Exh. 12). Exhibit FF depicts the pipeline route and the configuration of the claims is depicted on Exh. R. The pipeline follows, with minor deviations, the route of an existing two-track access trail for a distance of approximately 11 miles (Tr. 51, 93-94, 318-19).

Trappett, who completed the initial field work for the right-of-way and compiled stipulations for surface reclamation and rehabilitation following construction, periodically inspected the construction process during the summer of 1989. He stated that by the end of August, backfilling had been completed along the pipeline route from Black King No. 5 to Black King No. 13 and ended in the Black Diamond No. 23 claim (Tr. 318-19). He

explained that it was intended that any improvements to the existing road or trail would be temporary to facilitate the construction of the pipeline, and the pipeline route was to be reclaimed and the road was to be restored to its original condition after construction. He also testified that if the road had been intended for work in connection with the mining claims, BLM would have included other design criteria affecting grades, alignment, erosion, and amenability to travel (Tr. 322-23). He did admit, however, that Resources had installed a large number of water bars along the road on the claims, and that these water bars would aid in the prevention of road deterioration (Tr. 341-43).

It was Herrick's opinion that the road work could not be considered to be assessment work because it did not lead to further development of the claims, and did not materially change accessibility of the claims (Tr. 347). He also admitted that Resources had installed water bars for erosion control on the access road across the claims.

In August 1991 the claimants' representatives transported an experimental retort (distillation device for oil shale) using existing (reclaimed) roads near the pipeline right-of-way. The retort was operated for a period of 8 hours with 2 litres of product being recovered (Tr. 219-39; Exhs. BB, CC, DD). Herrick stated that appellants could have transported and unloaded their retort over the two-track road as it existed prior to pipeline right-of-way work (Tr. 359, 363).

None of the individuals who filed the affidavits appeared to present testimony at the hearing or submitted affidavits stating the nature or extent of the work allegedly performed.

We will consider the assessment year 1988-89 first. As a preliminary reminder, the Government must establish by clear and convincing proof that the former owner failed to have work performed or improvements made to the amount required by law.

[4] The assessment work may be performed by a party other than the claimant. It may be done by a lessor or a lessee. See New Mercer Mining Co. v. South Mercur Mining Co., 128 P.2d 269 (Utah 1942). It may be done by a shareholder. See Wailes v. Davies, 158 F. 667 (CC Nev. 1907), aff'd, 164 F. 397 (9th Cir. 1908). It can even be performed by the Federal Government. See Simmons v. Muir, 291 P.2d 810 (Wyo. 1955). Resources agreed to perform the assessment work in exchange for a right-of-way across the claims. There can be little doubt that there was privity between Resources and the claimants, or that the work it performed will inure to the benefit of the claims if it otherwise qualifies.

[5] The construction of an access road to the claims will qualify as assessment work, even though the road is not on the claims. See United States v. 9,947.71 Acres of Land, 220 F. Supp. 328 (D.C. Nev. 1963); Pinkerton v. Moore, 340 P.2d 844 (N.M. 1959). There is no doubt that the road in question provides access to the claims, as it was used by the mineral examiners when making their inspections. If the construction of a

road providing access qualifies, improvement of a road affording access to a claim will as well. In turn a road improvement which reduces road maintenance frequency or cost is as legitimate as an improvement that makes the road more accessible. We find the cost of installation of water bars on an existing road to prevent erosion and reduce the need to rehabilitate or maintain the road is sufficient improvement of the road to qualify as assessment work. The Government has failed to establish by clear and convincing proof that the claimants failed to have work performed or improvements made to the amount required by law during the assessment year 1988-89.

Ed Ginouves testified that if appellants had intended the pipeline right-of-way as a road for mining development, it would have been necessary to seek approval of a plan of operations under 43 CFR Subpart 3809, the surface management regulations applicable to mining operations (Tr. 54). We do not take this testimony to be an indication that BLM is of erroneous opinion that labor or improvements on a claim could not satisfy the assessment work requirements if the work had been undertaken without an approved mining plan of operations. There is nothing in either the Act or regulations that would support that conclusion.

[6] There is no doubt, however, that the Government has established by clear and convincing proof that the claimants failed to have work performed or improvements made to the amount required by law for the assessment years 1981 through 1988. The most telling thing in the transcript and other evidence in the record is the claimants' total lack of knowledge regarding the nature or amount of work that was supposed to have been performed.

They testified that they relied upon representations allegedly made by third parties, but admitted that they did nothing to confirm the alleged representations for a period of several years. Not one of the parties filing affidavits on behalf of the claimants was available to testify about the work performed. Some of the work allegedly undertaken was surveying and mapping, yet the claimants produced no maps or other evidence of a survey.

Evidence of a bona fide intent to develop the claim and use the mineral resources is paramount when assessing whether a claimant has made a good faith attempt to comply with 30 U.S.C. § 28 (1988). Chamberlain v. Montgomery, 261 P.2d 942 (Utah 1953). An attempt to assert a continuous right to a mining claim cannot be based upon a mere pretense of work so plainly a sham that it must be disregarded. McCormick v. Baldwin, 37 P. 903 (Cal. 1894). We do not wish to speculate regarding whether a pretense was carried out by the claimants or by those they relied upon. However, there is nothing in the record that would support a finding that in the assessment years 1981 through 1988, the claimants did anything other than attempt to hold the land for speculative purposes.

[7] As articulated in Wilbur v. Krushnic, 280 U.S. 306, 317 (1930), the "resumption doctrine" held that failure to perform annual labor rendered a claim subject to loss through relocation by another claimant. The basis for this doctrine is both logical and simple. If a claimant does not do the necessary annual labor for a period of time, but resumes before another party's rights attach, nothing is lost by allowing the claimant to revive the

claim with his labor, rather than formally relocating the claim. However, during the period that the claim has been abandoned and the land is subject to appropriation, and if another party's rights attach, the intervention of those rights deprives the claimant of the ability to reactivate the claim by resumption of work.

The claimants' arguments on appeal that the resumption doctrine applies in this case must fail because valid rights have attached. Those rights were recognized in Hickel v. Oil Shale Corp., *supra*, when the Supreme Court recognized that the United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1988).

The intervening rights were created when the 1872 Mining Law was effectively amended in 1920 by making oil shale a leasable, rather than a locatable mineral. For a period following this event the courts and the Department stated that a failure to do assessment work would not inure to the benefit of the Government.^{9/} This interpretation was abandoned after the Supreme Court handed down Hickel v. Oil Shale Corp., *supra*, and, following that decision, the resumption doctrine was no longer applicable to oil shale claims.

Having concluded that Judge Rampton properly found the claims void for failure to perform assessment work we need not, and will not consider _____
^{9/} See 30 Rocky Mt. Min. L. Inst. § 10.02[2] (1984), for a discussion of pre-Oil Shale Corp. decisions and regulations.

whether the claims were invalid for other reasons. The Board does not render advisory opinions. Edgar W. White, 85 IBLA 161 (1985).

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

R. W. Mullen
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

130 IBLA 368