

INTERIOR BOARD OF LAND APPEALS

Milan M. Martinek

139 IBLA 38 (April 2, 1997)

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MILAN M. MARTINEK

IBLA 94-624

Decided April 2, 1997

Appeal from a decision of the Alaska State Office, Bureau of Land Management declaring null and void placer mining claim F-59057.

Affirmed.

1. Mining Claims: Location—Regulations: Interpretation

A placer mining claimant who failed to show that a recorded location notice had been destroyed or lost was not entitled to offer secondary evidence of its existence under 43 CFR 3862.1-4.

APPEARANCES: Arthur E. Neuman, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Milan M. Martinek has appealed from a May 20, 1994, decision of the Alaska State Office, Bureau of Land Management (BLM), declaring unpatented placer mining claim F-59057 (Yellow Pup #3) null and void ab initio. The claim is in sec. 34, T. 15 S., R. 17 W., and sec. 3, T. 16 S., R. 17 W., Fairbanks Meridian, Alaska. The BLM decision found that Martinek had failed to establish that the Yellow Pup #3 claim was located prior to March 15, 1972, when the land on which it was situated was withdrawn from mineral location by Public Land Order No. 5179. *See* 37 FR 5579 (Mar. 16, 1972). It was concluded that the claim was void because it was not located until after the land had been withdrawn from entry.

In his Statement of Reasons on Appeal (SOR), Martinek asserts that the claim was located by his predecessor-in-interest, Jim Fuksa, in July 1963, prior to the 1972 withdrawal, and was maintained in conformity to filing requirements imposed by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) and (b) (1994). It is asserted that the 1963 location date is established by a declaration filed with BLM by Fuksa on September 27, 1979, which, under Departmental regulation 43 CFR 3862.1-4, relates the location of the Yellow Pup #3 back to July 1963 (SOR Ex. 1).

In reliance upon the earlier location by Fuksa, Martinek executed an amended location notice for the claim on June 24, 1993, "based upon the Fuksa map [SOR Ex. 2], my personal visits to the site and my conversations with Mr. Fuksa" (Affidavit of Milan M. Martinek dated July 19, 1994, at 3).

The 1979 statement recorded by Fuksa with BLM states, pertinently, that the Yellow Pup #3 claim was staked in "July 63" and recorded in 1963, but that a search of the Fairbanks Recorder's Office by Fuksa failed to reveal a location notice for the claim. Fuksa reported that "I found [notices for] Yellow Pup 1 - 2 and 4 but couldn't find #3" (SOR Ex. 1). No location notice for the Yellow Pup #3 claim has been produced.

A Supplemental SOR (SSOR) filed in support of Martinek's appeal provides additional documents concerning the Yellow Pup group of claims, numbered #1, #2, and #4. From the circumstance that three similarly named claims were located by Fuksa in the vicinity of the Yellow Pup #3 before 1972, it is now argued there is "a strong inference" the Yellow Pup #3 claim was located before the land on which it is situated was withdrawn from mineral entry. See SSOR at 2, n.1. Additionally, record keeping by the Fairbanks Recording Office of Mining Records is said by SSOR to be "very poor with a history of lost and misplaced or misfiled records" that supports a conclusion a presumed notice of location for the Yellow Pup #3 filed by Fuksa prior to 1972 was lost by the recorder (SSOR at 8). In a statement filed July 11, 1994, Martinek explains that:

I personally have seen the Recording Office Books in Fairbanks for the years 1963 and 1964 (years the Yellow Pup Nos. 1, 2, and 4 were filed). The pages are torn, mutilated and in general a mess. Due to the heavy use of mining records and the possibility that the page was torn out and lost might explain why the Yellow Pup # 3 location notice is missing.

(SSOR Ex. 10 at 2).

Martinek states that he acquired the Yellow Pup #3 claim in 1986. On August 30, 1993, he filed with BLM a document entitled "Reconstruction of Original Mining Claim Notice Missing from District Recorder's Office" for the Yellow Pup #3. Following a review of the records submitted by Martinek, BLM issued the decision here under review in response to his attempted reconstruction of the location notice for the Yellow Pup #3, finding that:

On May 20, 1993, the National Park Service [NPS] notified you that they were unable to locate a recorded notice of location for the YELLOW PUP #3 claim and extended you the opportunity to provide the appropriate documentation. Additionally, on January 27, 1994, a notice was sent to you requesting documentation to substantiate that the YELLOW PUP #3 was located while the lands were open to mining, and that the amended location notice filed August 30, 1993, related back to a valid location prior to the withdrawal date of March 15, 1972.

The BLM decision under review found that documentation provided by Martinek was insufficient to show that the Yellow Pup #3 claim was located prior to March 15, 1972, and declared the claim null and void ab initio. The primary documents reviewed by BLM are the same documents before us on appeal. Martinek now argues that, under 43 CFR 3862.1-4, BLM should have

accepted his reconstruction, in 1993, of the existence of a 1963 location for the Yellow Pup #3 claim.

The reconstruction of the 1963 location by Martinek, made in reliance on the 1979 statement of Fuksa, rests on a notion that the Yellow Pup group of claims numbered #1, #2, and #4 must have included a contemporaneously located fourth claim numbered #3, because otherwise the claim numbering system is anomalous. The record, however, does not support this assumption, inasmuch as the first two claims are shown to have been located by Fuksa on July 7, 1963, and recorded on August 15, 1963. The Yellow Pup #4 was not located until over a year later on July 21, 1964, and was recorded on September 2, 1964.

[1] Since the claims were not simultaneously located as a group, the broken numbering sequence is equally consistent with an interruption in the mining operation conducted by Fuksa between 1963 and 1964, as it is with a theory that there was a location notice recorded for a fourth claim (Yellow Pup #3) in 1963. It is true that, beginning in 1979, when recording of such documents began to be made with BLM pursuant to FLPMA, the Yellow Pup #3 appears in proofs of labor filed by Fuksa. Martinek has not shown, however, that proofs of labor filed by Fuksa in 1964 and immediately thereafter included the missing #3 claim, as should have been the case if the #3 claim were located in 1963. The NPS has submitted a statement that earlier work affidavits executed by Fuksa did not report work on the #3 claim, indicating that, with a single possible exception in 1973, there was no work being done on a Yellow Pup #3 claim by Martinek's predecessor-in-interest prior to 1979. See Declaration of Bruce A. Giffen, NPS, dated Aug. 6, 1993. Neither this lack of supporting documentation, nor the fact that the Fuksa statement fails to state a definite day in 1963 when a location notice for the #3 claim was recorded, is explained by Martinek.

The regulation relied upon by him provides, pertinently, that "[i]n the event of the mining records in any case having been destroyed by fire or otherwise lost, a statement of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the statement of the claimant." 43 CFR 3862.1-4. In this case, however, there has been no showing that the 1963 mining records at Fairbanks were "destroyed by fire or otherwise lost." Instead, Martinek has stated, as a conclusion, that those records, in his opinion, are "torn, folded, mutilated, and in general a mess." He states they are subject to "heavy use," and from this conclusion suggests a possibility that the page containing the location notice of the Yellow Pup #3 "was torn out and lost." This opinion of the state of the records is cited as the foundation for a suggestion that there is a "possibility" there was a location notice recorded as suggested by Fuksa, but that it was removed from the recording office. The suggestion of such a hypothetical event, however, does

not establish that part of the 1963 mining records of the Fairbanks Recorder were destroyed or lost so that the remedy provided by 43 CFR 3862.1-4 can be claimed by Martinek.

No notice of location for the Yellow Pup #3 appears in BLM's case file, and it is clear that none exists. Contrary to the inference Martinek seeks to draw concerning the operation of the Fairbanks Recorder's Office, there is a legal presumption of regularity that supports the official acts of public officers in the proper discharge of their duties. See, e.g., H.S. Rademacher, 58 IBLA 152, 155 (1981). An assertion that a document was destroyed or lost after it was recorded with an official charged with its safekeeping cannot be entertained without more of a showing than has been offered in this case. Martinek has failed to show that a recorded 1963 location notice for a claim denominated the Yellow Pup #3 was ever included among mining records for 1963 that were lost or destroyed at the Fairbanks Recording Office. There has been no showing at all that any records in the custody of that office were ever destroyed or lost; the observation that the records were open to public reference and were heavily used does not support any such finding. The records submitted in support of Martinek's appeal fail to support his contention that the #3 claim was located before the land at issue was withdrawn from mineral entry in 1972.

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

Franklin D. Amess
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge